

MEDIATION AND ITS APPLICATIONS FOR GOOD  
DECISION MAKING AND DISPUTE RESOLUTION



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XII

MEDIATION AND ITS APPLICATIONS  
FOR GOOD DECISION MAKING  
AND DISPUTE RESOLUTION

Carrie MENKEL-MEADOW  
Honorary Doctorate in Human Sciences  
KU Leuven  
9 February 2016



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Mediation and Its Applications for Good Decision Making and  
Dispute Resolution  
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## Laudatio for Professor Carrie Menkel-Meadow

Delivered in Leuven on 10 February 2016 by

Professor Alain Laurent VERBEKE

*Promotor doctor honoris causa*

*Also on behalf of copromotors Professors Martin Euwema  
and Koen Matthijs*

Honourable Rector,  
Your Excellencies,  
Dear Colleagues,  
Ladies and Gentlemen,  
Dear Students,

Our impressive list of honorary doctors may very well be the jewel in the crown of KU Leuven. Today, it is our privilege to add a multifaceted diamond of absolutely top quality. Presenting to the academic community a scholar, teacher, and friend such as Carrie Menkel-Meadow is a rare pleasure. Together with my co-promotors Professor Euwema and Professor Matthijs, I am delighted to include Professor Menkel-Meadow in the KU Leuven community. Her honorary doctorate is in keeping with a centuries-old KU Leuven tradition of research that aims for excellence and is committed to society with compassion for all fellow human beings.

Carrie Menkel-Meadow grew up in an environment with a strong desire for peace. Her grandfather was a peace activist in World War I, and her German parents –

her father Catholic, her mother Jewish – fled to the United States during World War II. An artwork by Käthe Kollwitz, *Nie wieder Krieg*, in her family home may have served as a constant reminder of the horror of war. With her father’s cousin serving in the Nazi army, she would have been no stranger to the ambiguity and multiple dimensions of conflicts. It entrenched in her an unflagging desire to heal the world.

For more than forty years, and together with her wonderful and supportive husband Bob, Professor Menkel-Meadow has been coordinating her quest for peace and understanding from Los Angeles and Washington. She was a Professor of Law at UCLA for twenty years. At Georgetown Law Faculty, she was the A.B. Chettle Professor of Law, Dispute Resolution and Civil Procedure for fifteen years. Since 2008, she has been the Chancellor’s Professor of Law and Professor of Political Science at the University of California, Irvine, where she is also a founding faculty member. She was the Faculty Director of the Center for Transnational Legal Studies in London, founded by a worldwide consortium of over twenty universities. She has spread her message of problem solving and collaborative conflict management all over the planet, as a Visiting Professor or Distinguished Chair within and outside the US, in more than 25 countries, and at universities including Harvard, Stanford, Queen Mary University London, and the Universities of Pennsylvania, Toronto, Fribourg, Turin, Haifa, Singapore, Melbourne, Buenos Aires, and Alberto Hurtado in Santiago, Chile. And although this is her first Honorary Doctorate on the old Continent, she has already received such high honour



in her homeland at Quinnipiac College of Law and at Southwestern School of Law.

What truly makes Professor Menkel-Meadow stand out is her excellence in all facets of the professorial identity. She is both a teaching legend and a research guru. Among too many prizes and awards to list, she was recently ranked fifth in the US for published works and citations in professional responsibility, legal profession, and legal ethics (2015), and she received the first ever American Bar Association Dispute Resolution Award for Outstanding Scholarship (2011). She is also one of very few American legal scholars who has had several groundbreaking articles published as a volume in the prestigious Collected Essays in Laws Series. In her generous service to the community, both in universities and in society at large, she gives of all of her talents and energy in a most unconditional “service above self”. She has consulted with the International Red Cross, the United Nations, and the World Bank, the US Attorney General, the United States federal courts, many state court systems, and the American Bar Association. She has trained numerous judges of state and federal courts. She was a member of Distinguished Panels of Neutrals, a mediator for the US Circuit Court of Appeals for the DC Circuit and in many important structural conflicts, including the Merrill Lynch Claims Resolution Process and the Asbestos Claims Facility.

More than three decades ago, Professor Menkel-Meadow was one of the first three law school teachers in the US to teach a course on negotiation. In her prize-

winning article of 1984 in the *UCLA Law Review*,<sup>1</sup> she depicted the model attorney as a professional who engages in creative problem solving, who probes into the deeper interests and concerns of her client, who encourages consensus and putting out fires rather than seeking glory as an adversarial champion of litigation. Her decades of innovative research on this matter have been captured in several leading treatises and text books that include *Dispute Resolution: Beyond the Adversary Model* (2<sup>nd</sup> ed. 2012) and *Negotiation: Processes for Problem Solving* (2<sup>nd</sup> ed. 2014). Carrie Menkel-Meadow is one of the founders of this collaborative and problem solving approach to conflicts, and among the first to promote mediation. This is a voluntary process of facilitated negotiation between two or more parties, in which a neutral third party, the mediator, helps these parties find a solution together. Her book *Mediation: Practice, Policy and Ethics* (2<sup>nd</sup> ed. 2013) sets the stage. Two brilliant recent articles promise to influence more than ever two key controversies in the mediation practice: the role of the mediator on the one hand, and the place mediation should have in how a jurisdiction deals with conflicts on the other hand.<sup>2</sup> When it comes to the place of mediation in dispute resolution, it is not at all surprising that Carrie Menkel-Meadow has

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<sup>1</sup> Carrie Menkel-Meadow, 'Toward Another View of Legal Negotiation: The Structure of Problem Solving,' *UCLA Law Review* 31 (1984): 754.

<sup>2</sup> Carrie Menkel-Meadow, 'The Case for Mediation: The Things That Mediators Should be Learning and Doing,' *Journal of the Chartered Institute of Arbitrators* (2016); Carrie Menkel-Meadow, 'Variations in the Uptake of and Resistance to Mediation Outside of the United States', in *Contemporary Issues in International Arbitration and Mediation, The Fordham Papers*, 2015.

inspired the concept of process pluralism, acknowledging there may be many ways to deal with or resolve a conflict, depending on the context and the circumstances. Another recent article demonstrates how she continues to rethink basic concepts.<sup>3</sup>

Throughout her research career, Professor Menkel-Meadow has explored two major elements: empathy and creativity. She may be considered one of the mothers of active listening: real listening without an inner voice that shouts out one's own opinions, feelings, and worries. She is convinced that this ability to break out of one's personal limited views and perceptions may play a decisive role in creating more understanding between human beings and in the end a more peaceful world. In these difficult and dark times of ideological international conflicts, Carrie Menkel-Meadow emphasises the responsibility of each and every one of us to engage in a genuine dialogue. Courses on conflict management and active listening should be required in any university curriculum, and even earlier on in high school or primary school. In her 2001 article in the *Harvard Negotiation Law Review*,<sup>4</sup> she explores how creativity may be possible in legal problem solving and teachable in legal education. And that is without saying anything about her research on feminist

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<sup>3</sup> Carrie Menkel-Meadow, 'Process Pluralism in Transitional/ Restorative Justice: Lessons from Dispute Resolution for Cultural Variations in Goals beyond Rule of Law and Democracy Development (Argentina and Chile),' *International Journal of Conflict Engagement and Resolution* (2015).

<sup>4</sup> Carrie Menkel-Meadow, 'Aha? Is Creativity Possible in Legal Problem Solving and Teachable in Legal Education?,' 6 *Harvard Negotiation Law Review* 6 (2001): 97-144.

theory, legal theory, professional and legal ethics, and transnational and comparative law.

Professor Menkel-Meadow does not only operate on a micro level: she cares deeply about the larger global conflicts that have an increasing impact on our societies. Her three-volume treatise on *Complex Dispute Resolution* (2012) studies not only multi-party and democratic deliberation and decision making, but also the intriguing labyrinth of international dispute resolution. It is the international scene and the horror that comes with it that demands Carrie Menkel-Meadow's most focused attention today. She is exploring how concepts from the theory of mediation may apply in radically different cultures, backgrounds and (legal) traditions. Her secret hope is that mediation may "Carrie" some universal truth to help create a better world – slowly but steadily. As the granddaughter of an Esperanto fan, she wonders whether mediation may be the new Esperanto for the twenty-first century.

The quality of a diamond is assessed on the basis of its four Cs: colour, clarity, cut, and carat weight.<sup>5</sup> Professor Carrie Menkel-Meadow scores so highly on all four Cs that in the world of diamonds she is priceless. Her colour is that of the purest diamond. Her clarity is flawless, with no inclusions and blemishes visible even under high magnification. As you may know, a diamond's cut grade (from excellent to poor) does not refer to its shape, but to the successful interaction between light and a diamond's more or less symmetric facets. The brightness, fire and scintillation of the research, teaching and community

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<sup>5</sup> Cf. the GIA 4Cs App.

service of Professor Menkel-Meadow are of a brilliant cut with a magnificent splendour. Add to all of this a generous, warm and humble personality, a talent for making friends for life on every continent, and charisma inspired by genuine passion, and you will understand that the fourth C, the carat weight, may come close to the 530 carats of the Cullinan I diamond, featuring in the British Royal Sceptre with the Cross. It is the largest of nine and several smaller gems cut from the original Cullinan of more than 3100 carats. Also known as The Great Star of Africa, the Cullinan I symbolises the impact of Professor Menkel-Meadow as a conflict resolution and mediation expert in our global society.



