

ARTICLE

**BALANCING THE SCALES: THE FORD-FIRESTONE
CASE, THE INTERNET, AND THE FUTURE DISPUTE
RESOLUTION LANDSCAPE**

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BALANCING THE SCALES: THE FORD-FIRESTONE CASE, THE INTERNET, AND THE FUTURE DISPUTE RESOLUTION LANDSCAPE

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The author discusses the Internet's potential equalizing effect on dispute resolution institutions. The emergence of online dispute resolution (ODR) mechanisms and virtual courts are the clearest manifestation of the Internet's influence on dispute resolution, but its influence extends beyond the immediate online environment, as is demonstrated throughout the Article by analyses of various examples and the specific case study of the Ford-Firestone debacle. The Ford-Firestone story provides a rich case study for the positive potential as well as the pitfalls of resolving disputes in the nascent Internet society, and it is especially useful for dispelling the notion that the Internet will only affect technology-related disputes. The author analyzes dispute resolution institutions (courts and ADR mechanisms) as they currently exist and as they are likely to develop in the future. The Article's prediction and main thesis is that as a result of the introduction of new technologies, traditionally disempowered disputants could potentially experience greater equality in the dispute resolution institutions of the Internet society. The Article concludes with a demonstration of how disputes similar to the Ford-Firestone case study will be played out in the landscape of the future.

I. INTRODUCTION

Dispute resolution institutions are not isolated bodies; "they are in and of society,"¹ and therefore are shaped by the technological and social changes that society undergoes. The Internet in particular has affected dispute resolution institutions in manifold ways. Before the proliferation of Internet communication, courts possessed unique qualities in dispute resolution that could not be replicated by other dispute resolution mechanisms: authority, finality and enforcement. But inherent in the court system are structural barriers that adversely affect litigants who lack the skills and funds to master and maneuver the system. Alternative dispute resolution (ADR) mechanisms, while offering distinctive advantages and remedying some of the ills of the

¹ Lawrence Friedman, *Court over Time: A Survey of Theories and Research*, in *EMPIRICAL THEORIES ABOUT COURTS* (Keith O. Boyum & Lynn Mather eds., 1983).

court system, have perpetuated some of the inequities characteristic of courts. With the emergence of the Internet, however, several important changes have occurred both in the court system and ADR mechanisms, changes that have permanently altered the landscape of dispute resolution by offering greater equality for traditionally disempowered disputants.

This article examines the influence the Internet has already had as well as the influence the Internet is likely to have on dispute resolution mechanisms and processes. The emergence of online dispute resolution (ODR) mechanisms and the likely widespread availability of virtual courts in the future are the clearest manifestation of such influence. But the Internet's effects on the dispute resolution landscape extend beyond the online environment, as is demonstrated throughout this article in the analysis of various examples and the specific case study of the Ford-Firestone debacle. The article begins with a description of some of the most salient characteristics of the Internet that are relevant to dispute resolution drawing on the Ford-Firestone story and other relevant examples. Through an analysis of dispute resolution institutions both as they currently exist and as they are likely to develop in the future, the paper then explores and develops its principal thesis, that new technologies have the potential to permit dispute resolution institutions to function in a more equitable manner. Subsequently, the paper relies on the Ford-Firestone case study to show how these issues play out in the real world and how they are likely to play out in the changed landscape of the future.

II. THE FORD-FIRESTONE STORY

The Ford-Firestone case provides a rich case study for the analysis of changing trends in dispute resolution. In August 2000, Ford announced a recall in the United States of one type of Firestone/Bridgestone tires used mainly on the Ford Explorers, in light of mounting evidence that the tires were faulty and could, under certain conditions, cause vehicles to roll over. An investigation conducted by the National Highway Traffic Safety Administration ("NHTSA") as of May 2000² concluded that this occurrence had already resulted in hundreds of deaths and serious injuries.³ In October 2001, Ford, bowing to NHTSA pressure, announced a recall and replacement of an additional 3.5 million tires. Meanwhile, the

² See Editorial, *When Tires Start Blowing Apart*, N.Y. TIMES, Aug. 11, 2000, at A18.

³ See Steven Greenhouse, *If It's Not One Thing, It's Another: As Tires Are Recalled, Bridgestone Faces Possible Strike*, N.Y. TIMES, Sept. 1, 2001, at C1.

NHTSA concluded that “a tread separation on an Explorer is no more likely to cause a crash than on other S.U.V.’s,”⁴ and announced that it was closing its investigation against Ford. Over 270 deaths and 700 injury cases in the United States have since been attributed to the Ford-Firestone failure.⁵

Since the recall, Ford and Firestone/Bridgestone officials have been called to testify before Congress⁶ and have been deposed in personal injury cases before courts.⁷ The automotive hearings led to the adoption of the Transportation Recall Enhancement, Accountability and Documentation Act (the “TREAD Act”) that requires tire manufacturers to keep track of potential tire defects and report them to the government.⁸ Hundreds of personal injury cases, generally naming both companies as defendants, have been filed.⁹ To date, most cases that have been resolved have been settled by both companies on a case-by-case basis, and many of the relevant corporate documents remain sealed from future claimants and government regulators.¹⁰ Both companies have also settled state government claims

4 See Kenneth N. Gilpin, *Firestone Will Recall an Additional 3.5 Million Tires*, N.Y. TIMES, Oct. 5, 2001, at C3. This conclusion was reaffirmed in 2002 when the NHTSA denied Bridgestone/Firestone’s request that it investigate safety defects in the Ford Explorer. See Danny Hakim, *Safety Agency Rejects Request to Investigate Ford Explorer*, N.Y. TIMES, Feb. 13, 2002, at C1.

5 See Bloomberg News, *Bridgestone Names a U.S. Chief*, N.Y. TIMES, Sept. 13, 2002, at C10; Associated Press, *Judge Denies Ford and Bridgestone Bids to Dismiss Suits*, N.Y. TIMES, Mar. 27, 2002, at C4; Richard A. Oppel, Jr., *Bridgestone Agrees to Pay \$7.5 Million in Explorer Crash*, N.Y. TIMES, Aug. 25, 2001, at C1.

6 See Stephen Labaton, *U.S. Expands Scope of Inquiry on Faulty Tires*, N.Y. TIMES, Aug. 31, 2000, at C1; Mathew L. Wald, *In Testimony, Firestone Puts Onus on Ford*, N.Y. TIMES, Sept. 22, 2000, at C1.

7 See Stephen Labaton & Lowell Bergman, *Settlement Seen by Ford in Suits over Ignitions*, N.Y. TIMES, Aug. 13, 2001, at A1.

8 See Warren St. John, *Mr. Not-So-Nice Guy in D.C.*, N.Y. TIMES, Sept. 15, 2002, § 9 (Style Desk), at 1. For the TREAD Act, see 49 U.S.C. § 30101 (2003).

9 See Bloomberg News, *Bridgestone Tires Are Recalled in Brazil*, N.Y. TIMES, Nov. 23, 2001, at C3; Reuters, *Unit of Ford Says Firestone Hid Defects*, N.Y. TIMES, Oct. 5, 2000, at C19.

10 See Bloomberg News, *supra* note 5 (stating that Ford and Firestone reached confidential settlements in hundreds of cases); Keith Bradsher & Mathew L. Wald, *More Indications Hazards of Tires Were Long Known*, N.Y. TIMES, Sept. 7, 2000, at A1 (referring to claims that the companies had sealed off information relevant to public safety in confidential settlements of lawsuits); Stephen Labaton & Lowell Bergman, *Documents Indicate Ford Knew of Engine Defect but Was Silent*, N.Y. TIMES, Sept. 12, 2000, at A1 (stating that in both the tire cases and ignition disputes “the company followed its practice of settling personal-injury and wrongful-death lawsuits raising safety concerns by requiring that the cases be sealed and that the plaintiffs return all incriminating company documents to Ford. In some cases, the settling parties had to also agree that they would take no steps to assist plaintiffs in other cases who assert similar claims”).

for tens of millions of dollars.¹¹ The almost century-long relationship between Ford and Firestone was severed in 2001.¹² The matter is still far from being settled and continues to draw public attention.¹³

As the public story unfolded in the media during late 2000 and early 2001, it gradually became clear that different groups had had prior knowledge of the problem. These groups included not only Ford and Firestone employees and management, but also Arizona state officials, officials of foreign countries, and plaintiff attorneys in personal injury cases.¹⁴ As it turned out, Arizona state officials had approached Firestone as early as 1996 with complaints that faulty design caused the tires to come apart and vehicles to roll over. Firestone had responded by citing tire maintenance as the cause of the accidents in question.¹⁵ In 1998, mounting insurance claims already had indicated to financial staff members at Firestone that a problem existed with the tires.¹⁶ In early 1999, incidents in the Middle East and South America led to a recall of a different Firestone tire in those regions; this remained undisclosed to American regulators until the following year.¹⁷ Internal Ford memos at the time of the foreign recalls did not, for unclear reasons, cross the desk of the relevant Ford executives in the United States.¹⁸

11 These settlements did not affect private lawsuits filed against either of the companies. *See* Danny Hakim, *Firestone Said to Reach Tire Settlement*, N.Y. TIMES, Nov. 8, 2001, at C12; Reuters, *Ford Settles Claims over S.U.V. Tire Safety*, N.Y. TIMES, Dec. 21, 2002, at C3.

12 Julie Flaherty, *The Corporate Alliance, As a Tightrope Act*, N.Y. TIMES, June 10, 2001, § 3 (Money & Business/Financial Desk), at 4.

13 In April of 2003, the South Carolina Supreme Court ruled that a man who had lost a case against Ford over ten years ago could reopen his case based on claims of false testimony by a former Ford engineer who testified on its behalf. This development could lead to the reopening of many other cases that were disposed of based on such testimony. Also, despite the recall of certain older S.U.V. models and the development of new models, S.U.V.s continue to be dangerous vehicles. *See* Danny Hakim, *Lawyers Taking Aim at Ford on Veracity of Expert*, N.Y. TIMES, Apr. 23, 2003, at C1. The Navigator, a new S.U.V. that was marketed by Ford as a car that was redesigned to make it safer for passengers involved in a collision, was recently found by the NHTSA to be “more harmful to people riding in passenger cars than the 1999 model.” *See* Danny Hakim, *Revamped S.U.V. Found to Cause Worse Injuries*, N.Y. TIMES, May 14, 2003, at C12.

14 *See* Keith Bradsher, *Documents Portray Tire Debacle as a Story of Lost Opportunities*, N.Y. TIMES, Sept. 11, 2000, at A1.

15 *See id.*; Keith Bradsher, *Warning Issued on More Tires from Firestone*, N.Y. TIMES, Sept. 2, 2000, at A1.

16 *See* Bradsher, *supra* note 14; *see* Keith Bradsher, *Documents Show Firestone Knew of Rising Warranty Costs*, N.Y. TIMES, Sept. 8, 2000, at C1.

17 *See* Bradsher, *supra* note 14; *see* *Congress Takes up Defective Tires*, N.Y. TIMES, Sept. 7, 2000, at A30.

18 *See* Bradsher, *supra* note 14.

The Firestone case provides an excellent example of the potential, as well as the pitfalls, of resolving disputes in an Internet society in the making. It is especially valuable in correcting the common assumption that Internet mechanisms will affect only disputes that arise from the new technologies of which the Internet is a part or the assumption that it will affect only disputes that are resolved online. On one level, the Ford-Firestone case is a dispute between dispersed individual consumers and two large corporations that sell their products globally.¹⁹ On another level, the Ford-Firestone case is also a dispute *between* two large conglomerates that are operating in an increasingly globalized world and seem to be having trouble adjusting to this new reality. During the course of the conflict, difficulties have emerged that stem from cultural differences in the management styles of “all American” Ford and the Japanese owned Firestone.²⁰ Both companies have found that this case is dramatically different from similar problems in the past, mainly due to the American public’s growing access to information and to the new possibilities of transmitting data instantly across state and national borders.²¹

On a third level, this episode offers a glimpse into the evolving relationship between private entities and the United States government. NHTSA, a federal agency, as well as local state authorities failed to detect and contain the defective tire/vehicle before significant damage had been done. State and federal regulatory agencies, which follow notoriously cumbersome procedures,²² operate on low budgets and with limited resources, are highly susceptible to capture by the automobile industry, and have tended to rely on data supplied by the very companies they are regulating and/or on the agency’s own statistics, which are often inadequate due to monetary

19 In contrast to many consumer disputes, the plaintiffs in these cases tend to come from privileged socio-economic backgrounds, as the product is an expensive luxury item, but are still weak actors in comparison to multi-national corporations.

20 See Miki Tanikawa, *Bridgestone Split from Ford Is Seen as Most Un-Japanese*, N.Y. TIMES, June 2, 2001, at C2; Miki Tanikawa, *Chief of Bridgestone Says He Will Resign*, N.Y. TIMES, Jan. 12, 2001, at W1; Miki Tanikawa, *Japanese Learning the Value of Corporate Public Relations*, N.Y. TIMES, Sept. 27, 2000, at C4. See also *infra* notes 66-69 and accompanying text.

21 See Keith Bradsher, *Firestone Struggles in Center of an Ever-Widening Storm*, N.Y. TIMES, Sept. 1, 2000, at A1 (comparing the present crisis to the Pinto problem faced by Ford two decades ago and Firestone’s survival of its recall of Firestone 500 tires in 1978).

22 See Fara Warner, *Rollover Safety Moves to Center Stage*, N.Y. TIMES, Mar. 16, 2003, § 12 (Automobiles), at 1 (stating that safety administration will not be able to conduct the real-world rollover tests required by the TREAD Act before mid-2004 because of the agency’s long rule-making process).

and other constraints.²³ NHTSA, for example, only collected and analyzed statistics about deaths and not about bodily injuries or damages to property, even though a more inclusive definition of “cases” generally would have facilitated earlier detection of risks and hazards.²⁴ In this case, it was a report by a local television station that triggered NHTSA’s investigation,²⁵ and a multitude of plaintiff attorneys have both concealed from authorities information they had discovered regarding the faulty tires,²⁶ and have served as quasi-regulators of corporate conduct through the heavy settlements they have obtained for their clients.²⁷ The government’s shortcomings have been reinforced by a regulatory regime that supports self-regulation by the automobile industry.²⁸

III. CHARACTERISTICS OF THE TRANSITION INTO AN INTERNET SOCIETY

The effects of the Internet on conflict resolution, as illustrated by the Ford-Firestone case and other relevant examples, fall into several categories.

23 See Michael Winerip, *What’s Tab Turner Got Against Ford?*, N.Y. TIMES, Dec. 17, 2000 (Magazine), at 46; Joan Claybrook, *Congress’s Part in the Firestone Crisis*, N.Y. TIMES, Sept. 4, 2000, at A17.

