

2 ONLINE DISPUTE RESOLUTION AND THE DEVELOPMENT OF THEORY

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1 INTRODUCTION

A young person seeking higher education in the late twelfth century might have trudged his way through medieval Paris to the complex of learning centers associated with *Notre-Dame* or *Sainte-Genevieve Abbey* seeking admission. Once accepted, the student faced a daunting curriculum that, taken together, covered all the theoretical knowledge faculty deemed worth obtaining. The entire curriculum consisted of the Arts, the Law, Medicine, and Theology. As the modern notion of a University as a self-contained body of scholars and students grew, a few disciplines were added to the four core disciplines of the *Universitas scholarium* of Paris. By the late twentieth century, film studies, black studies, women's studies, computer science, and even conflict resolution had been added to the list of disciplines, each with a growing body of theory.

To put the evolution of a university-based conflict resolution curriculum into perspective, consider that a person born in the year that the world's first graduate degree in conflict resolution was created would not yet be thirty years old at the time of this writing.¹ The Center for Conflict Resolution at George Mason University was made up of faculty from a number of "traditional" disciplines, and, as do all new academic disciplines, it drew upon established theory from related established disciplines.² As late as 1996, authors producing works on conflict theory were citing a variety of sources for the theories informing the practice of conflict resolution. As Schellenberg noted:

The jury is still out on whether conflict studies is to become a discipline in its own right. Some scholars have argued that this field has now developed its own literature and academic programs and therefore should be treated as an

1 The first graduate degree granting conflict resolution program in the world was founded in 1981 and housed in the Center for Conflict Resolution at George Mason University. The Center for Conflict Resolution later became the Institute for Conflict Analysis and Resolution, and finally in 2011 became the School of Conflict Analysis and Resolution.

2 See E.F. Dukes, "Public Conflict Resolution: A Transformative Approach", *Negotiation Journal* (1993) 9, 1, pp. 45-57.

emerging discipline. Others point out that most of the work still comes from persons who identify themselves primarily with one of the more established disciplines. ... Indeed, the list of disciplines that the systematic study of conflict resolution may draw upon is very long including the full range of the social sciences and the humanities, as well as mathematics and biology.³

Few still would argue that conflict resolution has not emerged as an established, albeit young, discipline, and few would deny the sizeable and growing body of scholarship including conflict theory. That body is now large enough to form a coherent whole with internal divisions flourishing such as facilitative and transformative mediation⁴ and stimulating substantive critiques from outside⁵ as well as from within the discipline.⁶

Notwithstanding significant development on its own, conflict theory has been drawn largely from scholars and practitioners in “traditional” disciplines with an interest in the idea of and the dynamics of conflict. Conflict theorists, at a point when the practice of conflict resolution was becoming a sub-field of study in itself, sometimes struggled with how to fit alternative dispute resolution (ADR) into an overall theory of conflict. Less than a decade ago, Scimecca argued:

I have presented ... the view that those who practice ADR will not become true professionals until ADR incorporates a theoretical base to undergird its practice, and, until it has such a base, it will remain an instrument of social control. At

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- 3 J.A. Schellenberg, *Conflict Resolution: Theory, Research, and Practice*, New York, State of New York Press 1996, p. 7.
 - 4 See R.A.B. Bush and J.P. Folger, *The Promise of Mediation: Responding to Conflict Through Empowerment and Recognition*, San Francisco, Jossey-Bass Publishers 1994 and E.F. Dukes, “Public Conflict Resolution: A Transformative Approach”, *Negotiation Journal* (1993) 9, 1, pp. 45-57.
 - 5 See J.S. Auerbach, *Justice Without Law?*, Oxford, Oxford University Press 1983; R. Delgado, C. Dunn, P. Brown, H. Lee, and D. Hubbert, “Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution”, *Wisconsin Law Review* (1985) 6, pp. 1359-1404; O.M. Fiss, “Against settlement”, *Yale Law Journal* (1984) 93, 1984, pp. 1073-1090; T. Grillo, “The Mediation Alternative: Process Dangers for Women”, *Yale Law Journal* (1991) 100, pp. 1545-1610; S. Riger, “Gender Dilemmas in Sexual Harassment Policies and Procedures”, *American Psychologist* (1991) 46, 6, pp. 497-505; and N.R. Rouhana and S.H. Korper, “Case Analysis: Dealing with the Dilemmas Posed by Power Asymmetry in Intergroup Conflict”, *Negotiation Journal* (1996), pp. 353-366.
 - 6 C. Cooper, “Mediation in Black and White: Unequal Distribution of Empowerment by Police”, in J. Asim (Ed.), *Not Guilty: Twelve Black Men Speak Out on Law, Justice, and Life*, New York, Amistad, HarperCollins 2001, pp. 125-141; R. Goldberg, “How Our Worldviews Shape Our Practice”, *Conflict Resolution Quarterly* (2009) 26, 4, pp. 405-431; M.A. Trujillo, S.Y. Bowland, L.J. Myers, P.M. Richards and B. Roy (Eds.), *Re-Centering Culture and Knowledge in Conflict Resolution Practice*, Syracuse, Syracuse University Press 2008; N.A. Welsh, “The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?”, *Harvard Negotiation Law Review* (2001), 6, pp. 1-96; L. Wing, “Mediation and Inequality Reconsidered: Bringing the Discussion to the Table”, *Conflict Resolution Quarterly* (2009) Vol. 26, No. 4, pp. 383-404.

