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## When Should I Be in the Middle? I've Looked at Life from Both Sides Now

By *Carrie Menkel-Meadow*



“Be yourself. Everybody else is taken.”  
—*Oscar Wilde*

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## Early Personal History: Origin Stories

Anyone who is a mediator has an “in the middle” story. Perhaps one is the middle child, or one got into the middle of a scrape in the school yard, or is an only child who sits between two parents with “issues.” I often date my motivations to be a mediator to a political “in the middle story” that sets the tone for the issues I have grappled with during my career—helping resolve other people’s disputes yet working toward social justice, often from a “non-neutral” stance, which can be both a professional and personal conflict of interest. This essay explores my personal history as a mediator and the larger policy and political issues that I see affecting the evolution of our field. I think that today we seem to be “in the middle” of our own more lofty aspirations and the costs and challenges that have come from great institutionalization of our field.

In 1968 at Columbia University I was a student activist in the protest and shutdown of the university to demand an end of the Vietnam War; a halt to the military-industrial establishment’s research on campus; the cessation of plans for a new “racist” gymnasium that would have built a fortress excluding the local community in Harlem; release, without disciplinary charges, for anyone arrested during our protest; removal of any Columbia trustees who had ties to the military-industrial complex, the major banks, and the complicit press; and a host of other demands (Cronin, 2018). I described myself as an advocate for social justice, bordering on the radical, from the comfortable political liberal left of New York (think anti-nuclear activity, the civil rights movement, the consumer movement, and just the cusp of the modern feminist movement at my women’s college, Barnard). From my Holocaust refugee family (one parent Jewish, the other Catholic, with a politically active anti-Nazi and pacifist grandfather), and our membership in the Ethical Culture Society of New York, a secular

humanist religion in which I was raised and later married, I learned political activism as well as aspirations for world peace. At the Columbia protest I joined those who occupied a building.

Alas, my then-boyfriend (now husband of close to 50 years) was a member of the Navy ROTC at another Ivy League campus and asked me to come to the Military Ball, which was a black-tie affair. Can you imagine the cognitive dissonance? So, being the dutiful, soon-to-be-raging-feminist-girl-in-love that I was, I left my building, went home, grabbed my high school senior prom dress, and went to the Military Ball in Philadelphia. In that very cataclysmic year, 1968 (which saw the assassinations of Bobby Kennedy, Martin Luther King, Jr., and riots all over the United States), racial tensions were building and riots broke out in Philadelphia, and we were told to leave the ball. I waved my hand in a peace sign and headed back to New York, where I discovered that I had been banished from my occupied building on the Columbia campus because I was now a “traitor” to the cause. What side was I on?

The next day we learned that the university was planning to call in the police to arrest the hundreds of students who had occupied buildings, and we feared police brutality would ensue. So I helped organize a group who took their sleeping bags to camp out in front of the occupied buildings because, we believed, if we interposed our human bodies “in the middle,” the university would certainly not trample on its own “innocent” and peace-seeking “neutral” students. We were wrong. The police were called in and the occupiers were trampled on, some beaten (documented in photographs on the cover of *Life* magazine and in the *New York Times*), and many were arrested. In the ensuing fracas of billy clubs, tear gas, and riot gear, I was convinced the United States revolution of '68 was about to begin. I narrowly avoided physical harm and arrest and

then helped organize a citywide solidarity march of students and workers from all over the city who confronted the university and the New York Police Department.

So how is this a mediation story? During the march I tried to engage the NYPD, who were guarding us, and tried to explain that we were protesting “for them”—for higher pay, for unions, for social justice for all. Why were they beating us? Why were they following the orders of the ruling class? I found myself at the head of the march, confronting a professor from Columbia Law School (Mike Sovern, a labor law professor and mediator and arbitrator who later became dean of the law school and Columbia University’s president) and asked him why we couldn’t just all sit down and talk about it all. To his credit, Sovern actually did try to mediate the student strike. Twenty-two years later, when I sat opposite him as a law school accreditation examiner in the university president’s office, he said, “Don’t I know you from someplace?” When I explained where we had “met” before, he said, “Well, now you have joined the Establishment, too.” Was I looking at both sides then?

In a recent speech at Barnard College on the 50<sup>th</sup> anniversary of the Columbia ’68 student strike, I recalled how I often visit “my steps,” the brick ones on the Columbia campus where I slept for several days, reminders of my first efforts to put my body “in the middle” to prevent violence and later to try to use words to persuade those on the “other side” to see the justness of our cause. But, though my body was “in the middle,” I remained committed to the causes we were fighting for in the student strike.