24 See Reuters, *Audit Faults U.S. on Identifying Auto Defects*, N.Y. TIMES, Jan. 10, 2002, at C2 (stating that a federal audit of the NHTSA prompted by the Firestone tire-related crashes concluded that the NHTSA’s procedures for detecting auto defects for investigation and information gathering sources were significantly flawed. The agency tended to rely heavily on industry data and rarely used other sources, such as its own accident databases or information from insurance companies and plaintiffs’ attorneys); Matthew L. Wald & Josh Barbanel, *Link Between Tires and Crashes Went Undetected in Federal Data*, N.Y. TIMES, Sept. 8, 2000, at A1 (referring to agency’s reliance on partial data).

25 See Jim Rutenberg, *Local TV Uncovered National Scandal*, N.Y. TIMES, Sept. 11, 2000, at C17.

26 See Keith Bradsher, *S.U.V. Tire Defects Were Known in ’96 but Not Reported*, N.Y. TIMES, June 24, 2001, at 1; Mathew L. Wald & Keith Bradsher, *Judge Tells Firestone to Release Technical Data on Tires*, N.Y. TIMES, Sept. 28, 2000, at C2; *infra* note 74 and accompanying text.

27 See Winerip, *supra* note 23, at 74 (stating that Tab Turner has played “a lead role as free-market capitalism’s de facto commissioner of auto safety.”)

28 See Danny Hakim, *Tough Questions on Safety for Automakers at Hearing*, N.Y. TIMES, Feb. 27, 2003, at C5.

A. EQUALIZATION

Winning a lawsuit, or reaching a settlement in a case like that of the rollover accidents, requires that a plaintiff have enough information to establish her case. In the past, the chances of individual consumers winning defective product claims were slim.²⁹ The costs of gathering information for a one-shot claimant and her solo practitioner attorney were prodigious and often resulted in either a rejected suit or an agreement to settle the matter confidentially for a sum lower than requested, perhaps lower than the true value of the claim.³⁰ This state of affairs has changed somewhat due to technological developments that have created new possibilities for the gathering and dissemination of information thereby enabling one-shot disputants such as the plaintiffs in the rollover cases and their attorneys to obtain enough information to litigate successfully opposite repeat players such as the automobile and tire manufacturing companies and the law firms hired by them.³¹

The new possibilities for information gathering and publication are unprecedented in the power they offer private individuals who previously had to rely on others for information gathering and/or for publication. Those who have traditionally been in possession of information – seldom private individuals – have been in a position to control the release of such data, distributing it selectively or keeping it completely confidential. This reality, at times, made it futile for individuals to dispute with larger, better-organized corporations with deep pockets who had long-term stakes in obtaining favorable results.³² During the second half of the 20th century, access to information among lawyers has become increasingly diversified, an occurrence that can be largely attributed to the various technological milestones each era has produced (the copier, the computer, the fax machine, etc). Lawyers who have traditionally faced tremendous access barriers to obtaining information are now able to acquire such data and use it to

29 See Mike France, *The Litigation Machine*, Business Week, Jan. 29, 2001, at 114.

30 See NO ACCESS TO LAW 64-67 (Laura Nader ed., 1980).

31 See France, *supra* note 29, at 114 (describing how tort plaintiffs have been empowered by the Internet and the creation of “assembly-line litigation” – the exchange of documents and information online while sharing the cost of conducting the research).

32 It is interesting to see the changes in Ford’s conduct in disclosure of information regarding its tire failures. It started out by keeping the information confidential, it then proceeded to make it available solely to reporters with passwords to its websites, and at a later point, it announced that it would make the data widely available on its website. See Keith Bradsher, *Ford Attacks the Lawyers Pursuing Suits over Tires*, N.Y. TIMES, Aug. 25, 2000, at C6.

their clients' advantage. Now that many documents are stored and transmitted digitally, they are more easily transmitted, stored, crosschecked and shared with others.³³

The story of Tab Turner, the most prominent plaintiffs' attorney in the Ford-Firestone rollover cases, is a good example of the Internet's equalizing power. Mr. Turner, a solo practitioner from Arkansas, has managed to overcome structural barriers traditionally faced by attorneys in his position,³⁴ and, through litigating against major law firms that represent large businesses, has won large sums of money on behalf of his clients.³⁵ The equalization of information enables attorneys like Mr. Turner to gain access to Ford/Firestone documents, store and compare different versions of documents they have obtained, as well as share such information at no cost with a large number of plaintiffs in similar cases in and outside the United States. Mr. Turner's feat would have been unthinkable without use of the Internet and other technological means.³⁶

Increasingly greater access to information will, most likely, lead to a loosening of legal controls over presentation of information in court. Courts have traditionally excluded certain information from the litigation process through evidence law, procedural rules and legal doctrines.³⁷ Previous evidentiary requirements for original documents were prohibitive for small litigants and lawyers to comply with,³⁸ and many courts have begun to loosen such requirements by, for example, accepting electronic documents as evidence and eliminating the need to produce original documents that are often hard to locate.³⁹

33 These changes are already affecting the law and dispute resolution institutions that deal with communication of information to and from society and its individual members. The legal doctrines that deal with regulation of information flow, whether they limit such regulation (the First Amendment) or promote it (copyright and privacy), will most likely alter and already have been facing tremendous challenges and difficulties in light of new capabilities for transferring digitally stored information such as music and movies. *See* ETHAN KATSH, *THE ELECTRONIC MEDIA AND THE TRANSFORMATION OF LAW* 113-97 (1989); *A&M Records v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001); *Universal City Studios v. Reimerdes*, 111 F. Supp. 2d 294 (S.D.N.Y. 2000).

34 *See infra* notes 37-43 and accompanying text.

35 *See* Barnaby J. Feder, *Unusual Line Of Business For Lawyers*, N.Y. TIMES, Aug. 16, 2000, at C1; <http://www.tturner.com/profile.html> (last visited Dec. 15, 2003).

36 *See* <http://www.tturner.com/profile.html> (last visited Dec. 15, 2003); Winerip, *supra* note 23, at 48.

37 *See* Katsh, *supra* note 33, at 168-97.

38 *See* Jonathan D. Glater, *Using Software to Sniff Out Electronic Evidence*, N.Y. TIMES, Sept. 4, 2001, at C1.

39 *See id.*; France, *supra* note 29 (describing the new digital capabilities available to plaintiff attorneys).

Also, new software promises to make feasible (and to a certain degree already has) what was previously almost unthinkable for a solo practitioner: uncovering information relevant to a case as effectively as a multi-member law firm with inexhaustible manpower.⁴⁰ Online filing of documents and motions, as well as official websites on which court opinions are published, make it easier and less expensive for litigants and their attorneys to meet procedural requirements and gather information about their own and other cases. Courts' willingness to accept submission of electronic documents as evidence not only facilitates compliance with evidentiary rules, but also helps solo practitioners and small law firms in conducting the discovery stage, since these documents can be searched and crosschecked electronically and new software tools are being developed to enhance such capabilities.⁴¹ In these ways, the information revolution is leading to an increased scope of litigation and bargaining power, in that disputes that formerly seemed hopeless are now winnable.

While it may seem far-fetched to imply that because of the Internet individuals have acquired power comparable to that of large corporate entities,⁴² it is definitely the case that the Internet equips individuals with unprecedented tools for publishing their ideas and learning from others. Via the Internet, solo practitioners like Mr. Turner can reach potential clients both domestically and abroad at relatively low costs. Clients need not meet with Mr. Turner before hiring him, and, throughout the professional relationship, communication through the Internet, telephone and fax often suffices.⁴³

Accident victims who were not aware of possible defects in their vehicles or tires can learn about similar cases by reading materials distributed on Mr. Turner's website as well as websites of other lawyers,⁴⁴ research firms,⁴⁵ and corporate and government entities.⁴⁶ Websites such AskMe.com answer legal questions free of charge to all who are interested; a 15-year-old with no legal education or experience was ranked first for the quality of *answers* he supplied on one such

40 See Glater, *supra* note 38.

41 See *id.*

42 See NICHOLAS NEGROPONTE, BEING DIGITAL 19 (1995) (stating that large media companies have no advantage over individuals when we are all just moving bits around).

43 See Winerip, *supra* note 23, at 50 (interviewing Turner while he was on his way to meet a client for the first time after having taken her case months earlier without having met her in person).

44 See, e.g., <http://www.tturner.com> (last visited Dec. 15, 2003); <http://defectivetiresinfocenter.com> (last visited Dec. 15, 2003).

45 See, e.g., <http://www.safetyforum.com> (last visited Dec. 15, 2003).

46 See <http://www.nhtsa.dot.gov/> (last visited July 14, 2003).

site.⁴⁷ Although lay people will probably always require paid legal assistance in their dealings with the law and the courts, they can now obtain at least some information and advice with the strike of a key on their computer (provided they have Internet access), for negligible cost, if any. The rankings of answers offered by such sites also help people evaluate the answers they have received, and they can choose to “shop around” for other answers and compare the different responses obtained. Even if this is somewhat time consuming, it is undoubtedly easier and less expensive to shop for answers virtually than in the offline world.

But the Internet is much more than a prodigious source of information for its users. By creating a 24-hour a day global “open mic” environment, the Internet has engendered an effective arena for public opinion of a kind missing from our society in centuries, as new virtual gathering ‘places’ provide a convenient and inexpensive arena for exchange of ideas, opinions and word of mouth. While in the past it was prohibitively difficult for individual consumers to communicate with one another and compete with the near monopoly corporations have traditionally had in mass communications, consumers can now be in contact with one another, gather and spread information and join forces through electronic communications on the Internet, either through such individuals’ own websites or through chats or listservs run from other websites. This is possible because the cost of creating and running a website or connecting to the Internet is a very small fraction of the cost of buying space in a newspaper, paying for a television commercial, not to mention putting up a billboard. These developments are having a direct effect on consumer complaints and disputes. While in the past it would have been expensive and ineffective for individual consumers to notify other customers of the fact that a company they had had a dispute with had not honored its obligation to its customers, today such an individual can cause substantial harm to a company’s reputation with negligible cost and effort.⁴⁸

Of course, the new possibilities for communication of information on the Internet have not evened out the playing field completely, but have merely made the disparities in publicity capabilities less extreme between large or wealthy entities and their smaller counterparts. The former still maintain a considerable advantage over the latter by being able to create sites that are more

47 Michael Lewis, *Faking It*, N.Y. TIMES MAGAZINE, July 15, 2001, at 32.

48 See, e.g., <http://ad-rag.com/article.php?sid=132> (last visited September 27, 2001) (posting the email exchange between Nike and a teenager who, in response to Nike’s “design your own shoe campaign,” tried to order Nike shoes with the words “Sweat Shop” on them).

attractive, colorful, “user-friendly,” more accessible through one-click links from other websites, and by paying search engines to give precedence to their sites. Moreover, search engines themselves may have alliances or cultural or political agendas that heavily influence which websites people visit. It is also important to bear in mind that at this point in time there are still many people who are not connected to the Internet because of deficiencies in income, literacy or infrastructure. However, in general, it seems safe to say that Internet technology is supplying individuals and small entities with unprecedented capabilities for competing with larger bodies, and in that respect, has an equalizing effect.

B. DISINTERMEDIATION

The Internet makes consumers increasingly less dependent on the “middle man” – the insurance agent, the travel agent, the publisher, and the attorney⁴⁹ – because the Internet allows us to access desired information directly, and because it allows us to order products or services directly from wholesalers. The field of dispute resolution will be deeply affected by such developments. Lawyers will no longer be the sole proprietors of legal information and know-how.⁵⁰ Some legal information is already given away free online: legal decisions and articles can be accessed online, for instance, and even dispute resolution processes have begun taking place online, thereby reducing language and process barriers associated with courtrooms and certain alternative processes, such as arbitration.⁵¹

Some commentators believe that the abundance of legal information, products and services available to us online will actually yield a paradoxical result, creating an overflow of information that will serve to increase our dependence on experts and professionals, such as attorneys.⁵² Since human capacity is limited, no matter how much information is disseminated we will have no choice but to rely on others to sort out for us what is relevant and reliable. In fact, it may be that the prodigious and unprecedented supply – some would say

49 This is a two-way process. Not only are individuals able to skip the middleman, companies can skip the retailer and approach the consumer directly, as in the case of Dell Computers.

50 See MICHAEL LEWIS, NEXT: THE FUTURE JUST HAPPENED 101-03 (2001).

51 See *infra* Part IV.

52 See MICHAEL L. DERTOUZOS, WHAT WILL BE? 239 (1997) (stating a belief that in the future we will generally have to rely more on experts and professionals).

oversupply – of information makes the interpretation of experts more necessary, not less.⁵³

C. GLOBALIZATION AND DECENTRALIZATION

In recent years we have witnessed a wide variety of phenomena, all having to do with a weakening of the U.S. government's control over electronic communications and the related weakening of social control in general. One example is the liberalization (some would say *de facto* abolition) of U.S. federal control over international export of encryption codes.⁵⁴ In 1999, the Clinton administration permitted the export of encryption software from the U.S. to most countries, subject to the requirement that the exporters of such materials make the encryption algorithm available to the U.S. government. This liberalization was prompted by a lawsuit filed by Bernstein, an academic who was unable to teach, discuss or publish his research on cryptography in light of the export controls that existed at the time.⁵⁵

The online availability of gambling facilities that are accessible to citizens of states that prohibit such activities provides another example of the difficulty of regulating online behavior.⁵⁶ One set of

⁵³ Whether reliance on intermediaries increases or not, it seems likely that in the long term their role in society will change. In a world in which more and more information is made widely available, intermediaries will no longer derive their strength primarily from their exclusive ability to access information. Rather, their value will lie in their ability to translate and interpret information for lay people. Naturally, some individuals will turn to experts' assistance to supply information as a matter of convenience or educational deficits, but such services will come at a lower cost, as opposed to services related to explanation and interpretation of legal documents, which will probably not diminish in cost. *But see* ETHAN KATSH, *LAW IN A DIGITAL WORLD* 175, 180 (1995) (stating that the lawyer's role as translator and interpreter will diminish as a result of digital communication and that the key to digital lawyering will be understanding how to use information to develop new relationships.)

⁵⁴ See Jeri Clausing, *In a Reversal, White House Will End Data-Encryption Export Curbs*, N.Y. TIMES, Sept. 17, 1999, at C1.

⁵⁵ See *Bernstein v. United States Dep't of State*, 974 F. Supp 1288 (N.D.Cal. 1997) (holding that regulations limiting the export of a mathematician's cryptographic computer source code to a greater extent than other software violated the First Amendment). The Ninth Circuit Court of Appeals affirmed this decision in *Bernstein v. United States Dep't of State*, 176 F. 3d 1132 (9th Cir. 1999). However, the Court of Appeals' decision was later withdrawn and the case was scheduled to be reheard en banc at a later time. See *Bernstein v. United States Dep't of State*, 192 F.3d 1308 (9th Cir. 1999). The hearing has not been scheduled to date.