present, I remain convinced that practitioners do little more than pay lip service to theory.⁷

Scimmeca seems to offer two arguments: first that there was no ADR theory at that time, and second that even if there were a body of ADR theory, practitioners would ignore it. Arguably, he could have been right on both counts in the early 1990s, but clearly in the interim there has developed a body of ADR theory, whether or not we pay attention to it. We suspect there are few who would still hold this “looking down the nose” attitude toward ADR, but it illustrates the progression that is to be expected in the development of theory in any discipline: an effort to separate theoretically from established disciplines, development of internally consistent theories, and, slowly, the addition of sub-disciplines or areas of study,⁸ and the confidence to critique areas of weakness from within the field.⁹

Given this, what relationship does online dispute resolution (ODR) have to the conflict theory and ADR theory that has developed? To put it into perspective, consider that a person born when the term ODR was coined in the mid-1990s would, at the time of this writing in 2011, barely be eligible to legally drive an automobile in the United States. It is not surprising, then, to note that there is as yet no substantial body of ODR theory, and it should not be surprising that there persists a reluctance on the part of established conflict resolution and ADR faculty and practitioners to treat ODR as fully legitimate. We argue, therefore, that ODR has been developing without its own cogent theoretical base. Whether attempting to create ODR theories, or for the purpose of critiquing ODR, practitioners have seemed to rely on conflict resolution theory designed for and out of the Face-to-Face (F2F) offline world, and on theoretical traditions from other disciplines. A growing number of creative ways of intervening with the use of technology have yet to be analyzed sufficiently to build a proper theoretical base. While the haphazard approach to furthering ODR has seen some success, we predict that ODR practice will both demand and generate a clearer set of theories grounded in the experience of navigating disputes in non-F2F settings, and we hope our discussion here will, in some small way, help to further these efforts.

7 J. Scimecca, “Theory and Alternative Dispute Resolution: A Contradiction in Terms?”, in D. Sandole and H. van der Merwe (Eds.), *Conflict Resolution Theory and Practice*, Manchester, Manchester University Press 1993, p. 211.

8 Most “recent” academic disciplines have produced works describing the gradual definition of and development of a coherent body of theory and research. For one example particularly germane to conflict resolution and communication, see F.J. Macke, “Communication Left Speechless: A Critical Examination of the Evolution of Speech Communication as an Academic Discipline”, *Communication Education* (1991) Vol. 40, Issue 2, pp. 125-143.

9 For a discussion of the growing literature critiquing from within the field, see A.L. Wing, “Social justice and mediation”. (Unpublished dissertation on file at University of Massachusetts, Amherst), 2002.

2 ODR: FROM WHENCE THEORY?

Theory development often is driven by perceived barriers or issues inherent in interaction, and it develops as a way to explain, and ultimately predict, behavior and dynamics in context. As Peter Zima argues:

The word theory is related to the ancient Greek verb *theorein* which means “to view” or “to observe.” So theory [...] could be somewhat generally defined as “observation.” [...] This etymological background is of some importance here: for in the modern context it reminds us of the fact that theory is a very specific way of viewing objects and of relating them to one another within a special type of discourse.¹⁰

Therefore, to begin exploring from whence ODR theory will emerge we briefly examine what challenges and opportunities the addition of technology offers to conflict resolution interactions since we believe they will be central to stimulating new theory development, and, in Zima’s words, stimulating a new, specialized type of discourse.

We start with the premise that all forms of dispute resolution are, to one degree or another, exercises in managing communication between and among parties who are interacting during conflict and conflict resolution processes.¹¹ Thus the dilemmas that ODR disputants and practitioners face that are in need of theorizing, (in other words those that are not effectively addressed by present theories) are likely to emerge from the impact of technology on party interaction and their conflict-related communications. Some of these include the exponentially growing speed, number, and types of disputes; others involve issues of identity (based on anonymity, false identities, or lack of understanding of cultural differences, for example). Many of these issues have already been named¹² but are still in need of theory and strategies (both human and technological) to properly address them. Interestingly, perhaps the most often cited barrier attributed to the practice of ODR is the loss of some nonverbal cues (when ODR occurs using video and audio channels), or the total loss of traditional nonverbal cues (when ODR occurs using synchronous or asynchronous

10 P.V. Zima, *What is Theory? Cultural Theory as Discourse*, London, Continuum International Publishing Group 2007, p. viii (Preface).

11 See K. Avruch, “What Do I Need to Know About Culture? A Researcher Says...”, in J.P. Lederach and J.M. Jenner (Eds.), *Into the Eye of the Storm: A Handbook of International Peacebuilding*, San Francisco, Jossey-Bass 2002, pp. 75-87.