After law school I became a poverty lawyer who sued governmental and private entities for discrimination, tenant and welfare rights, bad prison conditions, special education rights, due process, and other legal claims of social justice. Then came my real mediative “epiphany”: we often won lawsuits on the evidence, constitutional, statutory, or

technical grounds, but the underlying problems would not go away. Sympathetic government officials (social workers, prison managers) wanted to do better but did not have sufficient funds. In particular, having sued several Pennsylvania prisons on institutional and individual civil rights violations grounds, I worked with a special master appointed to monitor class-action settlements. Together, the former plaintiffs and defendants in the lawsuit joined forces to lobby for greater legislative appropriations to meet the requirements of the court-approved settlement, in an early attempt to “expand the pie” of available resources. My favorite case, which was very controversial at the time, was one in which I settled a race discrimination case against a trucking company by getting my client what he really wanted—a truck of his own to begin his own independent trucking operation. A negotiated settlement was forward-facing and tailored to his needs, more than a litigated and more backward-facing judgment would have been (if we had won!). We both had concerns, at the time, about the tensions between individual satisfaction (his and mine) and the possible costs to larger justice issues in maintaining the class action.

And so, as a new law teacher, while still litigating as a clinical professor, I began to look for ways to “solve the problem,” rather than “win” the case (Menkel-Meadow, 1984). I began to teach negotiation and mediation, first at the University of Pennsylvania, later at the University of California at Los Angeles and Georgetown, and then at the University of California Irvine law schools, trying to change the legal culture and teach students to listen to both sides, examine needs and interests (my take was a little different from Fisher & Ury’s *Getting to Yes* focus on instrumental interests), and look for creative, value-enhancing, integrative solutions to legal and social problems that were both tailored to parties’ particular needs and circumstanc-

es—but also to consider social justice outcomes and effects on third parties (thank you to Mary Parker Follet, 1995, conceptually and Gary Friedman for behavioral mediation training (Friedman and Himmelstein, 2008)).

In the early 1980s I worked with Jack Himmelstein and Gary Friedman of the Program for the Study and Application of Humanistic Psychology in Law, based at Columbia Law School, in a series of summer seminars in Colorado to teach law professors how to teach experientially and focus on legal problem-solving with more intense personal interaction and attention to human needs. Though Gary's training was incredibly valuable to me and others, I grew impatient with people trying to mimic Gary, trying to twist themselves into what they were not. (I call this the “charismatic” school of mediation, most often, but not exclusively, practiced by men.) People had to find their own way, just as I have done, and as I counsel my students to do.

I moved west (from the more conventional East) to more creative California and trained at Esalen and other new institutions to learn a totally new way to teach, practice, train, and be. Since I was already using these methods, experiential role plays, in my law teaching, it was not as strange as it would be for others. Work at Esalen sought to combine the “psychosocial” (internal processes) of individuals with larger social causes, using more direct communication methods (e.g., encounter groups and workshops that combined cognitive work with other dimensions—e.g., meditation, dance, drawing, etc.). These multiple modalities of accessing conflict, consciousness, and group action were great influences on my teaching and mediation practice. The early days of the modern ADR movement were about new and more interactive processes as well as the search for more creative outcomes and solutions.

I also chose at this time to challenge conventional legal scholarship by developing some of the theoretical and prac-

tical (from my clinical experience) concepts that would help form the alternative dispute resolution movement—problem-solving rather than winning cases, exploring mutual needs, not legal endowments, and non-legal approaches to creativity (Menkel-Meadow, 2001). My scholarly work in the 1980s won recognition three times by the Center for Public Resources for Best Articles in ADR, and I soon became one of the first female mediators and arbitrators in some major American and international disputes, particularly in mass torts (such as asbestos, Dalkon Shield) and class actions (discrimination in brokerage industry and elsewhere). I founded a mediation clinic at UCLA Law School in the mid 1980s, and my students and I mediated landlord-tenant cases, civil lawsuits under \$50,000, university disputes, employment, and community matters. I continued to do family, employment, environmental, commercial, and institutional cases as a private practitioner. I am proud to say that a good part of my work (since I have a day job as a professor and can choose my cases) has been repeat-player referral from lawyers and parties who were pleased with what I had accomplished for them. (Full disclosure—like all of us, I have had many failed cases.)

