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*Introduction, Foundations of Dispute Resolution:  
Vol I. of Complex Dispute Resolution (3 vols.)*

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# Foundations of Dispute Resolution

## Volume I

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# Introduction

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'The skillful management of conflicts [is] among the highest of human skills.'

Stuart Hampshire, *Justice is Conflict* (2000)

## A Brief History of the Foundations of Dispute Resolution and Process Pluralism

The social philosopher Stuart Hampshire opined in his Tanner lectures (*Justice is Conflict*, 2000) that after a lifetime of searching for universal moral goods, he could only conclude that diversity of values (and populations) made uniform agreement on universal moral goods unlikely. But, he suggested, we might still be able to get some almost universal agreement on the importance of process for resolving human disagreements and creating rules, procedures and laws with which we could live together. *Audi alteram partem* (or 'hear the other side') might be one way for us to use (the Anglo-American developed) adversary argument to try to persuade each other about what would be good for us all in making policy and resolving disagreements. Resolving disputes and conflicts, he suggested, was among the highest of human skills to be learned, studied and practised. Although I will suggest, in this and the subsequent volumes, that we must also learn to listen to *all*, not just *both*, sides of a dispute, I otherwise agree with Hampshire that we need good human conflict resolution processes (and skills) in order to survive and thrive as a species. These volumes on Complex Dispute Resolution are offered as an effort to collect some of the best writing on how we should think about dispute and conflict resolution in order to resolve our differences, create new transactions and entities, and learn to live productively together.

The field of dispute and conflict resolution is multidisciplinary, drawing from concepts in law, philosophy, political science, sociology, anthropology, economics, psychology and the newer applied fields of game theory, decision science and deliberative democracy. As a field of human knowledge and practice, dispute resolution has theories, 'theories-in-use' (Schön, 1983) and practice protocols, as well as evaluation research and empirical studies which attempt to assess whether dispute and conflict resolution processes actually deliver on the promises they offer for conflict 'management resolution' or, as I prefer, 'handling'. Those claims and promises range from 'better' qualitative solutions to human problems, more participatory processes, involving those affected by disputes and conflicts, as well as professionals, to claims about processual efficiency (cheaper, faster and easy access) for dispute resolution, in both formal legal (courts and litigation) and less formal, but potentially even more important (family and employment) settings.

The three volumes in this series present some of the foundational essays that have established the key concepts of the field and they demonstrate how a few simple ideas, which have revolutionized how we think about disputes and conflicts, have expanded into both theoretical and practical explorations of more complex issues and settings. Volume I

presents the foundational processes – negotiation, mediation, arbitration, adjudication and simple hybrids. Volume II presents recent work and classic research on how these foundational processes have been applied to, or have changed in, situations of multi-party or complex issue management, paying special attention to the modern dialogue between dispute resolution theory and practice and deliberative democracy, including public policy mediation and consensus-building. Finally, Volume III presents some of the best thinking on how these processes – foundational, hybrid and complex – have been used in international settings. These volumes offer only a small selection of some of the leading works in this rapidly growing field of theory and practice. In the introductions and codas to each volume I will try to reference some other important works that couldn't fit into our limited pages here.

This first volume presents some of the key ideas of dispute resolution, focusing on problem-solving, principled or 'resource-expanding' negotiation, facilitated negotiation in mediation and variations on the more adjudicatory forms of dispute resolution, like arbitration, which in turn, have led to the development of a variety of hybrid forms of dispute resolution. This Introduction will focus on the historical and conceptual development of the foundational processes of bilateral negotiation, triadic mediation and arbitration, and further developments into hybrid forms such as med-arb or arb-med and summary court processes, as these foundational processes have been combined and have morphed into more complex forms of process that are used in both public and private settings.

The idea that human disputes and conflicts need a 'menu' of *process pluralism* so that different disputes and conflicts might best be handled in different fora is one of the key contributions of this field of 'appropriate' dispute resolution (Menkel-Meadow, Love, Schneider and Sternlight, 2011). Let 'the forum fit the fuss', as Professor Maurice Rosenberg of Columbia Law School once suggested (see, for a modern treatment, Sander and Goldberg, 1994).

Many different factors may suggest different kinds of process for dispute handling. These include: the prior relationships of the parties ('one-off', 'repeat play' or ongoing); the *res* (or thing) in dispute, whether an item of scarcity or one capable of expansion or sharing; the number of parties and issues in dispute; whether a dispute needs a legally clarifying ruling or precedent or whether a private decision between interested parties is sufficient; the effects on third parties not present in the disputing process; and whether the parties prefer to choose and control their process of conflict management or whether they prefer to submit to formal state institutions for enforcement or other purposes. One of the intellectual founders of the field, Lon Fuller (1981/2001), a Harvard law professor and experienced mediator and arbitrator, suggested that each process has its own special 'integrity' and ethics and should be used only for the disputes most appropriately suited to that process (for example mediation for long-term relationships, adjudication where precedent is needed, arbitration where the rules specified by the parties are clear, as in labour collective bargaining agreements and contracts). But more modern developments have led to the combination and adaptation of these basic processes of negotiation, mediation, arbitration and adjudication to serve different kinds of populations and disputes, especially disputes that cross boundaries and borders where no one legal system may determine legal liabilities or provide legal remedies.