12 E. Katsh and J. Rifkin, *Online Dispute Resolution: Resolving Conflicts in Cyberspace*, San Francisco, Jossey-Bass 2001.

text).¹³ The lamentation of this loss is not surprising in the Global North where direct F2F contact is an important cultural value when communicating during conflict and is, therefore, foundational to conflict resolution theory and practice. Thus, technology is routinely viewed as a barrier creating disinterest, mistrust, and confusion over how and why ODR should be utilized. Given the importance of F2F direct contact and communication in both the culture at large and the theory, ethos, and strategies of conflict resolution, it is not a surprise that it is the lens through which ODR is viewed. Yet, continuing to use theories designed for F2F interactions to analyze the impact and possibilities of the new geography of online and other technologically-oriented environments is not adaptive. Instead, we believe it will be the realities of technology-reliant to technology-reliant (T2)¹⁴ interactions that will drive useful theorizing about ODR.

Without new theory, how is it that ODR has been developing within the larger dispute resolution field, which has relied until recently almost entirely on F2F methods of communicating? With the advent and growth of the use of the Internet as a mode or channel of communication, a few dispute resolution practitioners have begun to incorporate technological avenues for communicating. Yet, in some settings worldwide where the internet is not as accessible as mobile phone technology, the latter has become the most dominant avenue for communication beyond F2F.¹⁵ As is argued elsewhere in this book, dispute resolution practitioners are still only at the beginning of understanding and delving into the realm of the mobile phone. Additionally, the use of technology-dependent channels of communication for dispute resolution has yet to be formally incorporated into mainstream teaching and training about how to conduct intervention activities. Despite these conditions we note that the use of technology has begun to creep into practice with increasing momentum; often a manifestation of the ways in which the dispute resolution practitioner has incorporated the online environment into his or her own life, rather than being driven by theory or a set of techniques or strategies that are formalized into practice.

13 This is noted by parties, mediators, as well as students in ODR classes; the latter of whom routinely identify loss of nonverbal cues as the most significant barrier to the use of ODR tools. One student noted that, “the major advantages relate to speed and convenience and that the major disadvantages relate to the loss of face-to-face non-verbal cues”. D. Rainey, “Teaching Online Dispute Resolution”, available through Mediate.com at: <www.mediate.com/articles/RaineyD1.cfm>. See also A. Hammond, “How Do You Write ‘Yes’?: A Study on the Effectiveness of Online Dispute Resolution”, *Conflict Resolution Quarterly* (2003) Vol. 20, No. 3, pp. 261-286.

14 Leah Wing coined this phrase to describe the technologically-reliant relationships between disputing parties and any conflict intervenor assisting in ODR; this includes the possibility that a form of technology could be serving as the intervenor (see Katsh’s concept of the “Fourth Party” as described in Katsh and Rifkin 2001).

15 S. Hattotuwa, *International Peacemaking and ICT*, The 2011 International Forum on Online Dispute Resolution, 7-9 February 2011, Chennai, India; G. Szlak, “ODR in Latin America”, JAMS, New York City, 25 May 2011. Contact: ROSZ – Estudio Rotman and Szlak, <www.estudiosrosz.com.ar>.

For example, as email communication began to be a typical form of communication for setting up meetings both in the workplace and in practitioners' private lives, it is not a surprise that it increasingly became used by dispute resolvers to set up intake processes, share information, conduct mediation and facilitation, and to confirm appointments with parties and colleagues.¹⁶ In this way, it has been merely an extension of avenues of communication in which the "distance" created by using technology was not seen as a threat to the process of F2F communication but rather as expediting the management of dispute resolution sessions which would/could still happen in person. In fact, many of the activities were merely being shifted from telephone or postal communications (already seen as more distant than F2F) to online interactions.

As long as there was no precipitating event to shake up the traditional dynamics of mediation, facilitation, and other forms of dispute resolution, new communication channels appear to have been simply added to ADR practice with little thought or organization or seemingly threat to parties or the field.¹⁷ Yet, while in some ways that seamless insertion can prove fruitful, at times, it can also be harmful; for example, in the risky act of sending sensitive information via e-mail. This is perhaps, the *least* secure way to communicate, and yet even before ODR was a recognized concept parties and practitioners were routinely sending personal and sensitive information via e-mail as part of dispute resolution interventions. Even as options and awareness of ODR channels increase, non-secure online channels are being used. But awareness does seem to be growing that true ODR channels, with some security and user controls, add value. As this chapter was being written one of the authors was contacted by parties who had been told by an arbitrator that he wanted submissions by e-mail. Instead, the parties contacted the agency for whom the arbitrator was a contractor and requested a secure workspace on the agency's ODR platform, making it possible to comply with the arbitrator's desire to hear the case by submissions only, and maintaining privacy and confidentiality in a way that is not possible via e-mail. In such ways, then, the new territory of ODR continues to be charted through experimentation, creativity, and risk-taking all of which mark the history of the development of the conflict resolution field. The situation in the recent past has been an exciting place to begin, but not without drawbacks and a need for careful analysis.