**MEDIATION AND  
ITS APPLICATIONS FOR  
GOOD DECISION MAKING  
AND DISPUTE RESOLUTION**

Public Lecture on the occasion of  
the receipt of an Honorary  
Doctorate in Human Sciences  
9 February 2016

Carrie MENKEL-MEADOW<sup>1</sup>

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<sup>1</sup> Chancellor's Professor of Law (and Political Science), University of California Irvine, and A.B. Chettle Professor of Law, Civil Procedure and Dispute Resolution, Georgetown University. This lecture was delivered at the conclusion of the conference Beyond Mediation: Building Blocks of Constructive Conflict Management and in honor of receipt of an Honorary Doctorate conferred by KU Leuven on February 10, 2016. I am grateful to University Rector Rik Torfs, Dean of the Law Faculty, Bernard Tilleman and especially to my promoters Professors Alain Laurent Verbeke, Martin Euwema and Koen Matthijs for the invitation to give this lecture and for the most stimulating university environment in a week of presentations, stirring ceremonies, student meetings, conferences, faculty and community meetings, and engagement on issues of conflict management, world peace, restorative justice, and interdisciplinary study for human flourishing. I am proud to be an honorary member of such a distinguished academic community. I also thank my husband Robert Meadow for his thoughtful counsel and support for all of my work as he labors in the thicket of complicated politics in our democratic processes.

*“Process is the human bridge  
between justice and peace.”<sup>2</sup>*

*“The skillful management of conflict is among  
the highest of human skills.”<sup>3</sup>*

Rector Torfs, Dean Tilleman, my dear promoters and  
friends, Alain Laurent Verbeke, Martin Euwema,  
Koen Matthijs, university administrators, faculty,  
students, and distinguished guests: Thank you for this  
invitation to come to Leuven, which I have now visited  
three times and have come to love.

I. INTRODUCTION: WHY SHOULD WE MEDIATE?  
THE EVOLUTION OF HUMAN AND LEGAL  
PROCESSES

We are here today to learn together and study the  
components of “constructive conflict resolution” where  
mediation is one of the basic human building blocks of a  
process that allows us to truly hear from each other in the  
hope that we can resolve our conflicts, explore our  
differences, as well as complementarities, find mutual  
understanding, and achieve better outcomes and  
solutions to legal, social and political problems. This  
effort to “reorient the parties [to a dispute] to each other,”<sup>i</sup>

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<sup>2</sup> Carrie Menkel-Meadow, ‘Peace and Justice: Notes on the Evolution and Purposes of Legal Processes,’ *Georgetown Law Journal* 94 (2006): 553.

<sup>3</sup> Stuart Hampshire, *Justice is Conflict* (Princeton University Press, 2000): 35.



and to facilitate the solving of problems<sup>ii</sup> and, in the best of all worlds, the making of peace, between couples, communities, companies or countries, requires an interdisciplinary orientation. We need human knowledge and understandings drawn from a variety of constituent fields – older ones like history, law, psychology, sociology, economics, political science and international relations, and newer ones, including decision sciences, game theory and urban planning.

Here I will use two ideas, memes<sup>4</sup> or metaphors to trace the trajectory of where we have been, historically, and in practice, in modern legal dispute resolution, and where we might be going to build a more effective and creative future, through alternative processes to the more conventional processes of legal trials and conventional decision making. For me, mediation is a “meme” or “sensibility” with the possibility of transforming the way human beings resolve disputes and conflicts with each other. Here I will explore what we need to learn and do to give that meme more expression in our culture. I will talk about our past, our present, and the possibilities and challenges of some future applications of this varied process which has different goals and practices than traditional legal decision making.

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<sup>4</sup> A “meme” is an idea or “unit of imitation” (Richard Dawkins, *The Selfish Gene*, Oxford: Oxford University Press 1976) that is the building block of culture and cultural change, like “genes” that “carry instructions for action” (Robert J. Sternberg, *Handbook of Creativity* (Cambridge: Cambridge University Press, 1999): 316; M. Csikszentmihalyi, ‘Implications of a Systems Perspective for the Study of Creativity’ in id).

We are in a beautiful building (somewhat renovated for modern use) on very old land. My family passed through the land of Belgium in its travels away from the Holocaust in Germany and toward the United States and I have been back to study my own historical roots, as well as to admire the sources of knowledge produced by the great European universities, of which KU Leuven is one.

My first meme comes from the work of another profession – that of architecture and city planning. In recent times a group of progressive United Kingdom (now worldwide) professionals who design the spaces in which we live and work have renamed themselves “*spatial agents*.”<sup>iii</sup> Spatial agents recognize that land and buildings are limited and we cannot always find new land and construct new buildings as they are needed for more housing, markets and workplaces, as ever increasing human density demands the different use of space. Spatial agents, therefore, who are professionally trained architects and city planners, and “lay users” come together to remake and restructure the design of spaces – new uses and designs inside old buildings. How appropriate that we should be in such a building – old and new at the same time, with the modernization of design and function in old and traditionally beautiful spaces. Like the “spatial agents,” mediators (whether lawyers or psychologists or architects or social workers or accountants) are trying to remake legal dispute resolution from within, taking disputants who may have filed lawsuits against each other and encouraging them to come together to solve their problems, voluntarily, with facilitation and guided negotiation, without judicial command, and with the possibility of crafting solutions for the future, instead of

“mere” resolution of the controverted facts of the past, with binary results producing winners and losers. At their best mediative processes offer both mutual understanding and empathy development, and better outcomes and solutions for the parties involved, thus promising better human communication processes and also better substantive results.

My second meme is the idea of *human legal evolution* – consider how far we have come from trial by ordeal, and trial by combat or duel, where hot stones were placed in the hands of the accused or disputants were mounted on horses to “joust” till one was ousted from his seat, or disputants were thrown in a lake to drown unless saved by God (and where one disputant usually died in “resolution” of the facts and liability). We evolved in the late Middle Ages, on both the Continent and in England,<sup>iv</sup> to trial by evidence, hearing, and jury or judicial verdict, where jurors were known to the disputants and came from the same community or judges were agents of the monarchy. In the development of legal institutions we valued arcane legal procedures, some idea of “justice,” factual accuracy and adherence to legal principles, though how “precedential” those legal principles were varied in the common law and civil law systems. If “truth” and single “right” answers, producing winners and losers, was the primary value in earlier times, with a focus on finding out what happened to produce a dispute or wrongful act (“adjudication of the past”), we have now, I suggest, moved to a different reality and the need for expression of different and additional values. Post-modernism has taught us that the truth is not so simple or unitary; there may be many “truths” in any dispute or story,<sup>v</sup> and getting

at “the” truth may not be the only value a legal system or dispute resolution process should serve. It may be more common now that we would possibly have no trial at all, but a facilitated meeting of the minds, where the facts might not necessarily have to be “resolved” or agreed to in order to craft a resolution or solution to a situation of conflict – commercial, familial, political, or international.<sup>vi</sup> We might value peace, a commercial deal where each party gets something different out of the arrangement, a future plan for parenting after divorce, a licensing agreement for contested patent disputes, an agreement for land development with environmental protections, or confidential settlement of a lawsuit avoid damaging publicity. We might value the continuing relationship of the parties more than a particular financial outcome, or we might find it productive to craft a new contract out of the difficulties exposed by the disputes about an old one.

Our work as mediators is truly transformative in the evolution of human disputing. As the brittleness and binary quality of trial verdict and judgments (where winner takes all) or the “limited remedial imaginations of courts,” as I have described it in my early work on negotiation,<sup>vii</sup> (not the limited imaginations of actual judges, but what the authorizing law allows by way only of past fact resolution, money judgments and the rarer declaration or injunction) have caused us to look for better ways to resolve disputes, with *forward-looking solutions* that preserve (where appropriate) *relationships between the parties*, or, at least, *put the parties in a better place than they would have been in had they not mediated*, we have developed a wider range of tools and techniques to deal with dispute and conflict resolution. Parties may explore

more than the “past” dispute facts, the text of their current contract or the rigid sections of codified law or case law decision. Instead, they can look to their underlying needs and interests, what they really need from a relationship or the conflict they are in and, with the guidance of a skilled process mediator, look forward to crafting a resolution that may include provisions for the future or outcomes not necessarily prescribed by particular legal rulings. Mediation does not ignore the law, it considers what legal remedies have been made available by formal law, but it also permits more party- or situation-tailored solutions to particular problems, perhaps not contemplated by previous legislation, codes or court decisions.

Those of us in the room who have successfully mediated cases of all kinds know the “magic” or even “sacredness” of mediation,<sup>viii</sup> when two or more previously angry, wronged or suffering parties come together to mend their (commercial, familial, workplace or even inter-state) relationships, or to talk directly to each other (whether accompanied by lawyers or not) and truly hear each others’ stories, complaints and claims and come to appreciate, understand, and empathize with, if not fully agree with, another’s person’s experience or point of view.