In recent decades parties have demanded more control over how they deal with others with whom they have issues or problems (or with whom they seek to create new entities,

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transactions or organizations) with the result that dispute resolution theory and practice has been used by those who seek to enhance deliberation in democracy in larger polities, as well as by private parties who wish to control their own transactions and disputes. Thus, another dimension of choice – whether there should be both public and private locations for dispute management – has also led to new processes and institutions as well as spirited intellectual debate about the proper forum for making both public and private decisions.

While the insights of modern negotiation theory exemplified in the essays in this volume focus on improving conceptions of dyadic negotiations with assumptions of competition over scarce resources to consideration of resource-expanding collaborative processes ('expanding the pie'), more recently these interventions have been applied to conflict resolution in situations involving more than two parties and more than a single issue to be negotiated. Howard Raiffa (1982; Raiffa *et al.*, 2002), another founder of the field, coming from the fields of mathematics, game theory and decision science, devoted part of his long career to the question of how 'numbers' (of parties and issues) change the basic theory, structure and practice of dispute resolution. The second two volumes in this series present classic reflections on how multi-party dispute resolution may differ from simpler dyadic or triadic dispute resolution and on how knowledge and practice of dispute resolution may be expanded and conducted in transnational settings, adding yet another dimension of cultural variations in dispute resolution systems and preferences.

Disputing is as old as humankind. Dispute resolution is probably just a bit younger. Whether the first disputants settled their own disputes with direct negotiation, with violence, or with the assistance of a third party for conciliation, mediation, arbitration or adjudication remains a question for anthropologists and historians to study and debate (Shapiro, 1981). Modern dispute resolution theory and practice focus on differences in the types of dispute, the number of disputants, the location of the dispute, the use of third parties to facilitate or decide between and among parties and other factors to analyse what processes might be appropriate for addressing particular disputes. At its most inspirational, dispute resolution is a sensibility or mindset about how human beings should approach each other to solve problems, creatively engage with each other to improve current conditions, deal with divergent expectations and objectives, and prevent wasteful, unproductive and violent interactions. At its most pragmatic, dispute resolution processes offer instrumental techniques and tools for dealing with conflict, resolving disputes and effectively forming new relationships and transactions.

Early students of conflict in nineteenth-century sociology and political science (Karl Marx, Emile Durkheim and Georg Simmel) looked at whether conflict was productive for society in urging new social relationships and structural change, whether it should be managed for social stability or whether it is just part of the human condition. These tensions remain with us today. Seen as an individual, familial, social, national and now transnational phenomenon, conflict is omnipresent in our lives.

In law and legal studies, the unit of analysis has been the 'dispute' or 'case' – an activated conflict in which someone experiences a wrong and 'names it, blames it and claims about it' (Felstiner, Abel and Sarat, 1980–81) against someone or some entity. In law, we also look at processes that facilitate new transactions and relationships – thus, negotiation processes are used not only to resolve disputes, but also to create new legal relationships and entities through contracts and the creation of public and private organizations, and through constitutions,

laws and other legal documentation of collective human action. Negotiation, then, has at least two orientations – both backward- and forward-facing. It must deal with and resolve the ‘old’ (disputed facts and claims) and also focus on and create the ‘new’ (relationships and rules of dealing). Social scientists, especially socio-legal scholars, have looked at how disputes and conflicts are socially embedded in particular contexts and how those contexts structure or ‘socially construct’ the way in which disputes will be managed, or, as I prefer to say (recognizing that not all conflicts will be resolved), ‘handled’ (Menkel-Meadow, 2003). Legal scholars, particularly the legal realist school, have been concerned with looking at how legal disputes are actually (not just theoretically) handled, leading to a new ‘jurisprudence’ and empirical assessments of dispute resolution (Menkel-Meadow, 2000, 2010).