The *ad hoc* developments in ODR continued until events outside of the field focused the attention of a growing number of practitioners and scholars to the possibilities of ODR:

16 L.J. Boule, M.T. Colarella, Jr. and A.P. Picchioni, *Mediation Skills and Techniques*, Newark, Matthew Bender and Company, Inc, LexisNexis Group 2008.

17 Although we will argue that those uses of technology which appeared to substitute it for F2F are seen by many as problematic and often are avoided and mistrusted by practitioners in the field, we highlight here that incorporation of technology by most is done in ways that do not reduce F2F options.

in the early 1990s, the incremental and seemingly random evolution of the use of new technologies in ADR was changed forever. In 1992, the National Science Foundation, for the first time, allowed commercial interaction over the Internet. As a few in the conflict resolution community noticed, this changed the nature of a huge number of interactions, all of which were fraught with the possibility of conflict. Katsh and Rifkin (2001) were among the first to write about the shake-up: their ground-breaking observation was that we, as a society, were now creating a very large number of conflicts that were born online among disputants who had no practical way of engaging in traditional F2F mediation. In this environment, it was absolutely necessary to envision a mode of practice that relied on the same communication channels that were used to create the disputes, and they coined the term “Fourth Party” to describe the interaction of technology with all of the familiar elements of dispute resolution.¹⁸ eBay became the poster child for e-disputes, and a pilot project in 1997 demonstrated that online tools could successfully be used to address online conflict. That pilot project has grown into a dispute resolution system that handles millions of cases per year for eBay. The exponential growth of Internet commerce and the realization by a segment of the ADR community that, in a significant way, a new venue for conflict and conflict resolution had been created, kicked open the door for theory development in ODR.

However, despite the open door, efforts to stimulate ODR theory making have yet to be formally organized either from within the field or by sources outside of it.¹⁹ The results of which have left ODR in a nether-land somewhere between F2F ADR and an under-researched new terrain with new communication patterns creating conditions in which disputants have different needs and options than in F2F interactions. However, ODR, so far primarily text-based, continues to be judged by the cultural norms and theories created in and for the F2F paradigm upon which the conflict resolution field relies. This has created interesting circumstances as those experimenting with ODR have responded to the primary mode of communication through which many of these disputes developed by creating text-based tools.²⁰ Parties and interveners who were open to using technology were most often using the mode of communication in which they had begun their dispute in order to resolve it, and the impulse to use these channels and to focus on textual communication was understandable: often it is more efficient (allowing for asynchronous participation at the convenience of the parties), cost effective (not requiring payment for phone calls or

18 The term “Fourth Party”, coined by Katsh and Rifkin, is described in E. Katsh and J. Rifkin, *Online Dispute Resolution: Resolving Conflicts in Cyberspace*, San Francisco, Jossey-Bass 2001.

19 See E.F. Dukes, *Resolving Public Conflict*, Manchester and NY, Manchester University Press 1996, for a discussion of the infrastructure within the dispute resolution field and particularly outside of it that fostered the development of the discipline, its institutions, and theory.

20 Katsh and Rifkin (2001).

travel), and is often the only realistic option (when a cross-jurisdictional dispute of little or no monetary value is involved). In addition and importantly, as noted above, text-based elements are central to Global North conflict resolution, the handling of text documents during mediation are quite often a common element of F2F mediation,²¹ and we tend to want written documents as methods to formalize agreements and to make commitments “real” and final.²² Therefore, the choice to rely on text for handling communication during online disputing has a certain resonance with a leading cultural value of many of those who designed the first ODR processes.

However, in the face of these efforts, many in the ADR field continue to lament the loss of non-verbal cues and the unsuitability or awkwardness of using text-based technology for disputes resolution. Even with the addition of more sophisticated channels of Internet communication which allow for the voice to heard or face to be seen (*i.e.* audio and web video, etc.) the lack of more/any nonverbal communication remains a concern.²³ The use of technology to express emotions, improve relationships, increase understanding, and build trust are typically viewed as deeply antithetical to the cultural value placed on direct F2F interactions, especially in conflict resolution situations. We argue that this is a result of the communication and social interaction theories and cultural values upon which the field of dispute resolution heavily relies in the Global North. This includes contact theory which we will discuss as a substantive example to illustrate the challenges facing ODR and the need for new theory to respond to the new geography of conflict and T2T interactions.

Contact theory argues that in-person contact which takes place under certain conditions can be instrumental in reducing prejudice and enhancing understanding of and empathy for others belonging to different groups;²⁴ since direct contact is “the best way of reducing

21 See discussion of the one text procedure in R. Fisher, and W. Ury, *Getting to Yes: Negotiating Agreement Without Giving In*, Boston, Houghton Mifflin 1981. For further discussion of its utilization and importance see L. Susskind and J. Cruikshank, *Breaking the Impasse: Consensual Approaches to Resolving Public Disputes*, N.P., Basic Books 1987.

