Mediation, Democracy, and Cyberspace

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I. INTRODUCTION

David Brin offers an electrifying vision of the possibilities of using technology to sustain a vibrant, engaging democracy.[1] His account of a "disputation arena"[2] challenges the imagination of those in dispute resolution to consider how values, principles, and practices constitutive of traditional and alternative dispute resolution processes might contribute to implementing what he identifies as a new accountability forum.[3]

What is Brin's vision? He observes, correctly I believe, that persons who disagree with one another about significant matters frequently engage in dialogue that is rambling, constrained by time, and infused with rhetorical claims that go unsubstantiated.[4] We can all envision actual contexts in which this occurs. Consider meetings involving parents, school officials, and concerned citizens addressing the question of whether to adopt a "zero tolerance" policy for students bringing weapons onto school grounds. People rightly feel passionate about such matters and want to debate its persuasiveness. Persons will reference a variety of sources, including personal experiences, the effectiveness of comparable policies at other institutions, and religious philosophies to support their viewpoint. Do people listen to one another? More than listening, is there a viable sense in which persons are persuaded by the logic or reasonableness of a particular analysis such that it moves them to agree with those with whom they previously disagreed? In short, does dialogue matter, or is all that we can expect from such an exchange is that persons create a record of their statements?

Enter Brin and the idea of a disputation arena. Envision that the meeting and dialogue involving parents, school officials, and concerned citizens described above occurs on the Internet with some type of established ground

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[1] *See* DAVID BRIN, THE TRANSPARENT SOCIETY: WILL TECHNOLOGY FORCE US TO CHOOSE BETWEEN PRIVACY AND FREEDOM? 172–77 (1998) [hereinafter BRIN, THE TRANSPARENT SOCIETY]; David Brin, *Disputation Arenas: Harnessing Conflict and Competitiveness for Society's Benefit*, 15 OHIO ST. J. ON DISP. RESOL. 597, 597 (2000) [hereinafter Brin, *Disputation Arenas*].

[2] Brin, *Disputation Arenas*, *supra* note 1, at 605–09.

[3] *See id.* at 604–06, 609–16.

[4] *See id.*; *see also* BRIN, THE TRANSPARENT SOCIETY, *supra* note 1, at 175.

rules.[5] Persons and groups of all types and from anywhere in the world participate, so the conversation quickly engages participation with law enforcement officials, mental health professionals, educators, and other interested persons. There is an initial period in which rhetoric is encouraged to flourish. But then a structure emerges and perspectives on the matter become crystallized.[6] Persons or groups falling into competing perspectives are required to marshal data and information into an understandable, comprehensive format. They post the information on the Internet for anyone to examine. They reference, by link, the supporting data, resources, and literature that they believe supports the truth of the matters they assert.[7] And, in Brin's engaging picture, the contribution to this dialogue is widespread and relentless.[8] Persons log on twenty-four hours per day, seven days per week, to add new information or resources. The process is also unending—just when one believes that all has been marshaled, others offer new resources or contributions. Further, since anyone can participate, there is a sense of responsibility by concerned or affected groups to participate in addressing what they perceive to be an interesting or important issue. And finally, the memory of the discussion can be recalled instantly—it does not disappear into universe.

Brin then suggests the next phase, in which groups or persons respond to what others have posted.[9] Before answering, the respondent must demonstrate that she understands the competing viewpoints.[10] Those communicating would be required to highlight, underline, or in some other manner identify the precise text to which they are responding and then articulate what they understand to be the claim being advanced. If that understanding is not accurate, then rules are developed to ensure that the original point gets clarified. Once there is confidence that the claims are understood, persons could advance their critique or comments about those assertions, offer competing rationales for rejecting the consequences being offered, and the like.

In the end, Brin believes that through this process of relentless engagement, dialogue, and argument, truth emerges and that reasonable policies and practices will flow from that important consensus.[11]

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[5] *See* Brin, *Disputation Arenas*, *supra* note 1, at 612.

[6] *See id.*

[7] *See id.* at 612–13.

[8] *See id.* at 608, 612–13.

[9] *See id.* at 612–13.

[10] *See id.*

[11] *See id.* at 615–16.

Why should those in dispute resolution be interested in examining the possibilities of the disputation arena? Dispute resolution processes, at least in our society, carry the hope of advancing democratic values. The disputation arena connects the deployment of widespread, powerful technology with values essential to a democratic life. It is worth our while, then, to examine what overlap might exist for learning from one another.

I want to approach the analysis with a decided presumption in favor of finding a constructive way to deploy current technology in the principled resolution of disputes. If, in the final analysis, one concludes that using technology to resolve human problems is bogus, misguided, or, in the worst case scenario, harmful, then those conclusions should result from analysis and argument, not simple assertions.

But identifying that sympathy does not resolve the methodological question of how best to investigate the relationship. Two options immediately emerge. The first, an internal perspective, invites us to presume the existence of the disputation arena, to adopt the posture of being a technical resource for the design of dispute resolution systems,[12] and then to proceed to offer counsel and criticism regarding how best to structure the disputation arena to ensure its effective, equitable operation. In this way, for example, we could design the role of a moderator, suggest how participants could be grouped, develop protocols for storing information, and develop time frames for deliberations. And, using this approach, the designer would revisit some of the assumptions governing the disputation arena and raise questions or challenges about the values embedded in it.

I choose to adopt an external perspective, though, and proceed in the following way.[13] I shall set forth an account of mediation that tries to crystallize its governing values and features as it currently is used in traditional settings. Given that account, I then examine what values, if any, the current framework shares with the disputation arena and what conceptual and practical differences exist between the processes. In this manner, I can raise the questions that Brin's account of the disputation arena must answer before theorists or practitioners move to embrace its format. The goal of proceeding in this manner is not to impose the rigidity of an existing model

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[12] *See, e.g.*, CATHY A. CONSTANTINO & CHRISTINA SICKLES MERCHANT, DESIGNING CONFLICT MANAGEMENT SYSTEMS: A GUIDE TO CREATING PRODUCTIVE AND HEALTHY ORGANIZATIONS 117–33 (1996) (developing an approach to the theory and practice of the design of dispute resolution processes).

[13] Adopting an external perspective allows for a variety of starting points. One could begin by analyzing the operative assumptions of the disputation forum or by analyzing features of the contexts in which its deployment is recommended to assess whether they limit the forum's applicability.

on a proposed new arena only to distort or squash its possibilities; rather, it is to help shape the investigation in such a way that we are confident that, were we to embrace some or all of the disputation arena features, we would be acting in a manner consistent with our most decided convictions about how we believe disputes should be resolved in a democracy.