What we wish for is that the rest of the world could learn to truly “hear the other side” (*audi alteram partem* in Stuart Hampshire’s words<sup>ix</sup>) or, as I have said, “*hear all the other sides*”<sup>x</sup> (as no modern conflict has only two sides or only one issue), learn to empathize, be more substantively creative, and consider how to “expand” rather than “divide” the pie (the great metaphor of problem-solving negotiation).<sup>xi</sup> But if the rest of the disputing world is slower to come to evolutionary reason,

then it is among our roles to be the best mediators we can be and educate ourselves and others about what it means to mediate a dispute. Mediation is, as one of my mentors once said, a “sensibility” – a way of thinking about how we approach each other and live in the world.<sup>xii</sup>

We should start, I think, with not just the standard scripts or syllabi of a 20-, 30-, or 40-hour course or training module, filled with mostly instrumental tools and techniques – how to set ground rules (promises of confidentiality and neutrality,<sup>xiii</sup> rules of speaking), opening statements, joint sessions and caucuses, agenda setting, issue development, information and process management, communication facilitation, “reframing,” rapport building, empathy training, active listening, brainstorming, facilitated bargaining and solution-devising, reality testing, agreement reaching and drafting, enforcement, execution and follow-up implementation plans,<sup>xiv</sup> and now, more controversially, whether and how to “evaluate,” the merits of cases<sup>xv</sup> – but with a deeper study of conflict theory. Our goals are not only to “settle” a case<sup>xvi</sup> but to improve the situation of the parties who are in conflict with each other. This is not “win-win,” (those words were never used by Roger Fisher or me, though often attributed to us), but to leave the parties “in a better place than they would have been without attempting mediation (or negotiation).” We should not mediate without knowing *why* we mediate. There cannot be a good *how* to mediate without knowing what *purposes* the process is intended to serve. And there are increasingly many different ways of mediating, both in varying theoretical schools or ideologies and different practice techniques and intervention.<sup>xvii</sup> Mediation can be “thin”

or “lite,” as when courts order parties to attempt a quick mediation as a condition precedent to going to hearing or trial (the controversial issue of “mandatory mediation”), or it can be deep and rich, exploring both party relationships, true empathic understanding, and also the complexities of original, innovative or party-tailored solutions.

We should begin by understanding our history. Modern conflict theory is derived, in the first instance, from Cold War theories of conflict, assumptions of scarcity, bi-lateralism, competition, strategic (non-direct) communication and adversarial decision making. In the 1970s and 1980s a more optimistic group of social scientists, lawyers, psychologists and others (I count myself among them), building on older theories of integrative bargaining, labor relations, and peacemaking, began to develop theories of more creative problem-solving and integrative bargaining, facilitated communication and decision making, and multi-lateral engagement with hopes of changing perceptions of problems from scarcity to resource expansion and sharing.<sup>xviii</sup>

The rigorous study of conflict theory for mediators includes not only classical sociological understandings of when conflict is in fact, functional (or dysfunctional) for both individuals and societies,<sup>xix</sup> but also the various forms and typologies that conflict may take, including veridical (true conflicts over scarce and limited resources), value or belief conflicts, conflicting preferences, needs or interests, latent (hidden) or patent conflicts, relationship or identity conflicts, individual versus group conflicts, distributive (scarce resources to be divided) versus more integrative conflicts, and false conflicts (conflicts that are

used to hide other more important conflicts or conflicts that are in fact, not conflicts at all, but can be resolved when viewed in different ways).<sup>xx</sup> Conflict analysis asks us to consider whether resolution of disputed facts about the past is necessary, or the parties can craft a new future without “resolution” of the past, whether preserving a relationship – whether familial, social or business – is part of the dispute, if and how the resolution of a particular dispute does or does not resolve larger conflicts between the parties, or others the parties interact with (consider workplace settings, as well as family systems). The tools and techniques we use must be related to the different structures and forms that conflict takes. One size, will not, as I have argued in many contexts, fit all – that is why we need and have “process pluralism”<sup>xxi</sup> in our current legal and social systems. Tools and techniques must be chosen for reasons, reasons embedded in both theory and empirical research about how and why human beings have conflicts, and how they deal with them, both with and without facilitation or adjudication.

Conflict theory includes political theory (how conflicts have been used for both social control and social change), economics, decision science,<sup>xxii</sup> game theory, planning theory and practice, and anthropology and cultural analysis (as noted below, nations, religious groups and other social groupings process conflict differently). And, of course, most conflict professionals must have some rudimentary training in psychology, communication, management<sup>xxiii</sup> and the facilitative “arts.” More controversially, to the extent that mediated agreements implicate or use the law, mediators must either be lawyers or at least know when a lawyer must be consulted for legal



advice to be sure mediated agreements comport with legal requirements and truly resolve what are legal disputes, with legal implications.<sup>xxiv</sup>

The study and practice of mediation is thus both a “science” (comprised of many different fields that constitute its own theoretical foundations) and an “art” (of practice tools, interventions and most of all, judgment). Our basic canon or tenets include the injunctions to “look for interests underlying positions” (I like the frosting/icing, while my brother likes the cake, so we need not divide it in half vertically, but can both gain if we divide it horizontally), to which I have added: look to the parties’ needs<sup>xxv</sup> (a more feminist social welfarist model than the more instrumental and economistic interests perspective); look for resource expanding, sharing or creative solutions to conflicts,<sup>xxvi</sup> exploring complementary, not conflicting, desires; and always consider what all the alternatives are to whatever we are trying to accomplish –the Best/Worst and All Alternatives to other forms of conflict resolution (known as BATNA, WATNAs, ATNAs or MLATNAs – most likely alternatives to negotiated agreements).<sup>xxvii</sup> These teachings of our field have been accumulated with the insights of theorists, empiricists, and practitioners from law, economics, mathematics, game theory, sociology, political science, diplomacy and psychology. We explore “Pareto optimal solutions” (seeking gain for each party without worsening the conditions for others), as we explore “zones of possible agreement” (ZOPAs) that are mapped in graphs, decision trees and comprehensive planning documents.<sup>xxviii</sup> Mediative solutions also offer the possibility of contingent solutions – revisiting of agreements or “settlements” when the facts on the ground

change, unlike court judgments or binding constitutional commitments. Remember that Thomas Jefferson urged the framers of the United States' Constitution (he was not present at the drafting of the constitution, but was in France negotiating the Revolutionary War debt) to consider that constitutions should be revisited every generation. The dead should not bind the living.<sup>xxix</sup> We must study the science, and practice the art of mediation as process, and mediative solutions as substance.

Although mediation (as I first practiced it in the 1980s in the United States) was a generalist's work, increasingly mediators also are often steeped in the expertise and substantive knowledge base of some field of human endeavor, ranging from family law and social work, commercial, business and contract law, investment and securities, international, environmental, construction, intellectual property (including entertainment, sports) maritime, health and medical, government and public law issues, education, and workplace and labor issues and disputes. How mediation tools and techniques may have to be adapted for particular subject matters is what I like to call "Mediation 2.0." One of our leading commercial mediators has recently suggested that the opening joint session, derived from community mediation models, should be relabeled and restructured, "Joint Session 2.0," because the initial joint session in a complex commercial mediation with lawyers is differently structured, both substantively, and in process, than the models developed in early day community or small claims mediation.<sup>xxx</sup> Similarly, for those of us who mediate across borders, substantive expertise must also be supplemented by a wide range of multi-juridical and multi-cultural knowledge and practices.

As mediators should learn the foundational principles of their field, including its history,<sup>xxxii</sup> they must also consider the jurisprudence of its use and practice<sup>xxxiii</sup> – to what extent is the goal of mediation to reach “peace” and a good solution for the parties within the mediation, and to what extent should a mediated agreement achieve “justice,” not only for the parties themselves, but for the larger society in which any dispute is embedded (the issues of transparency, equality, and precedent-creation for the rest of the society).<sup>xxxiii</sup> While these larger philosophical issues may not seem to affect those who actually mediate every day, the arguments of scholars, judges, and policy planners about whether it is appropriate to “privatize” justice and in what settings, very much affects the acceptability of mediation to those who design, fund and use mediative processes. The larger jurisprudential issues also inform us about when we should *not* mediate (e.g. if parties or the society needs a precedential ruling, when there is too great a power imbalance between the parties, when a court ruling is necessary for enforcement or safety of parties and other issues that can emerge when parties are compelled to mediate in non-consensual settings).