22 As Boule, Colatrella, Jr. and Picchioni (2008) point out, “it is now common practice for Agreements to Mediate to stipulate that no decision made in mediation will be final and binding until reduced to writing” (p. 299). See also R. Cohen, *Negotiating Across Cultures*, Washington, D.C., United States Institute for Peace 1991; and W.C. Warters, *Mediation in the Campus Community: Designing and Managing Effective Programs*, San Francisco, Jossey-Bass 2000.

23 E.M. Boucher, J.T. Hancock, and P.J. Dunham, “Interpersonal Sensitivity in Computer-Mediated and Face-to-Face Conversations”, *Media Psychology* (2008) Vol. 11, No. 2 April-June, pp. 235-258; D. Rainey, L. Wing and E. Katsch, *Mediator Responses to Online Intervention in Labor Mediation*, (Unpublished research), University of Massachusetts, Amherst 2008.

24 See G.W. Allport, *The Nature of Prejudice*, Cambridge, MA, Addison-Wesley 1954; T.F. Pettigrew and L.R. Tropp, “A Meta-Analytic Test of Intergroup Contact Theory”, *Journal of Personality and Social Psychology*, (2006) Vol. 90, No. 5, pp. 751-783.

any tension or hostility that might exist”.²⁵ Contact Theory has significantly informed conflict resolution processes such as facilitation, mediation, and post-war reconciliation,²⁶ as both theory and practice are saturated with the implications of contact and communications theories based on informal and F2F interactions. Consider, for example, the heavy emphasis placed on F2F “joint sessions” that facilitators and mediators are taught to use as opportunities for parties to “tell their story” in front of “the other” and to listen to the other’s story. Mainstream mediation practice, for example, assumes the use of joint sessions, with “private caucuses” being optional forums to prepare for or debrief from the significant engagements with the “other” in the joint sessions.²⁷ Informal, extra-legal methods of handling disputes such as mediation and facilitation are valued in no small part specifically because they offer the framework for engaging with the other disputant(s) directly and informally F2F. Third parties are trained to cultivate conditions most conducive to promoting the benefits of contact: by seeking to treat the parties as equals, fostering cooperative problem solving for mutual gain, and offering the structure necessary for productive F2F communication. These conditions central to contact theory²⁸ are utilized in ADR to increase understanding, foster the healing of relationships, reduce conflict, and cultivate mutually acceptable outcomes.²⁹

The centrality of these attributes to informal conflict resolution processes is made more evident when we see the emphasis on disputant F2F contact in informal ADR communication strategies. In both mediation and facilitation, third parties typically structure the intervention so that the disputants can speak in front of and directly to one another;³⁰ mediators are often trained to create ground rules about disputants refraining from speaking to each other only as long as tension is high and then to structure opportunities for direct conversation between the parties later in the mediation process. Communication strategies within such forums also place emphasis on the parties controlling the content of their speech and the timing of when information is shared.³¹ Party control over speech and the importance of F2F contact are intertwined as evidenced, for example, by the default within the mainstream approach to mediation which assumes joint sessions with all parties present and allows for rare private sessions only when the parties have something legiti-

25 R. Brown, *Group Processes: Dynamics Within and Between Groups*, Oxford, Blackwell 2000, p. 342.

26 See C. Church, A. Visser, and L.S. Johnson, “A Path to Peace or Persistence? The ‘Single Identity’ Approach to Conflict Resolution in Northern Ireland”, *Conflict Resolution Quarterly* (2004) Vol. 21, No. 3, Spring, pp. 273-293; Dukes (1996).

27 See Boulle, Colarella, Jr. and Picchioni (2008).

28 See Allport (1954) and Pettigrew and Tropp (2006).

29 See further discussion of the literature in Church, Visser, and Johnson (2004), pp. 273-293. See Bush and Folger (1994) for an exploration of these attributes within different approaches to the mediation field.

30 For an interesting discussion of this with regards to seating arrangements during mediation see Boulle, Colarella, Jr., and Picchioni (2008), pp. 41-43.

31 Bush and Folger (1994) and Warters (2000).

mately to share only with the mediator. Party control over the content of their communication and the outcome in such settings are touted as fundamental reasons that disputants rate these informal processes as more successful in healing relationships and offering greater satisfaction with the agreements and their implementation.³²

Alternatively, the more formalized the setting (in court or even arbitration, for example), the greater the parties' distance from each other physically, in the social context, and in their communication. Simultaneously, rules play an increased role in controlling the communication, information flow, and social interaction between the disputing parties as well as with the third party; this includes rules of evidence; procedures about who can speak about what, to whom, and when; the use of surrogate speakers (attorneys, for example); use of third parties who entirely control the communication processes; a greater reliance on private meetings (between attorney and client, side bars, *ex parte* decisions, etc.); and, importantly, the increased use of text in the proceedings. These settings are not structured to foster the benefits of contact through F2F communication driven by the parties to increase the understanding and build/improve relationships between them. Instead, the separation of people through a variety of communication interventions (use of text documents, private caucuses, surrogate speakers, and communication rules) are meant to distance the parties for a number of reasons including maintaining third party control of process and outcome; protecting parties from abusing each other; and enforcing rules to ensure procedural fairness, which may be valued above enhancing relationships. Mainstream informal dispute resolution forums such as mediation which value bringing parties physically close to each other to facilitate their empowered direct communication, therefore, avoid such strategies that cause distance in proximity and communication.