⁵⁶ See LAWRENCE LESSIG, *CODE AND OTHER LAWS OF CYBERSPACE* 14 (1999).

difficulties associated with regulation of online gambling has had to do with the complexity of resolving the relevant jurisdictional questions associated with users engaging in gambling activities that are illegal in the state in which such users reside, but are legal in the site from which the online gambling facilities operate.⁵⁷ Other difficulties have had to do with the enforcement of the prohibition against online gambling when the jurisdictional issues have been resolved or are straightforward. Most recently, Congress has launched an effort to address these difficulties by restricting the flow of money from American credit card companies and payment services to online gambling sites. Although there seems to be a high chance of such legislation passing this year, the online gambling industry seems confident that its users will find ways to bypass it.⁵⁸

A third example of the difficulty governments are facing in regulating online activities has to do with the regulation of children's access to sexually explicit materials in face of the abundance of pornography on the Internet.⁵⁹ Congress's attempts to regulate children's access to pornographic websites have been mostly unsuccessful in meeting constitutional challenges before the Supreme Court.⁶⁰ The Supreme Court's decisions on these issues reflect the

57 See Matt Richtel, *Companies in U.S. Profiting from Surge in Internet Gambling*, N.Y. TIMES, July 6, 2001, at A1; Mark Lander, *Web Comes Up Fast on the Outside*, N.Y. TIMES, Mar. 18, 2001 (stating that "[j]ust as the Internet dissolves barriers in the world of information, these [online gambling] Web sites make a hash of the rules and regulations that protect one country from activities that are unlawful on its territory but legal elsewhere").

58 See Bob Tedeschi, *Congress Wants to Put More Restrictions on Online Gambling and the Sites Look for Ways Around the Rules*, N.Y. TIMES, Mar. 31, 2003, at C6.

59 See Katsh, *supra* note 33, at 181-89 (stating that "[t]he increasing availability of sexual materials due to the powerful distribution and production capabilities of the new media is assaulting the traditional legal model of obscenity" and predicting that "in the future control of such [pornographic] material will leave more, not less, discretion and choice in the hands of the individual").

60 The Communications Decency Act, 47 U.S.C. § 223 (1994 & Supp. IV 1998), which was passed by Congress in 1996 and criminalized the knowing transmission of obscene or indecent communications to minors, was declared as an unconstitutional content-based restriction on free speech by the Supreme Court in *Reno v. ACLU*, 521 U.S. 844 (1997). The Child Online Protection Act, 47 U.S.C. § 231 (1994 & Supp. IV 1998), was passed by Congress in 1998 in an attempt to restrict online commercial distribution of materials harmful to minors. This Act was twice successfully challenged before the United States Court of Appeals of the Third Circuit. See *ACLU v. Reno*, 217 F.3d 162 (3d Cir. 2000); *ACLU v. Ashcroft*, 322 F.3d 240 (3d Cir. 2003). It is now pending, for the second time, before the Supreme Court. See *Ashcroft v. ACLU*, 124 S.Ct. 399 (2003 cert. granted). See also Linda Greenhouse, *Supreme Court Roundup: Justices Say Doctors May Not Be Punished For Recommending Medical Marijuana*, N.Y. TIMES, Oct. 15, 2003, at A14. Finally, in 2001 Congress successfully passed the Children's Internet Protection Act, Pub. L. No. 106-554 (2000), which requires schools and public libraries that receive federal

difficulties inherent in regulating online access to such materials while upholding free speech protections, as well as the lack of consensus on these matters, both within and outside the Court.

The above phenomena are not unique to the U.S. They are also not new occurrences; their roots lie in the pre-Internet era in which the difficulty of controlling various means of communication had already become apparent. One interesting case in point is the story of ABC's cancellation in the late 1980s due to Soviet pressure of the screening of "Amerika," a fictional story depicting the U.S. under Communist rule.⁶¹ The Soviets were obviously concerned about the story permeating into the U.S.S.R. and did not trust their ability to regulate the information communicated to their citizens. In the post-Internet era, governmental controls seem even more vulnerable and the goal of restricting access to information in this manner no longer seems plausible.

As demonstrated by the examples described above, the ability to contact a vast number of people across the globe and to deliver information to them at relatively low cost through the Internet, which recipients can later redistribute (altered or in original form) at similarly low cost, make the Internet a medium that will always be more difficult to regulate than older media. Although, as Lessig has shown, we can change the Internet so as to make it more regulable and increase the level of governmental control over it,⁶² it seems to me that the Internet has already eroded and will further continue to dilute social patterns of authority.

One valuable way, however, in which the Internet actually will facilitate governmental regulation of the private sector is the ease with which information about individuals' and local governments' negative experience with corporations' products and services will be disseminated. In the example of Ford and Firestone, the American government faced difficulty in monitoring those companies' conduct and activities abroad; the fact that they had recalled tires in several countries in the Middle East, South America and the Far East months before the problem was uncovered in the United States⁶³ is testament

funding to use Internet filters to block access to pornographic websites. This Act has been declared constitutional by the Supreme Court. *U.S. v. American Minors' Library Ass'n, Inc.*, 123 S.Ct. 2297 (2003).

61 See Katsh, *supra* note 33, at 153.

62 See Lessig, *supra* note 56, at 43-60.

63 See Labaton, *supra* note 6 (stating that federal officials claimed to have a limited ability to monitor recalls of cars sold abroad in explaining why they had not been aware of the fact that Ford recalled tires in Venezuela and Thailand, and received complaints about the tires in Venezuela and Saudi Arabia as early as 1998).

to this difficulty. In this case, had the original fatalities occurred in an area with more Internet access, it is quite likely that the delay in reaching the American media would not have been nearly as long.⁶⁴

In the civil context, too, the Internet is having a profound impact on the government's ability to enforce laws and regulations. In the past, litigants could destroy records through the simple means of a paper shredder or a lit match. Today, such a vast proportion of data relevant to most civil cases has been recorded or transmitted digitally that even the most determined of litigants are finding that evidence that they thought was gone forever could in fact be resurrected (the examples of Monica Lewinsky's email being retrieved to her and the President's chagrin, and the restoration of long-deleted emails sent by the technologically savvy Bill Gates and other Microsoft executives that were later resurrected and used to their detriment in the case against Microsoft, conveyed this message to any and all future litigants).⁶⁵

64 The two largest online marketplaces, Amazon and eBay, now include the U.S. Consumer Product Safety Commission's product recall information on their websites. This illustrates how the Internet creates new channels through which information about defective products can be communicated to consumers. *See* Mary Hillebrand, *Amazon, eBay Add Product Safety Links*, ECOMMERCE TIMES, Apr. 3, 2000 at <http://www.ecommercetimes.com/perl/story/2883.html> (last visited Nov. 30, 2003). In a recent instance, an Amazon user received an email from the company notifying him that a baby car seat on his "wish list" was recalled. This policy struck me as particularly significant for several reasons. First, the consumer is not required to "pull" the information about the malfunctioning product (i.e. actively search for such information) but can rely on Amazon to supply it. Second, Amazon provides the information even though it is not the manufacturer or seller of the product but is merely a marketplace through which such transactions take place. This demonstrates the interesting new relationships developing between private and public entities in the Internet society. Last, Amazon provides the information even when a purchase has not been consummated and the consumer has merely showed interest in the product by placing it in his or her "wish list."

65 *See* JEFFREY ROSEN, *THE UNWANTED GAZE: THE DESTRUCTION OF PRIVACY IN AMERICA* 7, 54 (2000) (discussing how email, even after it has been erased, can be resurrected at a later stage, as was demonstrated by the Starr investigation). Since the Lewinsky and Gates investigations, several regulations and statutes requiring companies to retain data and records have been adopted (*see, e.g.*, Health Insurance Portability and Accountability Act of 1996, Pub. L. 104-191; Sarbanes-Oxley Act of 2002, Pub. L. 107-204), but the prospect of companies attempting to conceal information in cases of corporate cover-ups is obviously not a thing of the past.

D. CULTURAL DIFFERENCES

The Internet brings together people not only operating under different legal systems, but also people of widely disparate cultural backgrounds. Even without crossing national geographic boundaries, traditions of etiquette, deference, combativeness, or sex roles can vary significantly, and internationally the difference may be even more pronounced. One well-known difference between the United States and other countries, even Western European ones that appear relatively similar to Americans culturally, is the oft-cited American propensity for litigiousness.

In the Ford-Firestone case, the two corporations involved – one American and the other Japanese – are associated with two very different cultures that are widely known to be dissimilar in their disputation and negotiation styles.⁶⁶ For an experienced American businessperson, receiving a “cease and desist” letter, a subpoena, or a notice of lawsuit may be a familiar, if not routine, occurrence. To a Japanese executive, however, such an event might seem extraordinary.⁶⁷ In Japan the very notion of criticizing someone or complaining has a very different meaning than it does in the United States, especially given the shortage of practicing lawyers there,⁶⁸ which makes legal action the exception rather than the norm. Language barriers also play a role. But language barriers cannot be fully resolved by translation. Linguistic differences echo cultural

⁶⁶ See John L. Graham, *The Japanese Negotiation Style: Characteristics of a Distinct Approach*, 9 NEGOTIATION J. 123, 128 (1993) (stating that the Japanese negotiation style is less aggressive and more polite and that positive promises are preferred over threats and warnings); Philip J. McConaughay, *Rethinking the Role of Law and Contracts in East-West Commercial Relationships*, 41 VA. J. INT’L L. 427, 442, 479 (2001) (discussing how in Japan law was traditionally regarded as a regulatory tool and not as a means for private ordering, and thus has often been subordinated to relational values); Danian Zhang & Kenji Kuroda, *Beware of Japanese Negotiation Style: How to Negotiate with Japanese Companies*, 10 J. INT’L L. BUS. 195 (1989). But see John Haley, *The Politics of Informal Justice: The Japanese Experience 1922-1942*, in 2 THE POLITICS OF INFORMAL JUSTICE 140 (Richard L. Abel ed., 1982) (claiming that cultural factors have had less to do with the Japanese’s low propensity to sue than institutional barriers and managerial models that, for decades, have purposefully steered the Japanese to alternative forums).

⁶⁷ See Zhang & Kuroda, *supra* note 66, at 198, 201, 209 (stating that the notion of harmony is an important social value in Japan, that Japanese negotiators tend to place more importance on maintenance of relationships than on the specifics of an agreement, and that lawyers are treated with suspicion and disdain).

⁶⁸ See Steven Irvine, *More Lawyers Please*, M & A BRIEFING, June 18, 2001 at www.FinanceAsia.com (last visited Sept. 21, 2001).

differences and therefore translations often fail to bridge the gaps in parties' understandings and expectations.⁶⁹

The Internet, by facilitating globalization and contact between people who are at a similar technological level, but whose cultures are different, may make clashes of this kind more common. On the other hand, by transforming daily contact between, for example, Japanese and American companies and individuals into a highly ordinary occurrence, it seems inevitable that cultural traditions, which survived almost fully intact through prior technological revolutions, will be influenced and diluted as never before. Given what has happened in the rest of the world, it seems likely that Japan will be more influenced by what is happening in the United States than vice versa.⁷⁰

The Internet, by promoting a global economy, probably contributed to the now long-standing Japanese slump by placing Japanese corporations in direct competition with Western corporations that turned out to be more rigorous in their weeding out of inefficient employees and business practices.⁷¹ In general, by furthering globalization, the Internet engenders and creates an unprecedented degree of interdependence among world economies. The scrutiny – at times extremely unflattering – of Japanese business practices and economy has generated a similarly unprecedented degree of pressure on Japanese businesses and government, often about very specific matters such as allowing a specific bank to fail.⁷²

Also, by enabling near instantaneous purchase or sale of a nation's currency, the Internet has made nations and their leaders more accountable to globally accepted norms. A Malaysian prime minister, to take one example, who had previously issued anti-foreign

69 See Raymond Cohen, *Resolving Conflict Across Languages*, 17 NEGOTIATION J. 17 (2001); Zhang & Kuroda, *supra* note 66, at 205-06.

70 Even in countries like Iran and China, where there are strong anti-American sentiments from the top political echelon, society has been drawn to and influenced by American culture, as is evidenced by the popularity of American television programs such as "Bay Watch" and the "Simpsons." See Editorial, *MTV Rules*, N.Y. TIMES, Sept. 13, 1994, at A22. This is not to say that American culture will displace Japanese culture completely. Rather, American cultural icons and practices have already and will further be transformed to accommodate the local culture in the process of their transplantation to Japan. See Aviad Raz, *RIDING THE BLACK SHIP: JAPAN AND TOKYO DISNEYLAND* (1999).

71 See Tsuchiya Moriyaki & Konomi Yoshinobu, *SHAPING THE FUTURE OF JAPANESE MANAGEMENT: NEW LEADERSHIP TO OVERCOME THE IMPENDING CRISIS* 70-71, 75-81, 92-94, 138, 175, 236-38 (1997); Thomas Friedman, *Japan's Nutcracker Suite*, N.Y. TIMES, Apr. 30, 1999, at A31; THOMAS FRIEDMAN, *THE LEXUS AND THE OLIVE TREE* 60 (2000).

72 See Stephanie Strom, *Tokyo Fails to Come Up With a Plan on Ban Crisis*, N.Y. TIMES, Apr. 5, 2001, at W1; Ken Belson, *Japan Moves to Expand Cleanup of Banks*, N.Y. TIMES, Dec. 2, 2003, at W1.

comments with impunity, in the Internet era suffered immediate financial repercussions from foreign investors after he made unfounded accusations that “a Jewish-led conspiracy has sought to undermine Malaysia’s economy.”⁷³ It seems, therefore, that previously insular cultures will inevitably have to accommodate basic international expectations about behavior that affects stability or credibility, or pay an almost unimaginable price of isolation and deprivation.

E. PRIVATE KNOWLEDGE VERSUS PUBLIC WELFARE

The Internet has made possible a level of collection, interpretation and dissemination of data that used to be the monopoly of the government or quasi-governmental bodies. Most information about incidents occurring in different parts of the country or the world would have been out of reach of private individuals, or if it were accessible, would have been prohibitively expensive or not worth the opportunity cost of, for example, a solo practitioner lawyer. This has affected and will increasingly affect issues relevant to public safety, like the Ford-Firestone malfunction, that in the pre-Internet age would, most likely, have been uncovered initially by the government or a quasi-governmental body instead of being uncovered by private individuals or professionals. These private entities are often motivated primarily by their own financial interest, which may conflict with the public welfare. In the case of the Ford-Firestone defective tire cases, it turns out that plaintiff attorneys, not to mention the plaintiffs themselves, had known for several years about the safety hazard and had failed to alert authorities. The attorneys claimed that their conduct was driven by a desire and duty to promote the interest of their clients by maximizing the corporations’ incentive to offer large settlements, and that they had no similar duty towards potential victims.⁷⁴ The manufacturers’ interest in concealing the problems from the authorities and the public is obvious.

Even more far-ranging public-private conflicts occur in the area of Research and Development (R & D), which will be permanently influenced by the Internet. R & D (pure or applied scientific research being conducted by scientists in the employment of for-profit

⁷³ See Seth Mydans, *Malaysia Autocrat May Win Now but Lose Later*, N.Y. TIMES, Nov. 27, 1999, at A3; Wayne Arnold, *More and More Malaysians Question Economic Policies*, N.Y. TIMES, Dec. 4, 1999, at C2 (stating that the prime minister’s anti-foreign talk has alienated the much needed foreign investment fund managers).