II. A THEORY OF MEDIATION

A. *Definition*

Mediation is a dispute resolution procedure in which a neutral intervenor assists negotiating parties to identify matters in dispute and, through dialogue and analysis, to develop resolutions to those matters that are acceptable to each negotiating party.[14] So characterized, the mediation process has three central features, as follows: (1) to increase understanding among the parties as to the nature and dynamics of the matters in controversy; (2) to resolve the particular matters in controversy in a manner acceptable to all parties based upon that increased understanding among participants; and (3) to accomplish the above-stated goals with the assistance of a neutral intervenor.

So much is standard. What more is to be said? First, this streamlined account highlights that the mediation process promotes the following two important extrinsic values: (1) enhanced understanding of the situation by the parties to the controversy and (2) resolution. Second, as I will argue below, the account presumes that the relationship between enhanced understanding and settlement has a lexical priority to it;[15] that is, when mediating, the goal of securing settlement is predicated on the parties having achieved an enhanced understanding of the situation.

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[14] See JOSEPH B. STULBERG, TAKING CHARGE/MANAGING CONFLICT 5 (1987), where this definition of mediation is offered. Comparable definitions appear in various statutory schemes and professional codes. *See, e.g.*, FLA. STAT. ANN. § 44.1011 (West 1998). *See generally* MODEL STANDARDS OF CONDUCT FOR MEDIATORS (American Arbitration Ass'n et al. 1998). The *Model Standards of Conduct for Mediators* were developed by a joint committee composed of delegates from the American Arbitration Association, the American Bar Association, and the Society of Professionals in Dispute Resolution. These Standards, developed during 1992–1994, have been approved by the American Arbitration Association, the Litigation and Dispute Resolution Sections of the American Bar Association, and the Society of Professionals in Dispute Resolution.

[15] The concept of lexical priority used here borrows from the approach adopted by John Rawls in his celebrated book. *See* JOHN RAWLS, A THEORY OF JUSTICE 42–44 (1971).

This lexical ordering has significant implications for shaping the mediator's role. It implies that the mediator's first priority is to engage the parties in dialogue that promotes increased understanding of both their own circumstances as well as those of their bargaining counterparts. This priority is conceptual, not practical. The argument is not that it is simply more efficient for a mediator to begin discussions by focusing on information-sharing exchanges and then sequentially move to a problem solving phase, as many mediation trainers suggest;[16] rather, that training tip is a suggestion for how to conduct most mediation conversations effectively. But, to quote Hume, that sequence is simply an interesting feature of "constant conjunctions."[17] In contrast, the argument here regarding lexical priority is deeper.[18]

The claim regarding lexical priority is based on the observation that information sharing is importantly connected to an individual exercising her autonomy. Autonomy is an intrinsic, not extrinsic, value. Further, it is one of the constitutive values of mediation. And a deep theory of mediation must explicate mediation's intrinsic values and account for how they operate to distinguish mediation from nonconsensual decisionmaking processes such as litigation. The analysis of mediation's anchor values set out below falls within this latter category of justification.[19] I seek to highlight those values

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[16] *See, e.g.*, LEONARD L. RISKIN & JAMES E. WESTBROOK, DISPUTE RESOLUTION AND LAWYERS 345 (2d ed. 1997).

[17] DAVID HUME, A TREATISE OF HUMAN NATURE 10–17 (1888) (discussing the nature of causation).

[18] The recent popularity of so-called "transformative mediation" emphasizes that the first extrinsic value of mediation, information sharing, is not only a necessary condition for defining mediation but constitutes both its necessary and sufficient conditions. For reasons noted more fully in the text, I disagree with this perspective. But the lexical priority also rejects treating the second extrinsic value, resolution, as the value constituting the necessary and sufficient conditions of mediation. That position, fairly and easily ascribed to those who style themselves "evaluative" mediators, seriously fails to offer a principled account of mediation that successfully distinguishes it conceptually from other consensual or adjudicatory dispute resolution processes, including those that are offensively coercive. The most eloquent exposition of transformative mediation remains ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION 102–04 (1994). For an attempt to reconcile evaluative mediation within a consensual decisionmaking format, see DWIGHT GOLANN, MEDIATING LEGAL DISPUTES: EFFECTIVE STRATEGIES FOR LAWYERS AND MEDIATORS 267–305 (1996).

[19] Justifying the use of any social practice requires multiple layers of argument. Mediation is no different. One can endorse its use by claiming that it advances certain policy goals. Typically, mediation advocates claim that increased use of mediation will result in the more efficient use of public (i.e., court) resources or increase citizen

that make mediation a distinctive dispute resolution process and one that warrants our endorsement. Part of this latter judgment is that mediation so conceptualized resonates most closely with those democratic values that are at the heart of Brin's proposal. Once that is done, I can examine whether or where Brin's proposed disputation arena constitutes a desirable alternative to existing dispute resolution models.

B. *Mediation's Anchor Values*

What, then, are these anchor values? They are three in number, and in a manner noted above, are set forth in lexical priority.

1. *Autonomy*

Autonomy reflects that value which supports our conception of an individual human as being, in fact, a distinct person. To be autonomous is to have the capacity to make judgments over a range of tastes, preferences, judgments, and values that reflect what that particular individual, living at that time, decides what she wants to do or whom she wants to be. That is, exercising autonomy reflects in the most profound sense possible the notion that this is *my* judgment regarding the manner in which I want to live *my* life.

Autonomy covers a range of choices, from items of routine daily habit to the most significant life choices one can make. Choices range from what to eat for breakfast to whether to exercise, smoke cigarettes, play the stock market, participate in garbage recycling programs, call a friend, or worship a divine being. Disputes involving other persons raise opportunities for exercising one's autonomy over matters that fall along this extensive range or continuum of possibilities.

Certainly we have preferences for how individuals exercise their autonomy. We hope, minimally, that they make choices that do not harm

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participation in the justice system. *See, e.g.*, RISKIN & WESTBROOK, *supra* note 16, at 447. These, and other claims like them, are arguments of social policy—their realization are subject, in principle, to being confirmed empirically.