The reliance on contact theory in the conflict resolution field may have served it well in F2F contexts, but what role should it play in analyses of ODR where F2F is not often central to practices which have already emerged? As we ponder from where ODR theory might emerge, communication theory may prove useful to some extent. Although it is not the intent of this chapter to discuss every body of theory that could contribute to the development of ODR theory, there are two branches of communication theory that we think are particularly ripe for cross-discipline investigation. One is reasonably obvious: Interpersonal Deception Theory. The other is less obvious: Agenda Setting Theory.

32 See Boulle, Colarella, Jr., and Picchioni (2008); D. Kolb and Associates, *When Talk Works: Profiles of Mediators*, San Francisco, Jossey-Bass 1994; L.R. Singer, *Settling Disputes: Conflict Resolution in Business, Families, and the Legal System*, Oxford, Westview 1994; and L. Susskind and J. Cruikshank, *Breaking the Impasse: Consensual Approaches to Resolving Public Disputes*, N.P., Basic Books 1987.

The applicability of Interpersonal Deception theory to ODR seems obvious to us because it tracks very closely with leading cultural perceptions, for example what is probably the most often cited image used to describe interactions on the Internet. In the famous *New Yorker* cartoon one dog, sitting at a computer screen, says to another dog, “On the Internet, nobody knows you’re a dog”. In somewhat more academic language, Buller and Burgoon describe development of Interpersonal Deception Theory as an attempt to explain the communication patterns and assumptions between those who wish to deceive and those who wish to detect deception.³³ This theory, and the research supporting it, is grounded in Interpersonal Communication theory focused on F2F interaction, and has been adapted to the dispute resolution context, also in the F2F environment.³⁴ We think the study of deception, and the development of theory surrounding perceptions of truth and deception in an online environment is central to ODR where people are not meeting F2F.

Agenda Setting Theory may also have some relevance to ODR. Agenda setting is, primarily, a mass communication theory, dealing with the phenomenon of salience transfer. Basically, the central tenet of agenda setting is that the media, by choosing what to publish or distribute, have the ability to transfer importance or urgency to one issue over another. The ability of information and communication technology (ICT) systems and the Internet to host and/or create massive multi-party discussions and to invite the creation of an almost unimaginable amount of data over varied communication channels seems to us to suggest that some variant of Agenda Setting Theory may add valuable insights into the development of ODR theory and processes.³⁵

Since conflict resolution in the Global North has been built upon the value and centrality of F2F interactions as articulated by contact and the communications theories such as we have discussed above it is not surprising that attempts to handle disputes online has inevitably been viewed as restricting and threatening to the familiar forms of “direct” F2F contact. As previously mentioned, this has impacted interest in and trust for ODR. Therefore, generally, researchers are likely to continue to investigate whether technology can and does enhance “closeness”, how it can help eliminate barriers and distances between people,³⁶ and how it can increase parties’ understanding of each other; in other words, to

33 D.B. Buller and J.K. Burgoon, “Interpersonal Deception Theory”, *Communication Theory* (1996) Vol. 6, Issue 3, pp. 203-242.

34 See J. Hearn, *Interpersonal Deception Theory: Ten Lessons for Negotiators*, available at Mediate.com: <www.mediate.com/articles/hearnj1.cfm>, last accessed on 16 June 2011.

35 For a discussion of the creation of massive multi-party groups, see the ODR and Government chapter in this book.

36 See R. Spears, T. Postmes, M. Lea, and A. Wolbert, “When Are Net Effects Gross Products? The Power of Influence and the Influence of Power in Computer-Mediated Communication”, *Journal of Social Issues* (2002) Vol. 58, No. 1, pp. 91-107.

understand if technology, in non-F2F settings, can serve the same goals that mainstream dispute resolution practice promotes. In this way, major themes within the ODR literature will continue to focus on the attributes of ODR which directly relate to issues of party closeness and communication.³⁷ Research exploring, for example, technology's impact when there is geographic distance and different time zones (asynchronous engagement), language translation capacity, role of/need for video, lack of body language cues, access to emotional expression and understanding, and simultaneous textual communication (such as in multiparty synchronistic engagement of a kind not possible without talking over each other when speaking in person). Such research, unsurprisingly, applies the same expectations to ODR as for F2F mediation, facilitation, and negotiation. As noted previously, theory and cultural values from the offline F2F environment are typically assumed to be relevant tools to research and explain technologically influenced communication and social interactions. While they may have important currency, we wonder if new channels of communication do not demand a research agenda and practice that are grounded in the culture of that context.³⁸