While lawyers (and many other actors, including political leaders, diplomats and businesspeople) long thought of disputes in bipolar, ‘winner-take-all’ ways, from the beginning of the twentieth century (with the pioneering work of Mary Parker Follett’s pioneering work in the 1920s (Follett, 1996)), other analysts of negotiation processes offered more ‘constructive’ ways to conceive of negotiation processes to resolve disputes or create new transactions. In a confluence of intellectual activity (Menkel-Meadow, 2006) a number of scholars and practitioners, including myself (see Menkel-Meadow, Chapter 1, this volume), in a number of different fields suggested that many disputes could be approached from a perspective that maximized joint gain, or gain for both sides of a dispute, rather than for only one side (Fisher and Ury, 1981). This turn to ‘problem-solving’ or ‘principled’ negotiation suggested that, by focusing on interests and needs, rather than on the parties’ positions or demands, skilled negotiators could see disputes and conflicts as opportunities to ‘create value’ by trying to simultaneously meet the needs of both parties, rather than trying to ‘win’ by ‘besting’ or ‘defeating’ the other side. This work was made practical by using the insights of post-war game theory which focused on both competitive and cooperative games with, first, two (as in the Cold War) and then multi-party ‘players’ (Nash, 1950, 1953). Trying to satisfy the needs of multiple parties (see the vivid illustration in the movie made about game theorist John Nash’s life, *A Beautiful Mind* (Howard, 2001)) suggests the need for creativity and ‘resource-expanding’ and ‘trading’ solutions to human problems.

This more optimistic focus on conflicts as opportunities for human problem-solving predated the fall of the Berlin Wall in 1989, but as all theory is historically contingent, modern conflict theory and practice hoped to usher in a new non-zero sum game approach to conflicts – whether private and personal, or public and political. The 1980s brought a virtual flood of new insights, research and observations about how human beings could better resolve disputes and manage conflicts – from ‘creating and claiming value’ (Lax and Sebenius, 1986), to ‘breaking the impasse through consensus-building’ (Susskind, 1987), to the use of mediation to ‘prevent waste being left on the table’ (Raiffa, 1985) – by enabling a third-party neutral to gather information from parties afraid of strategic manipulation and ‘reactive devaluation’ (Ross, 1995).

The combination of scholarly and intellectual insights (that conflicts could be dealt with adversarially and competitively, by domination, or by collaboration and integration), along with practical and instrumental tools of behaviour, led to the development of a virtual canon of insights in the field, which have now circled the globe in the form of translations of works, courses in business, diplomacy, law and political science, and planning programmes and

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networks of scholars and practitioners (Honeyman, Coben and De Palo, 2009). Negotiators explore their needs and interests, looking for options for mutual gain, using objective criteria to solve disputes and explore their BATNAs (best alternatives to a negotiated agreement), WATNAs (worst alternatives to a negotiated agreement) and their ZOPAs (zones of possible agreements) (Fisher, Ury and Patton, 1991), always looking for more creative solutions to their disputes and possible transactions. Compromise is seen as a second best (Menkel-Meadow, 2006b) when maximizing the possible gain for both (or all – see Volume II) might be achievable with the right intellectual mindset and party motivation.

In the 1970s and 1980s in many modern democracies and legal systems (beginning in the United States but moving to the United Kingdom, Europe and South America), legal reforms to streamline court processes (such as the 1996 Woolf Report in the UK), make legal processes more accessible, or correct for overly brittle binary court decisions (one winner and one loser) led many countries to explore what was then called ADR (alternative dispute resolution) in both formal court and informal or private settings. Court-annexed mediation, arbitration or neutral evaluation programmes added alternative processes to courts – the 'multi-door courthouse' (Sander, 1976) – for parties to pursue different ways of resolving their disputes. At the same time, family practitioners urged the more participatory, less binary and more responsive form of third-party facilitated negotiation – mediation – to resolve divorce and child custody disputes. In many legal systems such mediation and conciliation processes are now mandatory. Perhaps more surprisingly, many businesses also took up the practice of mediation, using expert neutrals to help them resolve complex disputes in private settings so that confidential information and trade secrets would not have to be revealed to a wider public. In the United States major litigation, in the form of mass tort, employment, consumer and securities litigation class actions were resolved with complex court-supported settlement procedures, which then often referred cases to individual ADR (mediation or arbitration) treatment.

Observing these developments in courts and private dispute settlement settings, even law-making and regulation learned from the new hybrid methods of dispute resolution. In a revolution launched by one influential law review article (Harter, 1982), the process of 'negotiated rule-making' or 'reg-neg' was launched in American regulatory processes, and federal, state and even local government agencies began to apply the new negotiation and dispute resolution theories and practices to convene large groups of interested parties to negotiate rules and even legislation in the hope of more participation and less after-the-fact challenges through litigation. Attempting to make practical the dreams and theories of social philosophers like Jürgen Habermas (1984), Stuart Hampshire (2000) and Amartya Sen (2009), dispute system designers – a new field in itself (Harvard Negotiation Law Review, 2009) – have constructed processes and settings for political consensus-building events and processes to develop (and sometimes enact) public policy and regulations, even in highly conflictual settings (which are addressed in Volume II of this series). In less formal settings, new organizations like Public Conversations and America Speaks are attempting to develop ground rules and settings for mediation-like facilitated and moderated conversations and dialogues about highly conflictual subjects (such as abortion, gun control, gay marriage, animal rights, healthcare, immigration policy and affirmative action).