But the desirability and integrity of a social practice also require an account of the distinctive values that anchor the manner in which persons behave within it; explicating and justifying those values require a deontological, not consequentialist, form of argument. For a probing account of the need to distinguish arguments that justify a social practice overall from particular actions arising within it, see John Rawls, *Two Concepts of Rules*, 64 PHILOSOPHICAL REV. 3, 3–18 (1955), *reprinted in* JOHN RAWLS, *Two Concepts of Rules*, *in* JOHN RAWLS: COLLECTED PAPERS 20, 20–33 (1999) (applying this distinction in analyzing both the justification of punishment and the justification for keeping promises).

other persons. We seek to advance the well-being of many persons within the community through development of laws and public policies, be they regulations regarding safe housing, clean water, fair workplace practices, or stable economic arrangements. But if one respects autonomy, then one is committed to according fundamental respect to individuals who, in the exercise of their autonomy about both trivial and significant matters, make judgments that are sharply at odds with those of others. By incorporating autonomy as a core value, mediation is committed to the notion that persons can make significantly different choices that must be respected.[20]

Given this fundamental condition, what is its cash value? What difference does it make in practice to respect autonomy? To answer that, one additional distinction is required, and that is the traditional philosophical distinction between being rational and being reasonable.[21] Discussions regarding one's being rational and, more illuminating, being irrational, historically focus on an individual's capacity to assess and deliberate about options that take into appropriate account that person's fundamental interests regarding her well-being. Such fundamental interests include her physical and emotional health and, more generally, her capacity to sustain movement towards her stated life goals and dreams. If we believe that a person is rational, we are confident that she possesses the requisite mental and psychological balance to weigh competing options in a manner that reflects that she understands the potential consequences of pursuing each option and evaluates how acting one way rather than another will impact her other developed plans. If we are confident that those conditions obtain, then we judge her to *know* what she is doing in the most important sense of that term.

It is only when we are not confident that she knows how acting in various ways will affect her more fundamental interests or stated life goals that we question the rationality of her decision. We are concerned that she lacks an awareness of how acting in a particular way will set back importantly a fundamental interest that, as a person, she necessarily has. When an individual, for example, agrees as part of a marital dissolution process to accept a financial arrangement that will leave her destitute, we question whether she "knows what she is doing." This is because we judge that that arrangement will adversely impact her ability to sustain other

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[20] Indeed, by doing this, one can explain and justify the concept of nonviolent change in a democratic society. *See* Joseph B. Stulberg, *A Theory of Mediation* (2000) (forthcoming manuscript, on file with author).

[21] For an extended, penetrating discussion of the concept of rationality as it relates to fundamental interests and, more generally, the distinction between rationality and reasonableness, see 3 JOEL FEINBERG, THE MORAL LIMITS OF THE CRIMINAL LAW: HARM TO SELF 106–13 (1986).

welfare interests that she has, such as obtaining food and shelter necessary to her own survival. Similarly, if a person decides to engage in an activity that carries a high degree of risk to her physical well-being,[22] we are not confident that the person is rational because we believe that she does not fully appreciate the irreversible damage she might suffer by participating in the activity and the resulting constraints on her pursuing other life choices that then will obtain.

This concept of rationality is decidedly more narrow than the notion of reasonableness. Being reasonable allows one to be consistent in terms of her choices and fashion a lifestyle that promotes her fundamental visions of a worthwhile life, all the while not being irrational in the fundamental sense described above. Being reasonable captures the notion that persons have importantly different visions of a fun or worthwhile life. Some find high risk activities, such as mountain climbing, to add energy and passion to their human experience, and they engage in them with zest and commitment, knowing that it might be an exciting, albeit short, life. Others enjoy sky diving or scuba diving, while others of us perceive such activities as less inviting or risky or, for other reasons, choose not to participate in them.

Mediation supports persons exercising autonomy and forging mutually acceptable arrangements that fall within the zone of persons being reasonable. This means that persons operating in what are perceived as reasonably similar circumstances can develop settlement terms that are importantly different. Groups of parents, school administrators, teachers, and law enforcement officers, with a mediator's assistance, might develop thoughtful and insightful practices for securing safety at a school that are sharply at odds with how comparable groups in other school settings meet a similar challenge. Plaintiffs and defendants who develop different settlement arrangements for medical malpractice controversies or civil rights claims similarly can be applauded. Such diversity is to be celebrated as a source of strength, not of concern. Mediator conduct that compels parties to consider resolution terms that fall only within a tightly defined range of choices undercuts this fundamental, distinctive value of mediation.

2. *Participation*

A person's autonomy is reinforced and strengthened by that individual's participation in the decisionmaking process over matters the outcomes of

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[22] Some persons are willing to provide eggs for infertile couples as a method for generating economic income even if the potential risks to their own health or later child-bearing capacities are not fully known at the time. *See* Rebecca Mead, *Eggs for Sale*, NEW YORKER, Aug. 9, 1999 at 56, 56–65.

which affect her range of choices. That is, if one wants to exercise autonomy but is denied access to participating in the process that helps to articulate, shape, and realize her choices, then her integrity and autonomy is diminished. It is not good enough that other persons make the right decisions for someone else, for that simply results in a state of affairs being bestowed on an individual. She must engage her deliberative faculties and encounter the risks, excitement, or apprehension that attend the process of making choices in order to experience her personhood in a meaningful sense.

What happens to individuals who are involved in a dispute with one another when they engage in a deliberative process? People share perspectives and concerns with one another. They state their viewpoints. Sometimes they communicate their perspectives with great force and in an articulate, compelling manner. Sometimes they share it while barely controlling their rage. Some state their beliefs emphatically and in a manner calculated to provoke or shock, while others communicate in a quiet yet powerful manner. And some express themselves in halting or bungling fashion. Yet, in the process of such exchanges, persons learn about each other's sense of self as well as their counterpart's concern for, and interest in, the well-being of others. They frequently acquire new information concerning the content of the dispute as well as their counterpart's flexibility, patience, or disposition to resolve it. And, not insignificantly, persons learn new things about themselves. They sense whether they have conducted themselves in a manner of which they are proud. They assess whether they communicated their viewpoint clearly, felt a sense of growth and accomplishment in sharing concerns, or otherwise accounted for themselves in a manner that reflects self-growth and enhancement.[23]

And, in the process of such engagement, a person might be prompted to rethink or envision different possibilities for the resolution of the particular conflict. She might be persuaded by the logic or rationale of her counterpart's proposal or evaluate more favorably the desirability of alternative options in light of newly revealed information. She and her counterparts might, in light of newly exchanged information, brainstorm acceptable options that neither had considered previously. Or, in light of a perceived intransigence of the other side, a person might reassess her own attitudes about risk, calculate her best alternative to a negotiated agreement, and decide that her alternatives to a negotiated resolution are now her preferred outcomes. But all such decisions emanate from her meaningful participation in the decisionmaking process, not her exclusion from it.

