ONLINE DISPUTE RESOLUTION THROUGH THE LENS OF BARGAINING AND NEGOTIATION THEORY: TOWARD AN INTEGRATED MODEL

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I. INTRODUCTION

THIS symposium is another demonstration that online dispute resolution ("ODR") is receiving growing interest in the dispute resolution and legal arenas.[1] Much of the literature published to date highlights the great promise offered by ODR processes and its unique boundaryless cyber characteristics.[2] Nevertheless, even proponents recognize that, as with any emerging phenomenon, there are inevitable pitfalls and challenges to consider when evaluating ODR's potential societal contribution in both general and specific ODR procedures.[3] As with traditional dispute resolution procedures, ODR researchers have been attempting to develop a clear and measurable set of criteria by which to evaluate ODR processes and outcomes.[4]

We believe that existing efforts to evaluate and analyze ODR fall short in several respects. Specifically, this article rests on three premises. First, the majority of the criteria used to evaluate ODR are atheoretical. Much of the evaluation of ODR is developed in the form of a discussion of the advantages and disadvantages of ODR compared to dispute resolution in the physical world. Although assessing ODR's advantages and disadvantages is obviously an

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1. For an additional indication of the growing interest in ODR among dispute resolution researchers and practitioners, see Colloquy: *The Human Face of Online Dispute Resolution*, 23 CONFLICT RESOL. Q. 333 (2006).

2. *See, e.g.*, Joseph Goodman, *The Pros and Cons of Online Dispute Resolution: An Assessment of Cyber-Mediation Websites*, 4 DUKE L. & TECH. REV. 4 (2003), *available at* http://www.law.duke.edu/journals/dltr/articles/2003dltr0004.html.

3. *See id. See also* Julia Hornle, *Online Dispute Resolution: The Emperor's New Clothes?*, 17 INT'L REV. L. COMPUTERS & TECH. 27 (2003); George H. Friedman, *Alternative Dispute Resolution and Emerging Online Technologies: Challenges and Opportunities*, 19 HASTINGS COMM. & ENT. L.J. 695 (1997).

4. For a general discussion regarding the evaluation of traditional conflict management systems and some of the challenges associated with this process, see DAVID B. LIPSKY ET AL., EMERGING SYSTEMS FOR MANAGING WORKPLACE CONFLICT: LESSONS FROM AMERICAN CORPORATIONS FOR MANAGERS AND DISPUTE RESOLUTION PROFESSIONALS 263-95 (2003).

important endeavor, we believe that such efforts would be strengthened if they were founded on solid theoretical frameworks.

Second, we maintain that in evaluating ODR it is imperative that key elements of negotiation and dispute resolution processes be incorporated into the evaluation scheme.[5] Thus, we propose that the evaluation framework used for ODR be grounded in the rich and long-standing tradition of negotiation theory. One of the limitations of the existing literature on ODR is the lack of a theoretical framework and empirical evidence based on solid research. This leads to a never-ending debate between those who believe ODR is the next great revolution in dispute resolution[6] and those who believe ODR will undermine the dispute resolution process.[7] By shifting the discussion from an *ad hoc* debate of its merits and demerits to one that is grounded in negotiation theory, ODR scholarship stands to gain a more fine-grained analysis of and an expanded set of criteria by which to evaluate ODR's benefits and drawbacks.

Third, ODR is not a single phenomenon but in fact an umbrella term for a wide array of dispute resolution procedures and technological tools. Moreover, ODR, in its varied forms, is used to resolve a variety of disputes including those that originate online as well as offline. ODR evaluation criteria must take this variation into account and assess the manner in which different online tools and procedures influence resolution processes and outcomes for different categories of disputes. Here, too, we believe that this variation should be incorporated into an evaluation framework that is based on negotiation theory.

In this article we apply negotiation and bargaining theory to the analysis of online dispute resolution. Our principal objective is to develop testable hypotheses based on negotiation theory that can be used in ODR research. We have not conducted the research necessary to test the hypotheses we develop; however, in a later section of the article we suggest a possible methodology for doing so. There is a vast literature on negotiation and bargaining theory.[8] For the purposes of this article, we realized at the outset that we could only use a small part of that literature in developing a model that might be suitable for empirical testing. We decided to use the "behavioral" theory of negotiation developed by Richard Walton and Robert McKersie, which was initially

5. For a notable exception to the lack of attention given to issues of process, see Ethan Katsh et al., *E-Commerce, E-Disputes, and E-Dispute Resolution: In the Shadow of "eBay Law,"* 15 OHIO ST. J. ON DISP. RESOL. 705, 722 (2000), and Ethan Katsh, *Bringing Online Dispute Resolution to Virtual Worlds: Creating Processes through Code*, 49 N.Y.L. SCH. L. REV. 271 (2004).

6. *See, e.g.*, Richard Michael Victorio, *Internet Dispute Resolution (IDR): Bringing ADR into the 21st Century*, 1 PEPP. DISP. RES. L.J. 279 (2001); Alejandro E. Almaguer & Roland W. Baggiotte III, *Shaping Legal Frontiers: Dispute Resolution for the Internet*, 13 OHIO ST. J. ON DISP. RES. 711 (1998).

7. *See, e.g.*, Joel B. Eisen, *Are We Ready for Mediation in Cyberspace?*, 1998 BYU L. REV. 1305. It is interesting to note that Eisen's perspective increasingly seems to represent the minority view of ODR. Most of the ODR literature holds that ODR possesses great promise for dispute resolution. One of our motivations in contending that an integrated framework is needed for the evaluation and analysis of ODR stems from our belief that ODR will benefit from a more complete and balanced understanding of how it operates.

8. *Id.* at 1319 n.65.

formulated in the 1960s.[9] This theory has stood the test of time. Initially developed to explain union-management negotiations, it has proven useful in analyzing a wide variety of disputes and conflict situations.[10] In constructing their theory, Walton and McKersie built on the contributions and work of many previous bargaining theorists including economists, sociologists, game theorists, and industrial relations scholars. In this article, we have incorporated a consideration of the foundations on which their theory was based. In the concluding section of the article we discuss briefly how other negotiation and bargaining theories might be applied to the analysis of ODR.

We hope our work will stimulate others to analyze ODR theoretically. Clearly, bargaining and negotiation theory is not the only theory researchers can use to construct analytical models and testable hypotheses; for example, communication theory is a fertile source for model building.[11] A key assumption underlying our hypothesis-building exercise is that there are discernible and meaningful differences between the online and the physical, face-to-face world. We acknowledge that these differences may be waning and that the shibboleths conventionally associated with the online world may not have the significance they did a few years ago.[12]

II. STANDARD CRITERIA FOR EVALUATING ODR

In this section we review the standard criteria that have been used to evaluate ODR. Although we maintain in this articler that negotiation theory should be used to develop new criteria for evaluating ODR, the use of existing criteria to assess the advantages and disadvantages of ODR is a crucial building block upon which theory can be used to advance our understanding. In an effort to facilitate the discussion, we have grouped the existing criteria into six categories.[13]

A. Cost Reduction Criteria

When alternative dispute resolution ("ADR") started to gain popularity in the United States in the 1970s, one of the dominant rationales for shifting from the

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9. *Id.* at n.66.

10. *Id.* at 1320-21 nn.70-74.

11. *See, e.g.*, Nicole Gabrielle Kravec, *Dogmas of Online Dispute Resolution*, 38 U. TOL. L. REV. 125 (2006).

12. *See generally* David Allen Larson, *Technology Mediated Dispute Resolution (TMDR): A New Paradigm for ADR*, 21 OHIO ST. J. ON DISP. RESOL. 629 (2006). Larson points out that some of the differences that exist between the online and face-to-face worlds are perceived to exist by an older generation that did not grow up using current technologies and are likely to be much less significant when the current generation of young people reaches maturity. "In fact, a very real generational disconnect is developing between many current dispute resolvers, including commentators and theorists, and the children who are learning to live their lives through technology mediated communications.... [M]illions of children are learning the skills necessary to survive in a world where technology is ubiquitous." *Id.* at 630.

13. It is important to note that many of these criteria are clearly interrelated and are separated here for conceptual purposes.

conventional dispute resolution forums, such as the court system and regulatory commissions, was the potential saving of money and time.[14] Similarly, an important argument in favor of ODR is its potential to reduce the costs associated with resolving disputes.[15] The savings in time, the elimination of the need to travel, the greater ease of exchanging information, and the reduction in other logistical expenses are all claimed to make ODR a preferable dispute resolution forum for a growing population of disputes.[16] Thus, most ODR advocates maintain that cost reduction is a dominant criterion that should be used to measure the effectiveness of ODR. Are disputes resolved faster in online forums than they would be in face-to-face settings? When taking technological expenses into consideration, to what degree does the use of online forums result in monetary savings for the disputants? Does the reduction in costs vary across different types of disputes? These are the type of questions that are at the heart of cost reduction criteria for evaluating ODR.

B. Legal and Regulatory Criteria

Many of the purported advantages of ODR stem from its ability to transcend geographical, social, and cultural boundaries.[17] But these very characteristics of ODR raise a number of legal challenges. For example, legal scholars wrestle with the implications that cyberspace as a dispute resolution arena has on questions of jurisdiction and applicable laws.[18] The lack of strict jurisdictional rules and regulations allows ODR to provide a fast and less costly alternative to both litigation and traditional ADR. In addition, the absence of clearly defined laws and regulations allows the parties to develop rules and norms that are more suitable for their communities and modes of interaction.[19] However, as the use of ODR increases and expands into a wider array of dispute categories, the absence

14. For a discussion of the economic incentives for the use of ADR, see LIPSKY ET AL., *supra* note 4, at 101-05.

15. *See, e.g.*, ETHAN KATSH & JANET RIFKIN, ONLINE DISPUTE RESOLUTION: RESOLVING CONFLICTS IN CYBERSPACE 26 (2001); Arno R. Lodder & John Zeleznikow, *Developing an Online Dispute Resolution Environment: Dialogue Tools and Negotiation Support Systems in a Three-Step Model*, 10 HARV. NEGOT. L. REV. 287, 297 (2005); Lan Q. Hang, *Online Dispute Resolution Systems: The Future of Cyberspace Law*, 41 SANTA CLARA L. REV. 837, 855 (2001).

16. For a discussion regarding ODR efficiencies as compared to offline procedures, see Katsh et al., *supra* note 5, at 722.

17. For a discussion of the "boundaryless" nature of ODR, see Robert C. Bordone, *Electronic Online Dispute Resolution: A Systems Approach—Potential Problems, and a Proposal*, 3 HARV. NEGOT. L. REV. 175, 181 (1998).

18. For a general review of jurisdictional and other legal implications of the use of ODR, see Louise Ellen Teitz, *Providing Legal Services for the Middle Class in Cyberspace: The Promise and Challenge of Online Dispute Resolution*, 70 FORDHAM L. REV. 985 (2001); Eugene Clark et al., *Online Dispute Resolution: Present Realities, Pressing Problems and Future Prospects*, 17 INT'L REV. L. COMPUTERS & TECH. 7, 17 (2003).

19. *See, e.g.*, E. Casey Lide, *ADR and Cyberspace: The Role of Alternative Dispute Resolution in Online Commerce, Intellectual Property and Defamation*, 12 OHIO ST. J. ON DISP. RESOL. 193, 201 (1996); Hang, *supra* note 15, at 856.

of regulations and the existence of jurisdictional ambiguities may create complications that hinder its popularity and functionality.[20]

Compliance with and enforcement of agreements reached online are additional concerns that stem from the very nature of ODR.[21] How does a disputant ensure compliance with and enforcement of a facilitated settlement reached online? If enforcement is not guaranteed online, does ODR run the risk of becoming the hub for sterile agreements? One of the most frequently expressed concerns about ODR is the ability of parties to reach agreements online that are enforceable and free from complications that may arise out of the absence of clearly defined jurisdictional lines.

C. *Voice and Access to Justice Criteria*

Access to justice and the ability to exercise a meaningful voice have also played an important role in advocates' arguments supporting both traditional and online ADR.[22] ODR advocates point to the Internet's enormous potential for providing millions of individuals worldwide with access to a dispute resolution process—individuals who may not otherwise have had access to any means of settling their disputes.[23] Since many of the disputes that are settled through ODR mechanisms stem from online commerce, some argue that providing dispute resolution in a form compatible to the online transaction increases consumer voice. Giving consumers greater voice helps to assure a more level playing field between the individual consumer and the corporations with which they do business.[24]

Others acknowledge that ODR may be increasing access to justice for individuals who have the appropriate technological and knowledge-based capabilities; unfortunately many individuals, especially those who are older or have low incomes, lack access to both the technology and the knowledge needed to use ODR.[25] Evaluating ODR—both in terms of the effectiveness of specific ODR sites and ODR's larger implications for society—requires an accounting of the degree to which individuals are assured both access to and voice in ODR's processes and procedures.

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20. *See* Teitz, *supra* note 18, at 990; Katsh et al., *supra* note 5, at 707-08.

21. Hang, *supra* note 15, at 860.

22. For a discussion of the advantages of traditional workplace arbitration in providing access to justice for parties that are traditionally excluded from the judicial system, see generally Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate Over Predispute Employment Arbitration Agreements*, 16 OHIO ST. J. ON DISP. RESOL. 559 (2001).

23. *See, e.g.*, KATSH & RIFKIN, *supra* note 15, at 10, 30; Teitz, *supra* note 18, at 990.

24. *See* Llewellyn Joseph Gibbons, *Creating a Market for Justice? A Market Incentive Solution to Regulating the Playing Field: Judicial Deference, Judicial Review, Due Process, and Fair Play in Online Consumer Arbitration*, 23 NW. J. INT'L L. & BUS. 1, 7 (2002).

25. *See* Friedman, *supra* note 3, at 713; Julia R. Gordon, *Legal Services and the Digital Divide*, 12 ALB. L.J. SCI. & TECH. 809, 811-14 (2002).