⁷⁴ See Bradsher, *supra* note 26.

corporations), and the frequency with which these scientists and corporations know things related to the public interest before the government does, will be affected profoundly.

In some ways, the Internet will again level the playing field among large government-funded projects, world famous R & D departments of the largest corporations, and small R & D teams. Journals, which were prohibitively expensive to subscribe to, are now offered, at least in abstract form, online. The casual exchange of information among scientists has been greatly facilitated by informal email. Attendance at expensive international conferences is no longer indispensable. All this will result in a higher frequency of individuals employed by or having sole legal allegiance to for-profit companies (large and small) making discoveries (or being aware of them) that relate to the public interest. The question arises, what will the scientist or his/her corporate employers do with such information. Potential examples could include important discoveries about ways to decrease product obsolescence, which decreases sales; discoveries about how to lower fuel emissions, which increases manufacturing costs to an extent that would not be recouped by a potential price increase; or creation of a fully usable electrical car by an automobile company whose parent company has oil interests. Increasingly, because of the facilitation of up to the minute scientific knowledge fostered by the Internet, individuals, scientists, engineers, entrepreneurs and executives will possess knowledge that if shared publicly would have negative consequences for their own interests.

The Internet, and specifically email, by fostering informal exchanges among scientists and by enabling a reader of scientific literature to contact article authors easily, has created more porous boundaries between laboratories. This will lead to an increase in conflicts regarding patent rights and attribution of findings among academic scientists, whose careers depend on receiving credit for discoveries.

F. CONFLICT AND DISPUTE RESOLUTION

The frequency of conflicts requiring resolution will increase in the Internet society.⁷⁵ The growing number of international transactions and communications, as well as the increase in direct

⁷⁵ See Ethan Katsh et al., *E-Commerce, E-Disputes, and E-Dispute Resolution: In the Shadow of "e-Bay Law"*, 15 OHIO ST. J. ON DISP. RESOL. 705 (2000); ETHAN KATSH & JANET RIFKIN, *ONLINE DISPUTE RESOLUTION: RESOLVING CONFLICTS IN CYBERSPACE* 3 (2001).

communication between consumers and manufacturers and among individuals of different cultural backgrounds without the aid of intermediaries, yields a potential for disputes greater than has ever been present before.

Conflict resolution inevitably will be transformed accordingly. Dispute resolution mechanisms will have to be easily accessible and provide the quick resolutions that are demanded by the dynamic and fast-paced Internet society.⁷⁶ Mechanisms will have to be modified so as to facilitate communication among people who are physically distant and who cannot afford extended interruptions of their personal and business lives. These processes will have to promise enforceability of their resolutions and will have to deliver their users just decisions and fair treatment. The Internet society will, most likely, alter the dispute resolution landscape in fundamental ways, as further described below.

IV. TRADITIONAL DISPUTE RESOLUTION INSTITUTIONS

Traditional dispute resolution institutions, which can, for the most part, be divided into courts and ADR processes, have long fulfilled a variety of important social functions, only one of which is dispute resolution.⁷⁷ In spite of all the obvious and subtle differences in the external trappings of the traditional mechanisms, and despite the fact that the relative strengths and weaknesses of these institutions do vary, a common tendency has characterized both – a tendency to favor the powerful, the affluent and the “well-connected” at the expense of the disempowered, the indigent and the newcomer to the system.

A. THE APPEAL OF ADR

Research has shown that more and more disputes are being resolved through ADR. Most court cases in the United States are

⁷⁶ See Katsh et al., *supra* note 75, at 712 (stating that “the ease of access to a court or dispute resolution service will affect the extent of use of the service”).

⁷⁷ See MARTIN SHAPIRO, COURTS: A COMPARATIVE AND POLITICAL ANALYSIS (1986) (describing courts as serving three primary functions: dispute resolution, social control and lawmaking); see also Steven D. Smith, *Reductionism in Legal Thought*, 91 COLUM. L. REV. 68, 71-74 (1991) (stating that that law has three functions: dispute resolution, coordination, and an ameliorative role in critiquing and ameliorating social order “by attempting to move society to a condition of greater goodness or justice.”)

settled by the courts, through court-annexed ADR programs or independent ADR,⁷⁸ but these numbers do not include the substantial number of disputes that are resolved through alternative means without ever having ripened into full-fledged claims filed with the court system.⁷⁹

Disputants turn to ADR over litigation for three reasons: efficiency, flexibility and control. ADR processes are often less costly and less time consuming than litigation.⁸⁰ A quicker process means having to devote less time and energy to the resolution of the conflict, enabling disputants to maintain a sense of normalcy in their private life and work environment throughout the resolution phase. Moreover, ADR allows for a wide and flexible selection of remedies unavailable to litigants in the relatively rigid court system.⁸¹ In mediation, parties are free to devise any remedy they see fit. This freedom is especially helpful in cases in which the dispute is between parties with an ongoing relationship who do not wish to sever or otherwise damage it by resorting to a combative court proceeding. Finally, ADR enables disputants to retain control of the process⁸² (to a varying degree, depending on the specific type of ADR mechanism employed), often allowing parties to determine whether they would like to participate in the proceedings to begin with, as well as choice of neutral, choice of law, and, in some cases, freedom to accept or reject a non-binding resolution. In many cases, one of the prime advantages ADR processes offer disputants is privacy,⁸³ or control over the information they wish to disclose to outsiders regarding their conflict.

78 See Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4, 26-27 (1983).

79 See *id.* at 16.

80 See Carol A. Wittenberg et al., *Why Employment Disputes Mediation is on the Rise*, 578 PLI/LIT 747, 750 (1998).

81 See Gustav Niebuhr, *Dioceses Settle Case of Man Accusing Priest of Molestation*, N.Y. TIMES, Aug. 22, 2001, at A17 (describing the settlement of a case involving alleged molestation by a priest, which, aside from monetary compensation, specified steps to be taken by two Roman Catholic Dioceses so as to prevent molestation from recurring in the future and to allow victims to report such cases anonymously if they occur).

82 See Mary P. Rowe, *People Who Feel Harassed Need a Complaint System with Both Formal and Informal Options*, 6 NEGOTIATION J. 161, 166 (1990); Barry Winograd, *Men as Mediators in Cases of Sexual Harassment*, 50 DISP. RESOL. J. 40, 41 (1995).

83 See Jacqueline M. Nolan-Haley, *Court Mediation and the Search for Justice Through Law*, 74 WASH. U. L.Q. 47, 54 (1996).

B. THE ADVANTAGES OF THE COURT SYSTEM

Compared to ADR, courts present disputants with four main advantages: finality of conflict, catharsis, a mechanism for error correction, and enforceability of decisions. As an authoritative non-voluntary triadic dispute resolution mechanism, litigation offers the prospect of closure and finality to a dispute,⁸⁴ while ADR is often perceived as a first step in dispute resolution, but without the conclusiveness offered by litigation. That is why mediation is most successful where implicit mechanisms that strengthen its definitiveness exist – for example, an ongoing relationship between the parties or parties' reputation. For that reason, in close-knit societies in which word of mouth and public opinion were effective tools of social control, ADR-type processes were finite and did not require the power and authority of the state in order to be definitive. Nowadays, however, informal dispute resolution processes often lack the authority and legitimacy that is required in order to resolve disputes successfully.

Second, popular descriptions of courtroom proceedings often employ theatrical terms, such as “arena” and “drama,” and the setting of a trial can generate for the litigants a feeling of catharsis.⁸⁵ A trial takes place in a public setting before an audience. Both sides have a chance to confront each other and tell their stories, and the proceedings culminate in the reading of the decision rendered by the neutral party. Some empirical studies, in fact, show that litigants feel that appearing in court and telling their stories leave them with a sense of relief and accomplishment even if they ultimately lose their case.⁸⁶

Third, the hierarchical structure of courts strengthens courts' legitimacy, since it allows for error correction through appeal.⁸⁷ Most ADR processes, by contrast, do not allow for a review of the resolution reached by a higher instance, and even in arbitration where such

84 See Shapiro, *supra* note 77, at 49.

85 ADR processes may also generate a sense of catharsis, but it seems to me that the courtroom, with its monumental architecture, decorum and dress code generates a unique and different cathartic experience.

86 See J. M. Conley & W. M. O'Barr, *Hearing the Hidden Agenda: The Ethnographic Investigation of Procedure*, 51 LAW & CONTEMP. PROBS. 181, 186-87 (1998) [hereinafter Conley & O'Barr, *Hidden Agenda*]. But see J. M. Conley & W. M. O'Barr, *Litigant Satisfaction Versus Legal Advocacy in Small Claims Court Narratives*, 19 LAW & SOC'Y REV. 661, 663 (1985) [hereinafter Conley & O'Barr, *Litigant Satisfaction*] (stating that litigants are frustrated by rules that limit their speaking opportunities, and prefer forums that put fewer limits on the form and duration of their speech. These findings suggest that disputants can feel abused, frustrated and humiliated by a court system that has not enabled them to tell their stories, forcing them to leave out details that did not fit into legal rubrics or categories of relevance and credibility).

87 See Shapiro, *supra* note 77, at 49.

review is available, it is generally limited to extraordinary circumstances such as corruption or fraud in the procurement of an arbitration award.⁸⁸ These issues can be of special importance if questions of discriminatory treatment of minorities or other relatively disempowered groups are raised after the fact; indeed ADR mechanisms have often been criticized precisely along these lines.⁸⁹

Finally, since courts have the power of the state behind them, they can ensure enforcement of their decisions. As our interactions and disputes in modern society are often between strangers, there are relatively few cases in which implicit non-authoritative mechanisms that do not have the power of the state to support them are able to guarantee enforcement of resolutions. For all other cases, courts offer a variety of means that ensure compliance and further guarantee finality to the conflict.

C. CRITIQUES OF TRADITIONAL DISPUTE RESOLUTION MECHANISMS

1. COURTS

In their study, Conley & O'Barr conducted extensive ethnographic research on litigants' expectations from the court system.⁹⁰ They concluded, among other things, that litigants attach a great deal of importance to procedural rather than substantive issues, since the former affect litigants' opportunity to "tell their story."⁹¹ They found that litigants – precisely because they place such importance on procedural rules – were often frustrated with courts' rules of procedure and evidence that restricted their ability to convey freely their accounts of events.⁹² For this reason, many of the litigants were more satisfied with small claims court procedure, which allowed

88 See Federal Arbitration Act, 9 U.S.C. § 10(a); See also Stephen P. Younger, *Agreements to Expand the Scope of Judicial Review of Arbitration Awards*, 63 ALB. L. REV. 241, 241-47 (1999) (stating that parties to an arbitration limit their right to an appeal in exchange for reduced costs and an expedited process, and therefore judicial review of arbitration awards under both the Federal Arbitration Act and state rules has been extremely limited.).

89 See *infra* notes 108-11 and accompanying text.

90 See Conley & O'Barr, *Litigant Satisfaction*, *supra* note 86; Conley & O'Barr, *Hidden Agenda*, *supra* note 86; J. M. Conley & W. M. O'Barr, *Lay Expectations of the Civil Justice System*, 22 LAW & SOC'Y REV. 137 (1988) [hereinafter Conley & O'Barr, *Lay Expectations*].

91 See Conley & O'Barr, *Hidden Agenda*, *supra* note 86, at 186-87.

92 See Conley & O'Barr, *Litigant Satisfaction*, *supra* note 86, at 665-72.

them more freedom in the presentation of their cases.⁹³ However, Conley & O'Barr also discovered that litigants' freedom to tell their stories turned out to be a double-edged sword. As small claims courts were still courts, albeit with relaxed rules of procedure and evidence, litigants' accounts given in every day language without clear attribution of blame often proved inadequate to substantiate a legal claim.⁹⁴ Without appropriate intervention by the judge, delivering a lay narrative of events often costs litigants their case. Language, as Conley and O'Barr demonstrated, is a political resource, and the party who possesses knowledge of how to use it has an advantage in the courtroom.

Similarly, Yngvesson & Mather expose the role language and other contextual factors play in limiting people's access to dispute resolution institutions in general and to courts in particular.⁹⁵ The authors present three such contextual constraints.⁹⁶ The first, open versus closed arenas, measures whether the process is open to the parties and/or an audience or whether one or both groups are excluded from it. The second constraint is the degree to which the process requires knowledge of specialized language and procedure, which would give an advantage to those with the needed expertise or to those who can afford an intermediary. Last, the authors address constraints created by organizational complexity. The greater the number of organizational levels a dispute must pass through in order to be resolved, the more likely it is for laws external to the case and meanings not intended by the parties to be introduced into the conflict.⁹⁷

Modern Western courts are characterized by all three constraints identified by Yngvesson & Mather. First, courts tend to be relatively closed arenas. Although most trials are open to the public, they are conducted in intimidating highly policed buildings, with limited capacity. Second, courts require specialized knowledge of language and procedure. Conley & O'Barr demonstrate how knowledge of these factors directly affects the outcome of cases.⁹⁸ And, as a third constraint, courts have complex organizational structures. The resolution of a case requires different stages of processing during which the case is defined and redefined by various actors.

93 *See id.* at 662.

94 *See id.* at 662, 684-90.

95 *See* Barbara Yngvesson & Lynn Mather, *Courts, Moots and the Disputing Process*, in *EMPIRICAL THEORIES ABOUT COURTS* (Keith O. Boyum & Lynn Mather eds., 1983).

96 *See id.* at 51, 66-67.

97 *See id.* at 51, 67.

98 *See* Conley & O'Barr, *Litigant Satisfaction*, *supra* note 86, at 662-63.

This description echoes, to a certain extent, Galanter's analysis of how structural characteristics of courts systematically favor the "haves" over the "have-nots."⁹⁹ He describes how the system rewards repeat players, who appear before it frequently, at the expense of "one-shotters," disputants who are involved in litigation once or twice in their lifetimes. Repeat players can afford to hire large law firms that are familiar with the specialized language and procedure of the court system, while one-shotters typically can only afford to hire solo practitioners who have less experience and are not as specialized as their incorporated colleagues.¹⁰⁰ Having repeat players engage large firms raises the costs and stakes of litigation. These characteristics of the court system have the effect of limiting access to justice, unevenly deterring the poor and other disempowered segments of society.

Although access of the poor to criminal courts may be higher than to civil courts, Sally Engle Merry found in her study of an under-privileged poly-ethnic urban neighborhood that criminal courts were ineffective in resolving disputes that arose in that neighborhood.¹⁰¹ The cases were commonly dismissed or resolved in a superficial and temporary manner, leaving the disputants to resort to self-help (if powerful enough); avoidance (if too weak to force their wishes but well-off enough to move to another residence), or endurance (if unable to resort to self help and without the financial means to relocate).¹⁰² Since disputes frequently arose between members of different ethnic groups that did not have shared social norms, informal mechanisms such as mediation could not be relied on either as a means for resolving disputes or for restoring social harmony.¹⁰³ In environments in which there was no effective third party to resolve disputes between members of different ethnic groups, disputes were resolved with the more powerful party always emerging the victor.¹⁰⁴ Merry's findings thus illustrate the limitations of both courts and alternative forums in certain settings. In such settings the courts may be inadequate to address the community's needs, having to focus on felonies and allowing smaller but very real crimes to fall between the cracks. Meanwhile, ADR was of only limited usefulness in Merry's study because of the lack of an informal or a non-governmental social

99 See Marc Galanter, *Why the "Haves" Come Out Ahead*, 9 L. & Soc'y Rev. 95 (1974).

100 See *id.* at 114-19.

101 See Sally Engle Merry, *Going to Court: Strategies of Dispute Management in an American Urban Neighborhood*, 13 L. & Soc'y Rev. 891 (1979).

