

# The Historical Contingencies of Conflict Resolution

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## Abstract

*This article reviews the historical contingency of theory and practice in conflict engagement. World War II and the Cold War produced adversarial, distributive, competitive, and scarce resources conceptions of negotiation and conflict resolution, as evidenced by game theory and negotiation practice. More recent and more optimistic theory and practice has focused on party needs and interests and hopes for more party-tailored, contingent, flexible, participatory and more integrative and creative solutions for more than two disputants to a conflict. The current challenges of our present history are explored: continued conflict in both domestic and international settings, the challenge of “scaling up” conflict resolution theory and the problematics of developing universal theory in highly contextualized and diverse sets of conflict sites. The limits of “rationality” in conflict resolution is explored where feelings and ethical, religious and other values may be just as important in conflict engagement and handling.*

**Keywords:** History of ADR , consensus building, multi-party dispute resolution, theory development, conflict handling.

## 1 Histories of the Field

### 1.1 *The Contingency of Theories*

To look at the world we live in now, we would wonder where is the field of conflict resolution. At the time of this writing, a murderous civil war rages in Syria; there have been bombing and military hostilities in and out of Gaza; there has been new violence in Kashmir and Northern Ireland; children and young women have been raped, shot at, and murdered on public transportation in several Asian and Middle Eastern countries; with accompanying protests and riots, a dissent rock band of women have been imprisoned in Russia; the United States almost fell off ‘the fiscal cliff’ as Republicans and Democrats could not negotiate a tax and budget plan; labour strikes and economic boycotts continue in many venues; and in many countries (including my own), political factions of left and right have so little in common they can barely scrape together enough votes for coalitions or pass legislation to govern their nations. In arena after arena, we note the absence

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of civil discourse and instead see the continuing rhetoric of adversarial, competitive, and nasty invective used by those who disagree with each other. With so much conflict in the world, where is the 'engagement' and 'resolution' that this new journal seeks to study and reflect on?

In this essay, I explore the *historical contingency* of our field. Can theories and practice of conflict resolution, management, or as I prefer to say 'handling'<sup>1</sup> change our historical conditions and improve our approaches to conflict as human beings, or does history bend and shape our theory and practice? These are, as Dickens (1859) would say, 'the best of times and the worst of times' to test our theories and practices. As conflict resolution theory and practice abound and grow, so does conflict, some of it seemingly intractable. Can we change the world, or do world conditions change us and our theories and practices? Can conflict resolution theorists and practitioners who seek nothing less than to change how we conceive of each other and our human differences reorient human beings away from assumptions of scarcity, competition and unproductive conflict towards more diverse, collaborative and problem solving means of human existence? Is it better/easier to create theories and practice of conflict resolution in more troubled times, or is it easier to imagine methods of conflict engagement in times of (relative) peace? To try to answer these important questions I will examine my own take on where the field of conflict resolution came from (in my own experience) and where it might be going.

I begin with some important caveats. In addition to historical contingency, there is *cultural contingency* in conflict resolution work. My own experience derives initially from American domestic legal ordering (both in theory and practice) and moves out to international conflicts at both private and public levels. And with my work in many countries now, I am exquisitely aware of the different meanings of our words, concepts and practices when 'transplanted' from one field, country or culture to another garden or military battleground. Even legal cultures of similar genealogy (the common law systems of the UK, the US, Canada and Australia, for example) internalize and operationalize the practices of conflict resolution differently. I have often expressed doubts that the American form of psychological pragmatism and narrative problem-solving, based on extraverted conversation and willing self-examination, that informs so much mediation as 'talking cure' might not be appropriate in more reticent (or hierarchical) cultures (Lee, 2009; Menkel-Meadow, 2003, 1995). So, a first question is, can there be any form of '*universal*' *conflict resolution theory*, or is conflict resolution such a socio-logically embedded practice that it must always be historically, socially and culturally *contextualized* (Menkel-Meadow, 2001a)?

The second problem of contingency is the *locus* of the theory and practice of our field. Derived as an 'applied' social science from the slightly 'older' fields of political science, anthropology, sociology, economics, psychology and more

1 I prefer to use the term 'handling' because it connotes the unlikely full 'resolution' of many conflicts. Conflict is part of life. We engage in conflict all the time. Many conflicts are good and produce change. Some are bad and produce death, injury or social harms. So we must learn to live with conflict and to 'handle' it productively as best we can.

applied game theory, decision sciences and planning, conflict resolution theory takes its concepts derivatively from a number of other disciplines and attempts to unify a theory of conflict resolution that transcends other disciplines (Deutsch & Coleman, 2000; Menkel-Meadow, 2005a, 2009a; Yarn, 1999). Whether those 'trans-disciplinary' concepts have their own integrity, clarity and legitimacy or 'canon' in the world of academic theory is one question; whether those theories have explanatory purchase in practice as 'theories-in-use' (Schön, 1983) is another. So there is a question of where theory comes from and to whom it speaks in its efforts to explain the world.