D. *Ethical, Fairness, and Balance-of-Power Criteria*

Some of the key criteria used to evaluate any dispute resolution procedure are those that are used to assess whether the procedure provides necessary due-process safeguards and guarantees a fair and ethically sound process. Many critics have raised questions regarding the protections in traditional ADR provided to complaining parties.[26] Similar concerns have been raised about ODR; to some extent the characteristics of ODR complicate the task of providing fair procedures. For example, concerns regarding the confidentiality of the process are clearly amplified by the nature of the ODR process and the existence of a perpetual "paper trail."[27] An additional concern is the close link between some online commercial enterprises, such as eBay, and related online dispute resolution websites, such as SquareTrade.[28] Just as ethical and procedural concerns are raised about employer-promulgated dispute resolution systems, in ODR there is also a need to assess whether dispute resolution services closely linked to one of the parties can provide an unbiased process for all disputants.[29] Katsh, Rifkin, and Gaitenby address issues of power imbalances in the use of ODR by referring to the dispute resolution process provided to consumers by eBay as "ADR in the shadow of eBay law."[30] The authors point to the greater power held by entities such as eBay, which are to a large extent the legislators of the "laws" that regulate the disputing parties.[31] In developing ethical and fairness criteria, ODR research should be informed by the persistent debates around these issues in ADR literature.

E. *Communications and Information-Processing Criteria*

In reality, ODR consists of a variety of sophisticated means by which parties can communicate with each other, exchange information, and attempt to resolve disputes. ODR advocates maintain that providing disputing parties with enhanced communications and information-processing abilities improves the dispute resolution process.[32] Some have argued, however, that the lack of face-to-face

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26. *See, e.g.*, Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s*, 73 DENV. U. L. REV. 1017 (1996); Arnold M. Zack, *Agreements to Arbitrate and the Waiver of Rights Under Employment Law*, *in* EMPLOYMENT DISPUTE RESOLUTION AND WORKER RIGHTS IN THE CHANGING WORKPLACE 67-94 (Adrienne E. Eaton & Jeffrey H. Keefe eds., 1st ed. 1999).

27. For a discussion regarding the degree to which rules of confidentiality may differ when using an Internet-based dispute resolution provider, see Orna Rabinovich-Einy, *Technology's Impact: The Quest for a New Paradigm for Accountability in Mediation*, 11 HARV. NEGOT. L. REV. 253 (2006).

28. *See* SquareTrade, *Solve Problems with Online Dispute Resolution* (ODR), http://www.squaretrade.com/cnt/jsp/odr/overview_odr.jsp (follow "Learn More" hyperlink) (last visited Aug. 25, 2006).

29. *See* Clark et al., *supra* note 18, at 21.

30. Katsh et al., *supra* note 5, at 727-33.

31. *Id.* at 731.

32. *See* Katsh, *supra* note 5, at 277.

interactions renders these improvements in communications futile because they believe the very essence of communications—the ability to express emotions or to see facial expressions—has been stricken from the interaction.[33] ODR supporters have grown accustomed to these types of criticisms and have countered them by providing empirical evidence for the power of online communications. This evidence fosters the essential components of dispute resolution, such as trust, empathy, and respect.[34]

Therefore, it is not surprising that one of the common criteria used to assess ODR is its ability to facilitate effective communication and information processing by disputing parties. Does ODR allow for appropriate communications between disputing parties? Is this communication avenue superior or inferior to traditional face-to-face methods? Currently, these are the types of questions ODR researchers are most interested in addressing.

As we will maintain below, negotiation theory indicates that assessing the effectiveness of communications between the parties in ODR requires that due account be taken of the precise nature of the dispute. For example, we will argue that communication and information sharing between disputants is strongly influenced by whether a dispute is principally distributive or integrative in nature, that is, on whether their dispute is more like a zero-sum game or a non-zero-sum game. Not only the nature of the dispute but also the procedure and the technology used to resolve the dispute can be expected to have a great deal of influence on the kind of communication the parties will think is appropriate.

F. Technological Criteria

ODR is, by its very nature, the product of technological advances that have transformed individuals' abilities to communicate and interact without face-to-face contact. The technological advances that make ODR possible are constantly improved, and new tools are created.[35] Thus, it is essential that an evaluation of ODR in general as well as of particular ODR websites address the implications of existing and emerging technologies. How user-friendly are these technologies? How costly is the use of a particular technology? In evaluating ODR, it is also important to take into account the degree to which technology plays a role in the dispute resolution process. In some forms of ODR, technology merely provides logistical assistance to the disputing parties. In other forms, especially those using cutting-edge technologies, technology plays a more central role in the process. In addition, one of the most fascinating questions receiving literary

33. *See* Eisen, *supra* note 7, at 1311.

34. For an in-depth discussion of the communication power of online technologies, see Larson, *supra* note 12, at 629-49. *See also* Katsh, *supra* note 5, at 285-86.

35. For a detailed discussion regarding the technological strides taken in this realm, see generally Larson, *supra* note 12.

attention is the manner in which technological tools influence the dispute resolution process itself.[36]

In a recent article, law professor Rabinovich-Einy assesses the effects of the technologies and procedures offered by SquareTrade, one of the most active ODR sites, on the mediation process. She finds that using online technologies has created a means of enhancing the mediation process by adjusting the traditional tension between accountability and flexibility.[37] We find this line of research especially fruitful and believe that it is precisely this type of ODR assessment that will illuminate not only the outcomes associated with ODR procedures but also the interaction between technology and process.

III. FOUR CRITICAL DIMENSIONS OF ODR

An essential building block in our effort to provide a theoretical framework for ODR assessment is the recognition of the critical dimensions distinguishing ODR from conventional face-to-face dispute resolution. These dimensions also distinguish one form of ODR from another. We will discuss four of these dimensions: the type of technology (e.g., synchronous or asynchronous), the origins of the dispute (online or offline), the type of ODR procedure used to resolve the dispute (automated or facilitated), and the ADR procedure used (e.g., mediation or arbitration). We argue that using theory to develop hypotheses for evaluating ODR requires accounting for variation in these core dimensions.

A. The Type of Technology

There are at least two types of technologies that persons need to consider in building an analytical model of ODR. *Synchronous* technologies allow for communication between disputing parties in real time. *Asynchronous* technologies provide participants with the capacity to store and retrieve data or material.[38] There has been considerable discussion about the "convergence" of these two types of technology. Increasingly, convergence means that synchronous and asynchronous technologies are used simultaneously, and "blended" solutions often combine synchronous techniques (e.g., video teleconferencing), asynchronous techniques (e.g., websites and e-mail), and face-to-face interactions.[39] Even though convergence may ultimately mean that a user

36. For a typology on the role technology plays in ODR, see Mohamed Wahab, *The Global Information Society and Online Dispute Resolution: A New Dawn for Dispute Resolution*, 21 J. INT'L ARB. 168 (2004).

37. *See generally* Rabinovich-Einy, *supra* note 27. For an additional example of how technology might alter the actual dispute resolution process, see Katsh, *supra* note 5, at 281.

38. Kevin Oakes, *E-Learning: Synching Up with Virtual Classrooms*, T&D (Tech. & Dev.), Sept. 2002, at 57.

39. For a sampling of sources on convergence and blended solutions, see generally THE HANDBOOK OF BLENDED LEARNING: GLOBAL PERSPECTIVES, LOCAL DESIGNS (Curtis J. Bonk et al. eds., 2006); RICHARD E. MAYER, MULTIMEDIA LEARNING (2001); NIGEL CHAPMAN & JENNY CHAPMAN, DIGITAL MULTIMEDIA (2d ed. 2004); JOSH BERSIN, THE BLENDED LEARNING BOOK: BEST PRACTICES, PROVEN METHODOLOGIES, AND LESSONS LEARNED (2004); DAVID B. YOFFI,

enjoys a seamless interface across technologies, at the moment the distinction between synchronous and asynchronous technologies still has significant practical relevance.

Telephonic communication is one obvious example of electronic communication that is typically done in real time; note that voicemail is a form of telephonic communication that is not done in real time and is therefore asynchronous. Perhaps a more interesting synchronous technology is video-conferencing or video teleconferencing ("VTC"). VTC employs real-time picture and audio transmission and allows individuals in two or more locations to both hear and see each other simultaneously. The availability of VTC dates to the invention of television and the development of closed-circuit television systems. In earlier years, VTC using analog technology was very expensive. The use of ordinary telephone networks for transmission resulted in poor picture quality and limited its widespread adoption. With the adoption of digital technology in the 1980s, the diffusion of VTC outside the broadcasting industry began in earnest. Even then, however, the use of VTC was limited by the lack of adequate bandwidth and efficient video compression techniques. Over time, the technology has steadily improved, and the cost of investing in units has steadily declined. "Video teleconference systems throughout the 1990s rapidly evolved from highly expensive proprietary equipment, software and network requirements to [a] standards-based technology that is readily available to the general public at reasonable cost."[40] The videoconferencing technology now available allows broadcast-quality communication between parties at multiple sites. For example at the School of Industrial and Labor Relations at Cornell, distance learning courses using videoconferencing technology have regularly been conducted to link faculty and students in the United States with faculty and students in Europe, Asia, and South America.

The use of satellites to transmit video and audio signals is another form of synchronous technology. However, transmission of video by means of satellite typically allows only one-way communication between the participants at a given location and participants at distant locations unless both locations have uplink and downlink capacities. When satellite technology is used in business or educational arenas, achieving two-way communication usually requires that the technology be supplemented by the use of telephonic, e-mail, or web-based communication.

Over the last decade high-speed internet connectivity has enabled the development of personal VTC systems that use webcams, software compression, and desktop computers. Picture and audio quality has steadily approached broadcast quality, and costs have dropped significantly. Proponents of VTC

COMPETING IN THE AGE OF DIGITAL CONVERGENCE (1997); ANDY COVELL, DIGITAL CONVERGENCE: HOW THE MERGING OF COMPUTERS, COMMUNICATIONS AND MULTIMEDIA IS TRANSFORMING OUR LIVES (1999); Michael J. Murphy, *Convergence, Interactive Media, and Innovation*, Inno'v@-tion^2, http://www.innovation.ca/innovation2/essay_murphy.html (last visited Sept. 6, 2006) ("Convergence is the melding of previously segregated fields of computing, telecommunications, and broadcasting.").

40. *Videoconferencing*, Wikipedia, The Free Encyclopedia, http://en.wikipedia.org/wiki/Video_teleconference (last visited Sept. 6, 2006).

systems maintain that the interactions between individuals nearly replicate the interactions that would occur in a face-to-face environment. Those who have advocated the use of VTC in dispute resolution note that participants can discern changes in facial expressions and body language that may relate to an individual's credibility and voracity.[41] The use of VTC in dispute resolution has the obvious advantage of saving time and travel costs associated with face-to-face meetings. However, access remains a serious problem; not all parties in a dispute may have the hardware necessary to participate in a VTC. Currently corporations and other large organizations may have VTC hardware and using VTC in business-to-business disputes has become increasingly feasible. Low-income individuals may lack the means to purchase the hardware necessary to participate in a VTC, so the use of the technology in disputes involving these individuals remains limited.

In addition to accessibility, another limitation on the use of VTC for dispute resolution is scalability. In practical terms, there is a limit on how many individuals can effectively participate in a VTC, particularly if the individuals are at multiple sites. Accordingly, VTC may be an effective technology for two-party or three-party disputes, but its effectiveness declines as the number of parties in the dispute increases.

Asynchronous technologies are more commonly used for dispute resolution than synchronous ones. The development of the Internet spawned the use of asynchronous technologies, including e-mail, the World Wide Web, file sharing, and instant messaging.[42] Anyone with a desktop computer is already familiar with most forms of asynchronous technologies so we will not dwell on the topic here. Almost all of the best known and presumably most successful online dispute resolution services rely on asynchronous, web-based technologies including clickNsettle,[43] Cybersettle,[44] and SquareTrade.[45] Because of the widespread availability of desktop computing and the Internet, web-based ODR services are usually more accessible than video teleconferencing, and the hardware costs are likely to be significantly lower. Also, the scalability of web-based ODR services far exceeds that of video teleconferencing. Conversely, users of web-based services typically cannot see or be seen by the other parties in

41. *See* James P. Timony, *Demeanor Credibility*, 49 CATH. U. L. REV. 903, 932 (2002) (examining the use of video and assessment of credibility in the court room).

42. In common usage, the Internet and the World Wide Web are often used synonymously, but this is an error. "The Internet is a collection of interconnected *computer networks*, linked by copper wires, fiber-optic cables, wireless connections, etc.; the Web is a collection of interconnected *documents*, linked by hyperlinks and URLs, and is accessible using the Internet." *Internet*, Wikipedia, The Free Encyclopedia, http://en.wikipedia.org/wiki/Internet (last visited Sept. 6, 2006).

43. Overview, clickNsettle.com Inc., http://www.business.com/directory/law/clicknsettle_com, _inc/ (last visited Sept. 6, 2006).

44. Information, Cybersettle.com, http://www.cybersettle.com/info/main.aspx (last visited Sept. 7, 2006).

45. Learn More, SquareTrade.com, https://www.squaretrade.com/cnt/jsp/odr/overview_odr.jsp ;jsessionid=ysb5xy6022?vhosti (last visited Sept. 7, 2006). An excellent source for ODR information is The Center for Information Technology and Dispute Resolution website, http://www.odr.info/ (last visited Sept. 7, 2006).

the dispute (unless the online service uses webcams or a related technology; we are not aware of any ODR service that does at this time). Some may consider that, insofar as resolving disputes is concerned, the visual interaction that is an integral part of video teleconferencing gives that technology an advantage over text-based web communication. Some argue that the impersonality of the Internet hinders effective dispute resolution.[46] Others maintain, by contrast, that online text-based communication is every bit as capable of building and sustaining interpersonal relationships as either face-to-face communication or communication via video teleconferencing.[47]

B. The Origins of the Dispute

Distinguishing disputes that originate online from those that originate offline is another critical dimension of ODR to consider in building an analytical model of ODR. When ODR first flourished, the dominant type of disputes channeled to online providers were ones that arose from online interactions or activity.[48] In fact, many of the arguments in favor of ODR rested on the claim that an online forum was a more suitable arena for the new and emerging types of disputes in cyberspace.[49] However, as ODR evolved into a sizeable segment of the dispute resolution world, it was used for the resolution of disputes that were the product of offline interactions and activities.[50] For example, one of the areas in which ODR is used to resolve disputes originating offline is international arbitration.[51]

Just as the type of technology used to resolve a dispute has important implications for assessing the dispute resolution process, so does the origins of the dispute. For example, the nature of the parties' previous interactions and relationships will differ if their dispute begins offline rather than online. Many of the disputes online are between parties that have never met and most likely will have no further interactions after the resolution of their dispute. E-commerce disputes are a good example. Parties turning to an ODR provider for the resolution of an online commerce dispute tend to have no previous relationship and little prospect of having future contact. Offline disputes, however, include disputes that are likely very different in this regard. For example, the use of ODR for a workplace dispute will involve parties that have a pre-existing

46. *See generally* Larson, *supra* note 12.