102 See *id.* at 920.

103 See *id.* at 898, 908.

104 See *id.* at 923 (stating that "where neither courts nor informal sanctions function to settle disputes, the use of force may be an essential strategy for protecting one's personal as well as property rights").

structure that functions as a limit setter in a context in which disputants do not share a common set of norms.

2. ADR

ADR turns out to be most effective when conducted in closed, rural societies in which avoidance is impossible and relationships among community members can be expected to last for the foreseeable future.¹⁰⁵ ADR has also been found to be effective in urban industrial settings where implicit mechanisms such as ongoing relationships (family relations, neighbors) or markets for reputations (between businesses and consumers) exist. It should be pointed out, however, that even in these settings ADR has many shortcomings. Christine Harrington¹⁰⁶ studied the 1970s informalism movement in which cases were selectively diverted to ADR based on certain criteria, especially the existence of a presumed ongoing long-lasting relationship.¹⁰⁷ As a result, many domestic cases were shunted to ADR, where too often the emphasis was on preserving ongoing relationships rather than on transforming them. In ADR, she said, disputes “are reduced to individual problems” in which “[t]he social and economic factors are depoliticized or ignored.”¹⁰⁸ This tendency seems especially relevant when domestic disputes are diverted to ADR. Aggressive spouses or neighbors may turn out not to respond to the social pressure on which ADR depends; meanwhile the (mostly) women who are seeking protection or justice are effectively denied the protection of courts.

Laura Nader,¹⁰⁹ in her study of consumer complaints, similarly found much to criticize in ADR. Nader found that companies tended to favor ADR mechanisms in their disputes with customers since these processes often allowed them to settle justified claims while protecting their reputations. Nader found that companies frequently were able to arbitrage on consumers’ lack of information and bargaining power, enabling these companies to secretly settle justified claims against them for less compensation than might have been the case if the decision had been made by a judge.¹¹⁰ Even when individual claims

105 See *id.* at 895.

106 See CHRISTINE HARRINGTON, *SHADOW JUSTICE: THE IDEOLOGY AND INSTITUTIONALIZATION OF ALTERNATIVES TO COURTS* (1985).

107 See *id.* at 112.

108 See *id.* at 129. See also Lauren B. Edelman et al., *Internal Dispute Resolution: The Transformation of Civil Rights in the Workplace*, 27 *Law & Soc’y Rev.* 497, 504 (1993) (describing how dispute resolution mechanisms, by transforming disputes from right based claims to individual disputes de-politicize the claims).

109 Nader, *supra* note 30.

110 See *id.* at 65-67.

were resolved in a fair manner, Nader expressed concern that often, and to the detriment of other consumers, the claim and its resolution are not publicized.¹¹¹

A close look at the concerns presented by Harrington and Nader reveals that they resemble those brought forth by critics of courts. Both courts and their alternatives are described as susceptible to manipulation by powerful parties to the detriment of weaker ones. Proponents of ADR believe that such forums yield more participation and satisfaction by disputants as well as qualitatively better, more long lasting resolutions of disputes in that they address underlying issues and restore social harmony.¹¹² Courts, they claim, are *de facto* inaccessible to poor and weak claimants,¹¹³ and even when courts are available, they end up rewarding the repeat player at the expense of the one-shotter.¹¹⁴ Critics of ADR view the informality and lack of transparency of such processes as potential tools in the hands of the powerful to silence the weak¹¹⁵ and to shut court doors to underrepresented groups.¹¹⁶ And, as Merry shows us, in cases where neither courts nor ADR methods prove effective, there is no third party to turn to, and the powerful side, unconstrained by law and social norms, often wins the battle by sheer force.

Although the gap between the powerful and the powerless may never disappear, the properties of the Internet society described in Part II above – democratization of information, empowerment of individuals and solo practitioners in their encounters with large corporations and leading law firms, the lowering of access barriers and the creation of an effective arena for public opinion – may provide traditionally weaker segments of society with tools that will help them resolve their disputes with their powerful counterparts. The Internet has already spurred, and will continue to spur, changes in existing dispute resolution institutions. The Internet is also likely to create new dispute resolution mechanisms, some of which may have already begun to surface in the form of ODR.

111 *See id.* at 86-88.

112 *See Merry, supra* note 101, at 917 (stating that courts do not settle disputes in an anthropological sense, i.e. do not restore social harmony in social relations and thus often exclude facts that “are relevant to restoring a balance”).

113 *See Harrington, supra* note 106, at 78.

114 *See Galanter, supra* note 99.

115 *See Nader, supra* note 30, at 40 (stating that third party complaint handlers are the best way to cool out complainants); Conley & O’Barr, *Litigant Satisfaction*, *supra* note 86, at 699 (raising the concern that “informal procedures substitute expressive satisfaction for the enforcement of rights” in their analysis of litigant satisfaction and behavior in small claims courts).

116 *See Harrington, supra* note 106, at 78.

V. ANALYSIS OF DISPUTE RESOLUTION INSTITUTIONS IN THE INTERNET AGE

A. ODR

In ODR, parties and the neutral communicate entirely through an ODR provider. Typically, the ODR provider uses specifically designed online software. The medium creates online parallels to such processes as negotiation, mediation and arbitration.¹¹⁷

As with ADR, advocates of ODR portray it as non-adversarial and as capable of rendering non-dichotomous resolutions. The fact that ODR is not conducted in a physically real setting preserves its non-adversarial character. Since ODR processes are conducted across national and jurisdictional boundaries, and since the parties have to negotiate what norms are applicable to their dispute, the shadow of the law in ODR is hazier and may make ODR *feel* more consensual than ADR. This enables the parties to maintain more control over the terms of the resolution of their dispute than they would have had in an ADR proceeding conducted in a physical setting in which the shadow of the law is clearer. Moreover, lawyers often are not physically present; communication can either be synchronous or asynchronous, allowing parties to consult others or conduct research before responding to a communication; and parties can engage in the process from anywhere, including their own homes.

ODR promises to maximize some of ADR's selling points.¹¹⁸ Through ODR, parties can resolve their differences even more quickly than through traditional ADR. Travel time is often eliminated or shortened. The need to set up "appointments" – frequently at the cost of devoting time to one's work obligations – is reduced when ODR is not conducted in real time. These conveniences, as well as disputants' ability to consult legal on- and offline resources on their own, serve to reduce costs dramatically.¹¹⁹ In addition, ODR's use of technology can serve to reduce costs in other, less obvious ways. One ODR provider¹²⁰ offers "direct negotiation" services free of charge prior to using its paid online mediation services. The direct negotiation software is a sophisticated product that often manages to move parties towards

117 See <http://www.squaretrade.com> (last visited July 12, 2003); <http://www.onlineresolution.com> (last visited July 12, 2003) (both sites offer various online dispute resolution services).

118 See Katsh & Rifkin, *supra* note 75, at 10-11, 24-27.

119 See, e.g., <http://www.nolo.com> (last visited December 4, 2003); <http://www.findlaw.com> (last visited December 4, 2003); *supra* note 49 and accompanying text.

120 See www.squaretrade.com (last visited December 3, 2003).

resolution of their dispute using many of the techniques a “live” mediator would use, such as compelling the parties to define what the problem is and what their desired solution would be, reframing and finding common ground. Needless to say, the direct negotiation technology is a much more efficient means for resolving simple disputes than relying on a human mediator.

Since ODR is significantly less expensive than other forms of dispute resolution, it opens the door to a wider range of disputes than do other dispute resolution institutions. Conflicts that would have been weeded out of traditional mechanisms via a cost-benefit analysis may make sound financial sense if handled through ODR. A good example of these types of disputes is low dollar-value consumer complaints. Aggregate solutions such as class action suits have failed to provide a comprehensive solution to consumers’ lack of incentive to pursue such complaints.¹²¹ The same may be said of traditional forms of ADR. Companies have often used physical inaccessibility, financial burden and time consumption as strategies for discouraging consumer complaints,¹²² leaving consumers with no option other than “lumping it.” In another article,¹²³ I explained in detail why the strikingly inexpensive and relatively accessible process of ODR, combined with companies’ interest in engendering consumer confidence in e-commerce, is likely to make ODR a more convenient and effective process for the resolution of consumer complaints with respect to products and services¹²⁴ offered both off- and online. The immense popularity and success of SquareTrade,¹²⁵ eBay’s (as well as several other marketplaces’) ODR provider, in resolving such disputes is a clear testament to this potential. For example, an eBay user from San Francisco who paid a Texas-based company \$30 for CDs and never received them, a New York-based eBay buyer who purchased a \$250 sofa from a U.K. company and received one with a different fabric than was ordered, or an eBay user from Chicago who ordered a new mattress from a small company that did not publicize its address and received the mattress two weeks later than promised forcing her to purchase an inflatable mattress for \$75, might all find SquareTrade’s

121 See Nader, *supra* note 30, at 92-93.

122 See *id.* at 23, 26, 33.

123 Orna Rabinovich-Einy, *Going Public: Diminished Privacy in Dispute Resolution in the Internet Age*, 7 Va. J. L. & Tech 4, 44-48 (2002).

124 SquareTrade, eBay’s ODR provider, also resolves offline real estate disputes. See http://www.squaretrade.com/cnt/jsp/odr/overview_odr.jsp;jsessionid=bj11x1xyu?vhostid=chipotle&stmp=car&cntid=bj11x1xyu2 (last visited November 20, 2003).

125 SquareTrade has successfully resolved over 200,000 disputes since 1999. See <http://www.squaretrade.com/cnt/jsp/abt/aboutus.jsp;jsessionid=7udzejweq1?vhostid=chipotle&stmp=ebay&cntid=7udzejweq1> (last visited December 3, 2003).

ODR services to be a more convenient and efficient means of pursuing their complaints than its offline equivalents. SquareTrade's services are easily accessible from eBay's website, the initial resolution process of assisted direct negotiation is offered free of charge, and should parties require a mediator, they would be charged a mere \$20, a substantially lower sum than that charged by for-profit offline ADR providers. Since the disputes in this example are low dollar value disputes that involve parties who are geographically distant from one another, it is most likely that in the absence of SquareTrade's services, these buyers would not have pursued their grievances at all.

But ODR is not merely a less expensive and more technologically advanced version of ADR; it differs from traditional ADR in substantial respects. Perhaps most important, it tends to be more transparent than some ADR processes. ODR, unlike ADR, is conducted through electronic communications and therefore leaves a "digital trail."¹²⁶ Since the information is transmitted online, it is preserved in digital form, and even after being "deleted" can often be resurrected.¹²⁷ The existence of ODR records heightens the element of traceability. In that sense, the records left by ODR are more permanent than those left by court trials, and are certainly better preserved than the oral face-to-face communications exchanged in traditional ADR.

The digital trail renders these proceedings more transparent to outsiders to the dispute,¹²⁸ affecting ODR in profound ways. Digital records may serve as a check on the behavior of mediators, parties and their representatives, even if no formal appeal procedure exists. Courts, which have become accustomed to the fact that there is no record to subpoena in traditional ADR cases, may be tempted to make use of the newly retrievable ODR data and thereby serve *de facto* as a higher instance reviewing the case.¹²⁹ Even if such a pattern does not develop, the mere existence of a permanent record of an ODR process may serve to expose injustice and mistakes in these processes, much as the written record and appeal mechanism function in the court system.¹³⁰

126 See Rosen, *supra* note 65, at 7 and accompanying text (referring to the "electronic footprints" we leave with every website we visit).

127 See Rabinovich-Einy, *supra* note 123, at 36-43.

128 See *id.* In that article I predict that a combination of factors – the online medium's being inherently less conducive to privacy, the growing number of disputes that will be resolved through private dispute resolution mechanisms and changing social views towards privacy – will render ODR more transparent than its offline equivalents and will, in time, render traditional ADR processes less opaque as well.

129 See *id.* at 42.

130 It is important to note that transparency of ODR proceedings could have a down side as well. As stated earlier, one of the main advantages to ADR proceedings has been their private nature, which induces information exchange and openness with the third party, and thus raises the probability of resolution. Complete

Transparency also has the potential to change ADR processes into comparatively open arenas, encouraging participation from outsiders to the conflict. It could bring dispute settlement back to the village square – the virtual village square – allowing for public deliberation about the dispute and its outcome.¹³¹

The Internet will not only make online dispute resolution processes more transparent, but also will make them more accessible to the non-wealthy by lowering their direct and indirect costs, and by reducing their procedural and organizational complexities. As mentioned above, initiating a complaint regarding an eBay transaction by a buyer of a low dollar value product, for example, is a simple and free process. The complaint form on SquareTrade requires the buyer to describe the problem and the remedy that is being sought in simple terms by choosing the applicable description from a pull down menu or providing a brief written description. SquareTrade's customer support team is readily available to assist with difficulties in using the services, and explanations on the use of the services are offered periodically on eBay chat boards. For an eBay user, this is obviously a simpler and substantially less expensive process than pursuing a complaint through offline mechanisms that tend to have more complex procedures for initiating and pursuing a complaint and may require retaining or consulting an attorney.

ODR's language barriers to dispute resolution may, however, turn out to be higher than in traditional ADR, at least in the short term. Despite the fact that ODR, like ADR, requires less knowledge of legalese than does litigation and often enables parties to tell their stories in plain everyday language, current ODR technology allows for textual communication only. The need to communicate in writing could create difficulties for certain disputants while giving an advantage to those who can articulate their positions skillfully. The divisions between those who can better express themselves ("powerful

transparency might diminish the parties' candor and openness. This concern could, however, be addressed through technological and regulatory means. See Rabinovich-Einy, *supra* note 123.

¹³¹ Obviously, this participation will be limited so long as only certain socio-economic groups have access to the Internet. Although Internet access in the United States is approaching the 60% range, this is far from the situation worldwide, especially outside Western Europe, and a few other exceptions. See http://www.nua.ie/surveys/how_many_online/index.html (last visited July 12, 2003). However, this probably will end up being a transitional problem, similar to past experiences with prior technological advancements, which with time have developed global geographic penetration. Of course, penetration within the lowest socio-economic groups, even in the most highly penetrated societies, has been spotty. See, e.g., J. Alan Moyer, *Urban Growth and the Development of the Telephone: Some relationships at the Turn of the Century*, in *THE SOCIAL IMPACT OF THE TELEPHONE* 342-69 (Ithiel de Sola Pool ed., 1977).

speech”), and those who cannot (“powerless speech”), often echo race, class and gender distinctions and therefore seem to perpetuate inequality along these lines.¹³² Of course parties in traditional ADR may be inept at presenting their arguments orally as well, but the online textual environment may be even more discriminatory because differences in writing capabilities may be more extreme than differences in oral presentation. On the other hand, it may be easier for the other side and for the third party to follow a less articulate story if it is in writing; they can read it more carefully, rereading difficult passages and asking for specific clarifications.