In the criminal justice arena, restorative justice or victim-offender mediation was designed to allow restitution and apology where legal systems only permitted punishment and retribution. New forms of criminal justice process were pioneered in a variety of nations (Canada, Australia and the Netherlands) in cases involving juveniles, then adults, and often diverse populations, including indigenous processes from indigenous peoples (Menkel-Meadow, 2007).

Most recently, new forms of negotiation, mediation and arbitration have been used where parties cannot even meet face-to-face, spawning the new field of ODR (online dispute resolution), which is used particularly effectively in consumer dealings on the Internet (Katch and Rifkin, 2001).

These innovations in formal dispute resolution were characterized by two often inconsistent motivations. On the one hand, proponents of the newer forms of dispute resolution were seeking 'quality' (more creative, pie-expanding) solutions and processes (more party participation and control), while others focused more on 'quantity' or efficiency in docket-clearing or reduction of court cases. These tensions remain in the consideration of what purpose(s) dispute resolution pluralism is supposed to serve – access to justice, better-quality solutions or simple caseload reduction, docket-clearing, or speed and reduced cost in how society manages its disputes.

The relative speed with which these processes have been institutionalized and professionalized in a variety of settings (Moffitt and Bordone, 2005) have led to demands for honest assessment and evaluation (Menkel-Meadow, 2010). Critics suggest that all of this activity in creating multiple fora for dispute resolution has 'privatized' justice and reduced the impact of public institutions in law-making and interpretation (Genn, 2009). Other critics worry about the unrepresented in all of these locales of dispute resolution, who may not be able to assess the relative advantages or disadvantages of each process (or have the resources to choose which one to use). Others contend that, in fact, new processes have added costs and time by sometimes requiring parties to jump through many stages of dispute resolution before a dispute is finally resolved. Most contentiously, in the United States large businesses have begun to require all those whom they employ or do any business with (including consumers of electronics products, healthcare, educational services and any and all services and products) to use contractually-based mandatory arbitration for any and all disputes, rather than litigation (a development which, so far, is prohibited in the European Union for both employment and consumer disputes). New critics suggest that sometimes a win-lose, formal litigation or even direct confrontation (war!) might be preferable to 'dealing with the devil' (Mnookin, 2010).

Those who prefer the direct communication and empathy-creating process (Friedman and Himmelstein, 2009) of negotiation, mediation and some of its hybrids, including consensus-building in government and community disputes, not to mention international diplomacy and transnational issues, continue to urge the study, teaching and practice of 'process pluralism', urging citizens of the world to make it a better place by pursuing the 'talking cure' rather than the 'killer's curse'.

The essays and book excerpts in these volumes explicate and review the issues implicated in using these different processes in a variety of different settings and suggest a full research (and practical) agenda for the next generation of process specialists. New processes remain to be developed, tested and evaluated. Assessment of how human beings deal with each other

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when faced with economic scarcity, identity disputes, personal and psychological conflict, territorial disputes, or the desire to resolve differences in order to live together productively will continue as long as people are still disputing and resolving (or evolving!). It is hoped that the essays in these volumes will provide not only an expansive illustration of the theories, practices, uses and evaluations of processes we have already utilized in many varied settings, but also the knowledge and suggestions necessary for creating even more new processes to enhance human well-being and flourishing.

### The Essays

This first volume presents thoughts, polemics and research on some of the foundational processes and issues in the development of the dispute and conflict resolution field. Its aim is to explore how the foundational processes are defined, used and critiqued so that, in Volumes II and III, we can explore how they have become more complex as they are 'scaled up' to deal with increasingly complex modern conflicts and disputes – with more parties, more issues and less clear rules for resolution (especially in transnational settings).

### *Foundations of Negotiation Theory and Practice*

Part I explores modern negotiation theory and practice. In the early 1980s the mindsets or orientations of negotiators were reconceived from being exclusively adversarial, competitive and distributive to becoming aware of the possibilities of collaborative, creative and integrative processes to produce more creative outcomes with joint gain or value for all parties to a negotiation, whether in dispute or in transaction creation. Carrie Menkel-Meadow, in a 1984 essay (reproduced here as Chapter 1), along with Fisher's and Ury's book, *Getting to Yes* (1981), was instrumental in setting forth the basic precepts of this 'new' way of looking at both legal and ultimately all forms of negotiation, namely:

- Consider party needs and interests.
- Look for integrative or creative multiple (not just one disputed) solutions or outcomes to negotiated problems.
- Look for reasoned criteria for resolving disputes, and consider the emotional, personal, and affective, as well as the principled, reasoned and utility-framed, preferences of the parties.