The third problem of contingency is the *arena or sphere of application* of conflict resolution and engagement. Can the same theory (or practice) be applied to conflicts within families, in lawsuits, between citizens, and between and among nations? Philosophers might call this a 'category mistake' as we attempt to apply theories to different levels of analysis or to different classes of conflicts, or different groupings of participants, beyond the explanatory power of the categories created for analysis, both in the abstract and practically. Most recently within the field of conflict resolution, as I have written elsewhere (Menkel-Meadow, 2012a), this has become a problem of 'numbers' in conflict resolution theory (Raiffa, 1996). If negotiation theory is often based on theories of the *dyad* (two parties to a negotiation over a contested matter or thing) and mediation, arbitration, and adjudication are often based on theories of the *triad* (Shapiro, 1981), what happens to our theories and practices when we have much larger groups of disputants ('multi-party dispute resolution') and many complex issues to be dealt with. Conflict resolution theory is now applied to such varied conflicts and disputes as two party divorces (with children), two party lawsuits (with insurers or other indemnifiers), two nation disputes (North and South Korea, Japan and China, with multiple national and indeed, world-wide effects), two party political systems and multi-party political systems (most of Europe, Israel), to disputes pitting the present against the future (environmental and physical resources issues) and to both unmediated (wars, diplomatic insults, school yard fights) and mediated (some lawsuits, labour and international disputes) conflicts. Do we have theories or concepts (e.g., 'ZOPAs' [zones of possible agreement], BATNA [best alternative to a negotiated agreement] [Fisher *et al.*, 2011], 'reactive devaluation' or even 'consent') that operate in all of these domains or do such conceptual frameworks have to be altered in different settings? Can there be a single 'best' alternative to a negotiated agreement if, in a multi-party setting, some can agree to exclude others and others can go find another 'deal' (Susskind *et al.*, 2005)? Indeed, a focus on more complex negotiation has spawned new concepts and theories (derived from observations of practice) of conflict handling such as the process of commitments, coalition formation, defections, groupthink (Janis, 1982; Sunstein, 2000), holdouts and spoilers, as well as new theories and practices for the more complex management of complex multi-party, multi-issue dispute resolution (Podziba, 2012; Susskind & Cruickshank, 2006; Susskind *et al.*, 1999) and the development of 'dispute system design' (Symposium on Dispute System Design, 2009), for treatment of iterated disputes between repeat players or within organizations. As reviewed more fully below, one important question for

the field is can dispute resolution theories and practices be ‘scaled up’ from dyadic negotiation or triadic mediation to whole polities and complex decision making in deliberative democracies (and elsewhere) (Erdman & Susskind, 2008; Menkel-Meadow, 2011)?

### 1.2 *Where Did It Come from? Conflict Resolution Theory as a Product of Conflicts in Time*

I have suggested in earlier essays on the origins of our field (Menkel-Meadow, 2005a, 2006a, 2009a, 2010) that conflict resolution theory has been a product of the historical conditions of our geo-political international and domestic histories. Both World War II and the Cold War, which followed it, produced decades of important theory development and modeling of decisions made in assumed-to-be bilateral and polarized worlds (Allies/Axis; ‘Free’ World-West/Communist World-East) of competition, scarcity and perceived defeat of the other as a ‘need to survive’. The game theory (Luce & Raiffa, 1957), which emerged from modelling of decision making in these perceived-to-be-hostile worlds, assumed lack of communication between the parties (the classic, ‘prisoner’s dilemma’ game, Baird *et al.*, 1994; Poundstone, 1992), before the ‘red phone’ allowed instant communication between the US President and the Soviet Premier, and assumed conditions of war, domination, and later, ‘deterrence’ through arms build-ups of unprecedented proportions. Although some game theorists also pursued study of cooperative, as well as competitive, games (Brandenburger & Nalebuff, 1996; Nash, 1953), the assumptions of negotiations in this period were how to ‘better’ or ‘defeat’ the other side in either one-shot or iterated ‘games’ (there is nothing game-like about the harsh realities in which these negotiations took place) of interaction, usually transpiring from one crisis to another.

Against this backdrop of geo-political development of conflict resolution theory in international relations and political science, a nascent theory of negotiation in legal negotiation behaviour began in the 1960s and 1970s in the United States, often (as in my own case, Menkel-Meadow, 1984) in the shadow of aggressive and competitive lawyering for the disenfranchised in the early days of the civil rights, anti-poverty, feminist, consumer, environmental (and now gay rights), and clinical legal education movements (Bellow & Moulton, 1978; Meltsner & Schrag, 1974). As early forms of legal negotiation theory focused on using competitive tactics to ‘win’ cases (often on behalf of well deserving and disenfranchised clients) the American legal culture seemed a subset of the cruel, brutish and harsh ‘cold war’. Adversarial models of negotiation taught us how to defeat the other side with a series of tactical and strategic ploys, used to trick, deceive and often manipulate our opponents (*e.g.*, Cohen, 1980), often, but not always, having nothing or little to do with the legal or other merits of the negotiation situation.