In ODR proceedings, it is more difficult to interrupt a person than it is in a physical setting. This may make people feel more satisfied with the process, since it provides a less restricted forum to tell their story. But telling a story to an unseen audience (the other party and the third party) may have less appeal than speaking to live audiences. As mentioned earlier, according to Conley & O’Barr, parties value the opportunity to tell their story; some view it as a therapeutic experience, while others seek validation from an authoritative figure.¹³³ It is not clear whether telling a story in a non-physical environment will satisfy these needs exhibited by litigants.

ODR has the capacity to reduce some of the structural biases exhibited in the court system and in traditional ADR processes, such as the tendency to benefit repeat-player disputants at the expense of one-shotters.¹³⁴ Alternative dispute resolution processes are often private processes in which third party dispute resolvers’ future income depends on parties’ recurring use of the process and hiring of the neutral, which in turn depends on such parties’ satisfaction with the process and its outcome. This creates a potential for conscious or unconscious bias by the dispute resolver in favor of parties who are repeat players, i.e., are likely to use the process in the future. The repeat players typically have the power to choose the specific dispute resolver in a dispute with one-shotters and may do so in light of a familiar neutral’s record of past decisions or outcomes. One way in

132 See JOHN M. CONLEY & WILLIAM M. O’BARR, *RULES VERSUS RELATIONSHIPS* 165, 173-74 (1990) (the authors refer to court proceedings in which parties have an advantage if they present their case in a “rule-oriented” manner, which is the manner in which judges often view cases, as opposed to presenting the case in a relational manner, which emphasizes the social context and underlying relationships between the parties; they find that these distinctions echo gender, class and race distinctions). These potential biases are reinforced, at least in the short term by limited access to computers and the Internet by individuals belonging to lower socio-economic groups, which tend to include a larger share of minorities.

133 See Conley & O’Barr, *Litigant Satisfaction*, *supra* note 86, at 663.

134 See Carrie Menkel-Meadow, *Do the “Haves” Come out Ahead in Alternative Judicial Systems?: Repeat Players in ADR*, 15 Ohio St. J. on Disp. Resol. 19 (1999).

which ODR could help reduce such structural imbalances is through its potential for a more random selection of third parties. Since ODR's pool of available third parties is unconstrained by physical location and is therefore wider and potentially more diverse, and since technology can be used to ensure random assignment by an ODR provider of a dispute resolver to a given dispute, the process can be structured so as to reduce repeat players' chances of prevailing in the resolution of a dispute.

Although ODR does not completely eliminate these imbalances, the Internet's transparency and low-cost distribution of information could serve as further checks on neutrals' (conscious or unconscious) potential abuse of their powers, if ODR indeed develops as a transparent dispute resolution process that allows outsiders to the dispute to review decisions reached by online arbitrators and resolutions facilitated by online mediators. Publication of arbitration awards could enable an analysis of individual arbitrators' decisions, revealing whether such decisions are systematically biased in favor of any individual disputant or category of disputants (trademark holders, buyers, etc.), as well as the creation and publication of aggregate analyses of results reached through online arbitrators.

At first glance, publication of decisions reached through online arbitration may seem more significant than that of mediated resolutions, since mediators, unlike arbitrators, do not render decisions but merely facilitate agreement by the parties. However, the agenda set by mediators, the manner in which mediators conduct the process and steer the communication between the parties, mediators' framing of issues raised by the parties, and mediators' evaluation of the strength of each party's "case" can all affect the course of the mediation and its outcome. In certain instances, these effects can consistently benefit an individual party or a category of parties at the expense of another, similar to arbitrators' decisions. Mediators in offline mediation have grappled with these issues for some time, trying to find ways to ensure mediator neutrality and accountability in light of the absence of a record of mediator actions and statements.¹³⁵ The automatic availability in ODR of a record of the mediator's interventions as well as the seamless recording of other dispute-related data such as parties' identities, the type of dispute, the terms of the agreement reached, etc., enable ODR providers to follow and analyze their mediator's conduct (whether on their own initiative or upon receipt of complaints from users), as well as crosscheck information regarding mediators with other ODR data so as to produce meaningful aggregate analyses of online mediation trends and results. The publication of such data

135 See Kenneth Kressel et al., *The Settlement-Oriented vs. the Problem-Solving Style in Custody Mediation*, 50 J. of Soc. Issues 67, 71 (1994).

would allow users, consumer organizations and government bodies to participate in the evaluation of individual online mediators' performance as well as that of ODR services in general, thereby enhancing ODR providers' legitimacy and accountability.

ODR, however, might fail to accommodate multicultural differences. Among the growing number of disputes resolved through ODR, we will most likely encounter many disputes among individuals, companies and organizations of different nationalities and geographic locations. If a dispute between such parties originates online, it seems only natural to resolve it online, too, especially if meeting face-to-face is inconvenient and costly. However, a common concern that arises when disputants and third parties of different backgrounds come together is that cultural differences will lead to an escalation in the conflict or will alienate at least one of the parties from the neutral. These concerns have been researched and debated extensively in ADR literature,¹³⁶ but are obviously even more acute in the ODR context, because cultural diversity is even more likely to be a prominent issue online, given that online communications span the globe and therefore parties who rely on ODR tend to come from diverse cultures and backgrounds and with differing expectations as to the rules and norms applicable to their dispute. Wide-ranging knowledge of different cultures' conventions and etiquettes (beyond the mere command of languages) will certainly become an increasingly important qualification for neutrals in the ODR field. However, recent reports seem to suggest that ODR, in its short existence, has failed to accommodate cultural and linguistic diversity of potential disputants and to realize its leveling potential on other fronts.¹³⁷ This limitation would obviously have to be addressed by ODR providers in the future if they are to offer a truly global dispute resolution tool.

Consumer organizations, not-for-profit entities, governments and international bodies have all raised concerns regarding the performance of ODR providers, particularly in the B2C (business to consumer) context. The shortcomings have had to do, for the most part, with the lack of transparency in the conduct of ODR providers

136 See Cynthia A. Savage, *Culture and Mediation: A Red Herring*, 5 Am. U. J. Gender & L. 269 (1996); Paul R. Kimmel, *Culture and Conflict*, in CONFLICT RESOLUTION: THEORY AND PRACTICE 461-66 (Morton Deutsch & Peter T. Coleman eds., 1983).

137 See ABA E-Commerce and ADR Task Force Final Report, available at <http://www.law.washington.edu/aba-eadr/documentation/docs/FinalReport102802.doc> (last visited July 14, 2003); see Consumers International, *Disputes in Cyberspace 2001*, available at http://www.consumersinternational.org/document_store/Doc517.pdf (last visited July 14, 2003). Indeed, this is a serious limitation that will have to be addressed in the future if ODR is to function as a truly global dispute resolution mechanism.

and the limited disclosure of relevant information to actual and potential ODR users, the providers' funding models and fee structures, the lack of standards for ensuring the neutrality of providers and neutrals employed by them, the lack of complaint mechanisms with respect to providers and their neutrals and, as mentioned above, the failure to accommodate cultural and linguistic differences.¹³⁸ Initiatives aimed at increasing fairness in ODR processes while maintaining their flexibility and efficiency have been undertaken. To that end, a wide range of entities and individuals are engaged in an effort to generate international coordination on ODR standards and best practices.¹³⁹ Whether these efforts are destined to succeed or not is beyond the scope of this paper. However, absent mechanisms that would ensure transparency of information, monitoring of the information disclosed by ODR providers and the results of ODR cases and the ongoing reevaluation of the standards that will have been established as well as the means for meeting them, there is a danger that ODR will fall prey to many of the shortcomings and biases of traditional dispute resolution mechanisms.¹⁴⁰ But the increasing awareness of ODR's current limitations, coupled with the ongoing serious international efforts involving private and public groups that represent a larger and more diverse constituency, gives reason to believe that some, if not all, of these shortcomings will be addressed and remedied.

138 Wide-ranging knowledge of different cultures' conventions and etiquettes (beyond the mere command of languages) will certainly become an increasingly important qualification for neutrals in the ODR field. Unfortunately, to date, ODR providers have been slow to accommodate linguistic diversity, let alone cultural differences. *See Consumers International, Disputes in Cyberspace 2001*, *supra* note 137.

139 *See supra* note 137; UNECE Press Release, Geneva, May 31, 2002, Forum on Online Dispute Resolution (ODR), available at <http://www.unece.org/press/pr2002/02opa09e.htm> (last visited July 14, 2003); Melissa Conley Tyler & Di Bretherton, *Research into Online Alternative Dispute Resolution*, available at <http://www.odrnews.com/ODRAusReport.doc> (last visited July 14, 2003); GBDe ADR Working Group, *GBDe Consumer Confidence Recommendations*, available at http://consumerconfidence.gbde.org/adr_rec.html (last visited July 14, 2003); Directorate for Science, Technology and Industry, Committee for Information, Computer and Communications, Policy Committee on Consumer Policy, Working Party on Information Security and Privacy, *Building Trust in the Online Environment: Business to Consumer Dispute Resolution Joint Conference of the OECD, HCOPII, ICC*, available at <http://www.oecd.org> (last visited July 14, 2003); Federal Trade Commission Department of Commerce, FTC Summary of Public Workshop, available at http://www.ftc.gov/bcp/altdisresolution/summary.htm#N_17_ (last visited July 14, 2003).

140 It is my contention that regulation of ODR providers should draw upon experimentalism, a regulatory model that is different from both traditional hierarchical models of regulation and self-regulatory systems. For a comprehensive description of experimentalism, see Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998).

B. FUTURE COURTS

Traditional dispute resolution mechanisms are likely to persist despite the growth of ODR. But they will probably be transformed by the Internet's influence on dispute resolution. Even though courts will face some increased difficulties because of the Internet, primarily due to the increase in cases that involve two or more jurisdictions, the court system may find itself revitalized in some ways by the new technologies. One such important development will be the lowering of access barriers to courts.

As has been observed above, the main access barriers to courts are their costs, specialized language and procedures, and the need to actively mobilize the system. Research has shown that lay people, when telling their stories in court without the aid of lawyers and without the assistance of active judges, tend to tell them in an inductive everyday manner, failing to comport with the legal requirements for packaging the story in a hypothesized deductive mode that clearly attributes blame.¹⁴¹ Furthermore, disputants often fail to understand why their accounts do not comport with evidentiary restrictions such as hearsay, opinion and relevance.¹⁴² In order to understand what is going on in the courtroom, let alone present a winning case, most litigants need lawyers to serve as intermediaries. Hiring a lawyer comes at a heavy cost, and lawyers vary in their levels of sophistication and expertise. As Galanter revealed, it is usually repeat litigants who can afford to hire large law firms and pay for more billable hours, and the large firms have more resources of personnel and legal literature. In addition to costs associated with hiring lawyers, there are direct costs and fees associated with filing cases that can be waived only in a limited number of extreme cases of financial hardship.¹⁴³ Indirect costs include the amount of time devoted to the case, the emotional burden on the litigant, and the energy and attention that a litigant must divert from work and other areas of interest and importance to her while litigating. Furthermore, since the Anglo-American civil court system is inherently adversarial, the plaintiff must take an active part in mobilizing her case through such measures as service of process and filing motions with the court. Not only does this place a burden on plaintiffs, but Conley & O'Barr have found that some litigants, even sophisticated ones, do not understand

141 See Connelly & O'Barr, *Litigant Satisfaction*, *supra* note 86, at 685-686.

142 See *id.* at 665-672.

143 See Ved P. Nanda, *Access to Justice in the United States*, 46 AM. J. COMP. L. 503, 514 & n. 67 ("[I]t is general practice in the laws of the United States that parties may litigate in forma pauperis, that is a poor person may file or respond to litigation without the necessity of paying a filing fee.").

that performing such duties is their responsibility, since they have an image of the civil court system that is actually closer to the criminal one in which the court and the state assume most of the job for moving the proceedings forward.¹⁴⁴ And, even in criminal settings, courts often rely on complainant initiative to continue with the case, which can both be burdensome and frightening to a complainant who wishes to avoid direct contact with the alleged perpetrator.¹⁴⁵

These barriers have been lowered somewhat by the Internet. Access to information about legal language, procedures and decisions has been broadened, and the legal profession has lost some of the strength it has maintained through exclusive knowledge and control over legal knowledge.¹⁴⁶ The next obvious step, it seems, would be to develop virtual courts.¹⁴⁷

The first and most basic precondition for virtual courtrooms would be for all potential litigants to have secure¹⁴⁸ access to two-way web video communications. Given current financial constraints and the fact that two-way digital communications are not yet widely available, it is not yet realistic for all court proceedings to take place online. But such availability is almost certain to become a reality in the future, at least in parts of the United States, Western Europe and other countries with a high rate of Internet connectivity.

But even if technology were to allow it, this development might give rise to a set of difficult questions. For example, would holding court proceedings online mean that they were no longer tied to a specific locale? If so, would virtual court proceedings come to resemble ODR? The likely answer to both questions seems to be no, since the distinctiveness of courts will continue to lie in their being hierarchical mechanisms that rely on state power to enforce their decisions. Thus, even if conducted online, they will continue to be tied to specific jurisdictional arenas, and to serve mainly locals in disputes that do not

144 See Conley & O'Barr, *Lay Expectations*, supra note 90, at 139, 148-49, 159.

145 See Merry, supra note 101, at 918-19.

146 See Lewis, supra note 50, at 87-110; supra notes 34-47 and accompanying text.

147 There are already efforts, in the United States and elsewhere, to create virtual courtrooms whose function would be limited to specific types of proceedings and/or disputes. See <http://www.michigancybercourt.net> (last visited July 14, 2003); <http://www.lawlink.nsw.gov.au/lec.nsf/pages/ecallover> (last visited July 14, 2003).

148 The technology necessary to ensure that information communicated is secure from manipulation and distortion by the parties, the third party and outsiders to the dispute is already available to Internet users in the form of public key encryption but is not widely used. See <http://web.mit.edu/network/pgp.html> (last visited July 14, 2003).

encumber courts' enforcement powers by introducing foreign elements.¹⁴⁹

If and when litigation is conducted online, it is bound to affect courtroom decorum. Will the judge still be dressed in a gown? Will she have to conduct the process from a specific place, or could the hearings take place anywhere? Will the parties dress formally? Will they have to stand up before the judge? Obviously, at least some of the present day practices in courtroom decorum are bound to change if proceedings are conducted online. Such changes may make the process feel less authoritative by giving the judge less control over the courtroom and litigants' conduct. The judicial process would, at least in its external trappings, become less formal, and it is reasonable to expect that this would have a subtle but very real psychological effect. This lack of formality may help disempowered groups who would be intimidated by judges' black robes, attorneys' three-piece suits and the monumental architecture of the brick-and-mortar court. On the other hand, the strict protocol observed in courtrooms may actually help the relatively disempowered by placing both parties on the same level vis-à-vis a judge who, within the courtroom, has a monopoly on power and authority. The experience of seeing even expensive and obviously wealthy lawyers being reprimanded or refused a request by the judge may have an enormous effect.

