

ODR and Government in a Mobile World

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Mobile Internet, when it really arrives, will not just be a way to do old things while moving. It will be a way to do things that couldn't be done before.

Howard Rheingold (2002: xiv)

6.1 Introduction: What does “Mobile” Mean?

It is tempting to think of “mobile” in terms of the technology itself. We have, after all, transitioned in just over sixty years from the immovable, room-sized ENIAC¹ in 1946, to the constantly in motion, palm-sized Smartphone or digital device. While it is true that the technology itself, the hardware, has become increasingly mobile, however, the more profound impact and the more important conception of “mobile” is related to the way we define our work and play environments.

ENIAC created what was essentially a large electronic campfire, around which members of the group could gather and interact. The group, at that time, was a small number of researchers and academics who had access to the precious resources offered by ENIAC. When other large, immobile computers came online, more campfires were created, allowing the group to expand, and for members of the group to move from campfire to campfire, carrying information and

¹ For information about ENIAC and other early computers, see Goldstone (1993).

creating the first step in mobility. When networks and remote access came into existence several decades later, the campfires were linked, and it became possible for members of the now much expanded group to move from campfire to campfire, working virtually from remote locations. Wireless and hand-held technology have, in a sense, greatly amplified the size of the common campfire and made immeasurably more people a part of the tribe. These changes in technology are noteworthy in themselves, but the creation of truly mobile communication and information sharing technology has created significant changes in the way we conceptualize and relate to the members of the group and to our place in it. Simply put, it isn't just the technology that's mobile—it's us.

Humans, of course, have always been mobile and have also always had connections with other people and groups. Generally, however, when one has been mobile one has not been connected and when one has been connected, one has not been mobile. We are now both more mobile and more connected. We can be mobile in a new way, able "to wander the earth and never leave home" (Benedikt 1992: 14) and also able to be at home whenever we are moving about elsewhere. Distance still matters, of course, but not for everything. Retrieving information, in any form in which it happens to be stored, rarely requires physical presence and we are moving in the direction of being able to provide and present information to recipients who may be anywhere as effectively as if they were present.²

New capabilities for being connected and mobile at the same time represent a shift not only in what we can do but, over time, how we decide what to do and what needs to be done. It gives us not only new tools but new ideas about the use of those tools, some of which are likely to conflict with accepted practices. New technologies change what it is possible to do and, in the process, raise a range of questions about the value and need for doing either what was diffi-

² For example, Cisco offers WebEx as an inexpensive and easily accessible online meeting service. They are adding "TelePresence," a high definition version of their online conference services that, they claim, offers an "immersive in-person experience."

http://www.cisco.com/en/US/netsol/ns669/networking_solutions_solution_segment_home.html). Going a step further, Cisco has partnered with Musion to create a holographic version of TelePresence that puts a virtual body in the room. (http://www.musion.co.uk/Cisco_TelePresence.html).

cult to do before or not possible at all. By opening new capabilities, new technologies can lead not only to greater efficiencies but to a reassessment of goals, priorities, assumptions and expectations.

By making it easy to be “together” virtually, the new mobility encourages the formation of relationships and, as people become linked to both machines and other people, the technology encourages more numerous relationships, and perhaps more complex ones. In the old non- mobile world the definition of “friend” for most people was rather narrow. Friends tended to be those people with whom one identified as part of a primary social grouping, and with whom, at some point, one had spent significant time interacting face to face. Even in a non-mobile world, interacting with friends could be facilitated by telephony, but there was a sense of longing for that lunch or that time together at a ball game where one could ask, “so, what’s new?” In our mobile world, concepts and definitions change and it is not unusual for individuals to have literally a thousand “friends” who share information about their lives in excruciating detail, but whom we may never have actually met face to face.