Mediation ethics is itself a growing field of complicated issues, including conflicts of interest, malpractice and competence, responsibility for unequal bargaining power, relations to those not at the table (children in family mediation, other employees in workplace mediation, future generations in environmental mediation), responsibility (legal or moral) for outcomes reached, cross-cultural mediation issues, confidentiality, witnessing and evidence provision, agreement drafting

responsibility, just to name a few, all of which require, in my view, rigorous study and collective grappling as we begin to frame ethics codes for our relatively new field.<sup>xxxiv</sup>

Thus, for me, it is not enough to be taught or trained in the skills and techniques of mediation alone; mediation training and practice must and should include deep consideration of theory, empirical knowledge and study, as well as evaluation of particular practice interventions.<sup>xxxv</sup> Many of us have studied law, social work, psychology, accounting, architecture, business, engineering, surveying, sailing<sup>xxxvi</sup> or other professions for many, many years before we were allowed to practice our trades and, in my view, mediation requires the kind of systematic study, observation, practice, apprenticeship, evaluation and continuing education and “master” classes that many of these professions require. We take our knowledge bases from a diverse set of disciplinary homes and in order to properly evaluate the use of a variety of disciplinary insights that lead to practice protocols (think neurolinguistics and “NLP,”<sup>xxxvii</sup> narrative mediation, cognitive and social psychological heuristics,<sup>xxxviii</sup> and now more evaluative forms of mediation), we need to be educated to judge the efficacy and ethics of each new technique being offered. For what purposes are we mediating and what instruments are appropriate for the kind of conflict we are considering?

## II. SOME CHALLENGES WE FACE (THE PRESENT)

If mediation is such an effective and better way of resolving conflict, as so many of us believe, why is there

still so much conflict in the world and resistance to mediation, in the legal arena, as well as in the larger world? As I have asked in another context, “Why Hasn’t the World Gotten to Yes?”<sup>xxxix</sup> The answers to this question are many, in my view. First, there is the cultural domination of adversarial, war, sports and conflict-based media (remember I live in Hollywood!) which continue to pervasively perpetuate the “winner over loser” stories the world now watches in so many outlets, or as commentator Deborah Tannen has framed it, we live in an “Argument Culture.”<sup>xi</sup> Even as Stuart Hampshire, the moral philosopher, opined in his Tanner Lectures some years ago, when lauding the importance of conflict resolution as “among the highest of human skills,” hearing “*the other side*”<sup>xli</sup> of the (Anglo-American) adversary system was what he thought could serve as an almost universal form of human decision making where we had no agreement on the substantive good. I would add to that that we must truly hear all “sides” (plural) of a conflict. The intractability of so many modern conflicts (whether community, familial, national or international) comes from recognizing that so many of them are multi-lateral and affect so many parties, both within the conflict and those who would be affected by any resolution. If one of our theoretical fathers, Jürgen Habermas, has elaborated the “ideal speech conditions” for human deliberation over decisions affecting the general polity (reasoned arguments, designed to persuade, with all having an ability to participate in setting the agenda and the conversation, without coercion),<sup>xlii</sup> we must also pay attention to other conditions for truly “active listening”<sup>xliii</sup> to others – the

requirements of “egalitarian reciprocity and mutual respect” which, in our current world of intercultural cacophony and migration, may be extremely difficult to do.<sup>xliv</sup>

Second (and probably first in any dangerousness measure), is the amount of actual conflict in the world, at the present time; think of Syria, Iraq, Afghanistan, Israel-Palestine, Ukraine, Nigeria, Sudan, Somalia, and any other inter- or intra-national conflicts we see daily on the news. What visible examples do we have of successful mediation of conflicts at the inter- or intra-national levels? In recent years, there have been the Good Friday Accords,<sup>xlv</sup> the Dayton Accords, the failed Oslo Accords, and our hopes for the success of the recently concluded Iran nuclear agreement, but there continue to be failures at negotiation of or mediation about North Korea, the South China Seas, Ukraine, the Arctic, and a variety of major international disputes. Why, we might ask, after so much death and destruction in the world wars of the twentieth century, do we seem unable, in the twenty-first century, to change the culture of world conflict? Are the nation-states effectively negotiating or mediating disputes over the migration issues that Europe currently faces, or the economic crises of both individual nations (e.g. Greece) and the larger world?

Despite these failures, there are also successes, such as in the new dispute resolution architecture of such groups, as one I have been working with in Israel and Palestine, the Parents’ Circle, which seeks to use mediative techniques and tools of “reconciliation” across conflicting groups (based on South African and other models of truth and reconciliation) even before there is actual peace.

Peaceseekers closer to the ground, with local mediation techniques of “restorative justice,” may be more successful, in some locations, than the higher-level diplomatic, state-based or military efforts to end conflict. Working together on tasks and relationships such as shared markets, educational, cultural and conversational exchanges and home visits may do more to reduce the conflict than formally negotiated agreements at the highest levels of government.

Third, and closer to home, we see that despite the increased amount of legal and regulatory support for mediative processes, especially in the EU and especially in cross-border disputing,<sup>xlvi</sup> there remain cultural and legal resistances to the use of mediation in many areas. I have recently argued that they are a variety of “cultural nodes” that combine legal and social cultures which determine the variations in the uptake of or resistance to mediation in a wide variety of nations, including the UK, and US, different countries in Europe, Asia and South America. We can think of cultures (e.g. the US, the UK, Italy, Israel, Australia and Canada as examples) as both *argumentative and adversarial* (which can sustain both a robust adversary legal system and a parallel use of mediation and other forms of “alternative/appropriate” dispute resolution). Other societies may be more focused on *harmony or face-saving* (stereotypically, but with some empirical reality, of some of the nations in Asia) or (also in Asia) more *cosmopolitan* cultures (think of Hong Kong and Singapore) that are seeking to develop international markets in cross-national disputing institutions, by founding and encouraging both international mediation and arbitration centers for commercial disputes. And there are newer

nations (think of post-colonial Africa or post-military dictatorship South America) that are *transitional and dialogic* (combining traditional legal processes with either indigenous processes like *gacaca* in Rwanda or Truth and Reconciliation Commissions in Argentina, Chile, Bolivia, South Africa and Liberia,<sup>xlvii</sup> which provide modifications to and innovations in the use of mediative processes for intra-national conflicts, thereby often creating new or hybrid institutions as well as new processes).<sup>xlviii</sup>

Mediation continues to suffer in comparison to other dispute resolution processes, like arbitration and litigation, in relation to such issues as enforcement. Is a mediation agreement simply a contract, which requires a lawsuit to be enforced, or, as in some countries, is it the equivalent of a judgment for purposes of enforcement and execution? In cross-border contexts mediation does not (yet) have the equivalent of the New York Convention for the Recognition and Enforcement of Foreign Arbitral Awards, although a proposed convention for enforcement of mediation agreements is currently being considered by the UN's UNCITRAL.<sup>xlix</sup> Even the European Directive on cross-border commercial mediation (Directive 2008/52/EU) has been met with mixed uptake and usage, causing some to suggest "mitigated mandatory mediation" (or designated quotas of mediation, as a percentage of all cases) to produce a "proportionality" of mediated cases to litigated cases.<sup>1</sup>

Even closer to my home, legal mediation in the United States is now often used for strategic and manipulative purposes (e.g. asymmetric information exchanges, ancillary litigation about good faith participation issues, one-sided cost manipulation, delay), all developments



designed to circumvent our founding principles but gainfully employed by very clever adversarial lawyers who have managed, in some spheres, to co-opt the mediation and other alternative processes. There are issues and disputes among parties, lawyers and mediators<sup>li</sup> about the appropriateness of mediators providing evaluations of cases,<sup>lii</sup> or as we call it in the US, “final offer mediation” (a final non-binding suggestive offer by a mediator at the end of a mediation seemingly mired in impasse). And, if we are to evaluate cases (for analysis of “most likely alternative to negotiated agreement,” i.e. the likely litigated result (MLATNA, not BATNA), what kinds of skills in quantitative analysis, legal prediction, and decision-tree analysis<sup>liii</sup> should be added to the mediation training programme?<sup>liiv</sup> Others, who strongly favor mediation, are divided over the question of whether mandating or requiring mediation will encourage good mediation and education about its advantages or create more manipulative and strategic end-runs around mediation’s basic purposes. There remain many issues about how to “get the parties to the table” in more pro-active, not mandatory, settings. How do we motivate parties, lawyers, politicians, diplomats, and leaders to see the advantages of a more open, solution-seeking, guided communication, facilitative way of solving problems and making decisions?

Perhaps the newest challenge comes from the new so-called “sharing” or “gig” economy, as more and more transactions are conducted by electronic webpages or apps, with the need for more instant dispute resolution or more efficient and user friendly systems. eBay was among the first in the new economy to develop a highly effective web-based online dispute resolution system, offering both

synchronous and asynchronous opportunities to resolve disputes through electronic engagements, using negotiation, mediative and arbitral processes. The removal of a live-person third-party neutral and the use of computer electronic facilitative processes have created the whole new field of ODR (online dispute resolution),<sup>lv</sup> raising questions of whether we are soon to be made redundant by technology. The European Union has been developing an online dispute resolution protocol for cross-border consumer transactions.<sup>lvi</sup> As I am a person who believes in P2P (person to person communication) or F2F (face to face), rather than B2B or B2P (business to business or business to person) dispute resolution, these modern uses of our processes with new technology present another sort of challenge.<sup>lvii</sup> In the UK, lawyer-commentator Richard Susskind has also offered a somewhat (for us) dystopian vision of “the end of lawyers”<sup>lviii</sup> with technology replacing conventional litigation as well as providing opportunities for “dispute avoidance.” In my view, the promises of ODR may yet run up against a series of their own challenges, including among other issues: privacy versus unwanted disclosure of data and private information, confidentiality, access to justice,<sup>lix</sup> fairness, consistency of result, responsiveness versus “routinized” dispute resolution outcomes<sup>lx</sup>, consumer resistance due to inefficiency or lack of responsiveness, but these are early days. I remember as catalogue/mail-order shopping began in the United States some mail-order companies prided themselves and their corporate images on responsive consumer remedies (e.g. LL Bean, Land’s End – two clothing companies), while in contrast Amazon now has a relatively bad reputation for

consumer responsiveness. How much the new economy will devote itself to truly responding to disputes and the people behind them remains to be seen.