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[23] In this dimension, the insights of Bush and Folger regarding the empowering dimension of the negotiation/mediation process are precisely on point as both an empirical and conceptual matter. *See* BUSH & FOLGER, *supra* note 18, at 209–11.

Participating in the decisionmaking processes does not, of course, prevent that individual from obtaining guidance and counsel from experts or advocates. There is no incompatibility between one's participating in the decisionmaking process and being assisted or represented by an agent, lawyer, or some other type of expert resource.[24] Expertise might include knowledge of both substantive or process matters. For instance, the expert might counsel an individual on the reported success of varying parental arrangements among divorced couples as they impact teenage children or offer guidance regarding financial investments or estate planning matters. The expert might counsel the person regarding her psychological development and needs or her spiritual perspectives. In each instance, the representative or resource clearly might be more knowledgeable about such matters than the individual in a dispute. There is no sacrifice of autonomy in a person's seeking such guidance, knowledge, and perspective in the decisionmaking process. A compromise in autonomy only occurs when the consultative process converts to a paternalistic perspective that has the expert persuasively, aggressively, or pointedly telling the person to accept a particular arrangement because the expert knows what is in the client's best interest, even if the client disagrees.[25]

3. *Dignity and Respect*

Different dispute resolution processes permit or require persons to treat one another in particular ways. To explicate the manner in which mediation shapes human interaction, it is helpful to contrast it to how a rights-based process of a rule-governed system guides such conduct as well as to how the negotiation process, mediation's predicate companion, structures the interactions.

When vindicating a claim in a rule-governed system, a person or group asserts that someone else has acted in a way that has undermined or

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[24] The representative's role, of course, must be congruent with the aims and goals of the represented parties' interest, which I have posited as being that individual's most extensive exercise of autonomy compatible with like exercise for all. This results, practically, in the agent interviewing and knowing her client with a depth that enables decisions to be made that advance that goal. Her advice regarding bargaining strategy and tactics must be congruent with those fundamental goals. Having noted that, however, the agent has much to "bring to the table" in terms of expertise.

[25] Persons participating in a mediation conference are entitled to the same respect and dignity as well. If the goal is to maximize autonomy, then intervenors' values and tactics must be congruent with those anchor values. To that extent, evaluative mediation is dangerously paternalistic in its problem-solving approach and systematically undermines the connecting tissue between mediation and democracy.

frustrated one's realizing or enjoying a particular state of affairs that one believes she is entitled to enjoy. If the landlord has the legal right to collect rent, the tenant's failure to pay frustrates the landlord's claim. If the consumer is legally entitled to have repairs performed without charge under operative warranty provisions, the provider's billing the consumer for repair services frustrates that right.

Rights have multiple sources, including, but not limited to, legal, moral, religious, institutional, or conventional bases. Whatever the source, the structure for claiming vindication is identical. Two examples suffice.

Assume that the New York Yankees and Atlanta Braves are playing a baseball game in the World Series. The Braves are at bat. The pitcher throws a pitch, the batter swings and misses, and that missed swing constitutes the third strike to that batter. Further, that out would be the third of the inning, and, according to the rules, the Atlanta Braves have been retired.[26]

Suppose, though, that the umpire does not call the batter out. Rather, she reasons that the game will be much more exciting if the inning continues because the bases were loaded and the batting team might be able to tie the score if the batter hit safely. Or, on the other hand, the umpire knows that if the batter gets one more hit, that will trigger an incentive clause in the player's contract that will pay him a substantial bonus for that year while the pitcher's statistical record will not suffer significantly by having to pitch to one more batter. The pitcher justifiably can complain that his right to have the batter called out has been violated, even if the game would be more interesting or rewarding if the batter had another chance. The pitcher's attitude towards the batter could be compassionate (e.g., "I'm sorry that you didn't qualify for the bonus"), neutral (e.g., "I really don't care if you earn more money or not"), or nasty (e.g., "You are a selfish, overpaid athlete already—I'm delighted that you won't get your damn bonus"). In a procedure to vindicate one's claim, though, the pitcher's attitude towards the batter is irrelevant to whether he is entitled to have the batter called out.[27]

A matter of more concern, of course, can come readily from multiple real-life scenarios. Consider the employee lured to leave her place of

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[26] Readers immediately will note that this is simply an updated version of H.L.A. Hart's example of scorer's discretion. *See* H.L.A. HART, THE CONCEPT OF LAW 142–46 (2d ed. 1994).

[27] It is true that the person's attitude towards her counterpart is relevant in making the decision *whether* to attempt to vindicate the rule. If one felt that the best thing, overall, was not to attempt to enforce the rule, then the umpire's egregious decision will stand. But if the person attempts to enforce the rule, the types of reasons the umpire cited do not constitute relevant considerations or acknowledged exceptions to the rule's application; hence, the attitude of the person seeking to vindicate the rule is not relevant. *See id.* at 143–44.

employment by a tantalizing employment offer from her current employer's competitor. The new employer, geographically located one-thousand miles from her current location, offers her a dramatic salary increase, added office and travel perks, and the prospect of a high visibility career at the new company. The employee, a single parent, announces to her current employer that she is leaving. She sells her current home, buys a new home in her new city, and makes appropriate arrangements for her school-age child to enter a school system. At the end of her first day of work at her new job, she is terminated. When she asked for a reason, she is informed that the company was engaging in a downsizing initiative that resulted in several individuals, herself included, being released from the company. The employee sues the employer, claiming that the representations made to her result in her being entitled to employment. The employer claims that the law governing the jurisdiction incorporates an "employment at will" principle that permits the employer to terminate employees for good reasons, bad reasons, or no reason at all.

In most jurisdictions in the United States, the employer in the above scenario prevails. Again, in vindicating the claim, the employer might act with compassion and sensitivity, genuinely making such statements as, "I feel very badly that things worked out this way for you and your child." But the employer also might adopt a contrary perspective and say, "I really don't give a damn what happens to you and your kid—I've got a business to run." We might find these latter statements offensive and morally blind, but we quickly would conclude that the person seeking to vindicate her right need not like or, more objectionably, care about what happens to the individual affected. And that is true even if, by an objective analysis, the company were making significant profits and had no apparent economic need to downsize at this particular point in time.

Does the same mode of interaction occur when disputants negotiate with one another in a mediation conference? The predicate process, negotiation, requires examination.