6.2 Mobility and Government

Researchers are just beginning to work out the impact of this erosion of the importance of spatial limitations, but it is very tempting to assume that some significant changes in our concept of relationships and our definition of social groups are in store. Some of the first reactions to technology by dispute resolution professionals centered around making it easier to do what dispute resolvers have always done, and some of the first approaches to ODR were to mirror online what had been done in the “real” world.³ In the long run, it is reasonable to assume that the changes technology is bringing to society

³ Beginning in 2004, The University of Massachusetts at Amherst and the National Mediation Board worked under two research grants from the National Science Foundation designed to address the impact of technology on dispute resolution. The first impulse was to carefully document a “normal” mediation process and to replicate that process in the software that was created to support the research. That approach quickly proved to be ill-advised, and led to work in an innovative area of information technology – process families.

at large will resonate in the dispute resolution community by making us challenge what we *can* do, what we *should* do and what we *have to* do.

Mobility tends to be thought of mainly in spatial terms, as a capability to overcome constraints of distance, thus providing access not only to information far away but also to people far away. Perhaps the classic example is the mediator who, while on a break from a mediation session in Florida, was able to use a smartphone to conference two parties in California and review with them final language for a settlement agreement. Yet, the new mobility also affects our temporal sense, shortening or accelerating time as well as overcoming space. We can create connections faster and expect outcomes from those connections to occur more quickly. Compared to the past, feedback loops are accelerated and both errors and the correction of errors can occur more quickly. The term “cyberspace” emphasized the concept of space but there is also lurking in the background something that might be labeled cybertime, a new set of expectations about duration and about how long things last (Katsh 1995). Before we entered the era of cyberspace and cybertime, citizen interaction with government moved spatially and temporally in much different ways than citizen interaction moves now. Once, it was common for masses of citizens to climb into busses, get into cars, hop on to trains, hitchhike, etc., to come to the “place” of government. Consider the Civil Rights March on Washington in 1963, at which Martin Luther King, Jr., delivered his “I Have a Dream” speech. Marchers, organizing for months and gathering for weeks, converged on Washington to demonstrate mass support for a political and ideological position. Their rally was a physical manifestation of that support, in real space. Their expectation was that, over time, their pressure might lead to policy changes that would work themselves out, perhaps over years of real time, in the traditional political process.

Alternatively, consider one of the early acts of the Obama administration—a public discussion of policy priorities, online, that fits under the general umbrella of the administration’s Open Government initiative.⁴ The White House Office of Science and Technology Policy opened an online discussion in 2009, which occurred al-

⁴ <http://www.whitehouse.gov/open>

most completely in cyberspace, and which, from beginning to end, consumed much less time than it took for the Civil Rights marchers to organize and get to Washington. Interested citizens were able to go online, leave their suggestions and comments, immediately see other ideas and comments, and engage in an “instant” dialogue with thousands of other citizens.⁵

Cyberspace makes a difference for citizen input: if you were poor in Oakland in 1963 you had very little hope of contributing to the dialogue, but if you were poor in Oakland in 2009, all you had to do was go to the local library (if you didn’t have an Internet connection at home) and type in your contribution.

Cybertime also makes a difference for citizen expectations: if you marched in 1963 you did so knowing that any direct feedback from your participation could be years away. If you participated in the 2009 online dialogue, there was an expectation that your voice would be heard right away (you could, after all, see it there on the screen immediately) and that there would be action.

6.3 Government in the Cloud

The influence of cyberspace and cybertime has the potential of greatly increasing the amount of citizen interaction, spreading the interaction out to more citizens, and creating expectations that the government will act to respond to citizen input as quickly as everyone expects responses to e-mail messages. The new mobility in cyberspace, as it fosters new relationships and transactions, and the new pressures from cybertime, as it changes assumptions about the shelf-life of products and ideas, is at the heart of both challenges and opportunities for government-related dispute resolution. In this regard, the current popular metaphor of “cloud computing” can be helpful in conceptualizing the new demands being placed on government as well as the new tools available to government.

The “cloud” represents applications and data that have been placed on remote servers, are accessible through web portals, and are separate from local server rooms and physical locations. One of the consequences of this is that in many respects now, and increa-

⁵ <http://opengov.ideascale.com/>

singly in the future, the virtual presence of government in the cloud will be competing for our attention with government in physical locations. Inevitably, over time it is likely to be government in the cloud, rather than government in physical locations, that will be the more accessible to citizens.