Therefore, we are encouraged that increasingly parties and practitioners are viewing the technosphere of the Internet and mobile phone technology as spaces where new forms of communication can positively impact trust and improve relationships without assuming that close, direct, F2F contact and communication are required. Whether out of experiencing such successes, maintaining faith in the newly emerging culture(s) and communication styles online, or having an adventurous spirit, ODR practitioners continue to move forward. And we believe that ODR theory development will slowly begin to emerge from the investigation of questions not only built on offline theory but also centered on the unique elements of the dispute resolution and human interaction processes occurring in online communication. Questions such as "what are common communication patterns online?"; "what difference does it make that we are not F2F?" and "in what new ways can technology serve to deepen understanding through e-communications?" can contribute to the beginnings of ODR theory building. The field could be further enriched by engaging the body of literature developing outside of the field of conflict resolution which is exploring contact theory as it relates to technology; for example, Amichai-Hamburger and McKenna (from, respectively, Bar-Ilan University and Ben Gurion University in Israel) have begun to question the impact of the Internet on social interaction generally.³⁹ Already there is some

37 See A. Hammond, "How Do You Write 'Yes?': A Study on the Effectiveness of Online Dispute Resolution", *Conflict Resolution Quarterly* (2003) Vol. 20, No. 3, pp. 261-286.

38 For a further discussion on the importance of culture in dispute resolution, see J.P. Lederach, *Preparing for Peace: Conflict Transformation Across Cultures*, New York, Syracuse University Press 1995.

39 Y. Amichai-Hamburger and K. McKenna, "The Contact Hypothesis Reconsidered: Interacting via the Internet", *Journal of computer-mediated communication*, 2006, available online at <<http://jcmc.indiana.edu/vol11/issue3/amichai-hamburger.html>>.

pioneering work in ODR examining issues specific to the online environment; one such project funded by the National Science Foundation and conducted by the University of Massachusetts at Amherst and the National Mediation Board in the US, is investigating the impact of anonymity (not available in F2F ADR) on the communication process and human interactions in ODR.⁴⁰

However, unlike some of these new areas of research not based solely on the foundational tenets of offline ADR, we predict that much of early theory development will continue to be based on traditional theory, exploring how technology impacts distance and closeness in social interaction online and, therefore, will include a strong interest in the nature of the difference between textual and oral communication. As noted above, given the heavy emphasis on putting in writing any commitment that is to be of value, the written word carries more weight legally and thus culturally, in general, in the Global North. Therefore, for parties from such cultures or negotiating with those who are, once a communication is written it has more gravitas and carries with it a threat of legal action if it is not upheld. Therefore, to create communication spaces in which parties will be most relaxed, creative, and willing to explore their own views and, importantly, the views of others, mediators and facilitators traditionally have focused almost entirely on oral communication. From such a cultural perspective, when asking parties to “tell their stories” or list their needs/interests, by speaking, they are not “tied” to anything. In other words, they can change their minds or restate something without having to “renew” on a statement, which is often the feeling when something is put in writing. Thus, oral methods of communicating about a dispute are the typical avenues used by third parties in mediation and facilitation. Often it is only when parties have begun to reach the stage in negotiating a resolution when they are making plans about the future, and contact theory’s fruits are hopefully being harvested, that third parties routinely encourage the use of text in their engagement with the parties.⁴¹

Interestingly, third parties themselves do utilize text before then, but they do so in ways that foster closeness between the parties; for example, to organize the communication in ways to create understanding, highlight similarities, and build momentum towards a resolution or transformation of the conflict. To accomplish this, intervenors highlight the differences and similarities between the disputing parties’ stories/needs/interests either in their own notes or as “public” notes on a flip chart in front of the disputants or meeting minutes that a facilitator writes up and circulates. In the process, it is common practice

40 This research, “Process Families and Their Application to Online Dispute Resolution”, is based on National Science Foundation award #0705772, <www.fastlane.nsf.gov/servlet/showaward?award=0705772>.

41 See Boule, Colatrella, Jr. and Picchioni (2008).

for the third party to alter the communication as it becomes text listing all the concerns as “agenda items” or “interests/issues” rather than creating separate lists for each party. This strategy reduces the visual distance between the parties and builds a common task for all the parties to work together to address the issues or interests that exist between them. In other words, third parties introduce text to highlight (or at times impose) commonality as a dispute resolution strategy. Arguably, that is because the third party is trying to utilize the strength of the written word to reinforce such claims of commonality as a strategy to move the parties closer together, fostering relationships and joint problem-solving as part of the conflict resolution process. Third parties seek to use text to set up a relationship of commonality and shared commitment to dispute resolution rather than highlighting distance and differences.⁴² Therefore, conflict resolution practitioners in the Global North appear to use text most often when it fosters connection and resolution.

While these efforts appear grounded in traditional F2F theories, still we believe they offer potential for some important and exciting research questions such as: Will a new culture emerge online in which text is seen in a new light as more temporal, or more flexible and malleable? Will parties become (have they already become) bi-cultural, living in two worlds, one in which text is weighted heavily and another in which it is less so or at least weighted differently? And as research questions begin to emerge directly from observing the online environment and the increasingly expanding mobile phone architecture of communication rather than concentrating only on questions birthed from the F2F world of conflict resolution, we will start to carve out an ODR research agenda that more fully reflects the realities and potential of the technosphere.