My own personal history as a legal services lawyer for the poor ultimately coincided with what ultimately became our ‘ADR movement’ in the United States. As I watched my colleagues fight bitterly contested lawsuits against the state (prison conditions, welfare entitlements, resource allocations, school disputes) and private parties (discrimination, consumer disputes, landlord tenant cases)

and often win (Constitutional, class actions and statutory claims were won on the law in summary judgment motions, often without trials), I noticed we not very often solved the actual problems of our clients. Poverty continued, people were denied benefits on new grounds, rules were amended by more powerful parties (Galanter, 1974) and those without documentation could not win evidence-based lawsuits. My early role model was a lawyer in my office who quietly called offending public officials and private bosses and landlords and negotiated to solve the problems of her individual clients, rather than using more public class action litigation. Just as I transitioned to become a clinical law teacher I began to focus on how to teach young lawyers a new way of conceptualizing legal issues – what about solving the problem, rather than ‘winning the case’? My early studies of negotiation and conflict resolution theory immediately turned to scholarship and practice outside of law (Menkel-Meadow, 1983) – where some other fields were focused on when and how people (and animals) collaborated, cooperated or utilized more ‘mixed’ behaviours to solve their survival problems (e.g., Axelrod, 1984).

The non-technical, but theory-changing, classic, *Getting to Yes: Negotiating Agreement without Giving in* (1981) by Roger Fisher and William Ury began to transform conceptions of both legal and non-legal negotiations in a variety of real-world contexts and educational programmes. By suggesting that underneath the demands or positions of negotiators, there were instead ‘interests’ (or in my work [1984], ‘needs’) of the parties that, if focused on, could lead to ‘integrative’ solutions to problems that used trades of complementary, if not conflicting, interests, to ‘expand the pie’ and increase resources, before dividing them, or to look for other ways to maximize ‘joint gain’ rather than to assume maximization of individual gain as the goal of any negotiation. The classic ideas here were laid on the foundations of earlier work by Mary Parker Follett (in the 1920s), the real ‘mother’ of integrative solutions (Menkel-Meadow, 2000), who suggested that oranges could be divided by peel and fruit, and draughts in libraries could be avoided by opening windows in other rooms (Graham, 1993). Negotiation did not have to be about dividing and competing; it could be about asking deeper questions about preferences and needs and then seeking solutions that were more likely to satisfy both (or all) parties, rather than only one. Relative satisfaction of all sides to a negotiation ensured greater stability of outcomes, and perhaps avoided the desire for revenge, retribution or non-compliance that has characterized so many competitive ‘victories’.

At roughly the same time (late 1970s to early 1980s), a variety of legal commentators and practitioners in the United States, focusing on both ‘quantitative’ (too many cases) (Burger, 1982) and ‘qualitative’ (commanded legal solutions that were too ‘brittle’ and inflexible) deficiencies of the formal court system (Sander, 1976), began to focus legal attention on other ways to process legal disputes, including mediation, arbitration, ombuds and fact-finding, and then hybrids (e.g., med-arb) of these processes. Asking a third party ‘neutral’ to facilitate parties’ own negotiations, whether represented by lawyers or not, became facilitative mediation (Friedman & Himmelstein, 2008; Riskin, 1994) and more active, decision-suggesting or making third parties became either evaluative mediators or

arbitrators. Thus, was a social/legal 'movement' created, naming itself 'alternative' (now 'appropriate') dispute resolution, or called, somewhat more critically, 'informal justice' (Abel, 1982).

As a field of knowledge and practice, this new movement was highly aspirational; claiming it could teach individuals, parties in lawsuits, families, community groups (Merry & Milner, 1993), labour unions (Kochan & Lipsky, 2003; Walton & Mckersie, 1965), public officials and agencies, and even nations, to solve their problems more peaceably and with better outcomes. The ADR movement created its own 'ideology' at many different levels of engagement – legal, neighborhood, community, political, domestic and international. It was criticized by many for failing to take account of structural inequalities among those in conflict (e.g., Delgado *et al.*, 1985 [race, ethnicity and class]; Grillo, 1991 [gender]) or for over valuing 'settlement' as a desirable social and legal practice over more 'principled' and public outcomes (Fiss, 1984; Luban, 1995). The founders of this field, of whom I am one, thought we could change the world, through education, theory development, training, and practice in a wide range of arenas and substantive domains (Menkel-Meadow, 2001b).

For many of us, the teachings of these alternative approaches to problem solving anticipated the fall of the Berlin Wall (1989), in which, for a few brief moments, we could hope that bipolarized demonization of the 'other' was past history (Fukuyama, 1992) and we would learn to peacefully solve problems, even across vast cultural, social, political and economic differences. This optimistic moment of transnational dispute resolution ideology was short-lived, as a spurt of ethnic and civil wars sharply disrupted the hopes of the 'cosmopolitans'. I recall my own personal experience while teaching ADR in Canada and reading Michael Ignatieff's powerful book *Blood and Belonging* (1994), I recognized that peaceful problem solving was not to be, as repressive regimes that had also suppressed conflict gave way to bitter fights about identity, borders, scarce resources and survival, when demands for self-determination emerged from the yokes of oppression. A hope that a more optimistic period of human history would facilitate more collaborative theories and practices of conflict resolution, seemed, once again, to dissolve in the face of more discouraging geo-political realities.