One simple example, although not strictly using cloud computing, will demonstrate this likelihood. In years past, it was necessary to go to a physical location (the Department of Motor Vehicles) to renew a state driver's license. The government DMV presence was physical, and consisted of many local DMV buildings where long lines and long waits were notorious. Now, in most states, license renewal can be done online. The government presence is a web portal accessible by all citizens, twenty four hours a day, seven days a week, where in a few minutes time all of the necessary "paperwork" can be completed, resulting in a new license arriving in the mail in less than one week. It will be interesting to see the result of fragmenting government "locations" and creating government in cyberspace – in a sense, we are going through a period analogous to the ENIAC process of creating a large virtual campfire. In the case of government transformation, we are going from physical locations around which members of the body politic gathered in a slow and deliberately moving social environment to locations in cyberspace where we individually interact with government in an atmosphere that is increasingly, or at least apparently, urgent.

The transformation of government with a physical presence that is largely distant to one that is virtual in nature and accessible anywhere at anytime is likely to bring a broad spectrum of changes, from the symbols that shape how we think about government to the services that are actually provided. Some of the symbols of government, for example, that are tied to physical spaces will obviously not be present in virtual spaces. On the other hand, perhaps these symbols will not be needed in the way they have been in the past. The symbols of government we typically identify with large, impressive and seemingly permanent physical structures were needed, at least in part, because government was distant. The symbols reminded us of our expectations and hopes for government when government was not visible to us. With data in the cloud, government becomes closer to us and, through the computer screen, more visible to us. It is unlikely for the cloud to replace the monumental building as the sym-

bol of government but some new and appropriate symbols are in our future.

The increased presence and proximity of virtual government enables government to know more about citizens. It also, however, allows citizens to observe and judge the performance of government in ways that were not possible before. When the Congress was debating the Health Reform Act, over 2000 pages of text were posted on the “Open Congress” web site, where any citizen with Internet access could read and comment on the proposed bill using a wiki built into the site.⁶ Whether or not any other citizen actually read the entire bill or not, it was there for them to see as the Congress was actively debating its passage. Contrast this with the process used to pass the Civil Rights bill that was the indirect result of the March on Washington in 1963.

We no longer need to leave where we are to interact with government and participate in it. We can make claims on government more easily and, as a result, new expectations are likely to emerge. Mobility ultimately supports the reworking of relationships between citizens and government and that is likely to be an ongoing process as government services are provided virtually and as the large buildings and other physical symbols of government lose their hold on how we think about government.

6.4 ODR and Mobile Technologies

Increasingly mobile citizens and an increasingly accessible government are involved in a transition from a relationship that was shaped by a very different sense of both time and space. We are now, and probably will be for some time, in a state of experimentation as we readjust both our minds and our activities to an accelerated and more complex information and communication environment.

Dispute resolution, one of government’s primary responsibilities, may provide one of the clearest lenses through which to view the direction in which this transition is moving. Dispute resolution is a practice and responsibility not only of courts but of all regulatory agencies. In some instances, government serves as a neutral third

⁶ <http://www.opencongress.org/bill/111-h3200/show>

party. In other situations, government is one party and a citizen or group the other party. Whatever the form of contact, every dispute resolution process communicates a message not only about the problem and controversy but about the accessibility and authority of government. In various ways, the prevalent form of dispute resolution can be expected to generate symbols and other clues about the nature of the relationship between government and citizen.

The reason for this is that dispute resolution is not simply about resolving disputes. Providing a service that fixes a problem may be the clearest objective of a dispute resolution process but it is not the only one. Dispute resolution can be a means to build trust in a system's fairness and effectiveness, thus reinforcing a relationship. Dispute resolution processes send several kinds of messages, some of them to parties and some to the public about the value placed on government functions in promoting order, protecting rights and reducing risk.