47. *See generally id.*

48. KATSH & RIFKIN, *supra* note 15, at 19.

49. *See, e.g.*, Katsh, *supra* note 5, at 283.

50. *See* KATSH & RIFKIN, *supra* note 15, at 7 (discussing ODR efficiencies compared to offline procedures).

51. *See* Melissa Conley Tyler, *115 and Counting: The State of ODR 2004*, Center for Information Technology and Dispute Resolution, http://www.odr.info/unforum2004/ConleyTyler.htm (last visited Sept. 7, 2006) (discussing the extent to which ODR services address offline disputes). The article tracks 115 ODR sites and analyzes a variety of dimensions. With regard to the breakdown of sites in terms of their use for resolving online or offline disputes, the author finds that 39 of the 115 sites are used for online originating disputes; 34 of the 115 sites are used for offline originating disputes, and 42 sites are used for all types of disputes. *Id.*

relationship, and these parties will be concerned about whether they can sustain their relationship after their dispute is resolved.

We believe developing an analytical model for ODR requires that this dimension be captured. Thus, it is possible to hypothesize that some of the alleged limitations of ODR regarding its impersonal nature would be alleviated when the dispute originated in the face-to-face world. Similarly, legal questions regarding jurisdiction and enforceability are likely to be less challenging if the dispute originates offline rather than online.

C. The Resolution Technique

There is a central distinction in ODR between automated and facilitated dispute resolution. Automated resolution is a technique used by some ODR websites that provides software-based solutions for disputing parties. For the most part, automated techniques are used with negotiating parties who are not seeking the aid of a third party. The technique does not call for any interaction between the parties but merely requires them to submit their proposals and counterproposals. The program software then determines whether there is a zone of possible settlement.[52]

One popular form of automated negotiation is called blind bidding. For example, clickNsettle asks each party to enter a settlement offer into its online system. The software algorithm then compares the offers of the parties and determines whether they are within a preset range of each other, usually within 20% to 30% of each other.[53] If the offers meet this requirement, the software program will split the difference and inform the parties they have reached an agreement. If the offers do not meet this requirement, the parties are informed that they do not have a settlement, and the program destroys the record.[54] The clickNsettle system limits the period of time the parties can enter offers and counteroffers; within that period they can enter as many offers as they want, provided they alter every successive offer by a specified percentage after each unsuccessful round.[55] There are some ODR websites that provide third-party neutrals with an automated component of the dispute resolution process.[56]

Facilitated techniques have been used for negotiations, mediations, and arbitrations. One form of facilitation simply provides the parties in a dispute with an online space that allows them to negotiate with each other. However, this is seldom the only mechanism used in facilitated dispute resolution. Rather, it is often the first step in a series that leads to mediation and, occasionally,

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52. Goodman, *supra* note 2, ¶ 3.

53. KATSH & RIFKIN, *supra* note 15, at 61.

54. *Id.* at 61-62.

55. Goodman, *supra* note 2, ¶ 5. *See also* KATSH & RIFKIN, *supra* note 15, at 61-63; Richard John Galati, Jr., Evaluating Current Methods and Assessing Future Implications of Online Dispute Resolution (May 2006) (unpublished senior honors thesis, Cornell University) (manuscript at 28-29, on file with author).

56. *See* Katsh, *supra* note 5, at 287-89 (discussing the manner in which ODR tools can provide neutrals with automated options).

arbitration.[57] Facilitation is also used for other aspects of dispute resolution, including complaint handling and case appraisal.[58]

It seems obvious that the technique—automated or facilitated—used by online providers is likely to have a significant effect on both the process and the outcomes of a dispute. Evaluating ODR without accounting for this dimension is similar to evaluating face-to-face mediation without accounting for whether the mediator used a transformative or evaluative approach.[59] Therefore, we contend that this dimension should also be incorporated into any effort to model ODR processes and outcomes.

D. The ADR Procedure Used

The fourth dimension is the actual dispute resolution procedure the ODR provider uses. ODR has incorporated the full range of traditional ADR procedures developed in the offline realm, ranging from two-party negotiations to mediation, arbitration, and litigation.[60] Much has been written about the nature of each ADR procedures; thus, we will not discuss their characteristics here.[61] Each of the major ADR techniques is characterized by procedures and processes that are likely to influence the resolution process. Thus, accounting for the

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57. SquareTrade, The Claim Room, and ECODIR are three sites that provide facilitated negotiation; if negotiation fails, then each of these sites provides more formalized procedures for resolving a dispute. *See* SquareTrade, *supra* note 28; The Claim Room, http://www.theclaimroom.com/ (last visited Sept. 7, 2006); ECODIR (Electronic Consumer Dispute Resolution), http://www.ecodir.org/ (last visited Sept. 7, 2006). In these systems, the provider requests that a disputing party complete an electronic form that identifies the issues in dispute and possible solutions. The provider then contacts the other disputing party and requests that it complete a similar form and send it to the initiating party. Successful facilitated negotiations occur when this initial exchange of information and positions leads the parties to reach agreement. Goodman, *supra* note 2, ¶ 8; Galati, *supra* note 55, at 21.

58. For a useful breakdown in terms of the popularity of automated versus facilitated techniques, see Tyler, *supra* note 51. Of the 115 sites she studied, approximately 20 provided automated negotiations services; nearly 90 sites provided facilitated mediation or arbitration services in addition to other forms of facilitated services. *Id.*

59. *See* Lisa B. Bingham, *Employment Dispute Resolution: The Case for Mediation*, 22 CONFLICT RESOL. Q. 145, 156-57 (2004) (discussing different models of mediation).

60. In the United States, iCourthouse is an electronic litigation service in which a plaintiff files a complaint and includes a trial book consisting of his or her closing arguments, testimony and affidavits, along with other documentation or evidence. The defendant then responds in kind with his or her own trial book. Subsequently, a jury of iCourthouse members, selected by the disputing parties, renders a verdict. These are advisory verdicts, not binding on the parties unless stipulated in advance that they will abide by them. *See* iCourthouse, http://www.i-courthouse.com/main.taf?&redir=0 (last visited Sept. 7, 2006). In Australia, the Federal Court has established an eCourt that has been effective in handling certain kinds of disputes, especially those involving native land claims and discrimination cases. Australia, with its very low population density, has made a special effort to accommodate electronic courthouses. Melissa Conley Tyler & Di Bretherton, *Country Experiences of ODR: Australia*, Proceedings of the United Nations Economic Commission for Europe (UNECE) Forum on ODR 2003, http://www.odr.info/unece2003/pdf/tyler1.pdf (last visited Sept. 7, 2006).

61. *See generally* KATHERINE V.W. STONE, PRIVATE JUSTICE: THE LAW OF ALTERNATIVE DISPUTE RESOLUTION (2000).

fundamental differences between different ADR procedures is also essential in the development of an integrated theoretical framework for the study of ODR.

There is a big difference between a dispute that originates offline, is submitted to a provider that uses facilitated techniques and video teleconferencing, and is resolved through negotiations by the parties, and a dispute that originates online and is submitted to a provider that maintains a conventional website with an automated program used to reach a settlement. We contend that a dispute of the first type more closely approximates the experience the disputants would have in the physical world than a dispute of the second type. ODR, we maintain, is a large tent, and unless researchers incorporate these various dimensions into their models, their ability to analyze ODR in a rigorous fashion will be seriously limited.

IV. TOWARD A THEORETICAL FRAMEWORK FOR ASSESSING ODR: APPLYING BARGAINING AND NEGOTIATION THEORY

A number of themes emerge from our review of the standard criteria used to evaluate ODR and our discussion of four central ODR dimensions. First, it is apparent that the existing ODR literature has not attempted to incorporate the various evaluation criteria into a coherent and integrated framework. We culled the criteria from numerous articles on ODR that discuss some or all of the criteria but do not attempt to incorporate them into a more rigorous model that contains testable hypotheses.

Second, as we noted earlier, much of the literature on ODR has considered evaluation criteria in an atheoretical and *ad hoc* manner. The discussion of ODR has principally been shaped by the debate between proponents and opponents and has not yet incorporated traditional social science theory-building. We believe that ODR has now evolved to a stage that calls for the formation of models, the generation of hypotheses, and the testing of hypotheses through sound social science techniques. ODR advocates should support efforts to apply social science methodologies to ODR because we are confident that the application of such methodologies will deepen our understanding of ODR. That deeper understanding will likely result in new applications of this powerful tool.

Third, the application of existing evaluation criteria does not reflect the complex and varied nature of both the online and face-to-face dispute resolution processes. Although communication and information-processing criteria have been used to address some of the behavioral elements (such as trust) in dispute resolution, there has been little attention paid to most of the behavioral or tactical aspects of dispute resolution. Nor has it been recognized that the behavioral or relational aspects of online dispute resolution will depend on the four dimensions of ODR we discussed in the previous section. We do not mean to criticize earlier writers because, as Thomas Kuhn emphasized in his classic work, *The Structure of Scientific Resolutions*, the early researchers in a particular field must first map

the critical questions that need to be addressed before theoretical models can be built.[62]

One of the most fertile sources of social science theory that can be applied to ODR is bargaining and negotiation theory. Theories intended to enhance our understanding of negotiation, bargaining, and dispute resolution in the face-to-face world should be useful in enhancing our understanding of these processes in the online world. Virtually every social science discipline has developed its own brand of bargaining or negotiation theory.[63] We cannot attempt in this article to apply the full range of bargaining and negotiation theory to ODR. Instead, we chose to focus on the "behavioral" theory formulated by Richard E. Walton and Robert B. McKersie, which was most notably explicated in *A Behavioral Theory of Labor Negotiations: An Analysis of a Social Interaction System*.[64]

Theories of negotiation and bargaining attempt to explain (1) strategy (i.e., the parties' choice of goals and objectives and their plans to achieve them), (2) structure (i.e., whether the bargaining situation involves individuals, groups, organizations, or other entities, and the locus of decision making in negotiation),

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62. THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 1 (1962). *See also* David B. Lipsky & Ariel C. Avgar, *Research on Employment Dispute Resolution: Toward a New Paradigm*, 22 CONFLICT RESOL. Q. 175 (2002) (applying Kuhn's concept of scientific paradigms to employment dispute resolution).

63. *See generally* ALLAN M. CARTER, THEORY OF WAGES AND EMPLOYMENT (1959) (classic work in economics); JAN PEN, THE WAGE RATE UNDER COLLECTIVE BARGAINING (T.S. Preston trans., Harv. Univ. Press 1959) (same); FREDERIK ZEUTHEN, PROBLEMS OF MONOPOLY AND ECONOMIC WARFARE (1930) (same); JOHN G. CROSS, THE ECONOMICS OF BARGAINING (1969) (same); J.R. HICKS, THE THEORY OF WAGES (1932) (same); John F. Nash, *The Bargaining Problem*, 18 ECONOMETRICA 155-62 (1950) (classic work in game theory); THOMAS C. SCHELLING, THE STRATEGY OF CONFLICT (1960) (same); John F. Nash, *Two Person Cooperative Games*, 21 ECONOMETRICA 128 (1953) (same); ANATOL RAPOPORT, FIGHTS, GAMES, AND DEBATES (1960) (same); HOWARD RAIFFA, THE ART AND SCIENCE OF NEGOTIATION (1982) (same); JOHN C. HARSANYI, RATIONAL BEHAVIOR AND BARGAINING EQUILIBRIUM IN GAMES AND SOCIAL SITUATIONS (1977) (same); CARL M. STEVENS, STRATEGY AND COLLECTIVE BARGAINING NEGOTIATION (1963) (classic work in industrial relations); NEIL CHAMBERLAIN, COLLECTIVE BARGAINING (1951) (same); MORTON DEUTSCH, THE RESOLUTION OF CONFLICT (1973) (classic work in sociology); R.M. Emerson, *Power-Dependence Relations*, 27 AM. SOC. REV. 31(1961) (same); John R.P. French & Bertram Raven, *The Bases of Social Power*, *in* STUDIES IN SOCIAL POWER (Dorwin Cartwright ed., 1959) (same); SAMUEL B. BACHARACH & EDWARD J. LAWLER, BARGAINING: POWER, TACTICS, AND OUTCOMES (1981) (same); ROGER FISHER & WILLIAM URY, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN (Bruce Patton ed., 2d ed. 1991) (classic work in management); DAVID A. LAX & JAMES K. SEBENIUS, THE MANAGER AS NEGOTIATOR (1986) (same); MAX H. BAZERMAN & MARGARET A. NEALE, NEGOTIATING RATIONALLY (1992) (classic work in social psychology); DEAN G. PRUITT, NEGOTIATION BEHAVIOR (1981) (same); ROBERT AXELROD, THE EVOLUTION OF COOPERATION (1984) (classic work in political science); I. WILLIAM ZARTMAN, THE 50% SOLUTION (1976) (same). *See also* ROY J. LEWICKI ET AL., NEGOTIATION (5th ed. 2006) (discussing most of these theories in a best-selling textbook, but not those in economics or game theory); AVINASH DIXIT & SUSAN SKEATH, GAMES OF STRATEGY (1999) (covering game theoretic approaches to bargaining in an introductory text; Nash's theory of bargaining is explained in chapter 16, at 521-49).