Thus, for me, the challenge of reporting on and evaluating the trajectories of conflict resolution theory, practice and 'engagement' is like the double helix of the mapping of DNA – parallel bonds of upward and downward spirals as conflict resolution theory and practice try to tame the less predictable behaviour of the more conflictual real world and the conflictual real world then asserts its influence on the development of theory and practice. Do we reach greater insights by studying retrospectively what has happened and trying to understand what we could 'have done differently'? Or, should we continue to offer more optimistic prescriptive and aspirational notions of how conflicts (in the present or future) might be resolved? In his classic treatment of negotiation theory Howard Raiffa cautioned against conflating the descriptive and the prescriptive (Raiffa, 1982) and advised that analytic separation of prescription for one set of actors in a conflict from advice for all parties (or the mediator) of a conflict might be very different, depending on one's orienting frame of one-sided or multi-party 'maximization'

strategies. So our theories may be derived from the same descriptions of the past and go off in very different directions for prescriptions for the future, in both theoretical and more practical domains, depending on our own orientations to conflict. One of our greatest practitioners, John Paul Lederach has often reminded us that our field is a long multi-generational process – he can touch the hands of both his grandparents and grandchildren to see a span of over 100 years of human struggle with conflict – perhaps, little by little, each generation will learn from the one that went before (Lederach, 1995).

So our field has different histories if looked at from the perspective of abstract theory development, untethered to any larger history, but a variety of very different histories if linked to the contextual frames in which conflict resolution theory and practice has developed – community, civic, ethnic, legal, labour, political, organizational or international conflict.

### 1.3 *Legal and Jurisprudential Histories of Conflict Handling*

The study of conflict and its significance actually comes initially from sociology (Aubert, 1963; Coser, 1956; Durkheim, 1984; Simmel, 1955), anthropology (Abel, 1973; Avruch, 1998; Gulliver, 1979; Llewellyn *et al.*, 1941; Nader & Todd, 1978), and international relations and peace studies (Boulding, 1962; Burton, 1987; Galtung, 1989), and only later in time from law and legal studies (Alberstein, 2007). Only later in the twentieth century, as a reaction to the devastation of World War II and the Cold War, has a broader and multi-disciplinary field of ‘conflict resolution’ emerged to attempt some systematic understanding of conflict prevention, managing and handling (Kriesberg, 1998; Miall *et al.*, 1999). Much current conflict resolution work is framed by legal and more philosophical theories of jurisprudence and by the functions of ‘process’ in dispute resolution (Hampshire, 2000; Menkel-Meadow, 2006b). In this our intellectual progenitor is Lon Fuller (1981), whom I have often called the ‘jurisprudent of ADR’ (Menkel-Meadow, 2000).

Lon Fuller, Harvard law professor, arbitrator and legal philosopher, in a series of law review articles, based on both theoretical syntheses and speculations, and practical experience, developed the notion of the ‘*integrity*’ of different processes for different purposes. Adjudication is necessary when we need to not only resolve a dispute, but elaborate, through articulated reasons, why a rule or decision is appropriate, not only for the parties in dispute, but to serve (in a common law system) as precedent for others in similar situations (Fuller, 2001). Arbitration is best used when the parties understand the rules that govern them (*e.g.*, though contract, as in a collective bargaining agreement) and want to select their own decision makers and apply the particular rules of their repetitive dealings (‘the law of the shop’), usually, but not always, in a more private setting (Fuller, 1963). Mediation is appropriate when the parties have on-going relations (as in a family or workplace) and want to ‘reorient themselves’ (peaceably) to each other or want to tailor their own future-oriented solutions to problems that do not necessarily lend themselves to more brittle ‘win-lose’ commands (Fuller, 1971). In Fuller’s conception of dispute resolution purity, each of these processes has its own integrity (from a structural-functionalist perspective) because each process

has particular goals (decision or agreement), different categories of parties (one-shotters or repeat players) and different audiences (the disputants alone or the larger public) with different requirements of transparency or privacy. The rigorous conceptualization of such process divisions has led to more modern legal categorization to the claims (originally made by Professor Maurice Rosenberg of Columbia Law School, then by Professors Frank Sander and Stephen Goldberg) that “the forum should fit the fuss” (Sander & Goldberg, 1994). Yet, in fact, more modern practices of dispute resolution have often hybridized those ‘pure’ forms of process, as Goldberg himself notes in arguing for forms of ‘med-arb’ or ‘arb-med’ in labour grievances, and later, in other settings (Ury *et al.*, 1988). Dispute resolution in courts and ancillary to courts for legal problem solving is now called ‘process pluralism’ (Menkel-Meadow, 2006b).

*Hybridization* of dispute resolution processes allows us to seek consensual solutions first (negotiation and mediation) and then to move towards more command and decide choices when the parties cannot resolve their conflicts themselves (evaluative mediation, arbitration and adjudication) and, as it has been argued, in many settings, can reduce the costs of conflict resolution, as the same parties can shift from one role (mediator) to another (arbitrator), even as some cleave to Fuller’s notion of integrity and suggest that such role shifting presents some ethical difficulties (Menkel-Meadow, 2001c; Menkel-Meadow *et al.*, 2011). Hybridization of dispute resolution processes has produced a great variety of legal innovation in processes that range from summary jury trials and early neutral evaluation (in public courts), mini-trials (private settings), ombuds services in organizations (Gadlin, 2000), variations in arbitral types (*e.g.*, ‘baseball’ and final offer), negotiated rule-making in formal governance (Harter, 1982) and a wide variety of grievance and dispute ‘tiered’ processes between and within organizations (‘Internal Dispute Resolution [Edelman *et al.*, 1993], in iterated dispute settings [Symposium on Dispute System Design, 2009]) and now ODR (on-line dispute resolution) (Wahab *et al.*, 2012). In more formal governmental settings (see below) various forms of conflict resolution have been ‘scaled up’ for policy formation and negotiated rule-making and decision-making in such processes as ‘consensus building’ and ‘public policy mediation’, some of which is now formally recognized in law (at least in the United States) (Podziba, 2012). The field of conflict resolution itself is one of creative innovation as new forms of conflicts (in person, on the internet, and between unseen adversaries) spawn new forms of conflict resolution that are ever evolving.