The presumptive motivation for engaging in negotiation is the belief by one or more parties that they need the cooperation of someone else in order to achieve their objective; if a person could obtain her goal unilaterally, she has no need to negotiate with anyone. Fundamental to the negotiating perspective, then, is the notion that one must secure cooperative behavior from another. While there are multiple strategies and suggestions offered for how one gains another's cooperation, one cannot obtain it by disregarding or ignoring the interests, goals, or aspirations of her bargaining counterpart.[28]

[28] There is no question but that a negotiator might calculate, after engaging in negotiations with a particular person, that she is better off pursuing some other avenue to

As the late Yitzhak Rabin said, one makes peace with one's enemies, not one's friends.[29] And that can be done only by being attuned to how one's own bargaining proposals or posture impacts the standing and capacity of the bargaining counterpart to advance or protect her interests and goals. One need not agree with or endorse the desirability of those aspirations; but if cooperation is required, then one fundamentally must at least acknowledge that one's counterpart wants to secure some interest or goal. One must do this if only to be able to assess more accurately the likelihood of being able to establish mutually acceptable resolution terms.

Insisting that a negotiator cannot disregard the interests or concerns of others when attempting to reach a mutually acceptable outcome does not mean that that the negotiator must compromise or adjust her proposals or viewpoints in order to explore reaching a negotiated resolution. That is, engaging in negotiation does not require that one reach agreement. What is required is that each person be ready to account or explain to her bargaining counterpart what reasons she finds persuasive for acting in a particular way. She cannot escape responsibility for accounting to one another what beliefs or convictions she finds persuasive. In that sense, personal accountability is an indispensable feature of negotiation. Holding a conviction publicly exposes that person to her bargaining counterpart—if one is ruthless, selfish, or not open to considering new information, then those traits at least are revealed in the bargaining process. In a significant sense, negotiating allows persons to see one another "for what they really are." It may be of small practical consolation to the less powerful negotiator to be able to report to her friends, with solid evidence, that her bargaining counterpart is a mean or self-centered individual. This is a sharply different and stronger judgment from the one she otherwise might have to report if her counterpart shielded himself by asserting that he was doing only what the law (or some other rule) entitled him to do. The rule-governed system, in the latter instance, serves to protect the individual from a deservedly harsher judgment.[30]

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achieve her goal; that assessment is not incompatible with the point being made here. Rather, it simply exposes the notion that reaching agreement is never guaranteed, even if the calculation is incorrect. But in order to envision an agreement, there is a requirement that a negotiator pay attention to, consider, and somehow acknowledge her negotiating counterpart. Again, Bush and Folger speak of this in their account of recognition, but one does not need to embrace their communitarian account of morality in order to embrace this value of negotiation and mediation. *See* BUSH & FOLGER, *supra* note 18, at 96–99.

[29] *See Barak Elected in Israel: Hope for a Peacemaker*, SYRACUSE HERALD-JOURNAL, May 19, 1999, at A14.

[30] *See* BRIN, THE TRANSPARENT SOCIETY, *supra* note 1, at 175.

With this account of mediation's intrinsic values, how can it help us to capitalize on the promise, or minimize the limitations, of Brin's proposed disputation arena?

III. DISPUTATION ARENAS AND DISPUTE RESOLUTION: COMMONALITIES AND DIFFERENCES

A. *Areas of Commonality*

Brin's account of a disputation arena immediately commands our attention because its fundamental values are perfectly congruent with mediation's intrinsic values and those of a democratic society.

1. *Autonomy*

The disputation arena invites each individual to advance any proposal or idea that the individual believes to be justifiable.[31] There are no rules or external constraints defining what can or cannot be discussed, nor constraints on the range of ideas, arguments, or perspectives that can be offered. Relating this to the preceding discussion, it means that persons participating in a disputation arena can discuss a broad array of topics and offer a range of analyses or proposals that are fundamentally reasonable, even if wildly differing in terms of conventional practices or norms.[32] None are ruled out as irrational unless subsequent discussion and dialogue demonstrate that the ideas advanced importantly frustrate a person's or group's primary interests.[33] Thus, the disputation arena secures autonomy and accountability.

2. *Participation*

The disputation arena dramatically expands the possibility of broad-based participation.[34] It invites persons from quite literally throughout the globe to participate in and contribute to dialogue. While it does not demolish all access barriers because persons must have both access to the technology and the resources to pay for its use, the disputation arena and its supporting

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[31] *See* Brin, *Disputation Arenas*, *supra* note 1, at 612–13.

[32] *See id.*

[33] *See id.*

[34] *See id.* at 612.

technology importantly reduce the economic threshold level for participating in dialogue.

3. *Dignity and Respect*

There is much anecdotal information suggesting that dialogues through a chat room, e-mail, or other computer-based technology allows for persons to treat one another with remarkable lack of respect and dignity. As Brin notes, when one does not see the person with whom the individual is communicating, it can give that individual both courage and hubris to write or say things that are fundamentally foul, extremist, or provocative.[35] When individual group members talk mostly among themselves, they can create images of their "enemies" that reinforce hostile, divisive, and alarmingly stereotypical caricatures of them.

But, as Brin notes, that is not a necessary feature of Internet dialogue.[36] His suggestion that a person or group, before responding to an adversary's proposal, must first demonstrate that she has understood what that person has said[37] resonates familiarly among dispute resolvers as the elementary technique of summarizing the bargaining counterpart's comment or proposal. Summarizing does not mean agreeing with; rather, it is the simple requirement that one try to understand the other's comment before evaluating it, rejecting it, or side-stepping it. If a guideline such as this were capable of being enforced, then a disputation arena can secure this third anchor value of mediation.

It is important to stress one further observation in this context. Brin properly portrays robust dialogue as one that can involve persons who are wildly disputatious.[38] Their conduct can be aggressive, mean-spirited, or righteously indignant, and their language can be provocative or coarse. There is no need for disputants to be nice. The same holds true in conventional dialogue formats. Efforts by intervenors to make people behave properly impose a rigidity on the dispute resolution process that importantly diminishes individuality. It is not at all inconsistent for disputants to act in ways that are flamboyant, aggressive, or otherwise perceived as impolite. The important perspective the intervenor adds to dispute resolution efforts is to confront individuals behaving in this way with questions and queries regarding how they believe that so behaving will result in gaining

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[35] *See* BRIN, THE TRANSPARENT SOCIETY, *supra* note 1, at 168–69.