### III. MEETING THE CHALLENGES: WHAT OTHER THINGS WE COULD BE DOING (THE FUTURE)

Let me return to my opening memes. I am a “pragmatic optimist” about what we can accomplish. At its best, what mediation is attempting to do is reinvent the old structures and processes of the legal system. We can work from within, like the new architecture within old buildings, or new designs on older land, or we can work from without, changing the design, materials and shape of the buildings and institutions themselves.

In Singapore the Supreme Court and the Singapore Mediation Center are housed in the same modern building, providing a true “multi-door courthouse” as Professor Frank Sander originally imagined it.<sup>lxii</sup> There is room for formal hearings and precedential rulings and also room for more consensual, future-focused solutions to all kinds of issues presented by a modern multicultural society. When I was teaching in Singapore a few years ago, a dispute among residents of one of the thousands of multi-ethnic property blocks broke out (between ethnic Chinese and ethnic Indian Singaporeans) about the so-called “excessive” curry smells in the building. The matter went to mediation, where it was publicly and incorrectly reported as the mediator “ordered” (that is the incorrect misconception

of mediation as arbitration) that the curry cooking be conducted during specified hours of the day. In a country often criticized for its “autocratic” and anti-free speech government, by the end of the week there were literally thousands of comments on the public city-state webpage criticizing or commenting on this mediation. In a model display of civic engagement (including extremely frank, sometimes rude, but always honest comments), the citizens of Singapore recognized that this single “dispute” was really a “conflict” about much bigger issues – increased migration of workers from outside Singapore (including Indians, mainland Chinese and Malaysians), government-directed demographic quotas in the publicly subsidized housing, and the more basic issue for this cosmopolitan city state of how diverse populations of every religious hue and belief system can live together as the larger polity is struggling to remain economically successful, while encouraging a bit more freedom of political action and expression. Dispute resolution, in its modern form here, included formal mediation in a new physical structure, borrowing from centuries’ old models of Confucian mediation,<sup>lxii</sup> with modern adaptations of that process and commented on and debated by thousands of interested citizens in a publicly transparent and web-based process. This one example of how dispute resolution can be reinvented and harnessed to so many of our deep purposes – individual dispute resolution, transparency, engagement on public issues, and public education about how disputes can be handled differently (sharing time, discursive engagement) in real and virtual space demonstrates how creative and evolutionary human disputing can be, not to mention, sprinkled with

a little “curry powder” to transform old legal processes from colonial powers to more multi-cultural and multi-processual forms. In more complex, diverse and modern cities and states, mediation (and other similar processes) can indeed be the bridge<sup>lxiii</sup> between peace and justice.

If we are to educate the rest of the world (and continuing education for ourselves as mediators) about different and more productive ways to handle disputes and make the parties better off than they were before, we should look to some of the newer applications of our work. We might take a look at how other professions, like architects, have restructured their work as conditions in the physical world have changed. Like architects, an older profession, business consulting, a newer profession, has adapted to changed economic conditions by developing different strands – those that specialize in consulting on business processes (e.g. accounting, finance and venture capital, investment, management, computerization and automation, insurance and risk management, human resources management, insolvency and restructuring) and those that specialize by industry type (banking and finance, automotive, retail and consumer goods, telecommunications, aviation and marine, insurance, construction, public, government and social welfare provisions, manufacturing and the human services industries).<sup>lxiv</sup> One stream of the profession has focused on processes; the other on “industry” or substantive expertise and problem solving.

As mediation scholars and practitioners explore the challenges of “scaling up” mediative sensibilities and

techniques to situations in which there are many parties or disputants, we are looking at what decision scientist and mathematician Howard Raiffa identified as the “numbers” problem – do the numbers of participants in a dispute, conflict or decision making exercise make a difference in process, voting and decision rules, and types of outcomes?<sup>lxv</sup> This has now become a new subfield of “multi-party dispute resolution,”<sup>lxvi</sup> in which we study whether a group of three (two parties and a mediator) behaves differently than a group of four (two parties and two lawyers), or five (add a mediator), or 25 (consider a complex insurance dispute), or 200 (consider a resolution at the United Nations or a treaty negotiation), or a nation debating policies (such as migration, economics, taxes or whether or not to stay in the EU).

We as dispute resolution professionals can extend our process expertise to the new fields of preventative dispute consulting, dispute system design,<sup>lxvii</sup> early dispute system resolution,<sup>lxviii</sup> mass tort or accident dispute resolution, through claim facility design,<sup>lxix</sup> internal dispute resolution, facilitating consensus building processes for policy formation and deliberation,<sup>lxx</sup> or what I have called “scaling up dispute resolution as deliberative democracy”<sup>lxxi</sup> (not always so easily accomplished, as the American town halls on President Obama’s Affordable Health Care reform demonstrated).<sup>lxxii</sup>

As dispute resolution professionals we can educate workplaces, organizations, corporations, universities and government bodies how better to prevent, counsel, advise

and handle disputes among human beings and in policy formation and decision making, help design internal dispute resolution systems, using mediation, ombuds and other grievance processes (called “internal dispute resolution,” such as those used by most international organizations such as the World Bank and the United Nations) and train those who professionally engage in such work. In the United States, federal workers in our public agencies and tribunals are trained as mediators to do “collateral duty” as dispute resolvers in other agencies (those not their own, to prevent conflicts of interest and to offer an “outside view” on particular human or policy issues). New policy standards and criteria for resolving employment disputes have been developed and implemented by those with mediation training and skills, within public and private institutions and organizations, and especially in the international organizations, like the World Bank, IMF and United Nations, which are not subject to the labor (or other ) law of any sovereign. Even a few of our major political leaders have used their mediation skills in their policy work. In the Clinton (Bill’s, that is!) administration, Secretary of the Interior Bruce Babbitt designed Habitat Conservation consensus-building processes to resolve complex environmental disputes in a more consensual manner with stakeholders with highly conflictual goals, who learned to negotiate preservation of wildlife, conservation of land and some development in a variety of land use disputes in the United States.<sup>lxxiii</sup> In a variety of peace efforts throughout the world mediators seek to empower and educate citizens for more direct engagement for bottom up peace negotiations, rather than relying on more formal

diplomatic efforts, as in Israel-Palestine (e.g. the Parents' Circle-Families Forum),<sup>lxxiv</sup> Northern Ireland, and other seemingly intractable conflict spots throughout the globe.

Mediators, cum large group facilitators, have learned to help structure and manage large scale policy formation at community, local, regional, national and even international levels,<sup>lxxv</sup> using hybrid mediative and more formal processes, such as Professor Lawrence Susskind's alternatives to "Robert's Rules of Order" for more consensual and inclusive decision making.<sup>lxxvi</sup>

Mediation values of reconciliation, listening, storytelling, empathy, understanding, accountability, and apology, if not forgiveness, have been used to help structure the variety of new processes and institutions of "restorative justice" at both local (juvenile and criminal offenders),<sup>lxxvii</sup> national<sup>lxxviii</sup> and international levels. In many countries transitioning from civil wars, military dictatorships, apartheid and other great harms, parallel processes of formal legality and prosecutions co-exist with newer hybrid truth and reconciliation commissions and uses of more indigenous forms of accountability and reconciliation.<sup>lxxix</sup> In the sense of our evolutionary meme, human beings are learning that different kinds of processes may be necessary for some deterrence and punishment (the new International Courts for Criminal Law and regional courts (European and Inter-American) for human rights violations), but other processes are more appropriate for healing and moving forward to a more productive future, while still acknowledging past



harms. We as mediators can serve a useful function in the “mediation” of conflicts among and between professionals in international criminal law, human rights advocacy and conflict resolution and peaceseeking, all of whom may share goals of human flourishing, but see the achievement of that goal through different ideological and practical lenses.<sup>lxxx</sup>

I am encouraged by a variety of recent developments pointing to our human disputing culture’s evolution, when I see human rights organizations around the world beginning to consider the use of mediation in treatment of human rights claims.<sup>lxxxii</sup> In the United States a group called *Public Conversations*<sup>lxxxiii</sup> manages and mediates community and public discussions of such controversial issues as gun control, abortion, affirmative action, immigration policy, community-police relations and animal rights, without necessarily achieving any particular outcome (as in the transformative mediation approach to mediation) but to enhance human understanding across value conflicts.