64. RICHARD E. WALTON & ROBERT B. MCKERSIE, A BEHAVIORAL THEORY OF LABOR NEGOTIATIONS: AN ANALYSIS OF A SOCIAL INTERACTION SYSTEM (ILR Press, 2d ed. 1991) (1965). *See also* RICHARD E. WALTON ET AL., STRATEGIC NEGOTIATIONS: A THEORY OF CHANGE IN LABOR-MANAGEMENT RELATIONS (1994) (important sequel to A BEHAVIORAL THEORY).

(3) process (i.e., the interactions between the parties in negotiations, including their choice of tactics and other behaviors), and (4) outcomes (i.e., whether negotiations result in an agreement and the nature of that agreement). Very few theorists have attempted the gargantuan task of producing a truly comprehensive theory of negotiation that explains all the dimensions of a bargaining situation. Rather, most theorists focus on one or two dimensions and ignore the others. For example, game theorists focus on strategy and outcomes, sociologists on process and power, and psychologists on process and behavior.

Although Walton and McKersie did not develop a truly comprehensive theory of negotiation, they managed to synthesize more disparate threads of theory than any one had done before (and few have tried to do since then). A hallmark of Walton and McKersie's theory is that they adopted concepts and principles initially developed by economists and game theorists and interpreted them in *behavioral* terms, using ideas from other disciplines, especially industrial relations and sociology.[65] For example, they borrowed the game theorists' distinction between "zero-sum" games and "non-zero-sum" or "variable-sum" games.[66] They initially focused their theory on explaining labor-management negotiations; their work has proven particularly useful in that context.[67] But in the decades since the first edition of their book appeared, researchers have found that their behavioral theory can be profitably applied to any bargaining situation involving negotiation between groups, organizations, and other entities—situations in which a negotiator (or agent) represents constituents (or principals). For example, the theory has been applied to negotiations between supervisors and employees,[68] environmental disputes,[69] "public" disputes involving government agencies and voters,[70] Native American disputes,[71] and international relationships.[72] As Kochan and Lipsky have noted, "Walton and McKersie's theory has proved to be relevant in a wide variety of settings. Indeed, the robust nature of their theory is a phenomenon seldom encountered in the social sciences."[73]

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65. WALTON & MCKERSIE, *supra* note 64, at 1-10.

66. *See* JOHN VON NEUMANN & OSKAR MORGENSTERN, THEORY OF GAMES AND ECONOMIC BEHAVIOR (1943) (widely regarded as the book that launched the field of game theory).

67. A good example of the authors' own application of their theory to labor-management relations can be found in JOEL CUTCHER-GERSHENFELD ET AL., PATHWAYS TO CHANGE: CASE STUDIES OF STRATEGIC NEGOTIATIONS (1995).

68. Janice A. Klein, *Changing Relations Between Supervisors and Employees: From Deal Making to Strategic Negotiations*, *in* NEGOTIATIONS AND CHANGE: FROM THE WORKPLACE TO SOCIETY 54 (Thomas A. Kochan & David B. Lipsky eds., 2003).

69. *See* Max H. Bazerman & Andrew J. Hoffman, *Applying the Insights of Walton and McKersie to the Environmental Context*, *in* NEGOTIATIONS AND CHANGE, *supra* note 68, at 257.

70. *See* Lawrence Susskind, *Collective Bargaining and Public Policy Dispute Resolution: Similarities and Differences*, *in* NEGOTIATIONS AND CHANGE, *supra* note 68, at 269.

71. *See* Lavinia Hall & Charles Heckscher, *Negotiating Identity: First-Person Plural Subjective*, *in* NEGOTIATIONS AND CHANGE, *supra* note 68, at 279.

72. *See* Ji Li & Chalmer E. Libig, Jr., *Negotiating with China: Exploratory Study of Relationship Building*, J. MGMT. ISSUES, Fall 2001, at 192-94.

73. *Introduction*, NEGOTIATIONS AND CHANGE, *supra* note 68, at 12.

In brief, Walton and McKersie postulate that negotiations involving agents and principals consist of four subprocesses, which they label *distributive bargaining, integrative bargaining, attitudinal structuring,* and *intraorganizational bargaining.*[74] It is worth noting immediately that distributive bargaining is the analogue to a zero-sum game, while integrative bargaining is the analogue to a non-zero-sum game. In the former, the parties' interests and positions are purely in conflict; in the latter they are not.[75] We will provide a précis of each of these subprocesses, but we want to caution the reader that our abridgement of Walton and McKersie's text necessarily sacrifices much of the richness of their analysis. Also, for ease of understanding, we will assume there are two parties in the bargaining situation; Walton and McKersie's theory can be applied to negotiations involving multiple parties.

A. Distributive Bargaining

Distributive bargaining is the term used to describe the aspect of the negotiation process that constitutes a *pure conflict of interests or positions* between the negotiators.[76] Game theorists refer to a game in which the players' interests are entirely in conflict as a zero-sum game.[77] For ease of conceptualization, researchers frequently refer to a proverbial "pie," which needs to be divided between the negotiators. The larger the share of the pie one negotiator obtains, the smaller the share obtained by his or her opponent.[78] In other words, in a zero-sum game the proceeds or rewards allocated between the two negotiators are fixed. Moreover, for authentic zero-sum conditions to hold, one needs to imagine that an initial allocation of available rewards has already taken place, and the negotiators face the challenge of negotiating a different allocation of those rewards. The initial allocation of rewards is the default position of the parties; it is the share of the proceeds each party would obtain if negotiations did not occur at all. For example, party A initially may have a quarter of the pie and party B the remaining three quarters. If party A wants to increase its share of the pie, party B must sacrifice part of what it already possesses. In this situation one party's gain represents the other party's loss—a situation often characterized as a "win-lose" game. It is theoretically and actually impossible for both sides to gain in a true zero-sum game.[79]

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74. WALTON & MCKERSIE, *supra* note 64, at 4-6.

75. *See id.* at 13-45, 126-43.

76. *See id.* at 13-45.

77. *See, e.g.*, MARTIN J. OSBORNE & ARIEL RUBINSTEIN, A COURSE IN GAME THEORY 21 (1994).

78. *See, e.g.*, Gerald B. Wetlaufer, *The Limits of Integrative Bargaining*, *in* WHAT'S FAIR: ETHICS FOR NEGOTIATORS 30-31 (Carrie Menkel-Meadow & Michael Wheeler eds., 2004).

79. It is useful to introduce two closely related concepts from economics in this discussion. One is *efficiency*: an efficient solution in bargaining is one in which all of the available proceeds in the game are distributed to the players, and nothing is "wasted." In other words, if the entire pie is divided between the parties, and no pieces of the pie are left over, the division is considered an efficient one. In the parlance of every-day negotiations, an efficient outcome would be one in which the negotiators "leave nothing on the table." Closely related to the concept of efficiency is the concept of *Pareto optimality*. The condition of *Pareto optimality* exists when no individual can

In real life there are many examples of zero-sum games; virtually all games that people play for recreation are zero-sum games. In baseball and football, poker and chess, and countless other games, there is clearly a winner and a loser (not counting the possibility of ties). In other forms of social interaction, it is not so clear that zero-sum games are the norm. Is the Israeli-Palestinian conflict a zero-sum game? What about the U.S. involvement in Iraq? Some observers might argue that they are zero-sum games, but most social scientists are far from confident that every war is a zero-sum game.

Walton and McKersie recognized that the strategy and tactics a party uses in distributive bargaining will and should differ from the strategies and tactics that a party uses in integrative bargaining. For example, in distributive bargaining a party will stake out strong commitments, restrict the amount of information shared with an opponent, engage in bluff and misrepresentation, use coercive tactics such as threats and warnings, and have a point in negotiations where a party will not compromise (which Walton and McKersie call a "resistance point") that a party may or may not share with an opponent.[80] Walton and McKersie recognized that how one behaves in bargaining depends on what one believes about the nature of the game.

B. Integrative Bargaining

Walton and McKersie use the term integrative bargaining to describe the aspect of the negotiation process that allows the parties to seek joint or mutual gains. The parties' interests and positions are not in direct conflict in integrated bargaining; rather, the parties share common goals and interests. One party's gain is not at the expense of the other party; the pie is not fixed but can be expanded to potentially benefit both parties.[81] An alternative characterization, which is equivalent to "expanding the pie," is to picture a situation in which two negotiators have not yet divided up a pie, but have the task of doing so. At the start of negotiations, neither party has a single "piece" of the pie, but they do have the opportunity of negotiating its allocation. If, for example, the two parties decide that one should have two-thirds of the pie and the other one-third, both have ended up with more than they had before the negotiations occurred.

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be made better off without another being made worse off. The terms *Pareto optimality* and *Pareto efficiency* are used interchangeably: all *Pareto optimal* outcomes are efficient outcomes. In a zero-sum game there are (theoretically) an infinite number of ways to divide the pie; each division is *Pareto optimal*, but to move from one division to another means that one player gains while the other loses. *See, e.g.*, DREW FUDENBERG & JEAN TIROLE, GAME THEORY 18-23, 397-98 (2d. prtg. 1992); OSBORNE & RUBENSTEIN, *supra* note 77, at 7, 122, 125, 290, 305.

80. WALTON & MCKERSIE, *supra* note 64, at 58-125. The ethical implications of using distributive tactics in negotiation have been widely discussed and debated. Some writers argue that the use of deception, threats, and other coercive tactics in negotiation is justified if the parties have a mutual expectation that such tactics will be used; other writers justify the use of such tactics if a party in negotiation expects an opponent to engage in potentially wrongful or harmful conduct. *See, e.g.*, WHAT'S FAIR, *supra* note 78, chs. 7-13 (compilation of various viewpoints on use of distributive tactics in negotiation).

81. WALTON & MCKERSIE, *supra* note 64, at 126-43.

This example illustrates that disputes may occur even in integrated bargaining situations. Even though joint gains are possible, the parties may disagree on the precise division of the pie. Focusing on labor-management relations, Walton and McKersie point out that the distributive or integrative nature of negotiations may depend on the issue in dispute. In bargaining between an employer and a union, the wage issue might well be distributive (higher wages for employees may mean lower profits for the employer, so the union's gain is the employer's loss). Other issues, however, may be integrative ones. For example, it is often in the best interests of both unions and employers to strive to achieve improved safety and health conditions for employees. Obviously, employees desire safe and healthful working conditions, while employers desire reduced costs of insurance coverage and lawsuits if they provide these conditions. Thus, cooperation between the union and the employer on job safety can lead to joint gains. However, although unions and employers can achieve joint gains on job safety, disputes can arise over how much safety is needed to satisfy the interests of both parties. Employees may desire to reduce the risk of injury on the job to zero, whereas employers seldom believe that the benefits they would obtain from doing so outweigh the costs they would incur.[82] In Walton and McKersie's discussion of management's desire for flexibility and the union's desire for job security for its members, they note that each issue considered in isolation could be a distributive, zero-sum issue. But negotiating the two issues in tandem allows for the parties to engage in tradeoffs that convert a potentially distributive situation into an integrative one.[83]

Walton and McKersie discuss the tactical and other behavioral implications of integrative bargaining. Cooperation, information sharing, openness, and joint problem solving are the hallmarks of integrative bargaining. In distributive bargaining, the parties ordinarily are adversaries, but they need not be in integrative bargaining. Rather, the parties become joint problem solvers. If the parties truly share joint goals, objectives, and values, they can work together as a team to achieve solutions for their concerns. Distributive tactics, such as bluff, deception, and threats, are inappropriate and unnecessary in integrative bargaining. Integrative bargaining is generally characterized by an open flow of communications, a high level of mutual trust and respect, and a positive and supportive climate.[84]

Integrative bargaining is a term that has entered the popular lexicon, and it is frequently used interchangeably with "win-win" bargaining. Fisher and Ury, in *Getting to Yes*, indisputably the most widely read book on negotiation, developed an approach they term "interest-based" bargaining or "principled negotiation."[85] In the literature on negotiation and in practice, the terms integrative bargaining, win-win bargaining, interest-based bargaining, and principled negotiation are frequently used interchangeably. However, a close reading of Walton and

82. THOMAS A. KOCHAN ET AL., THE EFFECTIVENESS OF UNION-MANAGEMENT SAFETY AND HEALTH COMMITTEES 13-14 (1977).

83. WALTON & MCKERSIE, *supra* note 64, at 129-35.

84. *Id.* at 137-43.

85. FISHER & URY, *supra* note 63, at 41-57.

McKersie and Fisher and Ury reveals that there is only a partial correspondence between integrative bargaining and interest-based bargaining. If "hard" tactics are associated with distributive bargaining and "soft" tactics with integrative bargaining, then the approach proposed by Fisher and Ury is a third approach, which is neither hard nor soft but "principled." In distributive bargaining, the parties often mistrust each other, but in integrative bargaining the parties' relationship is characterized by high levels of trust. In contrast Fisher and Ury recommend that the parties "proceed independent of trust" in principled negotiations.[86]

C. *Attitudinal Structuring*

Attitudinal structuring is the term Walton and McKersie use to describe that aspect of the negotiation process that involves "a maintenance or restructuring of the attitudes of the participants toward each other. The attitudes of each party toward the other, taken together, define the relationship between them."[87] In developing this subprocess, Walton and McKersie meld behavioral and social-psychological concepts into their theory. They maintain attitudinal structuring encompasses the parties' motivational orientation toward each other, each party's beliefs about the other's legitimacy, each party's feelings of trust about the other, and each party's feelings of friendship or hostility. They posit that the *pattern* (or the nature) of the relationship between the parties depends, in part, on the environment in which the parties negotiate as well as the personalities of the negotiators.[88]

In considering Walton and McKersie's theory, one implication that has both theoretical and practical significance is the connection between attitudinal structuring and distributive and integrative bargaining. To what extent is there a connection? Do the attitudes of the parties affect the bargaining process and bargaining outcomes? One might easily imagine that attitudes must unquestionably influence the process and outcomes of negotiation; on reflection one realizes that the interactions across the subprocesses of negotiation are quite complex. It is probably true that most people prefer a relationship characterized by friendship, open communication, high levels of trust, and low levels of stress. These positive characteristics of a relationship generally are associated with integrative bargaining. As Walton and McKersie point out, positive attitudes may interfere with the process of distributive bargaining. "A tactic designed to

86. *Id.* Fisher and Ury call the conventional approach to negotiation "positional bargaining." *Id.* at 5. Interestingly, they never cite Walton and McKersie in *Getting to Yes*, although it seems to us their debt to Walton and McKersie is quite obvious. Implicitly, at least, Fisher and Ury attempt to develop an alternative approach to negotiation that stands in contrast not only to Walton and McKersie but all earlier negotiation theorists. Whether they succeeded in developing a truly unique approach, let alone one that produces more efficient and satisfactory outcomes than positional bargaining, has been subject to considerable debate. *See, e.g.*, Joel Cutcher-Gershenfeld, *How Process Matters: A Five-Phase Model for Examining Interest-Based Bargaining, in* NEGOTIATIONS AND CHANGE, *supra* note 68, at 141-60.