[36] *See* Brin, *Disputation Arenas*, *supra* note 1, at 612–13.

[37] *See id.* at 613.

[38] *See id.*

cooperation from their bargaining counterparts. So, Brin's vision that a democratic society nurtures individualistic, constitutionally-contentious, or rambunctious individuals who engage in unrelenting, persistent debates, feints, or counterarguments with others[39] is perfectly compatible with mediation's anchor values.

Though the anchor values are compatible, there are important conceptual differences between mediation and a disputation arena that raise questions regarding how these anchor values are respected or realized in their respective fora. By examining these differences, we can target the potential contributions and unanswered questions posed by Brin's vision of a disputation arena.

B. *Differing Values and Concepts*

There are two critical differences between a conventional mediation process and a disputation arena. Noting them helps to identify their distinctive strengths.

1. *Concept of a "Dispute"*

In conventional mediation, two concepts shape the engagement. The first is that of an "issue" and the second, derivatively, is that of "parties to a dispute."[40] An issue is some matter, practice, policy, or behavior that, when implemented or executed, alters or affects another person's interest or need.[41] A matter or practice is a negotiable issue when persons engaged in those behaviors have the authority and capacity to change or alter them. Parties to a dispute then can be defined as those persons or organizational representatives who are capable of resolving negotiable issues.[42]

These concepts immediately govern the mediation dialogue in three significant ways, as follows: (1) they identify who should participate in the dialogue (i.e., negotiators); (2) they identify what topics they should discuss (i.e., negotiable issues); and (3) they identify one criterion for determining when mediated discussions should end (i.e., when all negotiable issues have been resolved or have been identified as not being able to be resolved at that time by the parties).

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[39] *See id.* at 608, 612–13.

[40] The analogous framework in the context of such rule-governed procedures as a lawsuit is the idea of a "legal cause of action" (dispute) and persons who have "standing to sue"(parties).

[41] *See* STULBERG, *supra* note 14, at 81.

[42] *See id.* at 82.

By contrast, Brin's vision of a disputation arena shifts the fundamental concept from that of a dispute to that of a policy challenge or, more conventionally speaking, a "problem."[43] The result is that a disputation arena, at its fundamental best, invites citizens to engage in public discourse over issues or topics that matter. It is designed to have persons clarify, probe, and analyze the desirability or persuasiveness of certain modes of conduct.

By having a problem-solving rather than a dispute resolution focus, the concept of a disputation arena also shifts the description of the participants from persons who are "parties to a dispute" to those who are "participants in a conversation." And participants do just that, they participate. They share information, experiences, and perspectives. Some simply observe and try to learn from others. But participants have characteristics that distinguish them from parties to a dispute. Participants, for example, can engage in sustained dialogue or participate only intermittently, or they can choose to withdraw from the conversation without undermining the capacity of others to continue the dialogue. Further, some persons can choose to opt out of the dialogue, deciding to let others decide or shape policy initiatives. And finally, persons can participate in a dialogue the outcome of which will have no discernible impact on their lives. Participants could be concerned individuals or experts who, as good Samaritans, want to contribute to an informed discussion of the topic under review, or they could be individuals who simply like to meddle in other people's business. Parties to a dispute, by contrast, have a stake in how the matter is resolved. While they always have the practical freedom to opt out of discussions or ignore the situation, they can do so only by assuming the risk that the matter will be resolved in a manner adverse to their interests. Thus, participating only intermittently, ignoring the matter, or letting others decide the matter for them carries significant risks for a party to a dispute.

Given these contrasts, for what types of matters might a disputation arena be helpful? Examples are easy to envision. As the aftermath of the tragedy at Columbine High School vividly illustrates, school administrators, parents, teachers, and interested citizens are confounded by how best to address recurring threats of violence made against children attending public schools. Should high schools conduct unannounced locker searches? Establish dress codes? Eliminate students' ability to bring book bags into school? Erect metal detectors at each school entrance? This is a problem that exists throughout the United States. Without trying to impose a "one solution fits all" response to it, using a disputation arena to generate thoughtful dialogue, share information, exchange ideas, and debate the strengths and

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[43] *See* Brin, *Disputation Arenas*, *supra* note 1, at 606, 614.

weaknesses of various policies might contribute significantly to informed action by multiple players.

The principle is straightforward: adopting a version of a disputation arena to address matters of significant community or organizational policy could boldly expand participation, information sharing, and public support of various policies. Disputation arena dialogues regarding gun control, health care delivery, diversity and affirmative action, law enforcement practices, workplace policies governing drug and alcohol abuse, or environmental management could become routine aspects of our lives and contribute importantly to enhancing our collective understanding and performance in these areas. What makes these situations amenable to this dialogue format is that they are information intensive and susceptible of being addressed on a "best practices" basis.

But is dialogue the only outcome in a disputation arena? Stated differently, what constitutes a successful outcome in a disputation arena?

2. *Concept of a "Resolution"*

Persons try to resolve disputes, but if disputes remain unresolved, they fester, thereby creating continuing, perhaps expansive and unpredictable, complications. But the notion of resolving a dispute is connected conceptually to the concept of a negotiating issue. Parties resolve disputes when they reach agreement on how to address the identified negotiating issues. One criterion for successfully resolving a dispute is that parties have addressed the negotiating issues in a manner acceptable to them.[44] But the same concepts of resolution are not germane to the disputation arena.

Brin argues that resolution occurs when the most compelling or persuasive proposal or justified position emerges through debate and dialogue.[45] Resolution is epistemologically tied to a notion of objective truth. And truth will emerge triumphant by a consensus among responsible dialogue participants—one need not hope or strive for consensus in the sense of the outcome being acceptable to everyone.

Brin's characterization of truth has much to commend it. But it importantly is tied to epistemological accounts in the natural sciences as to

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[44] There are other criteria for assessing the resolution, including durability of outcome and the efficiency with which the resolution was secured. Similarly, resolution in a rule-governed dispute resolution system such as adjudication occurs when the authorized decisionmaker renders a dispositive ruling on the issues; that is, she applies the presumptively applicable rules to the facts presented to her, thereby answering how the presented legal causes of action shall be addressed.