I am honored to know that significant elements of our field's canons, ethics, principles, *telois*, and techniques have emerged from my engagement with the theories animating dispute resolution and other fields, my experiences as a neutral and as a teacher, and my integration of theory and lived research. Therefore, the remainder of my chapter will not dwell on my idiosyncratic biography, detailing the path that only I can and will take, but will focus instead on the issues and matters I have been privileged to work on during the course of my career thus far and their relationship to the directions I have taken (and continue to take) in my scholarship and teaching. This exploration may help to explain why so many have told me that they view me as

a “mother” of this field. My chapter also will try to explain how I have reconciled myself, a committed political activist and poverty and civil rights lawyer, to the mediation canons of neutrality, confidentiality, and self-determination of the parties. I also hope it will address whether tailored creative problem-solving by the parties, in private, always satisfies the claims and demands of social justice with which I started my career.

### **Practice and Teaching**

I began mediating in the early 1980s after teaching negotiation in various clinical and non-clinical settings in law schools and after training with Gary Friedman with his “understanding” (no caucus) model of mediation. This model suited my own theoretical approach to mediation, as “facilitating or teaching negotiation to the parties” based on the empowerment models of mediation and my problem-solving model of negotiation (meaning that parties arrive at their own “tailored” solutions to their problems). My cases involved family and domestic disputes, educational, and institutional disputes within my own university and then, through the mediation clinic at UCLA, working with students as co-mediators, all matters in civil litigation, landlord-tenant, consumer disputes, and other *ad hoc* requests we had for mediation. After I mediated a number of disputes within my university I grew sensitive to conflicts of interest (e.g., students mediating disputes involving students and professors, and administrators who tried to avoid or sabotage mediated outcomes), and I began to focus as a scholar, as well as a practitioner, on ethical issues in alternative dispute resolution. I began to experience conflicts of interest in my large case work, too, with repeat players and more heavily resourced parties, and was one of the first to begin writing about these issues (Menkel-Meadow, 2017). I was especially privileged

in my professional life to be able to view ethical and practice issues from my actual work in the field and then reflect on them in a more deliberative fashion as a scholar.

As a result of my work with the Center for Public Resources and its founder, James Henry, three major involvements grew my mediation practice. First, I was listed on several CPR distinguished neutrals panels, and I began mediating larger cases: major asbestos insurance disputes through the Wellington facility, employment disputes at higher corporate levels, intellectual property disputes, class actions, commercial disputes, health care, and other mass torts disputes. I encountered many lawyers, managers, and corporate officials who were intrigued by new ways of solving problems, and over the years I developed many long-term relationships with leaders in major companies and the legal profession. They continue to choose me as a mediator, even knowing that I had been a plaintiff's lawyer and a political activist. Sometimes being perceived as being "on the other side" of a dispute or claim gave me enhanced credibility.

Second, I became part of the CPR training corps and began training others in mediation and dispute resolution in major corporations, major law firms, and for many federal and state court systems. With Margaret Shaw, I trained and evaluated mediators in various federal court programs, and together we also conducted master classes to demonstrate different models of mediation in a variety of professional training venues. Training venues were especially useful places to test out different models of mediation with both lawyer-representatives and would-be mediators. It also gave me an early window into the administrative needs of courts and corporations to institutionalize, internalize, and regularize the use of mediation. Creativity and innovation often began to give way to efficiency and cost reduction—a conflict of values that continues.

Third, James Henry asked me to chair, and the Hewlett Foundation funded, a project to develop mediation and arbitration ethical standards for both individual and institutional providers (now codified in the *Georgetown-CPR Ethical Standards for Use of ADR and Principles for Providers of ADR services*). I headed (with Elizabeth Plapinger of CPR) a large commission of lawyers, judges, consumer advocates, and dispute resolution professionals as we dealt with issues including fees, conflicts of interest, voluntariness, confidentiality, and accountability of providers for outcomes. With the assistance and guidance of Geoffrey Hazard, then director of the American Law Institute and professor of law from both Yale and Penn, I had a great mentor in the complexity of drafting rules and standards for a very complex profession, requiring judgment, flexibility, and discipline. I later tried, vainly, to get the American Bar Association to include some ethical standards for ADR professionals in the lawyers' Model Rules of Professional Conduct.<sup>1</sup>