In the U.S., Federal government interest in ADR developed at a time when ADR generally was more narrowly defined than it is today. Early conceptions of ADR as an alternative to litigation and other formal legal processes shaped the development of ADR systems in the government, and ultimately led to a focus that is still largely on workplace disputes.⁷ The ability to use technology has caused a number of agencies charged with dispute resolution duties involving "external" customers (citizens, citizen groups, private sector organizations, etc.) to begin discussing how to use mobile technology and other advances in ODR to better serve their client base.⁸ This external customer base is not proximate to the agencies, and the staffing in the small agencies is not sufficient to cover a national demand. Further, many of the issues involved with this client base are urgent, so from both a spatial and a temporal perspective, mobile technology and ODR may be the key to creating a new set of relationships between the agencies and the clients.

⁷ Under the Department of Justice the Clinton administration formed the Inter-Agency Dispute Resolution Working Group (IADRWG) to encourage the use of ADR across the government.

⁸ On April 26, 2010, the initial meeting of a group of small agencies with external ADR programs met at the National Mediation Board to discuss their community of interest, and to begin planning a small agency Summit which will occur later in 2010.

How government attempts to achieve the various goals embodied in a dispute resolution process is relevant because online dispute resolution is emerging and developing after a thirty year period of transition in the provision of offline dispute resolution services in the United States. Alternative dispute resolution (ADR) offline, in the form of mediation and arbitration, has grown in use during the last thirty years, while litigation and use of the courts has decreased. ADR, which some view as the privatization of dispute resolution, has proven to be attractive since it is generally less costly, quicker, less formal, and more flexible than litigation. It is desirable for government as a cost-saving strategy, and has been portrayed not as an abdication of governmental responsibility but as a process freely chosen by users in lieu of the still available, albeit undesired, option of litigation. All of this has resulted in the phenomenon of the “vanishing trial”, a situation in which the percentage of cases going to trial in the federal courts declined from 11.5 percent in 1962 to 1.8 percent in 2002 (Galanter 2004).

As ODR builds on the ADR experience, it is important to understand that processes that migrate to cyberspace often change as they discover and begin to employ new capabilities for communicating and processing information. Dispute resolution online, therefore, may not take the same route and end up in the same place as dispute resolution has offline. The first attempts to establish online models of dispute resolution tended to mimic offline approaches but new capabilities for communicating and processing information using devices like smartphones can be expected to generate new models and approaches. In any move from offline to online one can expect to see unintended consequences, in this case the possible development of new forms of dispute resolution, or changes in the old forms, or new expectations about courts, or even the emergence of new modes of cyberspace-based rule making processes. ADR moved dispute resolution out of court and ODR is moving it out of any physical space. With the use of smartphones, we can expect more varied processes of communication and more varied models of dispute resolution as time and space are rearranged in ways never before possible.

A first step in many dispute resolution processes is to “bring the parties to the table.” A new application, designed for mobile devices, allows a “team leader” to communicate asynchronously in audio,

video, and text, with “team members” anywhere, at any time. A Federal agency is adapting this application to work with hierarchically organized negotiating teams that interact with chief spokespersons from other negotiating teams and with Federal mediators working to resolve issues between and among the teams.⁹ The pervasiveness of mobile phone technology with browsers and video capability makes it possible to eliminate, to some degree, “the table” around which negotiations have traditionally occurred, and to create a “moveable table” (if not a moveable feast) for the citizens and the Federal mediators. This obviously requires some rethinking of roles and expectations on everyone’s part.

ODR raises obvious questions about the ongoing role of law, a dispute resolution process with very clear links to physical spaces of courts and libraries (Katsh 1989). Legal modes of problem solving may be declining not only because they are expensive but because litigation is a process that is not a perfect fit for an age of rapid change. In an era in which durations are being shortened, the idea of imposing standards and creating precedents that will last for a long time is likely to be an increasingly difficult challenge. On the other hand, ODR is being implemented at a time in which there should be new opportunities for dispute resolution processes not tied to courts, processes that rely more on novel information processing capabilities of machines and more from participation of users than on processes relying on the authority and power of the state.