Not only may legal language and procedure become less specialized when court proceedings are conducted online, but they may also become open arenas (in Yngvesson & Mather's terminology),¹⁵⁰ allowing the public to observe their proceedings more closely and even to participate in them. The effect would be similar to that of televising all court proceedings, except that as a two-way communication technology, the Internet might potentially allow viewers to comment directly to courts. This possible contribution of observers to the permanent court record creates a potentially crucial role of "gate keeper." Some player – perhaps the judge, perhaps a clerk of the court – will have control over information flowing in and out of the courtroom. Once judicial proceedings are being webcast, through either streaming video or transcripts, a judge's potential power to "turn off the camera" will become a crucial factor in creating the documentary record of what did or did not happen. The implications of having proceedings webcast through streaming video will differ dramatically from those of text-only transmission. But, in either case,

149 Obviously, the potential gains time- and money-wise from having proceedings conducted online are enormous even when physical distance is not considerable, but virtual proceedings could also offer parties a new litigation experience as described in Part IV of this article.

150 See Yngvesson & Mather, *supra* note 95, at 66.

the mere fact of widespread access to courtroom proceedings is likely to affect the process and its proceedings with respect to formality in dress code and courtroom decorum. The monitoring of courtroom proceedings by outsiders might, perhaps, form a new set of constraints on the participants, replacing the formalities that have traditionally constrained judges', parties' and lawyers' conduct, speech and decision making in the courtroom.

Whether virtual trials become a reality or not, the Internet will inevitably alter the role of courts. When we consider the wide variety of conflicts resolved through ADR, especially through non-institutionalized ADR (such as direct negotiation, or turning to a mutual friend to resolve a dispute), it becomes clear that courts deal with a very limited portion of the world of disputes even today.¹⁵¹ The Internet, while overall causing an increase in the number of disputes in society, will decrease the percentage of those disputes settled by courts.

Although courts have always struggled with situations that involved "foreign elements" and the concepts of competing jurisdictions and choice of law are not new to them (after all, this is what private international law seeks to regulate), the World Wide Web has further complicated matters with respect to competing jurisdictions.¹⁵² In cases that deal with the Internet, it has become increasingly difficult to fit situations into existing legal rubrics in order to determine which law is applicable. If a Minnesota couple sitting at their computer terminal at home gamble on a site run from Chicago, are they breaking Minnesota's anti-gambling laws or Illinois'?¹⁵³ If Yahoo, through its auction site, allows "Mein Kampf" to be sold all over the world, including France, is it violating French anti-genocidal law?¹⁵⁴ Can the United States bring charges against a Russian cryptographer for publishing information on a Russian website that does not violate Russian law, but violates American copyright laws?¹⁵⁵

Courts will find it increasingly difficult to deal not only with disputes that spill across national borders, but also with those requiring

151 See Galanter, *supra* note 78, at 26-27.

152 See *supra* notes 54-60 and accompanying text.

153 See Lessig, *supra* note 56, at 54-55.

154 See Lisa Guernsey, *Mainstream Sites Serve as Portals to Hate*, N.Y. TIMES, Nov. 30, 2000, at G1; Lisa Guernsey, *French Restrictions on Nazi Insignia Bump into U.S. Constitution*, N.Y. TIMES, Nov. 9, 2001, at C5 (reporting on a federal judge's ruling that a French order requiring Yahoo! to remove Nazi materials from its website was trumped by the U.S. Constitution's Free Speech protection).

155 See Amy Harmon & Jennifer Lee, *Arrest Raises Stakes in Battle over Copyright*, N.Y. TIMES, July 23, 2001, at C1; Jennifer Lee, *Russian in Digital Copyright Case is Released on Bail*, N.Y. TIMES, Aug. 7, 2001, at C4; Jennifer Lee, *Man Denies Digital Piracy in First Case Under '98 Act*, N.Y. TIMES, Aug. 31, 2001, at C3.

understanding of sophisticated technological issues.¹⁵⁶ Where courts run into difficulties, alternative forums will flourish, allowing parties to choose a neutral with specific relevant technical expertise.¹⁵⁷ At the same time, the lowering of access barriers will make courts a more attractive option than they currently are for handling local disputes – disputes that do not spill across borders and in which the parties require the enforcement powers of a court to reach an agreement and ensure its fulfillment.

Although the overall amount of law made by courts may decrease with the shift of a growing number of disputes to alternative forums, in those cases in which courts will continue to fulfill this function they will, most likely, have a broader effect than before. Galanter, while discussing the effects of messages sent out by courts and indigenous forums, emphasized the importance of the ability to actually have these messages reach the general public beyond the specific disputants.¹⁵⁸ Messages can have a variety of effects, such as mobilizing future claimants to pursue a grievance or demobilizing them from doing so, effecting moral change or intensifying existing normative valuations of conduct.¹⁵⁹ The Internet, in addition to being an effective mechanism for conveying such messages to a broad audience, also – being a two-way technology – allows us to evaluate whether such messages have been understood, absorbed or rejected by people. Compared with op-ed articles in newspapers and panels of experts on television, a much wider variety of people can react and conduct conversations on the Internet as is already evidenced by the emergence of online forums in which legal issues and court decisions are discussed. Virtual court proceedings that allow for public input can be expected to enhance such discussions by drawing a wider audience, by supplying such participants with a more robust and direct channel for information on court proceedings and by offering platforms for communication that are close in time and place to the occurrence on which people wish to comment.

156 See Ken Auletta, *Final Offer: What Kept Microsoft from Settling its Case?*, NEW YORKER, Jan. 15, 2001, at 40-41 (stating that Microsoft viewed judge Jackson as “a technological caveman” who rarely used his computer and did not use e-mail at all).

157 There are differences of opinion within the ADR community whether mediators should possess subject matter expertise (specialization in the specific area of dispute) or process expertise. This controversy mirrors, to a certain extent, the differing opinions as to mediators’ role – whether it is to evaluate the parties’ case or to facilitate communication and resolution of their differences. Interestingly, in the resolution of cases that involve technological issues through ODR, the two types of expertise are linked.

158 See Marc Galanter, *The Radiating Effects of Courts*, at 124-27, 134, in *EMPIRICAL THEORIES ABOUT COURTS* (Keith O. Boyum & Lynn Mather eds., 1983).

159 See *id.* at 124-25.

C. THE FUTURE OF ADR

Traditional ADR processes can be expected to continue to thrive. Although certain disputes formerly dealt with through ADR will be diverted to ODR, not all disputes are suited for ODR, and they therefore will continue to be resolved through traditional ADR. Even disputes that are appropriate for ODR may, in some cases, be dealt with more effectively through a hybrid of ADR and ODR.¹⁶⁰ But traditional ADR, even though it will not be supplanted by ODR, will probably undergo significant changes because of the Internet's influence.

When introduced in the 1970s, ADR was supposed to provide a more accessible and just form of dispute resolution than that offered by the court system,¹⁶¹ and ADR has succeeded in lowering access barriers for the poor and other less powerful parties. ADR has also been successful in reducing legal costs and time consumption for business disputants.¹⁶² However, ADR's critics have claimed that ADR has tended to give the stronger party to a dispute an advantage, mainly due to ADR's private nature and the lack of procedural safeguards.¹⁶³ The absence of transparency typical of ADR proceedings often has left the community, and thus public opinion,¹⁶⁴ out of the picture, at times enabling repeat player businesses to settle justified claims against them for less than their worth and without future one-shotters finding out about the underlying claims and/or the specifics of their resolutions.¹⁶⁵

As I have claimed elsewhere,¹⁶⁶ it is my contention that the Internet, by democratizing information and by empowering individuals to publish and to access information, has had, and will continue to have, a profound impact on our notions of privacy. With time our attitudes towards aspects of privacy can be expected to change, and we as a society will grow to accept a higher degree of

160 See, e.g., <http://www.publicdisputes.org/> (last visited July 14, 2003).

161 See Harrington, *supra* note 106, at 30-31 (referring to reformers' claims that courts are inherently inferior to alternatives in addressing minor disputes).

162 See Wittenberg et al., *supra* note 80, at 750.

163 See Sally Engel Merry, *The Social Organization of Mediation in Non-industrial Societies: Implications for Informal Community Justice in America*, in 2 THE POLITICS OF INFORMAL JUSTICE, 39 (Richard L. Abel ed., 1982); Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, WIS. L. REV. 1359 (1985).

164 See Nader, *supra* note 30, at 35-36, 86-88.

165 See *id.* at 64-67.

166 See Rabinovich-Einy, *supra* note 123.

transparency in our personal lives.¹⁶⁷ These changing social views will also be manifested in the area of dispute resolution.¹⁶⁸ ODR is likely to develop as a relatively transparent form of dispute resolution for several reasons.¹⁶⁹ First, ODR, by being conducted online, is inherently less conducive to privacy than traditional ADR processes that are conducted in a closed-off, presumably private, room. Second, ODR resolutions and decisions can be published and disseminated much more easily than those resolutions reached through offline dispute resolution mechanisms. In addition, assuming that the predictions about the growing use of alternative dispute resolution mechanisms in future years are correct, it can be expected that once the privatization of dispute resolution reaches a critical mass, pressure will be generated to release ODR resolutions to the public domain to supplement traditional publication of court rulings. The Internet, as I have stated above, will also make courts more open and accessible arenas. These changes will both reflect changing social views towards privacy and actively shape those evolving attitudes in a society in which a growing share of people's private and public transactions take place online. In all likelihood, traditional ADR processes will not be immune to such changes and many of them will also become more open arenas in the long term. If ADR, and not just ODR, resolutions are published on the Internet,¹⁷⁰ this information will undoubtedly empower individual disputants in their negotiations and mediation or arbitration sessions with powerful businesses on- and offline. Individuals will be able to find out what companies were willing to settle for in the past; why they have been willing to settle; and who might be willing to join them in their complaints. Posting a "call to action" to similarly affected individuals on the Internet is an inexpensive and relatively easy procedure that can be set in motion almost instantaneously. Even if consumers who are physically remote do not join in on a process that requires physical presence, they can still supply information and evidence to strengthen other complainants' cases out of concern for public welfare or to promote their own beliefs or long-term goals.

Transparency of digital communications will undoubtedly be one of the main factors affecting disputants' choice between ADR or ODR,¹⁷¹ especially in the near future while ADR remains a confidential process.¹⁷² Parties seeking confidentiality will prefer traditional ADR, where information leaks by one of the parties are

167 See Katsh, *supra* note 33, at 196-97.

168 See *id.* at 112; Rabinovich-Einy, *supra* note 123, at 3, 12-16, 54-55.

169 See *supra* note 128.

170 See Rabinovich-Einy, *supra* note 123, at 38, nn.163-64.

171 In addition to the obvious consideration of the feasibility of a face-to-face encounter given the parties' physical location.

172 See Rabinovich-Einy, *supra* note 123, at 45-54.

technically more difficult to execute and where interception of information is substantially slimmer than it is in ODR.

In the longer term, however, in ADR, as in ODR, transparency should ameliorate many of the problems associated with structural biases favoring repeat players. Like ODR, a more transparent ADR process will bring added scrutiny of neutrals' and parties' conduct¹⁷³ by allowing public evaluation of proceedings, resolutions or decisions (depending on the type of process employed). Even if ADR processes remain tied to a physical locale, reactions to ADR resolutions or decisions – if published – will not be limited to the area in which the processes were conducted.

Another factor that may affect parties' choice between ADR and ODR, certainly as long as ODR communications are limited to textual formats, will be whether a dispute is emotionally charged or not. In physical encounters, a lot of information can be detected only through tone of voice, physical gestures and facial expressions. Such subtleties are crucial in conflicts that are highly emotional, allowing parties better to understand one another's position as well as to detect possible ways to reconcile differences. Even if ODR communications allow for two-way video communications over the Internet, the qualities of a face-to-face encounter may prove irreplaceable. It seems to me that extremely intimate, emotional matters will, in most cases, continue to be resolved, at least partially, in a physical setting.¹⁷⁴

Face-to-face contact will remain especially necessary if parties hope to undergo transformative mediation. Baruch Bush, a strong proponent of transformative mediation, describes it as a process whose success is measured according to two criteria – first, whether the process results in an “increased capacity for strength of self” (“empowerment”), and second, whether the process results in an increased “capacity for relating to others” (“recognition”).¹⁷⁵ Empowerment, Bush tells us, “is achieved when disputing parties experience a strengthened awareness of their own self worth and their own ability to deal with whatever difficulties they face,”¹⁷⁶ and “[r]ecognition is achieved when, given some degree of empowerment, disputing parties experience an expanded willingness to acknowledge

173 See *supra* notes 134-35 and accompanying text.

174 On the other hand, one could claim that it is precisely in emotional disputes in which tensions are high and parties often find it difficult to face one another, that ODR provides a convenient platform for the parties to communicate while maintaining a much needed distance from one another. See Rabinovich-Einy, *supra* note 123, at 52.

175 See ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION* 84 (1994).

176 See *id.*

and be responsive to other parties' situations and common human qualities."¹⁷⁷ This type of process requires mediators to "microfocus" on parties' conduct, statements and reactions so as to detect any opportunity for empowerment and recognition of the other parties' feelings, interests and positions.¹⁷⁸ Bush describes how "parties sometimes seem to reach, at least momentarily, an almost exalted state of both dignity and decency, as each gathers strength and then reaches out to the other."¹⁷⁹ It seems that such close and sensitive scrutiny of the parties by the mediator could only be reached in face-to-face encounters. For parties to experience empowerment – and perhaps even more so, for them to experience recognition – the immediacy and intimacy of physical interaction may well be indispensable.

Also, despite the creation of a "global village," it will generally remain true, especially in certain types of communities – rural towns or villages, tight-knit religious groups, or economically disadvantaged urban areas in which a person or a group of people is viewed as the local "boss" – that parties' willingness to participate in ADR will hinge on the identity of the neutral. This may relate to personal charisma, stature, reputation and power to enforce decisions. For these reasons, in certain situations, dispute resolution by an anonymous website will never take the place of traditional community ties. For various reasons, then, it is likely that traditional ADR will remain popular for resolving local disputes.

Obviously, the meaning of "local disputes" in today's shrinking world is different from that in the isolated, small-scale communities of the past, since contemporary mobility and looseness of social ties allow disputants not to resolve their differences if one of the parties can opt to move or otherwise terminate the relationship. In modern times, it seems, emphasis has shifted from how long parties have had a relationship with each other to whether they are expected to have contacts in the future that will necessitate resolving their dispute.¹⁸⁰ In a sense, the Internet might bring society closer to the small and isolated communities of the past by making it more difficult for disputants to avoid resolving disputes simply by relocating. Although we can change our physical location, we can never really move away from one another in the Internet society. In our global world, we all share one Internet on which information is exchanged. A local dispute in one place may affect relationships and business transactions in other locales, even if the original quarrel did not occur online. Despite physical distance, cultural differences and unfamiliarity with other

177 *See id.* at 84-85.