Through this work I began lifelong friendships and substantive discussions with other ADR founders such as Ken Feinberg, Frances McGovern, Eric Green, Stephanie Smith, Larry Susskind, Mary Rowe, and others who developed the first practices of dispute system design. At about this time I also became the first arbitrator in the Dalkon Shield ADR process, in which I handled hundreds of cases, where the women victims were often amazed (and usually pleased) that they had a woman as a hearing officer or arbitrator. The question of whether arbitration and formulaic "grid" case settlement (think Feinberg's September 11 Victim's Compensation Fund) or a more cathartic mediation process was appropriate for such cases (Elie, 2019) has remained both a practical and scholarly interest for me (Menkel-Meadow, 1998). I began teaching dispute system design, both in the United States and abroad. From my

CPR work I was engaged in more than dyadic and individual disputes, and I became interested in multiparty dispute resolution, which I then began teaching regularly in several law schools. As a former class-action plaintiffs' attorney, this was a natural outgrowth of my efforts to practice and study "good" aggregative settlements (Menkel-Meadow, 1995) as other legal scholars, including those more critical (e.g., Owen Fiss and Judith Resnik) decried the "privatization" of justice through class action and other aggregative settlement devices. For me, class-action settlements often provided faster relief to plaintiffs and more forward-looking remedies (such as medical monitoring) and other creative solutions that judges might not have been able to order in formal litigation.

At UCLA I met and worked with Howard Gadlin, who became the university ombuds, and together we received a Hewlett Conflict Resolution Center university grant to develop a program using mediation and conflict resolution theories and practices to study and understand inter-ethnic and racial conflicts. In the middle of this period, the 1992 Rodney King riots broke out in Los Angeles, and both of us were involved in a variety of both university- and community-based projects to see whether we could use mediative and other conflict resolution practices to "heal" or at least deal with the city's and the university's complex multi-racial/ethnic conflicts. Although we and many others were not able to heal all the wounds of this conflict, our work opened up the processes of mediation to be used in many similar situations, which continues today in modern civil rights struggles such as Black Lives Matter (see Levine & Lum, 2020; Pfund, 2013).

At about this time I had several conversations with Margaret Shaw, Frank Sander, and Howard Gadlin about the origins of so many of us as mediators—children of (or children of victims of) the Holocaust, growing up in con-

flictual, dysfunctional, or alcoholic families—wondering whether we were a generation that wanted to “heal the world” (Menkel-Meadow, 2005). This work has remained important to me, as I now work not only nationally but internationally in multi-racial and multi-ethnic settings, and the question of how differences can be mediated is very real at every level of individual and national existence.

In 1992, when I moved to Washington, DC, to teach at Georgetown at the same time the Clintons came to town, I was privileged to be involved in high-level policy discussions about the uses of mediation in the public sphere. I was asked, along with DC mediator John Bickerman, to train Attorney General Janet Reno and her senior staff in mediation skills (which failed miserably in the Elian Gonzalez dispute with Cuba). Reno’s interest in the field led to the development of an ADR office in the Department of Justice, which attempted to change negotiation and settlement policies in a variety of federal agencies. I became a mediator in the federal Court of Appeals for the District of Columbia, where I saw how clever lawyers could manipulate the process for their own or a client’s gain. I was also a repeat player for some large-firm lawyers who employed me for both mediation and arbitration of a variety of large disputes. I also served as a trainer, adviser, and sometimes outside mediator for a variety of federal agencies (EPA, Energy, Labor) and the Federal Judicial Center (trainer and adviser to federal judges) and a member of the federal ADR Committee of the Administrative Conference of the United States (ACUS), an interagency consortium of ADR professionals in the federal executive branch. This experience of working in so many settings at the same time allowed me to see how mediation was a very “plastic” process, usefully employed for creative problem-solving and more party engagement but also often coopted to privatize disputes or

have them settle quickly. I was definitely seeing mediation itself from both sides then.

As a scholar, since I had participated in some of them, I became involved in assessing the validity of class-action settlements under Rule 23 of the federal rules of Civil Procedure, wrote articles, and participated in the American Law Institute's law restatement projects on aggregative litigation, lawyer's ethics, and a variety of substantive law reform projects. As a university professor and mediator I also began to mediate both individual (tenure cases) and institutional issues for many universities (after having served as a trainer for United Educators, one of the first insurance companies specializing in educational disputes). I also did dispute system design and evaluation work for the World Bank, the United Nations, the International Red Cross, and the Smithsonian Institution. (More both sides now?—working for establishment institutions while trying to develop internal justice systems?) As I saw the ethical challenges of working in dispute system design where the clients are organizations but the users are individuals, I sometimes resigned from such work when it seemed contrary to my personal or social justice values (Menkel-Meadow, 2009).