87. WALTON & MCKERSIE, *supra* note 64, at 184.

88. *Id.* at 185-209.

promote a better relationship frequently entails a sacrifice of the substance of distributive bargaining; and conversely a tactic designed to achieve a distributive gain often adversely affects the relationship."[89] A fundamental quandary is the following: Are positive attitudes a desirable attribute for the parties to foster, regardless of all other considerations? That is, can they serve as an end in themselves? Or are the parties' attitudes, whether positive or negative, principally instrumental, shaped by the parties' desire to serve larger purposes? Walton and McKersie clearly believe that attitudes are instrumental and should not be "structured" without due consideration for the larger context of negotiations.[90] In other words, whether a party should behave in a friendly or hostile fashion (or choose any other tactic or form of behavior) with a bargaining opponent depends on the goals and objectives the party wants to achieve in negotiations.

D. Intraorganizational Bargaining

Intraorganizational bargaining is the term Walton and McKersie use to describe the aspect of the negotiation process that deals with the relationship between a principal negotiator and the members of his or her negotiating team, between the team and the people or constituencies the team represents, and between one constituency and others within the organization engaged in negotiation. Intraorganizational bargaining is partly a matter of the relationship between an agent and the agent's principal and partly (if an agent represents multiple principals) a matter of the relationship amongst the principals. Walton and McKersie were not the first scholars to recognize that organizations are not monolithic; they usually consist of multiple interest groups, stakeholders, and constituencies.[91] Negotiators need to worry about whether they have the support of the stakeholders and constituents they represent.[92] The term often used for achieving agreement through intraorganizational bargaining is "alignment."[93] There are several methods an organization can use to achieve internal alignment

89. *Id.* at 270.

90. *Id.* at 268-80.

91. *E.g.*, JAMES G. MARCH & HERBERT A. SIMON, ORGANIZATIONS 108-10, 137-49 (2d ed. Blackwell Publishers 1993) (1958) (the classic work on the topic). The so-called "pluralist" view of organizations holds that interest groups within an organization are motivated by political self-interest. *See* TERRY M. MOE, THE ORGANIZATION OF INTERESTS: INCENTIVES AND THE INTERNAL DYNAMICS OF POLITICAL INTEREST GROUPS (1988). *See generally* SAMUEL B. BACHARACH, POWER AND POLITICS IN ORGANIZATIONS: THE SOCIAL PSYCHOLOGY OF CONFLICT, COALITIONS, AND BARGAINING (1980). For a popular treatment of intraorganizational bargaining, focusing on how an individual can successfully form a coalition within an organization, see SAMUEL B. BACHARACH, GET THEM ON YOUR SIDE 73-191 (2005).

92. WALTON & MCKERSIE, *supra* note 64, at 281-302.

93. *See* LIPSKY ET AL., *supra* note 4, at 324-31 (discussing the challenge of aligning workplace dispute resolution systems with the mission and values of the organization as well as other workplace processes and functions).

including the exercise of formal authority by a superior, decision by majority rule, and a true consensus, requiring unanimity.[94]

Anyone who has ever served as a negotiator understands that it may be even more difficult to resolve conflicts within an organization than it is to resolve conflicts between organizations. Before Walton and McKersie wrote their classic book, industrial relations scholars had long recognized that unions were highly political entities, often racked by internal dissention and conflict. Some union leaders were able to achieve sufficient authority to resolve or suppress internal dissention, but other union leaders found it much more difficult to achieve a united front for the purposes of negotiating with employers.[95] Walton and McKersie devote most of their discussion of intraorganizational bargaining to the challenges unions face in achieving "solidarity" but devote very little space to intraorganizational bargaining on the management side of the table.[96] Building on Walton and McKersie, Lax and Sebenius analyze the difficulties managers encounter in achieving alignment between their goals and interests and those of the individuals and groups they manage.[97]

A negotiator not only needs to focus on achieving alignment on his or her side of the table but also has a vital stake in understanding and possibly influencing the internal alignment of interests on the other side of the table.[98] If negotiations are primarily distributive in nature, then a negotiator will simultaneously seek to unify his or her constituencies and to foster division among the groups represented by an opponent. "Divide and conquer" is not simply an old saw in conflicting relationships, but rather part of the arsenal of tactics employed by a professional negotiator. There are many tactics a negotiator can use to understand and influence the dynamics of the opposition. A classic tactic is the "end run," which is an effort by a principal negotiator to bypass the opposing negotiator and communicate directly with that negotiator's superiors or constituents. As Walton et al. note, "The 'end run' by management is perhaps the most vivid tactic used by one party [in collective bargaining] to sow divisions in the other side."[99] Obviously, the use of the end run is not confined to collective bargaining but is a tactic frequently used in many types of conflicts.

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94. LEWICKI ET AL., *supra* note 63, at 366-67.

95. Walton and McKersie cite several classic works on the difficulty of achieving union "solidarity" in the face of competing interest groups that exist within the union. *See* LEONARD R. SAYLES & GEORGE STRAUSS, THE LOCAL UNION: ITS PLACE IN THE INDUSTRIAL PLANT (1953); L.H. Fisher & Grant McConnell, *Internal Conflict and Labor-Union Solidarity*, *in* INDUSTRIAL CONFLICT 132-43 (Arthur Kornhauser et al. eds., 1954). There is a vast literature on overcoming internal conflict in unions. *See, e.g.*, Karen Brodkin & Cynthia Strathmann, *The Struggle for Hearts and Minds: Organization, Ideology, and Emotion*, 29 LABOR STUD. J., Fall 2004, at 1. *See also* ORGANIZING IMMIGRANTS: THE CHALLENGE FOR UNIONS IN CONTEMPORARY CALIFORNIA (Ruth Milkman ed., 2000) (analyzing, among other matters, the difficulties faced by unions attempting to organize disparate immigrant groups in Southern California).

96. WALTON & MCKERSIE, *supra* note 64, at 281-309.

97. LAX & SEBENIUS, *supra* note 63, at 154-82 (discussing the manager's role as a "mediator" who seeks to resolve conflicts between different interest groups within the organization).

98. WALTON ET AL., *supra* note 64, at 46-47.

99. *Id.* at 278-79.

During World War II, for example, both sides used various forms of communication and espionage to undermine the confidence citizens and soldiers had in their leaders. In 1942, the United States created the Voice of America, which broadcast news and information directly to Germany and German-occupied territories. During the Cold War, the VOA broadcast directly to Soviet citizens, attempting to bypass their leaders. Today, VOA continues to operate various services, including Radio Marti, which directs its broadcasts to Cuba, and Radio Sawa, which attempts to reach younger people in Arab countries.[100] The use of propaganda is common not only in international conflicts but also in many other conflict situations.

A classic illustration of a situation in which one side has the opportunity to undermine the unity of an opponent is the Prisoner's Dilemma, probably the best known of all non-zero-sum games. In 1950, Albert Tucker was the first to devise a narrative used to explain the Prisoner's Dilemma.[101] Over time the narrative has evolved and usually takes the following form: Two criminals make a solemn pledge to keep silent about a crime they have committed. When they are arrested, however, the police place them in separate cells and interrogate them individually. Each prisoner realizes that if his partner confesses and turns state's evidence, his partner will get no sentence, but he will get a severe sentence. The two prisoners face a dilemma; if they remain faithful to their pledge, they will each get a light sentence, but this depends on one prisoner trusting the other to remain silent. Each prisoner has a very strong incentive to betray his partner and confess; by doing so he will go free. The Prisoner's Dilemma has proven to be an apt description of many real-life interactions ranging from trench warfare during World War I to conflict between Congress and the Federal Reserve Bank.[102] In the Prisoner's Dilemma, a player must confront the necessity of choosing whether to cooperate or compete with his or her "partner." According to Walton and McKersie, this closely parallels the dilemma faced by a typical negotiator, namely, whether to use principally distributive (i.e., competitive) tactics or principally integrative (i.e., cooperative) tactics in negotiations.[103]

In a real-life Prisoner's Dilemma, police interrogators understand the dilemma that prisoners face and can use negotiating tactics to exploit the situation. Police and prosecutors, for example, often offer deals to one suspect if he or she will confess and implicate another suspect. Prosecutors can also use deception to achieve their objectives; they can lie and tell one prisoner that his partner has

100. *Voice of America*, Wikipedia, The Free Encyclopedia, http://en.wikipedia.org/wiki/Voice_of_America (last visited Aug. 28, 2006).

101. WILLIAM POUNDSTONE, PRISONER'S DILEMMA 116-21 (1992). Poundstone points out that it was actually Merrill Flood and Melvin Dresser who devised the game that Tucker later characterized as a Prisoner's Dilemma. *Id.* at 106-16.

102. AXELROD, *supra* note 63, at 73-87 (applying the Prisoner's Dilemma to trench warfare during World War I); AVINASH K. DIXIT & BARRY J. NALEBUFF, THINKING STRATEGICALLY: THE COMPETITIVE EDGE IN BUSINESS, POLITICS, AND EVERYDAY LIFE 115-18 (1991) (applying the Prisoner's Dilemma to conflict between the U.S. Congress and the Federal Reserve).

103. WALTON & MCKERSIE, *supra* note 64, at 58, 144.

already confessed even though he has not to eliminate any motive the prisoner may have to remain silent.[104]

To recapitulate, negotiators need to use intraorganizational bargaining for two purposes: to achieve the alignment of the multiple constituencies they represent and to understand and possibly affect the extent to which the opposing negotiators' constituencies are aligned.

E. Negotiating Dilemmas: Mixed-Motive Decision Making

We have already touched on a central theme in Walton and McKersie's theory, namely, the *dilemmas* faced by negotiators. Webster's defines dilemma as any situation "necessitating a choice between equally unfavorable or disagreeable alternatives"; in other words, a dilemma is any "perplexing or awkward situation."[105] The essence of negotiation is choice, and negotiators must constantly make choices on strategies and tactics knowing that any choice may have potentially unsatisfactory consequences. In real life, negotiators seldom play a purely distributive or integrative game. Rather, a negotiating situation typically has both distributive and integrative elements. In their later work, Walton and McKersie, joined by Cutcher-Gershenfeld, used the terminology "forcing" and "fostering" strategies, which are essentially strategies associated with either distributive or integrative bargaining, respectively.[106] In most situations a negotiator has the twin objectives of both expanding the pie and obtaining the largest share of it. Simultaneously, a negotiator needs to play both a distributive game and an integrative game, sometimes using fostering strategies to expand the pie and other times using forcing strategies to obtain the largest share. Negotiators, accordingly, are continually engaged in "mixed-motive" decision making.[107] Unless negotiators know with certainty that they are playing either a distributive, zero-sum game, or an integrative, non-zero-sum game, then

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104. This is precisely what the Cook County prosecutor did in dealing with Nathan Leopond and Richard Loeb after the two University of Chicago students murdered fourteen-year-old Bobby Franks in 1924. *See generally Leopold and Loeb*, Wikipedia, The Free Encyclopedia, http://en.wikipedia.org/wiki/Leopold_and_Loeb (last visited Aug. 28, 2006); HAL HIGDON, LEOPOLD AND LOEB: THE CRIME OF THE CENTURY (1999). Most people know that police must give criminal suspects a "Miranda warning." *See* Miranda v. Arizona, 384 U.S. 436 (1966). Many people, however, do not realize that police officers and prosecutors have broad latitude to use deception, tricks, lies, and dishonesty in interrogating criminal suspects and the Supreme Court has never clearly prohibited such practices. *See* Illinois v. Perkins, 496 U.S. 292, 297 (1990) (the law does not prohibit police from "mere strategic deception by taking advantage of a suspect's misplaced trust"); *In re* D.A.S., 391 A.2d 255, 258 (D.C. 1978) ("Confessions are not generally vitiated when they are obtained by deception or trickery, as long as the means employed are not calculated to obtain an untrue statement.").

105. WEBSTER'S DICTIONARY 633 (16th ed. 1966).

106. WALTON ET AL., *supra* note 64, at 25-29, 48-49.

107. *See generally* Richard E. Walton & Robert B. McKersie, *Behavioral Dilemmas in Mixed-Motive Decision Making*, 11 BEHAV. SCI. 370 (1966). *See also* R.E. Fells, *Overcoming the Dilemmas in Walton and McKersie's Mixed Bargaining Strategy*, 53 RELATIONS INDUSTRIELLES (1998), http://www.erudit.org/revue/ri/1998/v53/n2/005276ar.pdf.

negotiators have the difficult task of choosing the right mix of strategies and tactics that will achieve their twin objectives.

Uncertainty about the nature of the game would seem to make the negotiator's task twice as difficult. The contemporary approach to analyzing game-theoretic conflicts is to recognize that the players are unlikely to know whether they are in a zero-sum or a non-zero-sum game; they face uncertainty. Game theorists, however, have demonstrated that it is not necessary for a player to know with certainty the nature of the game he or she is playing. Rational parties in a conflict can resolve their differences if they can develop reasonable estimates of the probabilities of alternative outcomes.[108] In other words, in theory the complex, mixed-motive nature of most negotiations is not necessarily a barrier to achieving settlements.