178 *See id.* at 100-01.

179 *See id.* at 83.

180 *See Merry, supra* note 101, at 895.

users, the Internet gives rise to strong social forces that shape public opinion and affect individual behavior. These forces will, in time, give “teeth” to ADR processes by providing an effective arena for exchange of information and opinions, one from which it is extremely difficult, if not impossible, to escape.

Parallel to not being able to move away in the Internet society, we are also able to be in many places simultaneously. The Internet provides us with a glimpse into many different communities with various perspectives, cultures and customs. By alerting us to our own biases and preconceptions, the Internet may, perhaps, lead us to question our assumptions and to open ourselves up to different points of view.

As stated above, as more and more disputes are resolved through largely private ADR and ODR mechanisms, these institutions will become engaged in lawmaking. If these processes, as I have predicted, do indeed become more transparent, then the implicit and explicit messages sent out through ADR decisions and resolutions will have a broad effect on the general public. How these messages will interact with those sent out by other dispute resolution institutions is yet to be seen.

VI. RESOLVING THE FORD-FIRESTONES OF THE FUTURE

The Ford-Firestone case, which has played out during the early years of the Internet society, provides a good example of how the Internet age has affected and will affect analogous cases in the future. The role of the Internet in the case as it has unfolded was discussed above – the lowering of access barriers, the ability of a solo practitioner to take on multi-national corporations, and the like. But the Internet era is only beginning. It can be safely assumed that within most of our lifetimes the Internet will become increasingly widespread, powerful and “second nature” to an ever-broader generational span. The current overlay of senior businesspeople, academics and professionals who are computer illiterate will eventually shrink and for all purposes vanish. How will these changes affect the “Ford-Firestones” of the future?

First and foremost will be the impact of the Internet on the choice of avenue of dispute resolution itself – litigation, ADR or ODR. The main trends that help determine choice of dispute resolution mechanism and that are affected by the Internet are access barriers such as costs and spread of information, transparency of proceedings and resolutions, and increased globalization resulting in more cross-

border disputes as well as additional mechanisms to deal with them. These trends are likely to have manifold, in some cases potentially contradictory, influences on the choice of dispute resolution institutions.

The single most important effect of the Internet on consumer disputes, from the simplest complaints to the most tragic and salient cases such as Ford-Firestone, will likely be around the issue of access barriers. Disputes involving fatalities like the Ford-Firestone case would probably never have fallen into the “lump it” category, which can be the effect of access barriers on smaller complaints. Still, access barriers to courts in the pre-Internet world would have had, and in the Ford-Firestone case did have, the relative effect of making settlement a more attractive option than litigation for some victims and their families.

As the Internet becomes a more pervasive factor in society, the feasibility and frequency with which aggrieved individual consumers will be deterred from litigation because of access barriers will decrease. One example of cost reduction may lie in the area of expert witnesses, indispensable in tort cases such as the rollover accidents, and a heavy expense currently borne by plaintiffs. In the Internet age, there may be no need for expert witnesses to appear in court to be cross-examined; a physician or engineer will be able to testify from her office routinely, with minimum interference to her work, and, therefore, at a lower cost to the plaintiff. The plaintiff, especially if injured and therefore disabled, might also testify from her home.¹⁸¹ As technology advances, it seems likely that a growing number of proceedings will take place online, allowing all parties and witnesses to testify from anywhere in the world, constrained only by the need to coordinate a specific time to convene, if court proceedings maintain their synchronous nature; if court hearings become asynchronous even this constraint and expense generator may vanish. This decrease in access barriers in the form of costs, language barriers and procedural difficulties will create an increase in litigation, the dispute resolution process to which such barriers have been the highest.

Companies, in turn, in their choices as to how to respond to litigation, will have to change their decision-making calculus. If, in the past, a company could reasonably expect a certain number of court cases to be brought as a result of a specific kind of disaster, an increase will alter the risk-benefit analysis of litigating the cases versus settling out of court.

¹⁸¹ However, in choosing not to testify in person, a plaintiff may lose some of the advantages associated with courtroom testimony before a jury as described in further detail in Part V below.

The decrease in access barriers to courts will have the most dramatic effect on the litigation of local disputes, where courts can also offer disputants finality of conflict and enforcement of decisions. When disputes involve individuals and/or entities from different physical locales, the lowering of financial and logistical access barriers will, in many cases, be offset by added costs and linguistic and procedural difficulties because of jurisdictional obstacles.

Another major trend, already taking place in the Internet society, is increased access to information of all kinds, as well as new possibilities for dissemination of information either at dramatically lower costs or at no cost at all. The effects of these new capabilities for information spread are numerous. First, if information is indeed circulated efficiently, then it can function as a prophylactic measure, preventing cases such as Ford-Firestone from occurring to begin with, or at least from affecting nearly as wide a range of people. In a truly universal Internet society, once rollover cases had occurred in Venezuela and Saudi Arabia, regulators and consumers in the United States would have become aware of the danger at a significantly earlier stage. This wide dissemination of information will markedly decrease and may eliminate the crucial time gaps between corporate knowledge and public awareness of product failure. Shortening this time gap will eliminate the crucial "cover up" phase around which most public outcry and punitive damages turn.

Overall, then, the effects of the Internet's democratization of information may have the unintended, but societal beneficial effect, of making corporate cover-ups much more difficult to execute. Although corporations on a day-by-day basis may not welcome this added scrutiny and international gossip about their products and behaviors, in the long run they will, in all likelihood, be protected from extensive liability to which they otherwise would have been vulnerable.

From plaintiffs' points of view, the Internet's spread of massive amounts of free information will further lower access barriers to litigating cases. Research tasks that, in the past, were unduly arduous for solo practitioners, will now be well within their reach due to software that enables searching vast numbers of documents for specific key terms; the availability of industry and government statistics on the web; the sharing of information by solo practitioners with one another through use of digital communications, and new procedural and evidentiary rules in courts allowing for digital documents to be submitted in court. Even if complainants choose not to litigate their cases, access to more information will increase their bargaining power vis-à-vis big business, and will enable them to settle their cases in a more informed manner and from a more advantageous position.

An important area of change related to the Internet's facilitation of information spread will be the growing transparency of dispute resolution decisions and resolutions that we can expect in the Internet society. Given that the alternatives to litigation will, in all likelihood, become increasingly transparent, one of the main differences separating such processes from litigation will be removed. This development probably will affect disputants in their choice of dispute resolution mechanisms in various, and at times antithetical, ways. On one hand, the growing transparency of ADR and ODR may increase companies' motivation to litigate, since previously part of their motivation to settle was the gag order they often obtained through settlement. In the Internet environment, the efficacy of such gag orders will decrease substantially *de facto* if not *de jure*.

On the other hand, the growing transparency of ADR and ODR will serve to make these alternatives more appealing to complainants. Aggrieved parties who previously might have insisted on litigation because of their desire to expose a corporation's malfeasance or to educate the public about a consumer safety issue may now be willing to consider alternatives to litigation due to the alternatives' increased transparency.

A third area of change in the Internet age is the effect of globalization in shrinking our world, especially the business world. Many of the Ford-Firestone rollover accidents, for example, occurred outside the United States, injuring non-U.S. citizens who had purchased their cars in their native countries such as Venezuela and Saudi Arabia. Attorneys in Venezuela encountered difficulties filing lawsuits against either corporation in that country, eventually deciding that any claims filed against Ford/Firestone by Venezuelans would have to be filed in the United States.¹⁸² Given the costs and inconvenience of this avenue, clearly, this is not an optimal option from the point of view of the international consumer community – a situation that also ultimately harms corporations who have a long-term interest in marketing their product worldwide.

In years to come, dispute resolution institutions will become more accustomed to handling transnational disputes. The institutions

182 See Larry Rohter, *Low-Profile Consumer Protection*, N.Y. TIMES, Sept. 8, 2000, at C5 (stating that claims against Ford-Firestone by Venezuelans are likely to be filed in the United States due to problems of impunity, corruption, and lack of professional training and resources in the Venezuelan court system). And indeed, approximately 200 of the cases filed by people who were injured in the rollover accidents were filed by people who were injured outside the United States. A federal judge denied Ford-Firestone's request to dismiss more than 100 of these lawsuits that were related to accidents that occurred in Venezuela and Columbia. See *AP*, *supra* note 5.

that will prove best suited for the task will, in all probability, be ADR and ODR. First, these processes can, to a far greater extent than litigation, be structured so as to avoid complications arising from jurisdictional issues. Also, since both ADR and ODR have the potential to be less lengthy, and since ODR does not require physical presence of the parties or synchronous communication, these mechanisms are often substantially less costly than litigation. It seems safe to say that in the Ford-Firestones of the future, international consumers, even though they will face some of the same lowered access barriers to litigation as local disputants, will inevitably find ODR and ADR to be more accessible and less expensive to use. It also seems safe to say that the phenomenon of aggrieved consumers on another continent having a complaint but no efficient mechanism for addressing it will increasingly become a thing of the past as corporations discover that their global viability depends on this. In order to encourage consumers worldwide to purchase products and services, multi-national corporations may have to pre-commit to ODR and ADR in on- and offline transactions, as many websites are already doing with respect to online transactions, in order to generate and reinforce consumer confidence.¹⁸³

If access barriers to litigation are to decrease, if some or all court proceedings are to be conducted online,¹⁸⁴ and if alternatives to courts are to become more transparent, on what factors will parties of the future base their choice of dispute resolution mechanism? First, ADR and ODR will maintain their primary distinction from courts in that they are, to varying degrees, voluntary processes. Second, even if access barriers to courts are reduced, these access barriers will inevitably remain higher than those to alternative processes, given litigation's discovery stage, the need to comply with rules of procedure and evidence and the near-inevitability of hiring a lawyer. Third, at least with respect to local disputes, courts offer finality of conflict and enforcement of resolutions, neither of which most alternative mechanisms can offer. But last, and by no means least, in future cases like Ford-Firestone, even in a universally "wired" society completely transformed by the Internet, there will always be a role for face-to-face proceedings, both in the court system and in its alternatives.

In high-stake, emotionally charged litigation such as the Ford-Firestone case, the traditional courtroom setting will never entirely

183 See https://www.squaretrade.com/sap/jsp/lnm/overview_seal.jsp (last visited July 14, 2003) (SquareTrade, for example, through its seal membership program, in which it vouches for the credibility of eBay sellers who have met certain criteria and have undertaken to participate in its ODR program, allows online sellers to signal to buyers that they are reliable and that they are committed to ADR should a dispute arise). See also Katsh & Rifkin, *supra* note 75, at 5, 23.

184 See *supra* Part IV.

lose its desirability or attractiveness to one or more key players. Plaintiffs and plaintiff attorneys, if they have their way, will never abandon the possibility for direct eye contact with a jury, because of a concern that online proceedings, with the distance they put between parties and decision makers, will not yield the same high awards or the same sense of drama and catharsis for disputants as courtroom proceedings do. By the same token, the Ford-Firestones of the world will most likely try and whittle away the reliance on a brick-and-mortar courtroom. Corporations probably will hope that the more depersonalized the process, and the less opportunity there is for highly emotional in-person testimonies of victims and their family members, the lower jury awards will be. This expectation may be counterbalanced by the wish for corporations to give themselves a “human face” for juries by having live, carefully-chosen corporate and legal representatives challenge a jury’s impersonal conceptualization of a company as a soulless monolith.

Attorneys, both those accustomed to representing plaintiffs and those who represent corporate defendants, will have an interest in retaining courtroom proceedings that require lawyers’ presence. As the Internet society places more and more legal data and resources online, enabling laypeople to access such information and to duplicate a good deal of the expertise over which attorneys traditionally had a monopoly, trial lawyers may find themselves clinging to the skills associated with courtroom oratory, especially as regards “playing the jury,” as irreplaceable skills that cannot be mastered by lay people.

In the same way that the Internet will never eliminate some plaintiffs’, defendants’ and attorneys’ wish to maintain the courtroom option, the Internet will also not do away with face-to-face ADR. Certain complainants may still need to connect a face to the tragedy they have suffered; they may feel that they need to meet with a representative of the company in person, perhaps to hear an apology, or to feel a sense of catharsis. Such meetings can prove useful to the corporate side as well, since these encounters put faces behind the names and statistics, and can affect the conduct of executives and the manner in which they run companies. On a more cynical note, face-to-face proceedings can also help corporations “size up” the complainant, get a feel for whether she has a real case against the company, whether she intends to pursue it and what kind of impression she will make on a jury or the media.

The Internet, then, will not do away with what we tend today to think of as the paraphernalia of dispute resolution – the courtroom, the jury box, the judge’s robes, “in-person” and “eye-contact” components, and a sense of drama, or a room with teams on both sides of a table with or without a third party presiding over them. In all

likelihood, these paradigms will not become obsolete simply because of the expense and inconvenience associated with them and the availability of resources to conduct such activities online. There will always be some key player, at least in some cases, who will want to preserve the “live” court or ADR option.

Within this new landscape of dispute resolution institutions, attorneys will continue to play an important role. The increased number of disputes, combined with reduced access barriers to courts, will generate more local litigation, and therefore more work for attorneys. Despite individuals’ increased access to information, parties will need lawyers to recommend a path for dispute resolution – litigation or its alternatives, face-to-face proceedings or virtual ones – and to represent them at least in some of these settings. The costs of such services will decrease, though, both because of a decrease in information costs, and due to the fact that lawyers, in an age of efficient digital communication with their clients, will no longer need to spend large sums of money on expensive office space or proximity to other attorneys. Clients will be able to better evaluate the recommendations and work of their attorneys because of their own increased access to information, much in the same way that medical patients are increasingly able to evaluate their doctors’ recommendations and treatment.

VII. CONCLUSION

Dramatic changes, then, will take place in the landscape of dispute resolution in the Internet society. Individuals facing corporations, and solo practitioners facing large law firms, will be empowered by the decrease in access barriers (costs and information availability), by the transparency of dispute resolution processes, and by the Internet’s provision of an effective forum for public opinion, social pressures and market reputation. These changes will enable an increasing number of local disputes to be litigated, and additional disputes that have traditionally been in the “lump it” category will be resolved through ODR mechanisms. For international disputants, new avenues of dispute resolution will exist, offering them less expensive and often more effective options. At the same time, much of what we have come to recognize as part of the current dispute resolution landscape – in person courtroom proceedings, face-to-face ADR and the importance of lawyers – will remain in existence, and many of the changes that will occur, although they will lessen the gap between certain categories of disputants and attorneys, will not level out the playing field entirely. There will probably always be some disparity in

quality and volume of access, difference in literacy levels, intellectual levels, psychological levels, and in personality. Orwell's classic phrase in *Animal Farm* about some being more equal than others resonates in this context.

Perhaps most importantly, we must be cognizant of the fact that the new technologies' equalizing potential is not assured. Our current and future actions – those of governments, courts, private entities and individuals – will determine the manner in which the new technologies will operate; we must allow these technologies to realize their promise.