In an essay written in 2009 on the occasion of the 25th anniversary of the publication of Harvard's *Negotiation Journal*, Menkel-Meadow (Chapter 2) explored how negotiation theory has evolved from the early simple applications to dyadic negotiations with optimistic hopes for creative value and interest-satisfying solutions. Mapped against an increasingly conflictual world stage and the complexity of multiple parties with coalitions, hold-outs, viral (Al-Qaeda) or multinational actors, the negotiation theory of the 1980s required some revisions to account for the more complex environment in which not everyone shares the hopes of joint gain and mutual coexistence. As Carrie Menkel-Meadow explains in Chapter 7,

contextual analysis seems key to assessing the core and canonical concepts developed in the early stages of modern negotiation theory and practice.

In Chapter 3 Robert Mnookin explores the important work that he spearheaded while working with a team of scholars at Stanford University in the mid-1990s (Arrow, Mnookin and Wilson, 1995) on why, with all our powerful theories about joint gain, many attempts at negotiation fail. Mnookin summarizes the work of an interdisciplinary team of economists, psychologists, political scientists and others who have documented important cognitive and social biases (risk and loss aversion, reactive devaluation, prospect theory, endowment biases and others) that prevent us from 'getting to yes' even when we should. This important work continues in business schools and psychology laboratories throughout the world as researchers seek to explore how human beings process information and act in less than optimal ways with each other. It remains to be seen whether knowledge about these biases is enough to defeat or reduce them.

Andrea Kupfer Schneider (Chapter 4) reports on an important empirical project that assesses the effectiveness of negotiators, at least as perceived by those who negotiate with each other. This study replicates and expands on an earlier study by Gerald Williams (1983) which supports the claims of problem-solving negotiators that being collaborative, and not competitive, is indeed more effective, at least among legal negotiators.

In a second contribution Robert Mnookin (Chapter 5) previews his now published full-length book, *Bargaining with the Devil* (2010) in suggesting criteria for when we should not submit to negotiation processes (such as when we cannot trust our negotiation partner or there are truly 'evil' people or objectives involved). In a similar realistic (or some would say more cynical) vein, James J. White long ago criticized the 'principled' version of modern negotiation theory and practice by pointing out how many negotiated problems do involve issues of scarcity and how negotiators must, by necessity, act to deceive in order to wrest gain for their clients (at least in legal negotiations). His 1980 essay, reproduced here as Chapter 6, has become one of the classic critiques of the more optimistic problem-solving approach to negotiation, and also provides useful interpretations of the ethicality of lawyer negotiators (at least under American ethical rules for lawyers).

The final essay in Part I, by Randall Kiser, Martin Asher and Blakeley McShane (Chapter 8), presents very significant data about the mistakes that lawyers make when attempting to negotiate settlements in legal cases. Suffering from many of the biases discussed by Robert Mnookin, as well as unrealistic assessments of their legal cases, both plaintiff and defence counsel often do worse when they don't settle and subsequently litigate a case. Interestingly, one of the findings of this study is that lawyers who serve as mediators (in other cases) are less likely to make settlement errors (learning, perhaps, how to do more realistic settlement assessments from a 'third-party' experiential base).

#### *Foundations of Mediation Theory and Practice*

Part II explores the foundations of mediation theory and practice, beginning with Lon Fuller's first modern classic (1971) explication that mediation provides the opportunity for parties in relationship to 'reorient the parties toward each other' (this volume, p. 315). Here, Fuller offers a strong claim for the particular 'integrity' of mediation to resolve issues where the

nical concepts developed in the

work that he spearheaded while in the mid-1990s (Arrow, Mnookin). Without joint gain, many attempts at an interdisciplinary team of economists, psychologists, and other interested parties have failed. This important work throughout the world as researchers have found that in less than optimal ways with these biases is enough to defeat

important empirical project that has been undertaken by those who negotiate with others. As noted by Gerald Williams (1983), the problem is not being collaborative, and not being negotiators.

Reviews his now published full-length criteria for when we should not trust our negotiation partner. A similar realistic (or some would say 'principled') version of modern negotiated problems do involve deception in order to wrest gain. This is reproduced here as Chapter 6, a problem-solving approach to the reality of lawyer negotiators (at

and Blakeley McShane (Chapter 10) makes the point that the biases discussed by Robertson, both plaintiff and defence lawyers, litigate a case. Interestingly, mediators (in other cases) are not to do more realistic settlement

and, beginning with Lon Fuller's essay, the opportunity for parties to resolve issues where the

parties are in relationship to each other (families and workers and employers or repeat vendors and suppliers) or where a 'web' of issues means that many issues must be resolved together – pulling on a single strand or issue without dealing with the whole may destroy the web itself. Fuller's essay remains the most eloquent description of the mediation process, speaking with a simplicity and clarity of purpose that has been mined for decades by his successors in the theory and practice of mediation in a great variety of areas. Like Fuller, Howard Raiffa (Chapter 10) provides a simple, elegant and persuasive justification of mediation. By seeking to get private information from the parties that they might not reveal to each other, for fear of strategic exploitation, the mediator can offer 'post-settlement settlements' that include the additional information the mediator has that the parties might not choose to share with each other.