ODR is also emerging and of growing interest at a time of increasing numbers of disputes. Since disputes occur all the time and in all places we have no metrics for measuring overall disputing activity, but increases in disputing are likely in any new environment in which there are transactions and relationships. Cyberspace is, of course, such a place. The need to manage higher levels of conflict adds to the need for new approaches, as it did when the ADR movement began. The most well-known book about dispute resolu-

⁹ The application is ShapeStuff, a product of the small business incubator at George Mason University. ShapeStuff allows a team leader to conduct asynchronous meetings with a team using easily accessible audio, video, and text. The framework in which ShapeStuff operates is a mirror image of the standard bargaining committee structure (with a lead negotiator and members of the negotiating team), so it is being used for complex coalition bargaining by the National Mediation Board and its clients.

tion, *Getting to Yes* (Ury and Fisher 1991), is known for its advocacy of an interest-based model of negotiation and mediation. The link between the need for such an approach and a need to deal with growing numbers of disputes is also emphasized on the book's very first page in the statement "conflict is a growth industry." (ibid.: xviii). This may or may not have been the most appropriate way to emphasize the need for ODR but, in any case, it is fair to say that conflict is growing many times faster today than in the past and pressure for resolving disputes quickly is greater than in the past.

Smartphones, by allowing one to be online and connected all the time, add to the number of potential relationships, interactions and transactions and accelerate the chances of problems arising. On the other hand, new capabilities in using and processing information also provide opportunities. Marc Galanter, one of our most distinguished law and society scholars, once observed that

[L]aw usually works not by exercise of force but by information transfer, by communication of what's expected, what forbidden, what allowable, what are the consequences of acting in certain ways. That is, law entails information about what the rules are, how they are applied, with what costs, consequences, etc. For example, when we speak of deterrence, we are talking about the effect of information about what the law is and how it is administered. Similarly, when we describe 'bargaining in the shadow of the law', we refer to regulation accomplished by the flow of information rather than directly by authoritative decision. Again, 'legal socialization' is accomplished by the transmission of information. In a vast number of instances the application of law is, so to speak, self administered—people regulate their conduct (and judge the conduct of others) on the basis of their knowledge about legal standards, possibilities and constraints (Galanter 1985: 545).

Galanter is insightful in identifying the law's reliance on communication and in recognizing that media can assist in deterring certain kinds of behavior, in reinforcing policies, and in preventing disputes. The context he is describing, however, is also one in which individuals are more often recipients of information than creators of information. More particularly, the impact of information and communication in the manner Galanter describes may be quite accurate for an

age dominated by print, where, over time, authority came to reside on the printed page and information flowed more toward citizens than from citizens. One commentator has described the traditional legal establishment as resting on three pillars: people, places, and paper (Aresty 2007). Cyberspace and cybertime have the potential to radically redefine all three: opening the process to more people (who may be located anywhere physically), making traditional ideas of courts and places irrelevant or problematic (easily crossing jurisdictional boundaries), and exchanging paper for multimedia data, stored and shared in an “anytime, anywhere” environment.

Smartphones and other mobile devices place the individual in a very different context, in a very different relationship with information, and, as result, in a very different relationship with law and government. Media, in other words, may have a different impact on law, possibly even the opposite impact, when patterns of communication change and new communications capabilities arise that do not reinforce the law’s authority and processes in the same way. In fact, new capabilities may radically undermine the law’s authority and processes. This is consistent with other circumstances in which new media have been categorized as “disruptive,” not in a negative sense but as a force that opens new options for users and guides them in new directions (Bower and Christensen 1995, Christensen 1997).

As citizens of a world in which the virtual and the physical are merging, we don’t do things the way we used to. We don’t go to libraries and search stacks of legal decisions, and we increasingly don’t pour over the daily newspaper as a primary source of information. It is more common to sit in a local coffee shop, using a smartphone to check news items on multiple web sites, while reading and answering e-mail and engaging in social networking with hundreds of “friends,” all between sips of latte and nibbles of pastry. The fragmentation of our attention, and the sources of our information, surely will have an impact on how we form attitudes and react to formal systems.