For the practitioner, Walton and McKersie's theory can be translated into the four major responsibilities a negotiator (or agent) must discharge in representing his or her constituents (or principals): (1) the negotiator must get the best possible deal he or she can for the people he or she represents (distributive bargaining); (2) the negotiator must seek all the joint gains that are possible in the bargaining situation (integrative bargaining); (3) the negotiator must be the principal manager of the relationship between the parties in negotiations, doing his or her best to steer the relationship in the direction that best serves the interests of the people he or she represents (attitudinal structuring); and (4) the negotiator must do his or her best to (a) achieve alignment of interests and goals among the people he or she represents, and (b) understand and influence the alignment of interests and goals of the other party in negotiations.

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108. *See, e.g.*, Adam M. Brandenburger, *Strategy and Structural Uncertainty in Games*, *in* WISE CHOICES: DECISIONS, GAMES, AND NEGOTIATIONS 221 (Richard J. Zeckhauser et al. eds., 1996). The distinction between zero-sum and non-zero-sum games is critical in an analysis of conflict situations, but equally important is the degree to which the participants in a game have information about the nature of the game they are playing. If the players had *perfect information* (or complete information), a common assumption in economic theory, they would of course know whether in fact they were playing a zero-sum or a non-zero-sum game. Usually, however, the players lack complete information about the nature of the game and, accordingly, face *uncertainty*. Von Neumann and Morgenstern maintain that it is critical to distinguish between games with complete information and games with incomplete information. VON NEUMANN & MORGENSTERN, *supra* note 66, at 30. In the former, the players do not face uncertainty, and in the latter, they do. The distinction is important because how one plays a game depends on whether it is a zero-sum or a non-zero-sum game, but if a player is uncertain about the nature of the game, he or she may be uncertain about how to play it. John Harsanyi was the first to demonstrate that an equilibrium (or equilibria) existed for games with incomplete information; stable outcomes existed for such games if the players could construct subjective probability distributions of the outcomes of the game. "This approach, which defines rational behavior under uncertainty as expected-utility maximization in terms of the decision maker's own subjective probabilities, is often called the *Bayesian* approach." HARSANYI, *supra* note 63, at 9. *See generally* John C. Harsanyi, *Games with Incomplete Information Played by "Bayesian" Players I: The Basic Model*, 14 MGMT. SCI. 159 (1967) (containing formulation of *Bayesian* approach); John C. Harsanyi, *Games with Incomplete Information Played by "Bayesian" Players II: Bayesian Equilibrium Points*, 14 MGMT. SCI. 320 (1968) (same); John C. Harsanyi, *Games with Incomplete Information Played by "Bayesian" Players III: The Basic Probability Distribution of the Game*, 14 MGMT. SCI. 486 (1968) (same).

V. APPLYING THE BEHAVIORAL THEORY OF NEGOTIATIONS TO ODR: A THEORY BUILDING EXERCISE

In this section, we put Walton and McKersie's classic framework to work and engage in a theory-building exercise designed to generate testable hypotheses about how ODR influences the dispute resolution process. Our hypotheses are an attempt to isolate the differences between dispute resolution in a face-to-face environment and in an online environment. We want to understand how moving from a face-to-face environment to an online environment may affect each of Walton and McKersie's four subprocesses. We try our best to adopt a *positive* rather than a *normative* approach to model building. We seek to avoid judgments about whether ODR is better or worse than face-to-face dispute resolution. Before proceeding with the exercise, a number of assumptions and clarifications need to be made.

A. The Parameters and Scope of the Exercise

In developing our hypotheses, we need to make assumptions regarding the four critical dimensions of ODR discussed above. In building a social science model, it is necessary to introduce *controls* for intervening or mediating variables. In effect, the assumptions we make about the four dimensions are our controls.

1. *Technology*

We assume that the technology used by the ODR provider is an asynchronous one, specifically one that uses a standard, text-based website. We assert that the use of this technology, rather than a synchronous one, accentuates the differences between ODR and dispute resolution in a face-to-face environment.

2. *Origins of the Dispute*

In generating our hypotheses, we will initially assume that the dispute originates online. We will then change this assumption and discuss how our hypotheses are affected, if at all, if the dispute originates offline.

3. *Resolution Technique*

We assume that the resolution technique used by the ODR provider is a facilitated one, rather than an automated one. In contrast with our assumption about technology, we assert that our assumption about the resolution technique diminishes the presumed differences between ODR and face-to-face dispute resolution.

4. *ADR Procedure Used*

Last, and perhaps most importantly, we assume that negotiation, mediation, or another "interest-based" option is the ADR procedure used to resolve the dispute,

rather than arbitration, litigation, or another "rights-based" option.[109] We assume interest-based options are being used because doing so is more consistent with Walton and McKersie's behavioral theory than the alternative. We do not mean to imply that Walton and McKersie's theory cannot be applied to arbitration and other rights-based options; rather, we imply that the authors clearly intended their theory to apply to negotiations and other interest-based means of resolving disputes.

A truly complete theoretical model would build in variation in each of the four dimensions of ODR. Taking account of all the possible permutations in the four dimensions would obviously be a daunting task and would multiply the number of hypotheses generated by the application of the behavioral theory to ODR (although varying assumptions about the dimensions would not materially affect most of the hypotheses). For the purpose of demonstrating the type of analysis we think is necessary, we choose to focus on the differences between face-to-face and online dispute resolution, using the assumptions about the four dimensions we outlined above.

It is helpful to offer a hypothetical of the situation we have in mind. Suppose Organization A is interested in buying a commercial building from Organization B. Organization A is represented by Negotiator A and Organization B by Negotiator B. Walton and McKersie's theory can clearly be applied to the analysis of this hypothetical. Each negotiator has the four principal responsibilities, which stem from the four negotiation subprocesses described by Walton and McKersie. In Situation A, imagine a scenario in which Negotiator A, Negotiator B, and their respective teams, attempt to reach a deal in a face-to-face setting. Compare this with Situation B, in which Negotiator A and Negotiator B attempt to reach a face-to-face deal but reach impasse and turn to an ODR provider for assistance. In other words, their dispute occurred offline. For the purposes of the exercise, assume that the ODR provider has a conventional website and uses a facilitated rather than an automated technique for assisting the two parties. The task we have set is to develop hypotheses that describe whether the differences between Situation A and Situation B affect the ability of Negotiator A and Negotiator B to discharge their responsibilities with respect to distributive bargaining, integrative bargaining, attitudinal structuring, and intraorganizational bargaining.

In conventional social science, it is always essential to distinguish the dependent variable from the independent variables in a theoretical model. In our model the dependent variable—the outcome we are attempting to explain—is the negotiator's ability to meet his or her responsibilities with respect to Walton and

109. The terms "interest-based" and "rights-based" options are standard terms in the ADR literature. The principal difference between interest-based and rights-based options is that the parties largely control the settlement of the dispute in the former, whereas a third party imposes a settlement on the parties in the latter. Of the many sources on this topic, see WILLIAM L. URY ET AL., GETTING DISPUTES RESOLVED: DESIGNING SYSTEMS TO CUT THE COSTS OF CONFLICT 3-19 (1988).

McKersie's four negotiation subprocesses.[110] Our key independent variable—the variable that we hypothesize influences the dependent variable—is the use of ODR. To focus our model more precisely, we have introduced control variables that assume a specific type of ODR. There may be other intervening or moderating variables that influence the relationship between the dependent variable in our model and the key independent variable. For example, the characteristics of the chief negotiators (their experience, age, gender, race, etc.) may influence the dependent variable. If Larson is correct, the age of the negotiators may moderate the influence of ODR on the dependent variable.[111] The precise nature of the issues in the dispute might also have a significant influence on the dependent variable. In our hypothetical, if Negotiator A and Negotiator B are only negotiating price, this may have an effect on the dependent variable that would differ from the effect on the dependent variable of negotiators who are dealing with multiple issues, including the price of the building, the terms of financing, and the use of the building. Clearly there are many factors that conceivably moderate the influence of ODR on the negotiators.[112]

Operationalizing our key independent variable is relatively straightforward. It is a dichotomous variable, denoting either the use of ODR as previously specified or, alternatively, the use of traditional face-to-face interactions. Formulating hypotheses about the effect of the use of ODR on the negotiators is more complicated because there is considerable debate in the ODR literature on this matter. Essentially, ODR writers divide into three distinct groups. The first group argues that ODR has improved the way in which parties negotiate and settle disputes. These writers claim that the use of ODR technologies and techniques has enhanced overall the ADR process. Thus, the effect of ODR on the dispute resolution process is positive.[113] Writers in the second group—a definite minority—argue that ODR has weakened the dispute resolution process; the effect of ODR on these processes is negative.[114] Last, the third group maintains that because of the rapid advances in technological capabilities, the differences between the online world and the face-to-face world are diminishing. Therefore, the differences between ODR and face-to-face dispute resolution are diminishing, possibly to the point of vanishing.[115] The writers in this group

110. Since our discussion is not limited to negotiations but also pertains to other interest-based options (including mediation), the term "negotiator" is used broadly. It is a relatively easy matter to apply Walton and McKersie to mediators, facilitators, and other third parties.

111. *See generally* Larson, *supra* note 12.

112. The social scientist with a purist approach to modeling would insist that other independent or moderating variables should not be added to the model merely on an *ad hoc* basis but should be added only if sound theory suggests that they belong in the model. There is abundant theory that suggests that both the characteristics of negotiators and the issues they are negotiating influence the course of their negotiations.

113. *See, e.g.*, KATSH & RIFKIN, *supra* note 15; Katsh, *supra* note 5.

114. *See, e.g.*, Eisen, *supra* note 7, at 1308.

115. The literature on convergence suggests that the differences between the face-to-face and the online world are disappearing. If that has not totally been the case to date, these writers believe it will be the case in the foreseeable future. *See, e.g.*, sources cited *supra* note 39.

would probably hypothesize that the use of ODR does not significantly affect a negotiator's ability to fulfill his or her responsibilities.[116]

In this article, we have voiced our reservations about making sweeping generalizations regarding the effect of ODR on dispute resolution. Nevertheless, we believe we need to take account of the views of the three groups in developing our hypotheses. Therefore, we will frame each of our hypotheses around three possible outcomes: (1) compared to face-to-face negotiations, the use of ODR will have a positive effect on a negotiator's ability to meet his or her bargaining responsibilities; (2) compared to face-to-face negotiations, the use of ODR will have a negative effect on a negotiator's ability to meet his or her bargaining responsibilities; and, (3) compared to face-to-face negotiations, the use of ODR will have no significant effect on a negotiator's ability to meet his or her bargaining responsibilities.[117] In the hypotheses generated below, we also incorporate an indicator for the strength of ODR's effect by stating whether we believe that the effect, be it positive or negative, is major or minor. In addition to setting forth the actual hypotheses, we also identify the rationale behind the proposed relationship between the dependent and independent variable.

Finally, in developing the hypotheses below, we do not refrain from offering alternative, contradictory hypotheses. Given the exploratory nature of this modeling process and the need to provide as much theoretical underpinnings as possible for the empirical testing stage, we believe that a broad set of hypotheses is preferable. Future empirical work can begin the important task of narrowing the field by substantiating or challenging such hypotheses.

B. Distributive Bargaining Hypotheses

As noted above, distributive bargaining refers to the "zero sum" aspects of the negotiations process, and the negotiator's responsibility in this bargaining subprocess is to obtain as large a share of the pie as he or she can. A negotiator in this form of bargaining is required, among other things, to engage in strategies and tactics that limit the flow of information to the other side, to create an intentional fog regarding the party's positions and resources, to be aggressive by using threats and warnings, and to stay committed to a defined resistance point.

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116. Social science researchers have for many years been examining the effect of the substitution of various technologies for face-to-face interactions in education. In the literature on distance learning and e-learning, social scientists have constructed models and tested hypotheses that in many respects parallel those we are proposing in this article. For example, a considerable amount of systematic research has been conducted on whether and to what extent online learning, compared to face-to-face learning, influences the knowledge students acquire. Although the range of results of such research is quite wide, on balance, the research suggests that there is no significant difference between learning in the online world and learning in the face-to-face one. *See generally* THOMAS L. RUSSELL, THE NO SIGNIFICANT DIFFERENCE PHENOMENON (1999); CAROL A. TWIGG, INNOVATIONS IN ONLINE LEARNING: MOVING BEYOND NO SIGNIFICANT DIFFERENCE (2001), http://www.center.rpi.edu/Monographs/Mono4.pdf.

117. As will be seen below, we only make use of this option once. However, it is important to list it as a possible effect because it infuses the other possibilities with additional meaning. In other words, a hypothesized positive effect is not merely in contrast to a possible negative effect but also to the possibility that using ODR will have no effect at all.

Given the nature of this subprocess, use of ODR will almost certainly have an effect on the negotiator's abilities to meet these responsibilities. The question that emerges is in what manner would ODR affect negotiator capabilities?

It is likely that conducting the dispute resolution process online improves the negotiator's ability to engage in tactics intended to restrict information and obfuscate his or her party's bargaining situation. In traditional face-to-face negotiation, it is common for a negotiator to expose, unintentionally through spoken or unspoken communication, discretionary information that the negotiator prefers not to reveal. Moreover, it is often difficult to ensure that in face-to-face bargaining sessions, the members of a negotiating team do not communicate restricted information. By contrast, in online dispute resolution, particularly when there has been an absence of past or present face-to-face interactions, the negotiator's ability to control intentional or unintentional flows of information is likely to be improved. ODR cannot eliminate all unintentional signals or flows of information that pass from one party to another. However, online communication ought to allow the negotiator to exercise greater control over the type and flow of information transmitted to an opposing negotiator. Thus, we propose that insofar as ODR improves a negotiator's ability to control and restrict the flow of information to the other party, ODR should have a positive effect on the negotiator's ability to meet his or her responsibilities in distributive bargaining.

Hypothesis 1a. When the dispute originates online, ODR procedures will have a major positive effect on the negotiator's ability to meet his or her distributive bargaining responsibilities.

Rationale 1a. ODR improves the negotiator's ability to restrict the flow of information and create ambiguities for the other side.