The remainder of Part II explores the variations of theories and practices within mediation. In Chapter 11 Carrie Menkel-Meadow explores and critiques several models of mediation offered in the first set of texts and descriptions of mediation practice in the 1980s and 1990s, ranging from community mediation to transformative and empowerment mediation, as well as legal and international diplomacy mediation. She attempts to develop a taxonomy of types of mediation practice and suggests that different tools and techniques will be necessary for different settings, all while mediators share some common purposes to do 'right' by what the parties desire to achieve. Carol Lieberman (Chapter 12) describes in great detail an important case study of a mediation inside a major university, illustrating and explaining, from the inside, the interventions and choices made by mediators (and parties). No issue is too big or small for her discussion and, in addition to its value in terms of its perceptive self-evaluation, urging us all to conduct 'parallel seminars' in our dispute resolution practices, this essay has become a classic on the analysis of the use of food and location and party participation and fatigue in mediation processes. Since he has recently died, I can report that former Secretary of State Warren Christopher once told me that his secret as a mediator was that he didn't need to 'sleep, eat or go to the bathroom' – thus he used persistence and the practice of 'waiting out' all his clients and parties to 'forge' (force?) an agreement. Some recent legal cases have questioned whether parties who can't 'eat, sleep or take their medications' can be said to have consented to their mediated agreements (see *Olam v. Congress Mortgage Co.*, 1999).

In Chapter 13 Jean Sternlight also uses recent research on social and cognitive biases in human behaviour to provide some important prescriptions for the lawyer who is representing parties in mediation, suggesting that lawyers can be most helpful as 'advocates' in the 'non-adversarial' setting of mediation. Leonard Riskin, a founder of the field of mediation in law, has contributed a much-debated taxonomy of mediation practice, invoking different mediator roles for those who would facilitate communication (the classic form of mediation) or evaluate cases, and those who define problems to be mediated 'broadly and deeply' versus those who look at the task at hand in a mediation more narrowly. His 'grid' of mediator modalities has helped to define the field, and offers different approaches for training, practice and client choice. In Chapter 14 Riskin questions his own grid and elaborates on a more complex understanding of the multiple roles any mediator must play in facilitating other parties' negotiations.

In Chapter 15 Marian Roberts, also a founder of mediation practice, explores how the practice of mediation in family matters in the UK has led to a formalized regulatory

regime that is being replicated in many countries as family mediation becomes the norm of family dispute resolution. In the UK, as in many diverse countries, the interplay of formal court mediation with private mediation, especially religion-based mediation, such as *sulha* in Muslim communities and elder/rabbinical mediation in Jewish communities, remains a complex and mostly open issue (see Waldman, 2011). Gary Friedman and Jack Himmelstein are also founders of family mediation (in the United States) and are here represented, in Chapter 16, by an excerpt from their important book, *Challenging Conflict* (2009). This piece sets out their particular approach to mediation – the ‘understanding’ model of mediation – which seeks to empower the parties to resolve their own disputes, with their own sense of ‘fairness’ and without resorting to the commonly used practice of private ‘caucusing’ with the mediator. Friedman and Himmelstein suggest that parties must learn to deal with each other directly and honestly, and that the mediator should not become a ‘shuttle diplomat’ who knows secrets the parties do not know themselves. This is in sharp contrast to the classic form of diplomatic mediation used by such figures as Henry Kissinger, Jimmy Carter, Tony Blair and other notables who shuttle around the world meeting with parties separately in order to craft a solution to problems when nations or their representatives don’t want to meet each other face-to-face. The shuttle diplomacy technique in mediation is most common in the area of commerce and big business.

Carrie Menkel-Meadow (Chapter 17) reports from a study of court-sponsored mediation on how lawyers actually negotiate in court mediation programmes. Despite her desire to see the ‘new’ theories and practices of negotiation, described in Part I of this volume, being used, she points out that most practising lawyers do not in fact come to mediation seeking to ‘expand the pie’ or to search for common ground. In actual practice, old notions of competitive court outcomes die hard. This is a study that badly needs modern replication (as Hazel Genn (1999) has done in the UK). In recent research into mediation in several settings, one scholar has noted that lawyers and clients do not often see what they are hoping to accomplish in mediation in the same way (Relis, 2009).