[45] *See* Brin, *Disputation Arenas*, *supra* note 1, at 609–10.

what is true or capable of being true. Without exploring that entire quagmire, one generously can suggest that while gaining agreement on what constitutes truth is certainly one approach for resolving differences of opinion, it is not the only option available for resolving differences of the most fundamental nature.[46]

What, then, constitutes a resolution of a discussion in a disputation arena? Discussions in the arena are designed to clarify matters. The discussions expose the strengths and weaknesses of particular ideas or proposals, in which strengths and weakness are assessed on such dimensions as the internal consistency of a proposal, the plausibility of the assumptions that ground particular ideas or proposals, or the empirical probability that the alleged consequences of adopting particular practices or policies will occur. In these important respects, then, participating in a disputation arena operates to persuade some persons to alter beliefs or conduct. That, however, suggests an arena not so much of dispute resolution as active education.

That is not a criticism of a disputation arena but rather an observation regarding its distinctive competencies and purposes. Working at its optimal capacity, the disputation arena could constitute a robust democratic forum for the exchange of dialogue and ideas regarding issues of public concern. Dispute resolution practitioners, in a manner similar to their efforts in facilitating public policy dialogues "in person," should explore ways in which they might make comparable contributions to ensuring constructive dialogue in the Internet venue.

But the promise of technology highlighted by Brin suggests more direct applications to the world in which dispute resolution intervenors actually operate. It is to a consideration of those possibilities that I now turn.

IV. TECHNOLOGY AND DISPUTE RESOLUTION: DEMOCRACY'S FRONTIERS

If the analysis above is persuasive, then a disputation arena engineered by the Internet's expansive use constructs a new dialogue arena but does not share defining features of traditional consensual dispute resolution forms in which intervenors urgently operate. So, the question arises whether the tantalizing feature of using the Internet can be incorporated into the practical work-life of dispute resolution intervenors.

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[46] Compare, for example, John Rawls's more recent analysis in *Political Liberalism* for how a regime accommodates competing comprehensive views, no one of which can be demonstrated to be wrong by a different perspective. *See* JOHN RAWLS, POLITICAL LIBERALISM 58–66 (1993).

A. *Context*

Mediators operate in an environment in which there are disputing parties and, at least after some discussion, identifiable issues.[47] Using the Internet's technology in a targeted manner could be of assistance.

To revisit the hypothetical offered above, if someone were mediating discussions involving high school administrators, faculty, staff, students, parents, and law enforcement representatives aimed at developing viable policies for dealing with threats of violence to school citizens at a suburban public high school, the mediator might, with the participants' permission, post some aspects of the matter on the Internet for a disputation arena-type discussion. For example, the participants might have developed an information base that describes the size and nature of the student, faculty, and staff population, the school's geographic location, and other data that they believe essential to portraying the situation that the school confronts. The mediator could post this to the Internet and invite Internet participants, given this information base, to share ideas and comments. Responses might range from someone suggesting that important aspects of the information base are missing to observations about how selected features of the challenge might be addressed. The mediator could summarize those responses for the parties, or, more actively, the parties to the mediated discussions could go online to question, probe, or otherwise interact with respondents in the Internet conversation. The forum discussion would conclude when the parties and mediator determined that they had exhausted the usefulness of that feedback mechanism or felt the need to proceed. They then would continue their efforts to develop acceptable action plans.

Using the Internet (and the modified disputation arena) in this way could be a bountiful avenue for mediators and parties to explore. Its benefits are obvious: it expands the information base on which to make intelligent decisions by inviting comments and observations from persons with an

[47] I believe that the analysis that follows also could be useful to the intervenor who has been asked to facilitate a policy-planning or analysis conversation in which the final outcome requires some person or group to make a decision. That is, there need not be a dispute to trigger intervention; however, some type of decisionmaking framework is required so that participants know where to target their comments. For example, if one were asked to facilitate discussions among a group of stakeholders regarding the development of a viable policy for homeless shelters, there need not be an existing dispute as defined above in order to initiate dialogue or, as germane here, to use the power of the Internet to expand participation. But the required feature is that there are some identifiable participants who have committed themselves to developing a proposal or decision on an identifiable matter.

active interest in the subject matter.[48] But using the Internet in this way has two practical consequences. First, it removes the negotiations from what otherwise might have been their presumptive status as confidential conversations among the parties into the daylight of public conversation. Second, it significantly expands, albeit in a targeted way, participation in the discussion to include persons other than those perceived as directly affected by the operation of the particular policies and practices. Particularly for these types of issues, though, these consequences are better viewed not as costs to traditional dispute resolution processes that might be outweighed by their benefits. Rather, given that enriched understanding of multiple perspectives is an integral feature of autonomous conduct, proceeding in this way promotes rather than compromises mediation's anchor values.[49] Not to use this forum would be to fail to realize mediation's potential.

But using technology, while alluring, does have consequences. And the final question to address is whether some of those consequences fundamentally collide with or undermine the anchor values of mediation to which we have given presumptive allegiance.

V. TECHNOLOGY AND DISPUTE RESOLUTION: WHAT ARE THE COSTS?

While one can envision the constructive use of the Internet as a resource that a mediator or parties could use to facilitate discussion and resolution, there are potential costs as well. If those costs jeopardize mediation's anchor values, then we might be well served to be cautious when embracing its use.

A. *Power Balance*

There are two fundamental questions regarding technology's use in the manner envisioned above. First, do people have access to it? Second, do people have the capacity to use it?

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[48] *See* Brin, *Disputation Arenas*, *supra* note 1, at 612–13.

[49] Mediating a more contentious issue might help clarify this point. Presume a vocal parent group that demanded that school officials adopt hiring practices that would generate increased ethnic and gender diversity in the school's staffing pattern. A critical element of the conversation might relate to the pool of available candidates from which the District recruits. Understandably, there might be a significant disparity of information resources between the parent group and school officials regarding that subject. Moving the inquiry to the Internet might prompt some interested advocacy groups to furnish information to the participants that could lead to hitherto unenvisioned possibilities.

Access seems the easier of the barriers to address. If persons must travel a significant distance to a meeting site, then conducting the conversation via the Internet can eliminate that expense. If a single parent must pay child care expenses in order to attend a public meeting, logging onto the Internet from her home eliminates that expense. Not everyone, of course, owns a computer or has the programs that permit participation, but if public libraries, schools, or other public institutions provide such resources, then barriers, importantly, are reduced for sustained, not merely one-time, participation. But use capacity is a different matter.

To those who lack confidence in their writing skills, the Internet does not make it easier for them to participate, even assuming basic literacy skills. Overcoming the typical frustrations of learning to keyboard, understanding the various commands, accessing the links, and the like are less of a problem to those who have grown up using computers. However, to several generations of persons, the computer is not user friendly. If a mediator were to ignore her comfort or discomfort level, she would be roundly, and justifiably, criticized.