If a dispute originates offline, should our hypothesis be revised? In disputes that originate offline, there is a greater likelihood that the disputing parties have already established a face-to-face relationship. This implies that the disputing parties may have already established direct or indirect channels of communication, before they take their dispute online, that weaken the negotiator's ability to restrict and control the flow of information to the other side. Providing this assumption holds, we maintain that offline origination of a dispute will modify Hypothesis 1a and reduce the effect of ODR on the negotiator's capabilities in distributive bargaining to a minor positive effect.

Hypothesis 1b. When the dispute originates offline, ODR procedures will have a minor positive effect on the negotiator's ability to meet his or her distributive bargaining responsibilities.

Rationale 1b. ODR improves the negotiator's ability to restrict the flow of information and create ambiguities for the other side, but the existence of a pre-existing relationship and channels of communication temper this effect.

Restricting the flow of information and creating ambiguities are not the negotiator's sole distributive bargaining responsibilities. At the same time that the negotiator is attempting to limit the other party's access to information, he or she is trying to attain an accurate understanding of the other party's true positions. Achieving the best possible outcome for his or her party requires that the negotiator gather as much information about the other party as possible. Since ODR is hypothesized to improve each side's ability to "keep their cards close to their vests," it also implies that negotiators will be impaired in their ability to fulfill this aspect of their responsibilities.

Hypothesis 2a. When the dispute originates online, ODR procedures will have a major negative effect on the negotiator's ability to meet his or her distributive bargaining responsibilities.

Rationale 2a. ODR impairs the negotiator's ability to gather information about the other party and to form an accurate assessment of the other party's bargaining positions.

If a dispute originates offline, Hypothesis 2a needs to be revised. If the parties have present or past offline communication and other means of interaction, then moving a dispute online may not have a significant effect on one side's ability to acquire "intelligence" about the other side. Therefore, we hypothesize that ODR will have a minor negative effect on the negotiator's ability to acquire information on an opponent's position if the dispute originates offline.

Hypothesis 2b. When the dispute originates offline, ODR procedures will have a minor negative effect on the negotiator's ability to meet his or her distributive bargaining responsibilities.

Rationale 2b. ODR impairs the negotiator's ability to gather information about the other party and to form an accurate assessment of the other party's bargaining conditions, but the existence a pre-existing relationship and channels of communication temper this effect.

Another aspect of distributive bargaining is a negotiator's ability to make a firm commitment to his or her bottom line.[118] In face-to-face negotiations, a negotiator may convey his or her commitment to obtaining his or her demand by a variety of devices. For example, saying emphatically and loudly, "I will not give you a penny more for the property!" while banging your fist on the table is one of many ways to convey commitment in the face-to-face world. In the online world, can a negotiator convey the same degree of commitment using a text-based website that he or she could convey in a face-to-face setting? Opinions differ on this matter. In the online world, a negotiator may have an easier time

118. Commitment is a very important concept in negotiation theory. Schelling, for example, maintains that a negotiator's ability to persuade an opponent that he or she is firmly committed to a particular course of action is the key to success in negotiations. SCHELLING, *supra* note 63, at 21-52.

restricting an opposing negotiator's attempt to convey commitment. For example, a party could shut off or limit communication from the opposing party or claim that messages sent by the other side have not been received. It may be easier for Party A to reject a proposal by Party B when Party B is at a distant location and uses the Internet to send the proposal to Party A than it would be in a face-to-face setting. Online communication may hinder Party A's ability to convey commitment to Party B; however, it also improves Party A's ability to thwart Party B's attempt to establish its commitment to a particular position. In this sense, ODR may improve a negotiator's ability to meet his or her distributive bargaining responsibilities.

Hypothesis 3a. When the dispute originates online, ODR procedures will have a major positive effect on the negotiator's ability to meet his or her distributive bargaining responsibilities.

Rationale 3a. ODR improves the negotiator's ability to resist attempts by an opposing negotiator to establish commitment to particular positions.

Using ODR to resolve disputes that originate offline is likely to require revision of Hypothesis 3a. Having current or previous interactions with the other side may weaken the negotiator's capacity to hold off the other side's penetration of the "line of defense" buffered by cyberspace. Therefore, we believe that offline origination of a dispute will have a minor positive effect on a negotiator's distributive bargaining responsibilities.

Hypothesis 3b. When the dispute originates offline, ODR procedures will have a minor positive effect on the negotiator's ability to meet his or her distributive bargaining responsibilities.

Rationale3b. ODR improves the negotiator's ability to resist attempts by an opposing negotiator to establish commitment to particular positions, but the existence of a pre-existing relationship and channels of communication temper this effect.

C. *Integrative Bargaining Hypotheses*

We noted earlier that integrative bargaining requires a negotiator to seek all the possible joint gains in a bargaining situation. The tactics associated with integrative bargaining include open communication, sharing information, joint problem solving, and cooperation. To what extent does ODR hinder or facilitate the use of integrative tactics?

Once again, the answer depends on whether one views online communication as more "impersonal" than face-to-face communication. The absence of face-to-face negotiations may make it more difficult for the parties to sustain an open and cooperative relationship. Open and cooperative relationships often require a

great deal of mutual trust, and limiting communications between the parties to an online environment could inhibit the fostering of mutual trust.[119] Therefore, we hypothesize that, insofar as this dimension of integrative bargaining is concerned, use of ODR for the resolution of online disputes will have a major negative effect on a negotiator's ability to meet his or her integrative bargaining responsibilities.

If a dispute originates offline but is then submitted to an ODR provider, what effect does ODR have on integrative bargaining? If the parties had an open and cooperative relationship before turning to ODR, then our assertion that ODR will have a major negative effect on integrative bargaining is likely to be mitigated. However, if the parties had an adversarial and hostile relationship before turning to ODR, then the use of ODR may accentuate the difficulty of engaging in integrative bargaining. Given this ambiguity about the origin of a dispute, we offer the following joint hypothesis.

Hypothesis 4. When the dispute originates either online or offline, ODR procedures will have a major negative effect on a negotiator's ability to meet his or her integrative bargaining responsibilities.

Rationale 4. ODR impairs the negotiator's ability to foster and maintain an open and cooperative relationship.

We acknowledge that ODR does provide disputing parties with some powerful tools to enhance their integrative bargaining capabilities. Integrative bargaining is fueled by the sharing, exchange, and processing of information. One of the hallmarks of ODR is its technological sophistication, which facilitates the ability of individuals to transmit and process information. Improving the flow of information should enhance the parties' ability to find innovative solutions to their problems and thereby maximize their joint gains. In this sense, ODR can improve a negotiator's ability to meet his or her integrative bargaining responsibilities. Once again, there is ambiguity about the effect of the origin of the dispute, so we will formulate a hypothesis that deals with both online and offline disputes.

Hypothesis 5. When the dispute originates either online or offline, ODR procedures will have a major positive effect on a negotiator's ability to meet his or her integrative bargaining responsibilities.

Rationale 5. ODR improves the negotiator's ability to share and process information.

D. Attitudinal Structuring Hypotheses

In many respects, attitudinal structuring is the subprocess that some people think most directly exposes ODR's Achilles' heel—structuring and managing

119. KATSH & RIFKIN, *supra* note 15, at 85-87.

relationships between the parties. Earlier we noted that ODR proponents dispute the claim that it is ill-equipped to handle interpersonal relationships. How does ODR affect a negotiator's ability to manage the relationship between the parties?

Mutual trust is one of the central elements of a stable and productive bargaining relationship. If it is a negotiator's objective to manage the relationship between the parties in a fashion that fosters trust, then the absence of face-to-face communication may hinder a negotiator's ability to achieve that objective. We acknowledge that technological advances may diminish barriers to the establishment of intimate relationships in the online world. Currently, we contend that the absence of face-to-face interactions makes it difficult to execute the delicate and subtle maneuvers necessary to structure a cooperative relationship. Thus, with regard to the development and preservation of trust and goodwill between the disputing parties, ODR will hinder the negotiators' ability to achieve this objective. As with integrative bargaining, we believe that it is difficult to hypothesize about the effect of a dispute that originates offline as compared to one that originates online. A preexisting positive relationship may moderate the negative effect of ODR, but a preexisting negative relationship may accentuate it. We therefore propose the following joint hypothesis.

Hypothesis 6. When the dispute originates either online or offline, ODR procedures will have a major negative effect on a negotiator's ability to meet his or attitudinal structuring responsibilities.

Rationale 6. ODR impairs the negotiator's ability to structure and maintain a trusting relationship with the other party.

As discussed earlier, Walton and McKersie emphasize that a negotiator may not necessarily want to structure positive attitudes between the parties. Attitudinal structuring is not solely a function of fostering a trusting relationship between the parties. This process is, to a large extent, an instrumental one and it entails a great deal of impression management. Because Walton and McKersie do not view trust and cooperation as an end in itself, they maintain that the negotiator must structure the relationship in the manner best suited to achieving integrative or distributive objectives. ODR has a unique capacity for improving the negotiator's ability to control the flow of information and create ambiguities for the other side. Similarly, it is proposed that ODR, especially when disputes originate offline, can enhance the negotiator's ability to manage the other side's impression and, therefore, manage attitudes in an instrumental fashion. ODR, even in its most advanced technological forms, provides the parties with an additional buffer. In some situations this buffer serves to impede the resolution process; however, a buffer can benefit the management of the other side's image of the negotiator and his or her party. One of the negotiator's attitudinal structuring responsibilities is to elicit the other party's belief in his or her side's legitimacy. It may be easier to appear legitimate over time when provided with additional "demilitarized" space within which to maneuver. Furthermore, there are situations in which the negotiator's goals and objectives are not in line with the facilitation of trusting and cooperative attitudes but with adversarial ones.

Therefore, we hypothesize that when the dispute originates online, ODR has a major positive effect on the negotiator's ability to meet his or her attitudinal structuring responsibilities.

Hypothesis 7a. When the dispute originates online, ODR procedures will have a major positive effect on the negotiator's ability to meet his or attitudinal structuring responsibilities.

Rational 7a. ODR improves the negotiator's ability to structure and manage the other party's attitudes.

Hypothesis 7a rests on the assumption that the negotiator has the ability to keep a tight grip on the information, messages, and images that are conveyed to the other party. In the case of disputes that originate online, this assumption is stronger. When the origin of the dispute is offline, it may be more difficult for the negotiator to restructure the other party's existing beliefs and attitudes and to restrict the flow of information. Thus, the negotiator's ability to manipulate the process of attitudinal structuring in his or her favor is not as pronounced in such cases. We therefore hypothesize that if the origin of the dispute is offline, then this factor will moderate the positive effect we have suggested in Hypothesis 7a.

Hypothesis 7b. When the dispute originates online, ODR procedures will have a minor positive effect on the negotiator's ability to meet his or attitudinal structuring responsibilities.

Rationale 7b. ODR improves the negotiator's ability to structure and manage the other party's attitudes, but preexisting relationships and channels of communication temper this effect.

E. Intraorganizational Bargaining Hypotheses

In our discussion of intraorganizational bargaining, we noted that this sub-process requires that a negotiator assume two distinct responsibilities. First, the negotiator must align the members of his or her own negotiating team and his or her other constituents. Second, the negotiator must assess the degree to which his or her counterpart has achieved such an alignment of interests. In many cases, the negotiator is interested in subduing internal conflict on his or her side while attempting to sow the seeds of conflict on the other side.

Since the first responsibility is primarily a function of interactions and communications between the negotiator and his or her negotiations team or constituents, it is likely that the use of ODR does not alter or influence this process. The negotiator may use ODR to negotiate with the opposing team, but this fact has little or no bearing on how his or her team operates internally. Therefore, we hypothesize that with regard to the attainment of the intraorganizational alignment of interests, the use of ODR will have no effect on the negotiator's ability to meet his or her intraorganizational bargaining responsibilities.

Hypothesis 8. When the dispute originates either online or offline, ODR procedures will have no affect on the negotiator's ability to meet his or her intraorganizational bargaining responsibilities.

Rationale 8. Managing the internal dynamics on the negotiator's team is not influenced by the mechanism used to negotiate with the opposing party.

With regard to a negotiator's responsibility to understand and influence the internal alignment of the opposing party, we propose that use of ODR will have a negative effect. Cyberspace's added barrier between the parties simultaneously serves to protect a negotiator from unwanted intrusions into his or her strategic territory; it also hinders the negotiator's ability to penetrate behind the other party's line of defense. Assessing the opposing party's intraorganizational alignment and internal conflict is inhibited by the use of ODR, especially for disputes that originate online. Therefore, we hypothesize that the use of ODR will have a major negative effect on a negotiator's ability to meet his or her intraorganizational bargaining responsibilities in regard to influencing and understanding the other party's internal alignment.

Hypothesis 9a. When the dispute originates online, ODR procedures will have a major negative effect on the negotiator's ability to meet his or her intraorganizational bargaining responsibilities.

Rationale 9a. ODR impairs the negotiator's ability to gather information on the state of the other party's intraorganizational alignment and internal conflict.

Finally, we hypothesize that a dispute that originates offline will moderate the negative effect the use of ODR has on the negotiator's ability to understand the degree to which an opposing party has achieved alignment. If the parties have a preexisting relationship, then a negotiator should have some indication of the internal dynamics of the opposing party. However, we continue to maintain that without the face-to-face interactions between the negotiating teams it will be more difficult for a negotiator to keep abreast of the opposing party's intraorganizational bargaining issues and dynamics.

Hypothesis 9b. When the dispute originates offline, ODR procedures will have a minor negative effect on the negotiator's ability to meet his or her intraorganizational bargaining responsibilities.

Rationale 9b. ODR impairs the negotiator's ability to gather information on the opposing party's intraorganizational alignment and internal conflict, but preexisting relationships and channels of communication temper this effect.

F. Testing the Application of Bargaining and Negotiation Theory to ODR

We have argued for the need to use theory to build models and formulate hypotheses that can be used in ODR research. We have focused on the application of bargaining and negotiation theory, a body of theory that has special relevance for ODR. We have developed specific hypotheses that can be tested by careful research. Of course, we have not conducted the empirical research necessary to support or refute our hypotheses, but it is reasonable for the reader to wonder how we would design a project that could do so. We offer here only a handful of suggestions, which are based on standard methodologies used by social scientists.