Around this time, I was privileged to work in two relatively major disputes of very different characters, which I'll relate while honoring confidentiality of those involved. As a result of some of my class-action work, Frances McGovern, a noted mediator and dispute resolution system designer, assisted federal Judge Sam Pointer in attempting to use creative dispute resolution techniques in the national class-action silicon breast implant litigation. As that litigation was nearing a nationwide settlement (later dismissed when a panel of experts found no epidemiological proof of causation), I was contacted to assist in the development of a mediational process of client counseling for class members

who wanted to be counseled confidentially about their legal options. Though the dismissal of the national class-action obviated the need for programmatic implementation, the process of planning a truly unique class-action counseling process, using mediative norms and skills, was a perfect illustration of how our justice system could be reconfigured to provide both individual and more aggregative justice, with more flexible and party-tailored processes.

As other system designers have noted, when it needs to, our legal system can be used to deliver more individualized justice, with both future-facing (mediative) and backward-judging (adjudication) values, which is useful in times when must we remember the past (such as the Holocaust) before we can move on (Menkel-Meadow, 2004). My current scholarly and practical work is concerned with these important questions of the delivery of justice, as well as peace, in a variety of different settings: transitional and restorative justice, as well as dispute system design issues. This is the “macro” justice question of use of ADR or mediation. Can systems, institutions, and processes be intentionally designed to deliver a *qualitatively* different form of justice (tailored, sensitive, needs-satisfying solutions), both in tandem with, or separate from, the *quantitative* justification of mediation and ADR (settling more cases and reducing caseloads, or “efficiency”)? For me, the issue has always been the qualitative rationale for mediation as a problem-solving process.

In a very different matter, I mediated a dispute between a major donor to a university art museum in which the donor’s family was not happy (and threatening major litigation) about how the bequest was being managed. In that case, working in a highly emotionally charged matter, the creativity of the parties, lawyers, and the process we used saved the museum, the donor’s art and financial gifts, and utilized a one-of-a-kind solution (which I cannot

reveal here). This matter illustrated to me that, in proper circumstances, away from brittle, winner-take-all results in court, tailor-made solutions could resolve disputes, heal relationships, and demonstrate that contingent and creative solutions can work.

My mediation practice has spanned, over more than 30 years, matters involving family, contracts, commercial, employment, health, educational, insurance, civil rights, landlord-tenant, art, corporate management, consumer, environmental, general civil litigation, class action, mass tort, intellectual property, and international disputes, in both private and public conflicts. I was fortunate enough to be at the founding of uses of modern mediation and thus have been lucky enough to be a generalist. I fear that more modern mediation (Menkel-Meadow, 2018) seems to be requiring not only sophisticated process skills but substantive expertise, which I worry about. Creative solutions, in my view, come from the cross-pollination of ideas from different realms that good mediation provides. Yet for all that mediation promises us, it also presents some issues of concern (Menkel-Meadow, 1991).

### **What Values in Mediation? Whose Justice (Just-U)s?<sup>2</sup>**

Mediation, as a practice and as a profession, is motivated by several key values: self-determination of the parties; a promise of confidentiality in information-sharing in service to problem-solving for the parties in their own matter; neutrality; non-bias and non-judgmentalness from the mediator; and, increasingly, concern about the ethics and integrity of the mediator. As mediation was “rediscovered” (from more ancient forms of dispute resolution in Africa and Asia) in the 1970s in the United States in civil litigation (having been around a bit earlier in labor relations, where I first encountered it as a labor lawyer), it was used primar-

ily in family law, small claims matters, and then more generally in all forms of disputes, both legal and social.

I was around for the modern reemergence of this process as I was criticizing the brittleness of legal decision-making—winners and losers and monetization of most outcomes in formal courts, with attention to past wrongs rather than future solutions. Mediation offered a way to do things differently—to be creative in solutions and involving the parties directly in processes that could be tailored to their own needs.

However, from the beginning there were also tensions for me in the work—which was individual, deep, psychological, and healing—and the need for more politically engaged group, organizational, and institutional change.