One always can retort that not everyone has to be capable of using the Internet. Uncomfortable individuals can recruit others to act on their behalf, either by actually doing the keyboarding for the individual or, more likely, by following the conversation and informing the principal that other discussion participants have conveyed similar sentiments or ideas. While this retort is accurate, it quickly raises all the complexities of questions regarding representation. The underlying danger remains: are some people not participating for lack of technology skill rather than a lack of substantive interest?

B. *The Value of Interpersonal Conversation*

Using the Internet to stimulate participation and share ideas seems presumptively desirable. How important is it, then, for there to be face-to-face dialogue among parties to resolve actual controversies? Put conversely, what are the costs of not meeting face-to-face? They include the following:

1. *Primary Costs*

a. *Language of Conversation*

Conversations are conducted in a natural language. If persons do not speak the same natural language, we engage translators to ensure that participants understand one another. It may be a technical challenge that

easily can be met by computer programmers, but there must become a way, technologically, to provide for immediate, if not simultaneous, language translation. If the primary discussion language of Internet dialogue is English but some of the participants know different natural languages, how can mediators check that all persons have understood the comments that have been advanced?

b. *Forms of Communication*

To use the Internet is to rely on one's capacity to express or justify her beliefs, ideas, and proposals in written form. While this is a primary form of communication among human beings, it certainly is not the only way to share ideas and thoughts, nor does the written expression always convey the complete meaning of what an individual is trying to communicate. The question for the dispute resolver to consider becomes: Is anything lost by not having persons communicate, and experience that communication, in one another's presence? For example, assume that it is the cultural custom of participating parties to begin each mediation session with an invocation, prayer, or some comparable ceremonial activity. Would communicating the words of that ceremony on the Internet capture its meaning?

Other nonverbal dimensions of communication are of interest to the mediator because they mean something; that is, there is a significance one tentatively can attach to the nonverbal dimension of the communication that leads the mediator and other parties to believe that it is part of the overall message being conveyed. Such behaviors include the following: (1) a speaker's hesitation when making a remark; (2) a person smiling or frowning while making her remarks; (3) speaking at a different tempo during the course of either single or multiple presentations; and (4) displaying formality or informality in one's demeanor and tone by such acts as bowing to one another or ensuring that a person occupies the appropriate place in the meeting room as a sign of respect. The question is whether the mediator can capture these communication components through the Internet. Presuming a negative answer, the question is whether what is lost is significant.

Finally, one must ask whether the language one uses to express herself is vital to the notion of a person exercising her autonomy. That is, written communications can constrain dialogue in a number of ways, from sentence structure to vocabulary. If a person cannot, in an important sense, "say what she wants to say in the way she wants to say it," then the dispute resolver must be concerned as to whether the technology has constrained that person's autonomy and participation.

2. *Derivative Costs*

a. *Trust*

One result of interpersonal interactions is that people make judgments regarding whether or not to rely on their counterpart's representation that they will do what they say they will do. Conversation breeds, if not familiarity, then at least evidence that can be used to inform someone's judgment regarding the other's reliability. That reliability assessment is reinforced in multiple ways, not the least of which is a handshake or some other culturally appropriate signal of strengthened ties. In an age in which many business transactions are handled completely electronically, one certainly cannot claim that face-to-face conversation is essential in order for persons to rely on another to honor her commitments. But, of course, not all transactions are business transactions.

b. *Participating Responsibly if not Enthusiastically*

Despite Brin's description of the individualist's temperament as being that of someone who is constitutionally contentious,[50] not all persons have that disposition. Some people are genuinely reticent to engage in debates, yet have a very significant interest in the outcome of a controversy. In live discussions, there always must be room at the table for the reluctant, shy, reticent, or quiet participant, for, by definition, if that person is a party to the dispute, then she has a veto over any proposed outcome. If there is to be an agreement, participants must find a way to engage the commitment, confidence, or acquiescence of the quiet party as well as the vocal participant. And, at least within the live interactional context, there are several strategies a mediator can deploy to elicit that person's perspective and participation.[51] The process, when well executed, adjusts its engagement terms in order to solidify the participation of all its stakeholders. How that could happen on the Internet is not immediately apparent.

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[50] *See* Brin, *Disputation Arenas*, *supra* note 1, at 611–12.

[51] Tactics include the mediator asking each of the parties to direct her comments to the mediator, asking questions designed to elicit responses from the quiet individual, creating mediator teams so that all participants have someone with whom they might be comfortable, or caucusing separately with each party, including the reluctant participant.

VI. DIVERSITY, DEMOCRACY, AND THE INTERNET

The attraction of the Internet to dispute resolution is its promise to expand exponentially the possibilities of citizen participation. But its dazzling capacities camouflage its most crucial drawback—it is antidemocratic in a seriously profound way. To see this, we must revisit Brin's account of a successful outcome.

To Brin, the disputation arena generates a successful outcome when truth emerges.[52] Through relentless exposure to additional information, careful analysis of an argument's connecting premises and conclusions, and a memory that is unyielding in terms of not permitting others to misrepresent what they had previously urged, we are presented with an image of a community of individuals fervently committed to reaching, and then acting on, rational decisions about matters of significant public concern.[53]

But the discussion above regarding the costs of removing dialogue from personal interaction to dialogue via the Internet reveals the relentless uniformity that communicating through the Internet imposes on human behavior. While using the Internet might celebrate values we cherish, including individual energy, vitality, imagination, perseverance, and a persistent search for a reasoned conclusion, we must not ignore what it fails to embrace: a respect for a diversity of lifestyles; a diversity of modes of communicating fundamental ideas, values, or concerns; and the nuances of expressing and experiencing human ideas and drama through such nonverbal behaviors and signs as crying, bowing to show respect, one's manner of dress, or the deliberate use of silence. Rather than advancing the laudable goals of a transparent society in which freedom and accountability are important partners, we are confronted with a picture of a dialogue form that is relentlessly homogenizing.[54]

To the degree that the Internet is a machine used by human beings to promote various purposes, we surely must not ignore its potential contribution to enhancing human understanding. But it is easy to be bedazzled by its pyrogenics. Part of the responsibility of dispute resolution intervenors is to establish terms of engagement among a variety of persons within the human family. To do that, we must embrace today's technology with a confidence in how we can use it to enhance human understanding, not distort it.

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[52] *See* Brin, *Disputation Arenas*, *supra* note 1, at 614.

[53] *See id.* at 612–14.

[54] *See generally id.*