In the legal arena, both pure and hybrid forms have also led to both *institutionalization* and *co-optation* issues, as various form of conflict resolution have been made mandatory in court settings, both to divert cases from time consuming and costly trials, and to encourage more party tailored and flexible solutions to problems. Twenty years ago I warned that the institutionalization of more flexible and voluntary forms of dispute resolution when imported into more conventional and mandatory settings like courts, could alter the very fabric of what ‘A’DR was intended to do (allow parties to voluntarily craft their own tailored and preferred outcomes to conflicts where law or court ordered solutions would not suit, Menkel-Meadow, 1991). My predictions have more than come true, as noted



in a wide variety of more modern explorations into what has happened to the aspirational aspects of mediation ideology (party problem-solving and peace-seeking) as it has morphed in mandatory court settings into mere ‘efficiency’ and lawless case settlement (Menkel-Meadow, 2012b; Mironi, forthcoming). Thus, even those of us who are founders and supporters of the field of less formal methods of conflict resolution believe there is still some purpose to Fuller’s separation of form and function – courts and adjudication should still be sites of authoritative decision making, where appropriate, and forms of negotiation and mediation, which are intended to reorient the parties to each other to seek future-oriented solutions and more flexible or contingent or more party tailored solutions, should not necessarily be merged into and distorted by the needs and requirements of other institutions (Resnik, 1995).

The relation of law and legality to different forms of dispute resolution is one of the most interesting challenges currently facing our field and its trajectories may be different as a matter of theoretical and jurisprudential interest, from its practical applications in widely different legal, national and international contexts. Different national and regional legal systems have expanded the use of mediation (see, especially all the recent efforts in the European Union; De Palo and Trevor, 2012; and elsewhere [Hopt & Steffek, 2012]) in court, labour, commercial, familial, criminal and other settings, with great cultural and legal variation. Ironically, as national court systems continue to expand the use of mediation and less formal means of dispute resolution, and increasingly private parties (especially in large commercial trans-border transactions and disputes) encourage them (see promotional activities of the International Mediation Institute, <<http://imimediation.org>>), we seem less successful in the use of mediation and conciliation processes in major international disputes (e.g., Syria, Israel-Palestine, the former Congo, Sudan, North/South Korea). Unlike national courts that now strongly encourage or require mediation as a condition precedent to litigation, the United Nations, the International Court of Justice and even the many new regional and specialty international tribunals cannot ‘mandate’ the use of more conciliatory forms of conflict resolution before litigation (Merrills, 2010). (This is a slight overstatement. Some of the newer international tribunals, e.g., World Trade Organization, International Tribunal of the Law of the Sea, actually do try to encourage various forms of conciliation and mediation before adjudication.)

So, one interesting question for our field to ask is why conflict resolution theory and practice has been so much more successfully, if somewhat co-optedly, ‘nested’ in law and courts than in non-legal (more political, national, ethnic, civil) forms of conflict?

## 2. Future(s) of the Field of Conflict Resolution

### 2.1 *Conflict Resolution Process Is Necessary for our Survival: Of Heads, Hearts and Stomachs*

In his Tanner lectures, later published as *Justice Is Conflict* (2000), social philosopher Stuart Hampshire, perhaps unwittingly, has written us a manifesto for the

future of conflict resolution studies and practice in the world. After a lifetime of studying what we should aim for in our search for the 'substantive good', Hampshire concludes that the modern world is filled with too much diversity of life and values for our species to agree on many things. We do seem to be able to agree on the common 'bad' (poverty, disease, war, resource shortages, unkindness, dictatorships and lack of freedom and self-determination), even if we, as human beings, do not always act consistently to eliminate those evils. But, says Hampshire, if we cannot agree on the common good, we must still as individuals, communities, societies, and the human race make decisions about how we will act and govern ourselves and so we must find ways to make decisions together. Building on work like that of Jürgen Habermas (1984) (specifying conditions for deliberative democracy and 'ideal speech conditions'), Hampshire assures us that 'reasoned argument' and 'conflict resolution skills' are among the most noble of human skills. Thus, even a substantive social philosopher now, at the end of his life, has recognized the importance of *process* to human existence and flourishing, and indeed the importance of conflict resolution in particular.