Mediation has also become a process of choice in use in a variety of specific subject matter disputes, such as environmental disputes,<sup>lxxxiiii</sup> workplace and labor disputes, housing matters, special education, and family matters. In many jurisdictions in the world, mediation is now often a condition precedent to civil litigation<sup>lxxxv</sup> and even the criminal law recognizes mediation in victim-offender mediation, restorative justice and even sometimes in the United States’ unique plea bargaining culture.<sup>lxxxvi</sup>

The use of mediative processes in a wide variety of different contexts and settings has allowed us to conceptualize and use different kinds of processes (principled argument and formal institutions in some, bargained for or traded interests and needs in others, and references to basic ethical, religious and deeply felt values in others). The challenge of modern dispute resolution and deliberative democracy processes, when “scaled up,” is to imagine and implement ways in which all three of these discourses (principled arguments, bargaining by interests, and value-based beliefs and claims) can be included in our decision making and dispute resolution processes. Some years ago political scientist Jon Elster compared American constitutional formation processes with French constitutional formation on differences in secrecy/transparency/publicity and plenary versus committee organization of the work and found that “second best processes” of the American process (secrecy and committee bargaining) rather than “first best” public, plenary and principled processes in France, produced a more robust (longer lasting Constitution – with of course, a great rift and amendment process in our civil war).

Building on Elster’s work,<sup>lxxxvi</sup> I have often offered the following schematic illustration of how different kinds of processes, informed by mediative and deliberative democracy conceptions, might suggest the use of different kinds of processes in different contexts:

Modes of Conflict Resolution<sup>lxxxvii</sup>

MODE OF DISCOURSE	PRINCIPLED (REASONS) (Brain)	BARGAINING (INTERESTS, NEEDS) (Stomach)	PASSIONS (Values) EMOTIONS/ RELIGION) (Heart)
<b>FORMS OF PROCESS:</b>			
<i>Closed</i>	Some court proceedings; arbitration, mediation (commercial)	Negotiation – US Constitution; diplomacy	Mediation (e.g. divorce, family)
<i>Open</i>	French Constitution; courts; some arbitration	Public negotiations; some labor	Dialogue movements
<i>Plenary</i>	French Constitution	Regulatory negotiations	Town meetings
<i>Committees</i>	Faculty committees; task groups	US Constitution/ US Congress, EU	Caucuses – interest groups
<i>Expert/ Facilitator</i>	Consensus building Some claims facilities	Mini-trial; claims facilities	Public conversations
<i>Naturalistic (Leaderless)</i>			Grassroots organizing/ WTO protests; political groups
<i>Permanent</i>	Government, institutions; internal or organizational dispute resolution	Business organizations, trade unions; internal dispute resolution	Religious organizations; Alcoholics Anonymous; Weight Watchers

<i>Constitutive</i>	UN; national constitutions	National constitutions; professional associations	Civil justice movements, peace
<i>Temporary/ Ad Hoc</i>	Issue organizations/ social justice	Interest groups	Yippies, New Age, vigilantes; Black Lives Matter; civil rights and other groups

Principles = reasons, appeals to universalism, law  
 Bargaining = interests, preferences, trading, needs, compromises  
 Passions = values-based arguments – faith groups, ethics

Open = public or transparent meetings or proceedings  
 Closed = confidential, secret process or outcomes (settlements)

Plenary = full group participation, joint meetings  
 Committees = task groups, caucuses, parts of the whole

Expert-facilitator = led by expertise (process or substantive or both),  
 e.g. mediator  
 Naturalistic = leaderless, grassroots, ad hoc

Permanent = organizational, institutional  
 Constitutive = constitutional  
 Temporary = ad hoc groups, political or issue based groups or disputants

Some predicted effects of process on outcome:  
 Closed = (confidential) proceedings allow more expression of interests, needs and passions = more “honest” and candid, allow more “trades,” less posturing, open to vulnerability  
 Open = (transparent) proceedings require more principled/reason justifications, produce more rigidity

Thus, we can see that the use of mediation is complicated. We hope to use techniques of conversational ground rules, empathy training, creative problem solving, and facilitated

communication to seek human understanding and better substantive solutions to problems of conflict and decision making. But we know that the numbers of parties matter, as does the context of the issues, conflicts or decisions, that power imbalances between and among the parties matter, that the resources or “res” of the disputes and conflicts vary, that some will use or manipulate the process, that there are ethical concerns in its use, and that in addition to micro issues of behaviors within mediation, there are macro issues in considering whether mediation is used appropriately in matters affecting public justice concerns. So we must see mediation as one further step in our human legal evolution and our attempt to design and architect new processes and institutions to respond to these issues and concerns, with all the multi-disciplinary knowledge we can seek.

As we continue to expand and extend the uses of our particular mediative practices and interventions, of asking those in dispute to:

- consider how the other side(s) see the situation,
- listen carefully to others,
- express our real needs and interests, rather than argue from rigid positions,
- ask for more clarification and more information,
- ask curiosity-inspired questions, rather than make assertive argumentative claims,
- search for creative, forward looking solutions to problems,
- consider the relationship of the parties to each other and to others outside of the dispute, and
- reframe conflicts and disputes into opportunities for greater human understanding and collaboration,

we are hoping to appeal to the aspirational and the “good” in human beings in the hope that mediative processes might help us evolve to better processes, problem solving and human decision making in social, legal, political, economic and even international relations. We have much to offer in the way of understanding conflict theory, process expertise and creative problem solving as we restructure old processes from within to evolve to new conflict resolving institutions and processes in search of better ways of being human beings. Conflict may be inevitable (as Mary Parker Follett once said, we need the friction of the bow on the violin to make music),<sup>lxxxviii</sup> but how we productively handle conflicts can be evolutionarily moved forward with our own innovations in dispute resolution design and practice. We too can be “agents” of change in the spaces and processes we inhabit as mediators.

#### ENDNOTES

- i. Lon Fuller, ‘Mediation: Its Forms and Its Functions,’ *Southern California Law Review* 44 (1971): 305, 308–09.
- ii. Carrie Menkel-Meadow, ‘Toward Another View of Legal Negotiation: The Structure of Problem Solving,’ *UCLA Law Review* 31 (1984): 754; Roger Fisher, William Ury and Bruce Patton, *Getting to YES: Negotiating Agreement Without Giving In* (3<sup>rd</sup> ed. New York: Penguin Press, 2011).
- iii. Nishat Awan, Tatiana Schneider and Jeremy Till, *Spatial Agency: Other Ways of Doing Architecture* (London: Routledge 2011).
- iv. John Langbein, *The Origins of Adversary Criminal Trial* (Oxford: Oxford University Press, 2005).
- v. Carrie Menkel-Meadow, ‘The Trouble With The Adversary System in a Post-Modern, Multi-cultural World,’ *William & Mary L. Rev.* 38 (1996): 5–44.

- vi. Carrie Menkel-Meadow, 'Is the Adversary System Really Dead? Dilemmas of Legal Ethics as Legal Institutions and Roles Evolve,' in Jane Holder (ed.), *Current Legal Problems* (Oxford: Oxford University Press, 2005), 85.
- vii. *Supra* note ii.
- viii. Sara Cobb, 'Creating Sacred Space: Toward a Second Generation Dispute Resolution Practice,' *Fordham Urban Law Journal* 28 (2001): 1017; Carrie Menkel-Meadow, 'And now a word about secular humanism, spirituality and the practice of justice and conflict resolution,' *Fordham Urban Law Journal* 28 (2001): 1073.
- ix. *Supra* note 3 at 8.
- x. Carrie Menkel-Meadow, 'The Lawyer's Role(s) in Deliberative Democracy,' *Nev. L. Rev.* 5 (2005): 347-369.
- xi. See Menkel-Meadow and Fisher, Ury and Patton, *supra* note ii.
- xii. With thanks to Howard Gadlin, Ombuds, National Institutes of Health, United States.
- xiii. Neutrality is actually a far more complicated concept than most mediation programs treat, see e.g. Howard Gadlin and Elizabeth Pino, 'Neutrality: A Guide for the Organizational Ombudsperson,' *Negotiation Journal* 13 (1997): 17-37 in Carrie Menkel-Meadow (ed.), *Mediation: Theory Policy and Practice* (Aldershot: Ashgate, 2001); Bernard S. Mayer, *Beyond Neutrality: Confronting the Crisis in Conflict Resolution* (San Francisco: Jossey Bass, 2004).
- xiv. All of these elements or components of mediation can now be found in many texts on mediation, see my own, Carrie Menkel-Meadow, Lela Love, Andrea Schneider, *Mediation: Practice, Policy and Ethics* (2<sup>nd</sup> ed. New York: Wolters Kluwer, 2013) or many others, Christopher M. Moore, *The Mediation Process* (4<sup>th</sup> ed. San Francisco: Jossey Bass, 2014); David Richbell, *Mastering Commercial Mediation* (West Sussex: Bloomsbury Professional, 2015), or, in my view, the best, my old favorite, Mark D. Bennett and Michele S.G. Hermann, *The Art of Mediation* (Notre Dame, Ind: The National Institute of Trial Advocacy, 1996). See also, Douglas Frenkel and James Stark, *The Practice of Mediation: A Video Integrated Text* (2<sup>nd</sup> ed. New York: Wolters Kluwer, 2012); Gary Friedman and Jack Himmelstein, *Challenging Conflict: Mediation Through Understanding* (Washington DC: ABA Press, 2008).