Mediation of individual, family, employment, educational, and relationship disputes can be enormously rewarding as one guides the “magic” or the “sacredness” of human understanding. We witness people learning to empathize with others, understand (if not agree with) others, and frame (and reframe) situations to be made, ideally much better, or sometimes only “livable,” but better than other alternatives. We try to make lemonade out of lemons and often succeed. For this work I am fulfilled and proud and happy to teach new generations to practice and expand our craft.

Yet given my political and social concerns, it has never been enough for me to heal, solve, or reframe people’s disputes as they come on an *ad hoc* basis. Like many of us searching for social justice through problem-solving, I want more. I want the world to develop what Howard Gadlin has called a certain “sensibility” about mediation and joint problem-solving—an approach to others that treats all people as ends, not means, and that seeks to empower the disempowered, to be fair, and, where possible, to correct, not just to ameliorate wrongdoing, inequalities, pain,

and suffering—to look for real, authentic, and better solutions and understandings than those currently offered up by our institutions and our alienated interactions with each other. Some, like Howard Gadlin (Gadlin, 2007) and me, want conflict resolution tools to be used for systemic as well as individual change and social justice.

Like others, I worry that too much mediation has been distorted by co-optation and assimilation to other forms of dispute resolution (notably, its use in mandated court programs) and what Margaret Shaw dubbed “mediation lite”—the use of mediation forms to reduce case backlogs, with little attention to the deeper engagement of the people it is intended to serve. Another concern is the growing practice, in private mediation, for more evaluative, no-joint-session, shuttle-diplomacy forms of mediation. Major litigation, commercial, employment, and divorce mediation have now become professionalized, organized, and institutionalized as well as commercialized, so that in my home town of Los Angeles, the norm is now closer to dispute management by a mediator who shuttles back and forth between the parties, “selling” solutions or settlements, without any or much quality face-to-face time.

In efforts to become acceptable as offering a go-to form of dispute resolution, modern mediation practitioners market themselves and compete for cases (including pitching their different approaches in large-case beauty contests) in a way that has the feel, for me, of crass commercialization and loss of the founding spirit. But, some might ask, were we any different in our own evangelical pitches to urge people to try another way?

Of continuing related concern is whether a process based on “voluntariness” should be mandated in any or all settings, as is now common in some court systems and growing in practice in other parts of the world. When we think that mediation, as an approach to problem-solving,

is a good thing, can everyone be required to use it always? The challenges of the current polarization of our polity have caused me to question that if we simply dialogue long enough, we will all be able to “get along” (Menkel-Meadow, 2018b). There are lines I will not cross and compromises I will not make about some basic values. My culture, or “religion,” is feminism—in the humanist sense of equality for all people, so there are limits in where I think mediation is appropriate (Menkel-Meadow, 2011).

So one question I have about our field is, what is (or is not) “mediateable?” When are dialogue, creative solution-seeking, even empathy, hard or impossible to achieve? When does justice require rulings of right and wrong—calling out what is simply unacceptable behavior (hate speech, KKK, Nazis, bullying, etc.) and yes, even punishing it? As the recent criminal trial of Harvey Weinstein for sexual assault has revealed, some things may not be mediatable when an important part of the public wants to “view” justice and punishment.

My German pacifist grandfather was an activist in the Esperanto movement in the early 20<sup>th</sup> century. In my work around the world, I have thought of mediation as the new Esperanto, hoping that a common core of language and practices would encourage curious inquiry, reframing, creative problem-solving, empathetic listening, and an increase in human understanding across all cultures. Yet my international work has also caused me to question whether this is possible. Is mediation an “ethnocentric” discipline of a “talking cure” that privileges articulation, talking and listening, and pragmatic and equalized problem-solving, most common in more equal and direct cultures that value “just getting on with it”? Mediation has been put to dangerous uses in the locations of its founders (including Maoist distortions of Confucian “harmony” principles in China and “wise elder” mediation in many

African communities) with deference to hierarchy (whether wealth-, family-, religion-, or gender-inspired) that in many cultures diminishes any real “autonomy” some parties can have in participating in the process. So I continue to teach mediation all over the world, with pride and with worry, that when one launches, teaches, or supports new ideas or practices (or older ideas repackaged), one can never be sure of what the “uptake” or opportunistic use of that practice (or theory) will be. I don’t want to be “in the middle” of a process that imposes agreements or solutions to enforce peace or harmony or particular political outcomes just to enforce someone else’s ideas of what that peace or harmony should be.