Hampshire lauds the principle of Anglo-American adversary process: *audi alterum partem* ('hear the other side'). In other essays (Menkel-Meadow, 2005b, 2006a, 2011), I have elaborated how Hampshire's recognition of conflict resolution skills must be broadened to acknowledge not just 'the other side', but '*all other sides*' to acknowledge the multiplicity of our modern day conflicts (in terms of both parties and issues) and interactions with each other. 'Hearing the other sides', in my view must include, not only 'reasoned argument' but also the other discourses in which human beings engage with each other – pragmatic and instrumental trades and bargaining (negotiation), and appeals to emotions, ethics, religions and values (the perhaps not so 'rational' things that matter to us).

Thus, for me the ultimate challenge of the future of conflict resolution study and practice is our need to combine different kinds of discourses into productive engagement with each other – the combinations of the human brain (head), heart, and yes, 'gut'. To live together, with productive conflict engagement, we need to think about, feel with, and get along with, tolerate (dare I say 'digest') other human beings, whose land, water and air we must share, even if we do not ultimately share all our values of what is most important in life. The future of conflict engagement and 'handling' in my view, then, is to develop processes, models, ideas and practices that allow us to combine these different levels of engagement with each other. This is not an easy task. There is some evidence, however, that some new forms of process and different forms of engagement are at least suggesting a more hopeful future of where conflict engagement might lead us. Thus, despite the evidence of much conflict in the world, I am hopeful that those of us who engage in field development will continue to forge new ideas, concepts and practices, from the materiel of the conflicts that our times have given us. I will describe a few such efforts below and hope that this new journal will be a source for reports of many more.

## 2.2 *Restorative and Reconciliative Forms of Conflict Resolution*

Much attention to conflict in the legal world has been devoted to civil justice, when in fact some of the most innovative work has been done in criminal and juvenile justice, with various forms of restorative justice, victim-offender mediation, 'healing circles' and other forms of more reconciliative choices around acknowledging and 'correcting' bad behaviour (Menkel-Meadow, 2007; Tullis, 2013). While a few localities and states in the United States, Canada, New Zealand, the Netherlands, and elsewhere have pioneered these processes, which never totally substitute for criminal or civil processes, but often serve as a parallel track for apology, forgiveness, restitution and plans for future reintegration into communities, other parts of the criminal justice system have in fact become more rigid (determinate sentencing). Some empirical work in the United States (before determinate sentencing in the federal system) has demonstrated that more tailored forms of criminal justice, involving individualized treatment of the defendant, the crime and the jurisdiction (Utz, 1978) can actually lead to better outcomes and lower recidivism rates. These innovative efforts to solve problems, rather than just to punish crimes, have also led to 'problem-solving courts', which use a 'treatment' rather than a punishment model, in such areas as drug, vice, family and other social, non-violent crimes (Berman *et al.*, 2005). The alternative court movement has made great headway in many urban areas in the United States, despite objections from more traditional adversarial criminal lawyers, on both the prosecutorial and defense side (Thompson, 2002).

Some models of individual justice system approaches to restorative justice have been successfully 'scaled up' in some nations for public reconciliation processes around formal state actions (*e.g.*, enforced kidnapping, child and sexual abuse, and cultural deprivation in Australia and Canada of indigenous groups). Since the first Truth and Reconciliation process in Bolivia, now over 30 nations have engaged in various forms of 'Truth and Reconciliation' processes (Hayner, 2001) in a variety of different forms of truth and fact-finding, restitution, apologies (yes, amnesties too), and efforts at reconciliation, after civil wars, genocides, and inter-state conflict. Though the TRC process in South Africa is most famous, since the mid-1990s many other countries have used TRC processes in many different ways and for different purposes (Stromseth, 2003). In the most recent variation of this important theme, a group I work with in Israel-Palestine, the Parent's Circle-Family Forum (2012), is seeking to promote reconciliation efforts, even before the formal state actors have created a permanent peace agreement. Building on the work of mediators, conflict resolution trainers, and lay experience, groups of people on either side of the conflict are exploring ways to understand each other's histories and stories, through narrative strategies and storytelling, group activities, empathy exercises, and interpersonal engagement in the context of both individual pain and harm, and the larger group conflicts from which they come. For those of us who work in peace studies and activism, such grassroots efforts raise important issues about whether conflict resolution is most effectively engaged from the 'bottom-up' or 'top-down' (my own views are that both are necessary at the same time, and that conflict professionals may be

key to mediating at the middle levels of engagement between formal negotiation and grassroots efforts) (Menkel-Meadow & Nutenko, 2009).