- xv. Leonard L. Riskin, 'Understanding Mediators' Orientations, Strategies and Techniques: A Grid for the Perplexed,' *Harvard Negotiation Law Review* 1 (1996): 7–51.
- xvi. A criticism of one school of mediation, the so-called, “transformative model” of mediation is that many mediators seek only to settle the instrumental problem or dispute and not to help the parties experience true transformation, by “recognition” and “empowerment,” see Robert Baruch Bush and Joseph Folberg, *The Promise of Mediation* (2<sup>nd</sup> ed. San Francisco: Jossey Bass, 2004).
- xvii. See Carrie Menkel-Meadow, 'The Many Ways of Mediation: The Transformation of Traditions, Ideologies, Paradigms and Practices,' *Negotiation Journal* 11 (1995): 217–242.
- xviii. Carrie Menkel-Meadow, 'The Historical Contingencies of Conflict Resolution,' *International Journal of Conflict Engagement and Resolution* 1 (2013): 32–54.
- xix. See e.g. George Simmel, *Conflict and the Web of Intergroup Affiliation* (New York: Free Press, 1955); Lewis Coser, *The Functions of Social Conflict* (New York: Free Press, 1956); Emile Durkheim, *The Division of Labour in Society* (New York: Free Press, 1984); Morton Deutsch, *The Resolution of Conflict: Constructive and Destructive Processes* (New Haven: Yale University Press, 1975); H. Miall, O. Ramsbotham and E. Woodhouse, *Contemporary Conflict Resolution* (Cambridge: Polity Press, 1999).
- xx. Carrie Menkel-Meadow, 'Conflict Theory' in Karen Christensen and David Levison (eds.), *Encyclopedia of Community: From the Village to the Virtual World* (Thousand Oaks, Cal: Sage Publications, 2003).
- xxi. Menkel-Meadow, *supra* note 2.
- xxii. See for the best treatments, Howard Raiffa, with John Richardson and David Metcalfe, *Negotiation Analysis: The Science and Art of Collaborative Decision Making* (Cambridge, Mass: Harvard Belknap Press, 2002) and Kenneth Arrow, Robert H. Mnookin, Lee Ross, Amos Tversky and Robert Wilson, *Barriers to Conflict Resolution* (New York: W.W. Norton 1995); Dean Pruitt, Jeffrey Rubin, *Social Conflict: Escalation, Stalemate and Settlement* (New York: Random House, 1986).
- xxiii. For the “mother” of ADR who married business and organizational management to social work and early conflict theory, see Mary Parker Follett, *Prophet of Management: A Celebration of Writings from the 1920s* (ed. Pauline Graham, Boston: Harvard Business School Press, 1995).



- xxiv. I have been a controversial scholar and practitioner in the United States for suggesting that certain kinds of disputes require lawyer-mediators, see e.g. Carrie Menkel-Meadow, 'Is Mediation the Practice of Law? Redux,' IV (5) *NIDR News* 2, 9, 12–13 (1998).
- xxv. Menkel-Meadow, *supra* note ii.
- xxvi. Carrie Menkel-Meadow, 'Aha? Is Creativity Possible in Legal Problem Solving and Teachable in Legal Education?,' 6 *Harv. Neg. L. Rev.* 6 (2001): 97–144.
- xxvii. Fisher, Ury and Patton, *supra* note ii.
- xxviii. See e.g. Carrie Menkel-Meadow, Andrea Kupfer Schneider, Lela Love, *Negotiation: Processes for Problem Solving* (2<sup>nd</sup> ed. New York: Wolters Kluwer, 2014); Carrie Menkel-Meadow, Lela Love and Andrea Kupfer Schneider, *Mediation: Practice, Policy and Ethics* (2<sup>nd</sup> ed. New York: Wolters Kluwer, 2013).
- xxix. Thomas Jefferson, letter to James Madison, 6 September 1789; Julian P. Boyd et al., *The Papers of Thomas Jefferson* (Princeton University Press), *The Founder's Constitution, Vol. 1, Chapter 2, Document 23*, University of Chicago Press 1987.
- xxx. Jeff Kichaven, 'The Future of Mediation: Joint Session 2.0,' available from [jk@jeffkichaven.com](mailto:jk@jeffkichaven.com) (suggesting the initial plenary session in a commercial mediation needs to be restructured for party to party communication, after extensive preparation by lawyers and mediator, *before* the initial session).
- xxxi. Carrie Menkel-Meadow, 'Roots and Inspirations: A Brief History of the Foundations of Dispute Resolution,' in Michael L. Moffitt and Robert C. Bordone (eds.), *Handbook of Dispute Resolution* (San Francisco: Jossey-Bass, 2005); Carrie Menkel-Meadow, 'Mothers and Fathers of Invention: The Intellectual Founders of ADR,' *Ohio State Journal on Dispute Resolution* 16 (2000): 1.
- xxxii. For the still leading treatment of the jurisprudence and "integrity" of each separate process of dispute resolution see Lon L. Fuller, *The Principles of Social Order* (Kenneth Winston, rev. ed. Oxford and Portland, Oregon: Hart 2001).
- xxxiii. Carrie Menkel-Meadow, 'Whose Dispute Is It, Anyway? A Philosophical and Democratic Defense of Settlement (In Some Cases),' *Georgetown Law Journal* 83 (1995): 2663–2696; Hazel Genn, *Judging Civil Justice The Hamlyn Lectures* (Cambridge: Cambridge University Press, 2009); Owen Fiss, 'Against Settlement,' *Yale Law Journal* 93 (1984): 1073.

- xxxiv. See my own efforts in this regard as Chair of Center for Public Resources Commission on Ethics and Standards in ADR and for Provider Organizations, available at [www.cpradr.org/publicpolicy](http://www.cpradr.org/publicpolicy). See also Ellen Waldman, *Mediation Ethics* (San Francisco: Jossey-Bass, 2011); Carrie Menkel-Meadow and Michael Wheeler (eds.), *What's Fair: Ethics for Negotiators* (San Francisco: Jossey Bass, 2004); Phyllis Bernard and Bryant Garth (eds.), *Dispute Resolution Ethics: A Comprehensive Guide* (Washington Dc: ABA Press (2002); Carrie Menkel-Meadow, 'Are There Systemic Ethics Issues in Dispute System Design? And What We Should (Not)Do About It: Lessons From International and Domestic Fronts,' *Harv. Neg. L. Rev.* 14 (2009): 195–231.
- xxxv. See e.g. Kenneth Kressel, Dean G. Pruitt & Associates, *Mediation Research* (San Francisco: Jossey-Bass, 1989) and Deborah Kolb & Associates, *When Talk Works* (San Francisco: Jossey-Bass, 1994); Carrie Menkel-Meadow, 'Lawyer Negotiations: Theories and Realities – What We Learn From Mediation,' *56 Modern L. Rev.* 56 (1993): 361–379; Carrie Menkel-Meadow, 'Empirical Studies of ADR: The Baseline Problem of What ADR Is and What It is Compared to,' Peter Cane and Herbert Kritzer (eds.), *Oxford Handbook of Empirical Legal Research* (Oxford: Oxford University Press, 2010).
- xxxvi. I draw this list of professional training from the diverse backgrounds of mediators I spoke with at the CiArb Mediation Symposium on 8 October 2015 in London. Participants included lawyers, social workers, captains of ships, surveyors, clergypersons, human rights activists, architects, engineers and accountants, medical professionals and theatre professionals, among others. We are a multidisciplinary field!
- xxxvii. Neurolinguistic programming.
- xxxviii. See e.g. Daniel Kahneman, *Thinking Fast and Slow* (New York: Farrar, Straus and Giroux, 2011).
- xxxix. Carrie Menkel-Meadow, 'Why Hasn't The World Gotten To Yes?: An Appreciation and Some Reflections,' *Negotiation Journal* 22(3) (2006): 485–503.
- xl. Deborah Tannen, *The Argument Culture: Moving From Debate to Dialogue* (New York: Random House, 1998).
- xli. *Supra* note 3.
- xlii. Jürgen Habermas, *The Theory of Communicative Action*, Vol 1 (1984) Vol. 2 (1987) (Boston: Beacon Press).