While some applaud how mediation is moving into the modern world of technology with online dispute resolution, I remain committed to face-to-face human encounters, even though I recognize that some access to justice goals can be achieved in some matters by permitting asynchronous computer-assisted dispute resolution (e.g., consumer, smaller value, or some international matters) (Menkel-Meadow, 2016). Yet as we try to “Get to Yelp,” using online reputational complaining as a modern form of direct class action for consumer redress, I worry about access to techno-justice, as I have always worried about access to any justice institutions. Will the elderly, disabled, or those without access to smartphones or computers need more help, rather than less, to directly resolve their problems? And with the diminishment of face-to-face human encounters, aren’t we more likely to increase polarization than create community?

As mediation becomes a process of confidential and private decision-making, many criticize the “privatization of justice.” A host of related macro or jurisprudential issues keep me up at night. What is the relationship of mediation to the rule of law and larger societal justice? Is media-

tion “just” for the parties in agreement in the bubble of the mediation process? Should we be concerned about the extent to which mediation agreements “track” or conform to the law? Should parties know their “rights” as well as their responsibilities to each other and to others affected by what they do inside mediation? Should the law be the determining principle in reaching solutions, as some have suggested, and if not, what other governing principles should we apply, such as fairness and consent? Should mediators be accountable to the parties, to the larger society, for the outcomes they “preside” over? What is the relation of individualized, *ad hoc*, if consensual, decision-making to the justice of a fair and equitable society? What should a mediator do if parties want to use confidentiality and non-disclosure agreements (NDA) to resolve individual problems but shield the rest of the world from knowing about past injustices (Menkel-Meadow, 2020)? When should we facilitate “amnesty” or reduced or confidential responsibility to “move forward”?

I find my current inspiration in my teaching in many different venues where a new generation is eager to learn how to solve problems with different tropes and skill sets and where disciplinary authority (e.g., legal rules) may mean less than actually and pragmatically looking for good solutions to many intractable problems (e.g., ethnic and political conflict, environmental survival, and international migration). As a mediator sitting “in the middle” of time, starting as a “founder” to “hand off” to the new parties practicing mediation, I look forward to seeing what a new generation will make of what some of us have tried to do. One can only hope that they can create less adversarial ways of dealing with differences to try to create a better world, both for individuals and for larger groups of people in pain or need of justice and fairness.

When I speak, two of the questions I hear often are “How can I become you? What did you do to get here?” The answer is that I bucked conventional legal scholarship demands with the help of a very supportive faculty at UCLA, which was especially important since I was working in more than one field—including legal ethics, socio-legal studies, interdisciplinary work with my (committed and feminist) husband, and empirical research supported by the National Science Foundation. I won the first-ever CPR award for ADR scholarship and as a result wound up being chosen as a mediator in some pretty big cases, as described here, and on the CPR Board which led to many other things, also described here. To young women—and anyone else who wants to get into this field today—I say, “Be creative. Be a founder of something. Don’t accept things as they are. Make your own way.”

## Notes

Author’s Note: Thank you to Joni Mitchell, composer, and Judy Collins, who recorded my favorite version of “Both Sides Now” on the 1967 album *Wildflowers*.

<sup>1</sup> Eventually, the ABA Model Rules of Professional Conduct (for lawyers) “recognized” ADR in two ways: Those who are third-party neutrals, including both mediators and arbitrators, are recognized (Rule 2.4 “Lawyer as Third Party Neutral”) but told only that they must inform clients they are not acting as their legal representatives. And the definitional section 1.0 (m) defines “tribunals” (which must be told “the truth,” Rule 3.3) as including arbitration, but not mediation, thereby eliding the many ethical issues involved in the practice of mediation (conflicts of interest, disclosures, fees, accountability, malpractice, etc.). Now ethical standards in mediation exist as precatory, not mandatory, rules in a set of principles jointly developed by the American Bar Association, the Association for Conflict Resolution, and the American Bar Association—Model Standards of Conduct for Mediators.

<sup>2</sup> Thanks to my friend and former colleague in mediation training, law professoring, and life, Charles Lawrence III. See Lawrence III, C., “‘Justice’ or ‘Just Us’: Racism and the Role of Ideology,” *Stanford Law Review*, 35, no. 4 (1983): 831.

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