One approach that is commonly used by social psychologists in testing negotiation theory is to use volunteer subjects in controlled experiments conducted in laboratory settings.[120] At Cornell, we can recruit students enrolled in the courses that we and other colleagues teach on collective bargaining, negotiation, and dispute resolution. We estimate that we would need to include between fifty and one hundred students in our experiment. We would then have half of the students engage in a face-to-face simulation and half in an online simulation. The experience gathered through ICODR would be very valuable in helping us to design our experiment. Both the cases used in ICODR and the web-based platform might be adopted for our research project. Students would attempt to resolve the case using basically the same tools that are currently used in the competition. Students in the face-to-face simulation, using the same case as students in the online simulation, would attempt to negotiate a resolution by conventional means.

In general, the criteria used to evaluate student negotiations in ICODR could be used in our research project, but they would have to be revised and refined to reflect the hypotheses we have formulated. Using standard statistical techniques, we would compare the performance of students in the face-to-face simulation with the performance of students in the online simulation. If we have conducted our experiment carefully, we would have results that either confirm or refute the hypotheses.

What we have described would seem to be a relatively easy experiment to conduct. However, there are a number of methodological complications that make the task more challenging. We want to do our best to achieve equivalency in the online and face-to-face simulations. For example, we might give students in both situations the same amount of time to finish the exercise. However, is an hour spent in face-to-face negotiations truly equivalent to an hour spent in online negotiations? Most experts would argue that they are not equivalent.

We could also use of qualitative methodologies in our research design. For example, researchers could select a handful of disputes to be resolved online; through the use of interviews and participant observations, they could conduct in-depth case studies as an initial exploratory stage of theory development. Focusing on a limited number of cases could assist in determining the intricacies

120. For a general discussion regarding laboratory experiments and social research, see EARL BABBIE, THE PRACTICE OF SOCIAL RESEARCH 237-59 (6th ed. 1992).

and nuances of using ODR.[121] Researchers could select cases that differ on a number of key parameters, such as the origin of the dispute or the nature of the issue in the dispute. By following each of the disputes throughout the process, researchers could get a particularly good sense of the implications ODR use has for the procedural elements of the dispute resolution process. These data can be compared to existing empirical research on negotiations in the offline realm.

Finally, researchers could make use of archival data of ODR providers. The dominant ODR sites, such as SquareTrade and Cybersettle, report that they have handled extremely high numbers of cases.[122] With a data set this large, there is inevitable variation across many of the important dimensions discussed in this article. While these data would pertain solely to online resolutions and would not allow for a comparison with offline dispute resolution outcomes, such variation would allow for interesting statistical inferences, some of which could address elements of the hypotheses developed above. In particular, using website archival data could allow for an examination of the differences associated with the online or offline origination of a dispute. Thus, statistical analysis using these data could help assess the effects that different ODR characteristics have on resolution outcomes.

VI. DISCUSSION AND CONCLUSION: APPLYING OTHER THEORIES OF NEGOTIATION AND BARGAINING TO ODR

In conclusion, we want to note that a vast number of theories, concepts, and principles exist in the literature on negotiation and bargaining that might be applied to the study of online dispute resolution. We would like to discuss briefly three additional concepts in negotiation theory.

A. Principled Negotiations

Earlier we noted that Fisher and Ury prescribe an alternative approach to negotiations that they call interest-based bargaining or principled negotiation. They list the four "methods" of principled negotiation: (1) "separate the people from the problem"; (2) "focus on interests, not positions"; (3) "invent options for mutual gain"; and (4) "insist on using objective criteria."[123] The concepts and methods of interest-based bargaining have been incorporated into countless college courses and training programs, and there are many practitioners who maintain that the Fisher and Ury approach is superior to more conventional methods of negotiating. There has been no research to date that tests the validity

121. For a discussion regarding the "process of inducting theory using case studies," see Kathleen M. Eisenhardt, *Building Theory from Case Study Research*, 14 ACAD. MGMT. REV. 532 (1989).

122. For a review of the number of cases handled by some of the leading ODR providers, see Tyler, *supra* note 51. For example, SquareTrade and Cybersettle are said to have handled over 1.5 million cases and 90,000 cases, respectively. *Id.*

123. FISHER & URY, *supra* note 63, at 15 (discussing the four methods of principled negotiation).

of Fisher and Ury's approach in the online world. Surprisingly, there has also been very little empirical research on the validity of principled negotiation in the conventional face-to-face arena.[124] Following Fisher and Ury's advice, if disputants focused on their underlying "needs, hopes, fears, or desires,"[125] rather than on their "positions," would it be easier for them to achieve "wise [outcomes] reached efficiently and amicably"?[126] We simply do not know the answer to this question in face-to-face interactions, let alone online interactions.

B. Framing

Sociologists and social psychologists have also made significant contributions to our understanding of negotiations.[127] One concept that researchers have contributed to negotiation theory is "framing."[128] According to Lewicki et al., "A frame is the subjective mechanism through which people evaluate and make sense out of situations, leading them to pursue or avoid subsequent actions."[129] In practical terms, social psychologists have taught us that the precise way in which a proposal (or counterproposal) is worded and presented influences the probability that the opposing party will accept it.

There is a large body of empirical research on framing in negotiations; most of this research has been conducted in controlled laboratory settings, using students as subjects. The research indicates that when a proposal focuses on the gains it yields for the opposing party, rather than the losses, it has a higher probability of

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124. One scholar who has conducted empirical studies of interest-based bargaining is Joel Cutcher-Gershenfeld. *See, e.g.*, Joel Cutcher-Gershenfeld et al., *In Whose Interest? A First Look at National Survey Data on Interest-Based Bargaining in Labor Relations*, 40 INDUS. REL. 1 (2001). *See also* Cutcher-Gershenfeld, *supra* note 86. Cutcher-Gershenfeld analyzed data from a survey of union and management negotiators who had used the U.S. Federal Mediation and Conciliation Service and discovered that the negotiators who had used interest-based bargaining reported that they believed it had improved their collective bargaining relationship. *Id.* at 159.

125. FISHER & URY, *supra* note 63, at 45.

126. *Id.* at 4.

127. For a good summary of this research, see LEWICKI ET AL., *supra* note 63, at 132-82. Significant contributions in this realm were made by Amos Tversky and Daniel Kahneman. Of their many articles, see, e.g., Amos Tversky & Daniel Kahneman, *The Framing of Decisions and the Psychology of Choice*, 211 SCI. 453 (1981); Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCI. 1124 (1974). Behavioral economics is a branch of economics that incorporates the insights and research of social psychologists in explaining economic phenomena. Daniel Kahneman won the Nobel Prize in Economics, even though he is a psychologist, because of the influence his research has had on behavioral economics.

128. Their ideas and concepts are too numerous to summarize here, but include the importance of "heuristics" or rules of thumb in negotiations (time constraints require negotiators to use rules of thumb in negotiations, but these rules of thumb are frequently incorrect and lead to faulty decisions), the Winner's Curse (in many transactions buyers overestimate the value of what they are buying, and pay more than the item is worth in objective terms), and the "endowment effect" (a negotiator who owns an object will require a higher price to sell it than he or she would be willing to pay for the same object if he or she were the buyer). *See, e.g.*, BAZERMAN &NEALE, *supra* note 63. *But see* MALCOLM GLADWELL, BLINK: THE POWER OF THINKING WITHOUT THINKING (2005) (disagreeing with the proposition that rules of thumb lead to faulty decisions).

129. LEWICKI ET AL., *supra* note 63, at 135.

being accepted. "If you couch your proposal in terms of your opponents' potential gain, you can induce them to assume a positive frame of reference and thus make them more likely to make concessions."[130] Once again, no research has been conducted on the influence of framing on negotiation and dispute resolution in the online world, and, to our knowledge, no empirical research has been conducted on any of the other concepts developed by social psychologists.

C. *Bargaining Power*

The leading experts in ODR have recognized the significant role that power plays in negotiation and dispute resolution. For example, Katsh and Rifkin, reflecting on their experience with the Online Ombuds Office at the University of Massachusetts, note that one of the first lessons they learned was that "power imbalances on the Web may be different from what they would be if the parties were interacting offline."[131] Katsh and Rifkin assert that the power differentials that may exist in the physical world may be significantly diminished, or even reversed, in the online world.[132] Rule has a different perspective when discussing disputes between businesses and consumers. He notes that in both the online and the physical world, businesses often have an advantage because they are likely to have more experience using dispute resolution procedures than individual consumers; businesses are more likely to be "repeat players" than consumers. If experience gives businesses greater knowledge than consumers typically possess, then a power differential favoring business is likely to exist. Resolving disputes online may only widen the power differential because businesses can be expected to have more technological expertise than consumers. "A process that appears fair through one or two uses may have built into it a systemic bias in favor of business interests that no one consumer can see but that becomes obvious over time."[133]

Some scholars of employment relations believe that the repeat-player effect may exist in that arena as well. Bingham has conducted several empirical studies of the repeat-player effect in employment arbitration. In one study, she found that employers who made repeated use of arbitration won the great majority of their cases, while employers who used arbitration only once tended to lose those cases. In employment arbitration, repeat players are likely to be employers, not employees. Accordingly, Bingham argues that employment arbitration may be biased in favor of employers.[134] We simply do not know whether arbitrating employment disputes online exacerbates or diminishes the repeat-player effect.

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130. BAZERMAN & NEALE, *supra* note 63, at 40.

131. KATSH & RIFKIN, *supra* note 15, at 80.

132. *Id.*

133. COLIN RULE, ONLINE DISPUTE RESOLUTION FOR BUSINESS 112 (2002).

134. Lisa B. Bingham, *Employment Arbitration: The Repeat-Player Effect*, 1 EMP. RTS. & EMP. POL'Y J. 189 (1997). *See also* Lisa B. Bingham, *On Repeat Players, Adhesive Contracts, and the Use of Statistics and Judicial Review of Arbitration Awards*, 29 MCGEORGE L. REV. 222 (1998). Bingham's research is highly controversial and has been criticized on methodological grounds. *See, e.g.*, David Sherwyn et al., *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 STAN. L. REV. 1557, 1570-77 (2005). In another empirical study of

The need for empirical research on the effect of ODR on the power differential between the disputants is quite obvious. It would be helpful if researchers conducting such studies in the future grounded their work in theories of bargaining power. Sociologists have recognized that bargaining power is an elusive and multifaceted concept. Most scholars of power maintain that the notion that experience and knowledge are the roots of bargaining power is only a part of the story.[135] There are in fact competing definitions and theories of bargaining power and a vast amount of literature on the topic.[136]

One definition of bargaining power is the ability of Party A to persuade Party B to do what Party A wants, even if Party B is not inclined to do so. A well-regarded theory of power in social interactions, initially posited by Emerson and later more fully developed by Bacharach and Lawler, is the "power-dependence" theory. This theory holds that Party A's power is a function of the extent to which Party B is dependent on Party A. For example, parents have bargaining power with their children because their children are often dependent on their parents for both financial and nonfinancial support. This dependence gives parents the power to convince their children to do what the parents wish. All parents intuitively know that when their children become teenagers and are less dependent, parents lose considerable power. As Lawler and Bacharach point out, a counterintuitive paradox is that bargaining power is based on "giving" and not on "taking." To the extent that Party A gives benefits to Party B that Party B values, Party A can increase Party B's dependence and Party A's corresponding power.[137]

Does ODR change the power-dependence relationship? If, for example, parents and children resolve their differences online, rather than face to face, does that alter the dependence of children on their parents? If so, does it increase or decrease their dependence? What effect does this change in power have on the ability of parents and children to resolve their differences? More generally, does ODR alter the power equation between disputants, and if it does, what effect does that alteration have on dispute resolution? We might imagine that Katsh and Rifkin would argue that ODR fundamentally changes power relationships, but Rule would maintain that it does not. To date, there is no data-based empirical study on these propositions.

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employment arbitration cases, researcher Elizabeth Hill found no evidence of a repeat-player effect. Elizabeth Hill, *Due Process at Low Cost: An Empirical Study of Employment Arbitration Under the Auspices of the American Arbitration Association*, 18 OHIO ST. J. ON DISP. RESOL. 777, 805-10 (2003).

135. As Schelling says, if bargaining power implies "that it is an advantage to be more intelligent or more skilled in debate, or to have more financial resources, more physical strength, more military potency, or more ability to withstand losses, then the term does a disservice." SCHELLING, *supra* note 63, at 22.

136. *See, e.g.*, DEUTSCH, *supra* note 63, at 84-93; Emerson, *supra* note 63, at 31-40; French & Raven, *supra* note 63, at 150-65; BACHARACH & LAWLER, *supra* note 63, at 41-79; LEWICKI ET AL., *supra* note 63, at 183-203. For a standard source on the topic, see generally JEFFREY PFEFFER, MANAGING WITH POWER: POLITICS AND INFLUENCE IN ORGANIZATIONS (1992).

137. *See generally* Edward J. Lawler & Samuel B. Bacharach, *Power Dependence in Collective Bargaining*, *in* 3 ADVANCES IN INDUSTRIAL AND LABOR RELATIONS 191 (David B. Lipsky & David Lewin eds., 1986).

We hope that our discussion of the application of bargaining and negotiation theory to ODR has stimulated the reader to think of how other theories might be applied to this important and growing phenomenon. We have done our best to engage in a positive, nonjudgmental analysis of the influence of negotiation theory on ODR. In closing, we would like to express some of our own opinions. It should be obvious that ODR is here to stay and will only grow in significance in the future. In his best-selling book, *The Tipping Point*, Malcolm Gladwell examines how an innovative social phenomenon, after a period of maturation, can be rapidly diffused.[138] We believe a tipping point has been reached in the use of ODR. The pioneers in the study of ODR have done an admirable job of advancing our understanding of this emerging form of dispute resolution. The time is ripe for researchers to build on the foundations erected by the pioneers and integrate theory and rigorous empirical testing into the research conducted on ODR.

138. MALCOLM GLADWELL, THE TIPPING POINT: HOW LITTLE THINGS CAN MAKE A BIG DIFFERENCE (2000).