Lawrence Susskind, in debate with fellow mediator Joseph Stulberg (1981), argued in a 1981 essay for the responsibility of the mediator for the agreements he ‘presides’ over, particularly in environmental disputes where future generations may be unrepresented. This essay, also a classic, remains the best statement of one view of the mediator’s role as being responsible for that which he ‘enables’ and is reproduced as Chapter 18. In contrast to Susskind, Stulberg argued the more common view that, as long as the parties agree on their settlement, the mediator bears no responsibility (provided that the agreement is otherwise lawful). Mediation is classically represented by the ‘consent of the parties’, and no one outside of that consent should judge their agreement. For my own agreement with Susskind in another context, see Menkel-Meadow in Menkel-Meadow and Abramson (2011, pp. 318–327).

#### *Foundations and Issues in Arbitration and Hybrid Processes*

Part III concludes this volume by reviewing some of the key issues in the use of arbitration (more akin to third-party decision-making like adjudication) and hybrid processes. Jean Sternlight (Chapter 19) surveys the treatment of mandatory contractual arbitration in consumer and employment matters and finds that the ‘US is out on a limb’ by being one of the only

mediation becomes the norm of countries, the interplay of formal based mediation, such as *sulha* Jewish communities, remains a Friedman and Jack Himmelstein (1985) and are here represented, in *Getting Conflict* (2009). This piece standing' model of mediation – disputes, with their own sense of sense of private 'caucusing' with disputes must learn to deal with each other become a 'shuttle diplomat' who sharp contrast to the classic form of mediation. Under Carter, Jimmy Carter, Tony Blair and other parties separately in order to avoid disputes don't want to meet each other. This situation is most common in the area

of court-sponsored mediation programmes. Despite her desire to be in Part I of this volume, being to come to mediation seeking to justice, old notions of competitive mediation replication (as Hazel Genn in several settings, one scholar is hoping to accomplish in

Philip Stulberg (1981), argued in his agreements he 'presides' over, situations may be unrepresented. His view of the mediator's role as discussed in Chapter 18. In contrast to mediation as the parties agree on their terms at the agreement is otherwise the parties', and no one outside the agreement with Susskind in another volume (2011, pp. 318–327).

issues in the use of arbitration (and hybrid processes. Jean-François Trépoigt's practical arbitration in consumer disputes' by being one of the only

nations that permits parties to be forced into an arbitral forum by pre-dispute contract. In most other countries employment disputes are assigned to specialized employment tribunals or courts, and consumer disputes are still matters for either special regulatory agencies or court litigation. Thus, one of the leading proponents of 'process pluralism' may now be on the road to some 'process monism' as the United States relegates whole classes of cases and litigants to a particular (and thought by many to be an unfair) forum, without choice and often without representation.

Finally, in the last essay of the volume Carrie Menkel-Meadow (Chapter 20) tells a sad and critical story of how process pluralism can be co-opted when forms of 'appropriate' dispute resolution are institutionalized by courts or private providers and players. Lawyers continue to act adversarially and manipulatively, not seeking to solve problems, but to win cases, and courts and government agencies seek to save money, rather than provide better outcomes and access to justice.

Although this volume does not include some of the classic critiques of 'ADR' (Grillo, 1991; Delgado *et al.*, 1985; Abel, 1982; Greatbatch and Dingwall, 1989), the reader should be able to consider not only the advantages, but some of the disadvantages of some of these processes for dispute resolution for particular matters or people. Any student of dispute resolution processes should be fully aware of both the shortcomings and promises of these various forms of conflict resolution, especially, as we shall see in the next two volumes, of what happens when these processes are expanded for use with many parties and many issues and in many different, non-domestic venues.

### Coda

A short Coda at the end of this volume briefly sums up and offers some points to think about, as well as suggesting some issues for consideration in reading the next two volumes.

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## Coda

The essays in this volume have elaborated on some of the foundational concepts in basic dispute resolution. These include the tenets of principled or problem-solving negotiation which include:

- focusing on *parties' needs and interests*, not just on demands or positions;
- understanding what the negotiation possibilities are (*'best' and 'worst' alternatives to negotiated solutions*), which could put the parties in a better position than they would be in without attempting negotiation;
- looking for *creative options* to resolve disputes or to structure new entities or relationships;
- considering *better ways of communicating information* and getting information from other parties;
- assessing what the issues in dispute are (the *res* or 'thing' in controversy);
- considering the *relationship of the parties* (long-term or 'one-shot');
- choosing *negotiation frameworks, orientations and behaviours* that match negotiation goals (whether to collaborate, compete, compromise or withdraw), depending on what is sought to be accomplished;
- deciding when it *might not be appropriate to negotiate at all* (depending on the trustworthiness of the parties or the issues in dispute);
- determining whether a negotiated outcome is possible at all (is there a *possible zone of agreement or ZOPA?*) and how possibilities for negotiation can be changed by the parties' own actions;
- identifying the relationship of rigorous analysis of negotiable situations (the '*science*' of negotiation in determining the substantive issues, the law, the creative possibilities for resolution, the strategic and cognitive issues of behaviour) to the more affective, emotional or behavioural aspects of human interaction in negotiation (*the 'art' of negotiation*).