### 2.3 *Deliberative Democracy and Consensus Building: Conflict Engagement for the Polity*

As the canon of problem solving or principled or 'interest-based' negotiation and problem solving concepts and practices moved out from applications of small groups in conflict, to legal disputes, to larger communities, and social and political conflict, a variety of social theorists and practitioners have explored the applications of ADR and conflict resolution strategies to political decision making and deliberative democracy. Consensus building (Susskind *et al.*, 1999) as a structured decision making process has been used to resolve neighborhood, community, budget allocation, environmental, regulatory, and highly contested social issues. Such processes, though often structured with formal ground rules and principled presentations, also allow for the fuller expression of emotional reactions and longer narratives, with fuller party participation than more formal legal or political processes. A few commentators have suggested that the techniques of consensus building can reengage highly conflictual polities and serve as models for more public deliberation in policy formation and citizen engagement (Cohen, 2008; Cohen & Alberstein, 2011). With more flexible formats, allowing greater numbers of parties to participate, and notions of 'adding value' and joint gain substituting for binary up and down majority votes, consensus building processes are designed to diminish the adversarial quality, with 'win-lose' outcomes of political disputes. Applying processes of deliberation to substantive areas of political conflict has engaged both conflict resolution professionals and political theorists and activists (Bohman, 1996; Guttman & Thompson, 1998, 2012), though others have challenged the idea that all citizens are equally enabled to participate in such time consuming exercises (Young, 2002). Such processes allow 'multiple truths' to co-exist, as parties seek pragmatic and contingent understandings and some outcomes, which may be provisional and revisited, and are always informed by a multiplicity of views expressed, and with my own hope that rational arguments are not the only discourse permitted. The claim here is that *process matters* (and that procedural justice is as essential as substantive justice, Welsh, 2004) and an inclusive, party-negotiated set of processes and ground rules, which are designed to maximize party participation and encourage recognition of differences (the group Public Conversations pioneered such protocols for discussion in abortion disputes in the United States, now used for community and political deliberation on a wide range of contested topics, such as gun control, affirmative action, gay marriage, health policy, see <<http://publicconversations.org>>), can also lead to better outcomes and greater acceptability and legitimacy of large group negotiated outcomes (Hollander-Blumoff & Tyler, 2008). If we are to 'hear all sides', then all sides need to be able to express their thoughts, reasons and feelings as well. My own view is that contrary to the teaching of the more 'rational' political theorists and philosophers, we are just as likely, if not more so, to be persuaded to understand and change our views by *empathy*, than by reason alone (Menkel-Meadow, 1992, 2001e). My version of dispute resolution has always focused on human

*needs*, in addition to the layers of ‘interests’ (instrumental and rational) and ‘demands’ (power and entitlements) (Menkel-Meadow, 1984).

I have argued that our efforts to expand such processes to the larger polity are one example of the legacy and promise of conflict resolution ideas and concepts, but that there is an irony in that, to be successful, such processes require the expertise of skilled process facilitators, schooled in the multi-party concepts of voting theory, dealing with hold-outs, saboteurs and managing multi-issue negotiations and conflicting preferences, raising issues about the ‘democracy principle’ in group deliberations ‘led’ by process experts (Menkel-Meadow, 2011). Democracy theory is one thing; conflict resolution and deliberative democracy practice are other things, and their relationship requires more work at both levels to realize the promise of more engaged public deliberation (Menkel-Meadow, 2006c). In this, parliamentary systems may be better suited to the use of conflict resolution theories and practices in multi-party (literally!) deliberations than the more polarized current system in my own two-party (gridlocked) political democracy. Conflict resolution theory and practice however, in my view, does provide some promise for development of ideas and practices to lead us out of our current crises – in that sense, our bad and conflictual ‘times’ may be the impetus and source of new ideas and applications of conflict resolution. I still hope that ‘necessity will be the mother of invention!’ (Menkel-Meadow, 2001d).

#### 2.4 *Dispute System Design*

If conflict resolution theories and practices are to have some impact on the conflictual times in which we live, we have two additional issues to confront: institutional design and transformative education. How can conflict resolution strategies have more impact on the individuals who have conflicts and the formal and informal settings in which those conflicts occur? As conflict resolution theory and practice has been applied to deliberative democracy, to lawsuit settlements (including large class actions, mass actions), constitutional theory (Cohen & Alberstein, 2011), family life and the workplace, a new segment of our field has professionalized the idea that dispute resolution can be institutionalized and taught in organizational, governmental, corporate, international, and other settings of iterative conflict. The idea that we could actually PLAN for managing disputes is embedded in many earlier articles in our field (e.g., Sander, 1976; Ury *et al.*, 1988), as we founders of the field sought to analyze what kinds of processes in process pluralism might best be allocated to which kinds of disputes. Thus, system design involves the development of many different kinds of dispute and conflict resolution processes (now most often arranged on a continuum of self-help, party control, third-party facilitation or decision-making and consensual or command processes (Menkel-Meadow *et al.*, 2011) ), and then applied to the various kinds of disputes and conflicts that occur in iterative settings.

Courts in many countries now require parties to at least attempt some form of dispute resolution before going to full hearing in what is now known as court-annexed dispute resolution (derived from Frank Sander’s original ‘multi-door courthouse’). Organizations may use one form of dispute resolution for their own employees (tiered counselling, negotiation, mediation, ombuds and arbitration

before any kind of litigation is permitted), and then use another set of processes for outside customers or vendors – online dispute resolution, grievance or complaint panels and processes, customer service lines and another set of tiered dispute resolution processes, as condition precedents to litigation by contract agreement. In the international arena each new treaty providing for agreements among and between countries in a variety of areas (e.g., trade, environment, transnational crime and anti-terrorism efforts, even human rights) now provides for more than one form of dispute resolution – conciliation, negotiation, consultation, mediation, arbitration, ‘amicable settlement’, and only then may more formal use of various tribunals be used. Because so many of our international and regional organizations (e.g., the UN, World Bank, IMF, International Red Cross, OECD, EU, NAFTA) have no formal legal status or enforcement mechanisms in the international legal regime they have created their own internal justice systems (Scharf, 2006), now often employing a full panoply of dispute processes. I have been teaching courses on International Dispute Resolution Tribunals and Processes for over 10 years, looking at many of the processes beyond the formal tribunals such as the International Court of Justice, the European and Inter-American Court of Human Rights, and others.