The fact that people are increasingly disputing online, in many cases across legal jurisdictions has already created many demands and opportunities for ODR, thus, providing potentially enormous data pools which could be used for theory building research. The media offered by technology has fostered innovations in both the dispute resolution field and, arguably, in cultures all around the globe offering rich possibilities for cross cultural research on ODR with partners worldwide. We believe that the mere fact that there are many with whom we communicate predominantly in text to both build relationships (romantic, professional, commercial, etc.)⁴³ as well as to negotiate and resolve conflicts, has undoubtedly impacted our views of the role of text as opposed to F2F oral/aural communication. With the increasing application of technology by offline dispute resolvers to

42 For a discussion of various approaches to carrying this out, see Boule, Colatrella, Jr. and Picchioni (2008); Bush and Folger (1994); Kolb and Associates (1994); and Susskind and Cruikshank (1987).

43 Although we are reluctant to rely on their statistics, online dating services routinely cite figures in the neighborhood of 18-20% when discussing the number of marriages that began with online dating over the past 2-5 years. For example, see <<http://eharmony-blog.com/1018>>.

their offline interventions, greater opportunities will emerge to ask new questions about the impact on communication in hybridized settings. Will we find that the lack of F2F communication may not be seen as only creating distance? Might technological forms and tools be creating different kinds of closeness and contact? Or might it even be that closeness and understanding are not the driving values of parties in dispute resolution in online settings? Again, we argue that new approaches to researching ODR theory is needed to explore such questions.

A large segment of society and of the dispute resolution community have trouble conceptualizing the changes in social interaction brought by the Internet. A colleague nearing retirement age recently commented that his son had 300 “friends” on Facebook. An eighteen-year-old might say that this man’s son was a social isolate, but our colleague commented that there were not 300 people whom he would say he really knew, much less 300 he would call his friends. Even as many of us see “going online” as constituting a different world, slowly the field of dispute resolution has begun to respond to the availability and use of technology. Dispute resolution theory has yet to catch up.

3 ODR THEORY: WHITHER ARE WE DRIFTING?

It is to be expected that traditional practitioners of dispute resolution initially saw, and to a large extent still view, the introduction of ODR tools as a degradation of and destruction of successful processes. ODR tools will radically change the way dispute resolution is pursued, but seen in context, the Internet and mobile phones are just the most recent in a long line of technologies that have radically changed social interaction. At one time, writing was a new technology, as was printing, and wireless radio, and television, etc. Humanity will survive the introduction of Internet communication, and it will adapt in ways we probably cannot envision. Conflict theories will, in time, begin to make sense of the changes in social interaction that challenge the assumption inherent in the Global North’s “offline” conflict resolution theories and practice that F2F human interaction is the most valuable and vital way to address conflict.

Eventually, the development of ODR theory, we think, will challenge the fundamental traditional definitions of interaction in many ways. We predict that a general cluster of theories will develop around what we will, for lack of any precedent, refer to as “virtual interaction theory”.⁴⁴ Key questions that will begin to develop virtual interaction theory will be related to the transition from one set of accepted channels and sub-channels to new

⁴⁴ As yet there is no unifying term to refer to the potential universe of ODR theories Virtual Interaction Theory, a term coined by Daniel Rainey, seems to us to be as good a descriptive as any.

channels. For example, we currently use various nonverbal cues to infer motives and meaning in F2F social interaction. What online, non-F2F channels will substitute to allow us to infer meaning and motives online? Human beings will not stop inferring meaning and motive, so there must be examination of how we do it online as opposed to F2F. This research will result in theories that reflect the new virtual communication patterns. Currently, a common metaphor to describe the conflict resolution process has us dealing with parties “at the table”. This is a metaphor strongly grounded in traditional practices, and indeed in contact and communication theories based on F2F interactions. Developing ODR theory will, and must, challenge the definition of “the table” and the interactions that occur “around” it.

New technology has changed our world, our interactions, ways of communicating and conflicting. This has already begun to alter our avenues and tools for addressing disputes. If we accept this reality it can require what Stuart Hall calls “a turn” in our thinking about conflict resolution:

A turn is neither an ending nor a reversal; the process continues in the direction in which it was travelling before, but with a critical break, a deflection. After the turn, all of the terms of a paradigm are not destroyed; instead, the deflection shifts the paradigm in a direction which is different from that which one might have presupposed from the previous moment. It is not an ending, but a break.⁴⁵

The “break” in our world has already happened; however, the “turn” in our discipline has yet to be fully realized in both senses of that word. Such a realization generates analyses to understand the dilemmas that we now face as we chart a direction forward after this “turn”. We believe that theory making will be an important part of this process.

45 S. Hall, “Stuart Hall and Sarat Maharaj: Modernity and Difference”, in S. Campbell and G. Tawadros (Eds.), *IV Annotations 6*, London, Institute of International Visual Arts 2001, p. 9.