This volume has also provided some data on how negotiations are actually conducted (descriptions) and offered some prescriptions about how it might be best to behave (instrumentally) to achieve good solutions or to be a good negotiator morally (the 'ethics' of negotiation and dispute resolution).

We have also explored what happens when we ask for assistance in resolving disputes, using third parties to mediate, arbitrate, evaluate or decide (adjudicate) in conflict situations. Several different models of mediation have also been illustrated, including:

- *facilitative mediation* (assisting the parties to communicate more effectively in their negotiations, both to improve or adjust relationships and to seek better solutions to

their problems);

- *transformative or empowerment mediation* which focuses more on the parties' relationship and learning from and about each other, rather than 'solving problems';
- *understanding mediation* – working at a deeper psychological level to 'reorient the parties to each other' as they work directly on their patterns of communication and understanding while still attempting to settle or resolve a particular dispute or set of issues;
- *evaluative mediation* which involves the mediator more in assessing claims and suggesting solutions;
- *arbitration* which, like adjudication, requires the third party to actually make a decision about the dispute at hand;
- *combinations of these processes* (med-arb, arb-med, mini-trials, summary jury trials) in both public (including courts) and private settings;

The essays describe different theories and philosophies of mediation practice, which, in turn, produce different tools or techniques and may vary depending on who the mediator is (a famous notable, a skilled professional mediator, a religious or governmental leader, or simply a local friend or community 'wise person'). In looking at how disputes are resolved, we can see how great is the variation between types of mediation practice, the diversity of parties and the kinds of disputes and issues that may occur at different levels of human interaction. Case studies of important individual cases (Kolb & Associates, 1994), as well as rigorous aggregate empirical studies (for example, Relis, 2009; Kiser, Asher and McShane, Chapter 8, this volume; Kakalik *et al.*, 1996; Genn, 1999; LaFree and Rack, 1996; Wissler, 1997), tell us how complex is the assessment of whether third-party interventions in disputes are effective and, if so, in what way and in what circumstances. Clearly, more rigorous empirical work and reports of both failures and successes in dispute resolution will continue to be necessary in order to evaluate how all of these variations in processes are actually performing in conflict-handling and management.

The work here also presents very important prudential and policy questions to be considered:

- When should disputes be dealt with publicly and when are disputes the parties' own business (Menkel-Meadow, 1995)?
- When and how should parties be able to choose their methods of conflict resolution?
- Who should pay for dispute resolution – the parties or the state?
- What standards of ethics, quality and legal liability should there be? Is dispute resolution to be regulated or function through private market controls?
- How separate should each dispute resolution process be from all others (Lon Fuller's 'integrity' of each process)?
- How do we know if we have appropriate methods for managing conflict?
- How do we know how much conflict is productive or destructive?

In Volumes II and III these questions, complicated enough in their foundational forms, will become even more difficult to deal with as we 'scale up' the foundational processes to be

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used when there are more than two, three or four parties to the dispute and when the dispute involves numerous issues or intractable or difficult issues such as environmental degradation, community and identity disputes, conflicts over scarce resources, and territorial and political conflict. Such complexification of disputing challenges the foundational structures and theories of negotiation, mediation and adjudication, and asks us to ponder further the following sorts of issues:

- If consent is the basis of agreement in dyadic negotiation, what happens when there are more than two parties and not all agree? Is majority or consensus enough to make an agreement?
- How can BATNAs or WATNAs be assessed when there are multiple parties and other possible agreements (or non-agreements) to be made?
- How can the few destroy the agreements of the many (hold-outs, spoilers, vetoes)?
- How can agreements among the many be enforced if one or more refuse to comply?
- What rules of decision (or voting) should be employed when there are more than two or three disputants or parties?
- What ground rules or rules of procedure should be used in different settings?
- What methods do we have to systematize dispute resolution processes in iterative or recurring dispute situations?
- How do cultural variations in the understanding of disputing and the role of conflict affect the behaviours and choices about conflict processes and solutions in multicultural, multinational settings?
- How can disputes, conflicts or transactions be resolved or handled when there is no one legal or court system to enforce whatever agreements are made?
- What other forms of dispute resolution processes might it be possible to use or invent in new and complex conflict settings?
- What does dispute resolution theory and practice offer to efforts to expand public participation in political, policy, social and international decision-making?

These and other questions are explored in Volumes II and III of this series as we look at how some of the leading thinkers and practitioners in the field of dispute resolution have taken the foundational principles of dispute resolution and expanded, modified or created new theories and practice protocols as dispute handling has become increasingly complex.

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