New professionals in the field now assist for-profit and non-profit organizations, universities, governmental agencies, non-governmental bodies and other institutions in creating processes for conflict education, prevention, handling, management and ‘resolution’, raising a host of questions about for whom this work is conducted – the organization, the users (Menkel-Meadow, 2009b)? These developments may represent the more positive aspects of our field: in designing such programmes both management and labour, supervisors and employees, customers and providers are often trained in basic conflict resolution and communication skills. Though some are critical of such ‘internal justice systems’ that might compromise or privatize the more formal and public justice system (Edelman *et al.*, 1993), there are counterarguments that such systems educate and make more accessible avenues for redress of grievances, and can also have more wide ranging jurisdictional coverage, beyond what legal claims might be allowed in more formal settings. And, a strong argument has been made that with conflict resolution specialization and institutionalization it is still possible, even within the frame of individual confidentiality, to account for more system-wide problems by examining the aggregation of individual claims and then seeking to prevent or correct such systemic problems or issues (Sturm & Gadlin, 2007).

Some industries have taken their ‘system design’ to even earlier stages – prevention and relationship development *before* the work is undertaken. For many years now, the construction industry in the United States (originally spurred by developments in military contracting) has used a process called ‘partnering’ to bring the parties together before work has begun on a project in order to develop relationships and plan for dispute resolution in advance with contract provisions for negotiation and mediation (Carr *et al.*, 1999; ConsensusDocs, <<http://consensusdocs.org>>). I used such a clause myself in a renovation project of my own home and all disputes were resolved with three way negotiations

(architect, owner, and contractor-builder) on the property at the time disputes arose.

Perhaps the newest application of system or conflict prevention techniques is to use mediators in transactional settings, to facilitate the making of deals, and creation of new entities, and to explicitly deal with potential conflicts before they arise, demonstrating the power of having a third party neutral prevent the 'reactive devaluation' that occurs when parties see themselves in opposition when they should be 'on the same side' (Peppet, 2004). System designers, like mediators, know that particular ideas or potential solutions to problems may best be heard when not attached to or labeled by one of the parties to the dispute, such as the use of the 'one-text' negotiation document that was used in the Camp David I peace accords (Fisher, Ury & Patton, 1991).

### 2.5 *Educating for Conflict Resolution*

Exposure to conflict resolution technologies, techniques, concepts and underlying values in a variety of fora, we hope, can 'spread the learning' about more productive ways to handle conflicts in all walks of life. Even school age children are now instructed in 'peer mediation' and 'use your words' to prevent unnecessary violence, bullying in school, and to promote more productive ways to deal with conflict. Many of the newer applications of conflict resolution (consensus building, multi-party dispute resolution, deliberative democracy, system design) have now spawned new courses and texts (e.g., Bingham *et al.*, forthcoming; Carpenter & Kennedy, 2001; Movius & Susskind, 2009; Rogers *et al.*, 2013) to provide for 'advanced' training and knowledge development in organizational conflict resolution. More and more schools at different levels (from primary education to highly specialized graduate schools) and in many different fields (law, business, international relations, social work, public policy, land use and planning) now require or recommend courses in negotiation and conflict resolution.

So, I am hopeful, that as the world delivers up more and more conflicts in both intimate and mass scale, we are also developing more tools for diffusing or preventing conflict, as well as engaging in it productively. Recall that most significant social change has come from conflict – both productive and deadly, including independence struggles, civil wars and protest movements. Theory development and empirical assessment abounds as social scientists debate whether we were better off with gridlocked, but conflict suppressing, polarized enemies during the Cold War (Miller, 2002) or now when conflict is so disaggregated and diffused (even if unseen in its 'viral' forms of communication and terrorism) that we can work at more manageable, if multiple, levels of conflict handling. Conflict resolution professionals (mediators, system designers) are now more often called in for assessment, facilitation, management or advice in highly conflictual settings. And, most importantly, from my perspective, conflict resolution has become the kind of field that works across disciplines, national boundaries and cultures that even within its cultural variations, it may provide a more multi-cultural 'universal' language of conflict engagement and resolution efforts.

Yet, I also worry that we, as a field, are not often enough called on to analyze or facilitate conflict situations and that our culture remains resistant to less

adversarial methods of problem solving. Those who seek collaboration or compromise, such as my own President Obama, are still too often labeled 'weak' (Matthews, 2012), when they are trying to operationalize the teachings of conflict resolution theory. Journalists and the public at large clearly still need more education about our field's concepts, purposes and tools.

We have a long way to go before all conflict is engaged in productively in the world. But despite the daily headlines of conflict, killings and many ways of expressing hostilities or causing harms, I also think we now have so many reasons in our current times for the historical moments we face to create the future of new research, ideas, techniques and technologies to forge a more systematic effort at promoting productive handling of conflict. I hope this new journal will add to the collective grappling we are all engaged in to make this a better world.

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