How might this relate to dispute resolution in an “everyone connected all the time” Web 2.0 environment?¹⁰ What is important about mobility is not only that it enables communication from anywhere but that it enables the intelligence and information processing

¹⁰ <http://oreilly.com/web2/archive/what-is-web-20.html>

capabilities of computers to provide value in ways not experienced before. For example, one may be mobile and, at the same time, others whom you may not know maybe aware of who you are, where you are, what you are near and what might be of interest to you in your location. Thus, while there may be a new sense of proximity to government, as described earlier, there is also likely to be a new sense of proximity to people and things that one would not have been aware of before. This new sense of place brings with it, as always, a new sense of time as messages circulate rapidly and reaction and response times are shortened.

It would seem to be more than coincidence that one of the most prominent uses of the new mobile devices has been to mobilize groups. “Mobilize” derives from the word mobile and is defined as “to make mobile or capable of movement.”¹¹ Mobilization with an electronic device involves moving with others who do not know you but have decided that they want to move, in some way, with you. It is indicative of the novel capabilities of mobile devices that they can not only inform people you know about where you are but inform people you do not know of where you are and who you are. All of this is reinforced even further by social networking sites. At its worst, such groups become a mob, another word derived from the word mobile.¹²

It is also not a coincidence that an activity originally associated with government, such as “mobilizing the troops” or mobilizing “the country's economic resources” is now possible using a small handheld device in a way that may highlight differences with government, or may in fact be seen as antithetical to government by those holding on to Gov 1.0 notions of governing. Powerful devices in the hands of individuals and groups will inevitably raise questions about the role and performance of government and how it exercises authority. The concept of crowdsourcing, the locating of authority in crowds, has similarities to mobilization but is more flexible and can refer to any size group (Howe 2008, Noveck 2009).

¹¹ <http://www.thefreedictionary.com/mobilize>

¹² Mob derives from the Latin *mobile vulgus*. See <http://www.merriam-webster.com/dictionary/mob>

6.6 Concluding Remarks

Dispute prevention is something studied far less than dispute resolution.¹³ Dispute resolution is a reaction to a problem that has grown to such an extent that self-help is not helpful. On the other hand, the precursors of disputes, grievances and complaints (Felstiner *et al.* 1980) are considered invisible and unknowable and what cannot be seen and what one is unaware of cannot be responded to. The new technologies can be particularly useful in gathering information about users and their behavior and using this data to understand why disputes occur and what might be able to prevent them. Information technologies also give hope for dispute prevention because they can provide the means for being alerted to problems at an earlier point in time than previously.

Early writers about law and cyberspace argued that rules for cyberspace needed to be made in cyberspace. This was a contentious position and resisted by many. We are currently in the midst of a kind of merger between the online and offline worlds, a breaking down of the boundaries between physical and virtual spaces, and this breakdown is being driven in large part by the mobility that cloud computing and mobile hardware have created. It is worth asking again about the role and authority of government. The question is not simply whether we need new rules but whether we can have processes that encourage citizens to view government as being effective and trustworthy. In the U.S. in 1996, President Clinton issued an executive order requiring that every agency have ADR professionals on its staff and that efforts be made to resolve disputes via ADR. This was an initiative that has generally been successful but it is also an effort that needs the kind of updating that could be achieved by ODR offices that are equally concerned with ODP (online dispute prevention) and that use data derived from disputes that were resolved to build systems to reduce the number of disputes occurring in the future. The current information rich and communications in-

¹³ Working to prevent the escalation of situations to the level of dispute or conflict has been a feature that may be lacking in the work on commercial disputes, but prevention or “provention” has been central to the work on complex intercultural or international disputes for many years. See particularly John Burton’s work on conflict analysis and prevention (1990, 1997).

tensive environment is an ongoing experiment in which we are all participating and if government is to fulfill citizen expectations, ODR and its partner, ODP, need to be high priorities.

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