- xliii. Carl Rogers, *Client Centered Therapy* (Boston: Houghton Mifflin, 1951); David Binder and Susan Price, *Legal Interviewing and Counseling: A Client Centered Approach* (St. Paul: West Publishing, 1977).
- xliv. See Seyla Benhabib, *The Claims of Culture: Equality and Diversity in the Global Era* (Princeton: Princeton University Press 2002).
- xlv. George Mitchell, *Making Peace* (New York: Knopf, 1999).
- xlvi. Felix Steffek, Hannes Unberath, Reinhard Greger, Hazel Genn and Carrie Menkel-Meadow (eds.), *Regulating Dispute Resolution – ADR and Access to Justice at the Crossroads* (Oxford: Hart, 2013).
- xlvii. Priscilla Hayner, *Unspeakable Truths: Confronting State Terror and Atrocity* (2<sup>nd</sup> ed. New York: Routledge, 2011).
- xlviii. Carrie Menkel-Meadow, 'Variations in the Uptake of and Resistance to Mediation Outside of the United States,' in *Contemporary Issues in International Arbitration and Mediation* (The Fordham Papers 2014, A. Rovine, ed. Leiden, Netherlands: Brill Nijhoff Publications, 2015), 189–221.
- xlix. Ellen Deason, 'Enforcement of Settlement Agreements in International Commercial Mediation: A New Legal Framework?,' *Dispute Resolution Magazine* 22(1) (2015): 32–38.
- l. See *Rebooting the Mediation Directive: Assessing the Limited Impact of its Implementation and Proposing Measures to Increase the Number of Mediations in the EU*, Study prepared for Legal and Parliamentary Affairs, European Parliament, Policy Department C, Citizens' Rights and Constitutional Affairs (Directorate General for Internal Policies) by Giuseppe De Palo, Leonardo D-Urso, Mary Trevor, Bryan Branon, Romina Canessa, Beverly Cawyer, L. Reagan Florence (2014).
- li. Carrie Menkel-Meadow, 'When Dispute Resolution Begets Disputes of Its Own: Conflicts Among Dispute Professionals,' *UCLA L. Rev.* 44 (1997): 1871–1933.
- lii. Riskin, *supra* note xv.
- liiii. Marjorie Corman Aaron and Wayne Brazil, 'Shaking Decision Trees for Risks and Rewards,' *Dispute Resolution Magazine* 22(1) (2015): 12–18.
- liv. Menkel-Meadow *et al.*, *supra* note xiv.
- lv. See Mohamed S. Abdel Wahab and Ethan Katsh, *Online Dispute Resolution: Theory and Practice A Treatise on Technology and Dispute Resolution* (The Hague: Eleven International Publishing, 2012).

- lvi. Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Regulation on consumer ODR).
- lvii. And new forms and sources of disputes. I have just completed teaching a new course, “Uberlaw: The Regulation of Innovation” exploring the legal issues and regulatory complexities of the “platform economy.” See Orly Lobel, ‘The Platform Economy,’ *Minn. Law Review* (2016).
- lviii. Richard Susskind, *The End of Lawyers? Rethinking the Nature of Legal Services* (Oxford: Oxford University Press, 2008), chapter 6, suggesting uses not only of online dispute resolution but technology uses for dispute avoidance.
- lix. See Roger Smith and Alan Paterson, *Face to Face Legal Services and Their Alternatives: Global Lessons from the Digital Revolution* (London: Nuffield Foundation Report, 2014).
- lx. Carrie Menkel-Meadow and Robert Dingwall, ‘Negotiating by Playbooks and Scripts: What to do when Big Bad Companies Won’t Negotiate,’ in Christopher Honeyman and Andrea Kupfer Schneider (eds.), *The Negotiator’s Fieldbook* (Washington DC: American Bar Association, 2nd ed. forthcoming).
- lxi. Frank E.A. Sander, ‘Varieties of Dispute Processing,’ *Fed. Rules Decisions* 70 (1976): 111.
- lxii. Joel Lee and The Hwee Hwee (eds.), *An Asian Perspective on Mediation* (Singapore: Academy Publishing, 2009).
- lxiii. In Israel, the term “*gishur*” (which means ‘bridge’) is the term most often used for mediation.
- lxiv. Christopher McKenna, *The World’s Newest Profession: Management Consulting in the Twentieth Century* (Cambridge: Cambridge University Press, 2006).
- lxv. Howard Raiffa, *Lectures on Negotiation Analysis*, Program on Negotiation, Harvard University, 1996.
- lxvi. See e.g. Carrie Menkel-Meadow, *Complex Dispute Resolution: Vol 2 Multi-Party Dispute Resolution, Democracy and Decision Making* (Aldershot: Ashgate, 2012).
- lxvii. Nancy Rogers, Robert Bordone, Frank E.A. Sanders and Craig McEwen, *Designing Systems and Processes for managing Disputes* (New York: Aspen Wolters Kluwer, 2013).
- lxviii. Some major industries like pharmaceuticals, energy, and automotive have recently attempted to develop programs for anticipating or reacting quickly to common (or mass) disputes

and providing opportunities for pre-litigation or early after litigation resolution processes.

- lxix. As in the claims processes developed by Kenneth Feinberg for the September 11 Victims Compensation Fund, BP Deepwater Horizon Oil Spill, and now possibly the multi-national claims against Volkswagen for air pollution tracker fraud, see Kenneth Feinberg, *What Is A Life Worth? And Who Gets What? Fair Compensation After Tragedy and Financial Upheaval* (New York: Public Affairs, 2012).
- lxx. Lawrence Susskind, Sarah McKearan and Jennifer Thomas-Larmer, *The Consensus Building Handbook* (Thousand Oaks: Sage Publications, 1999); Carolyn J. Lukensmeyer, *Bringing Citizen Voices to the Table* (San Francisco: Jossey Bass, 2013); Barbara Benedict Bunker and Billis T. Alban, *The Handbook of Large Group Methods: Creating Systemic Change in Organizations and Communities* (San Francisco: Jossey-Bass, 2006); John Forester, *Dealing with Differences: Dramas of Mediating Public Disputes* (Oxford: Oxford University Press, 2009).
- lxxi. Carrie Menkel-Meadow, 'The Lawyer's Role(s) in Deliberative Democracy,' *Nevada Law Review* 5 (2005): 347–369.
- lxxii. Carrie Menkel-Meadow, 'Scaling Up Deliberative Democracy as Dispute Resolution in Healthcare Reform: A Work in Progress,' *Law and Contemporary Problems* 73(3) (2011): 1–30.
- lxxiii. See Bruce Babbitt, 'Habitat Conservation' in Center for Public Resources, *Into the 21<sup>st</sup> Century: Thought Pieces on Lawyering, Problem Solving and ADR* (New York: CPR Institute for Dispute Resolution, 2001).
- lxxiv. Carrie Menkel-Meadow and Irena Nutenko, 'The Next Generation: Creating a New Peace Process in the Middle East,' *Negotiation Journal* 25(4) (2009): 567–584.
- lxxv. Negotiations for the Kyoto Clean Air treaty were preceded by negotiation training for over 140 countries.
- lxxvi. Lawrence E. Susskind and Jeffrey L. Cruikshank, *Breaking Robert's Rules: The New Way to Run Your Meeting, Build Consensus and Get Results* (New York: Oxford University Press, 2006).
- lxxvii. Carrie Menkel-Meadow, 'Restorative Justice: What Is It and Does It Work?,' *Annual Review of Law and Social Science* 3: 10.1–10.27 (Annual Reviews, Palo Alto, California) 2007.
- lxxviii. Carrie Menkel-Meadow, 'Unsettling the Lawyers: Other Forms of Justice in Indigenous Claims of Expropriation, Abuse and Injustice,' *University of Toronto Law Journal* 64 (2014): 620–639.

- lxxix. Jane E. Stromseth (ed.) *Accountability for Atrocities: National and International Responses* (Ardsley, NY: Transnational Publishers, 2003).
- lxxx. See e.g. Carrie Menkel-Meadow, 'Process Pluralism in Transitional/Restorative Justice: Lessons from Dispute Resolution for Cultural Variations in Goals beyond Rule of Law and Democracy Development (Argentina and Chile),' *International Journal of Conflict Engagement and Resolution* 3(1) (2015): 3–32; Craig Zelizer and Robert Rubinstein, *Building Peace: Practical Reflections from the Field* (Sterling, Va: Kumarian Press, 2009).
- lxxxi. See e.g. Lorna McGregor, 'Alternative Dispute Resolution and Human Rights: Developing a Rights-Based Approach through the ECHR,' *European Journal of International Law* 26(3) (2015): 607–634; Helen Keller, Magdalena Forowicz and Lorenz Engi, *Friendly Settlements before the European Court of Human Rights: Theory and Practice* (Oxford: Oxford University Press, 2010).
- lxxxii. [www.publicconversations.org](http://www.publicconversations.org).
- lxxxiii. Carrie Menkel-Meadow, 'Dispute Resolution Mechanisms,' in Amadine Orsini and Jean-Frédéric Morin (eds.), *Essential Concepts of Global Environmental Governance* (London: Routledge/Earthscan, 2014).
- lxxxiv. See Steffek, *supra* note xxxiv.
- lxxxv. See Pamela Utz, *Settling the Facts: Discretion and Negotiation in Criminal Court* (Lexington, Mass.: Lexington Books, 1978).
- lxxxvi. Jon Elster, 'Strategic Uses of Argument,' in Kenneth Arrow, Robert H. Mnookin, Lee Ross, Amos Tversky and Robert Willson (eds.), *Barriers to Conflict Resolution* (New York: Norton 1995).
- lxxxvii. This is an adaptation from Carrie Menkel-Meadow, 'Introduction: From Legal Disputes to Conflict Resolution and Human Problem Solving,' in *Dispute Processing and Conflict Resolution* (Aldershot: Ashgate Press, 2003), xi, xxxi.
- lxxxviii. Parker Follett, *supra* note xxxiii.