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What Am I Doing Here? Field Notes on Finding My Way to Mediation

By Ian Macduff

I.

> "It is quite true what philosophy says, that life must be understood backwards. But then one forgets the other principle, that it must be lived forward."
> —*Søren Kierkegaard*, The Diary of Søren Kierkegaard

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The inherent risk in a project such as this collection of chapters, is that we, as narrators and constructors of the diverse stories of our becoming involved in dispute resolution, find more coherence to the narrative than might in fact be true. This, however, did not necessarily trouble Bruce Chatwin, from whom I borrow the title of his last book, published posthumously: *What Am I Doing Here?*

Even in the opening essays of that book, written while Chatwin was in hospital, terminally ill (though he may not have conceded that), he sought an exotic explanation for his illness in a "very rare Chinese fungus of the bone-marrow." And through many of his other books and essays—in particular perhaps his most famous, *The Songlines*, written in 1987—the narrative served a larger purpose, which was to underpin his thesis about the fundamentally nomadic nature of the human species . . . in turn, an explanation to himself and long-suffering friends and family, as to why he was constantly on the move, when he wasn't imposing himself on someone's hospitality.

Only some 10 years after Chatwin's death were a number of his previously unpublished essays and papers collected by Jan Borm and Matthew Graves under the title *Anatomy of Restlessness*, highlighting both his nomadic quests and his hypothesis about the human imperative of constant mobility. It's a collection, however, that seamlessly mixes the fictional, the autobiographical, and astute social commentary.

In the following paragraphs, I will endeavor to trace some of the leads I found myself following, ending up in mediation though not initially knowing that's where I was headed—if only because mediation was something that belonged, at the time, either in the arcane world of labor relations or in the remote worlds of non-Western societies. There will be—as in Chatwin's writing and that of another favorite author, Patrick Leigh Fermor—a great deal of

shameless name-dropping, though in this case my aim is not to establish academic credentials but rather to make one core point about my own version of this pathway: it was the people I met along the way who *were* the path.

> He aha te mea nui o te ao
> *(What is the most important thing in the world?)*
> He tangata, he tangata, he tangata
> *(It is the people, it is the people, it is the people)*
> *—Maori proverb*

II.

I blame my sister's undergraduate anthropology texts from the year she spent at Auckland University in the mid-1960s. On the bookshelves at our parents' home in New Zealand an alluring array of texts appeared, and the one that stays with me is Raymond Firth's 1936 classic *We, the Tikopia*, a sociological study of kinship in Polynesia. My imagination about the lives of others had already been captured by *National Geographic*, to which my family had a subscription. In the anthropology texts, the formalizing of the *National Geographic's* relatively brief (and now dated) excursions in the form of a discipline of study seemed infinitely more interesting than what was on offer in the final year of my high school.

Once I started at that same university myself in 1966, the texts remained on the shelves but were displaced in my attention, if not in my interest, by the imperatives of a double-degree program in law and history and German. This was, however, the mid-'60s, and even in far-off New Zealand there were signs of ferment in academe. While hair grew longer and jeans displaced the "smart casual" norms, the occasional new academic appointment from

the United States and United Kingdom brought news of a loosening of the stranglehold of intellectual and social convention. For whatever reason, anthropology—the discipline and the university department—held a perceived promise of critical and personal exploration of what we'd now probably refer to as "the other," though I doubt that the term was used then. At that time—around 1968—the university established a department of Sociology and made its first professorial appointment—not without dissent, I recall, within the more established disciplines of anthropology, history, and political science, where people must have imagined that they had the territory of social sciences already covered.

My own program of study didn't involve formally taking up anthropology, but in (I think) my second year in the law school, the faculty appointed someone who had spent time in Singapore, Malaysia, and Papua New Guinea and introduced to some of us wide-eyed wanderers the subject of the anthropology of law. This, I suspect, is where the fever took hold, one that led, in due course, to works that are now very familiar to those who have been around mediation for long enough: Laura Nader's *The Ethnography of Law* (1965) and *Law in Culture and Society* (1969), Simon Roberts's *Order and Dispute: An Introduction to Legal Anthropology*, Cathie J. Witty's *Mediation and Society: Conflict Management in Lebanon*, and others.

Fortuitously, the then-mandatory subject jurisprudence was seen by instructors as sufficiently flexible in its agenda that some of those studies in legal anthropology could be brought in—to the horror, it must be said, of the more conventional and positivist of other professors, for whom sociology and anthropology could only be contaminants of the analytical purity of "real" jurisprudence. Nevertheless, here we came across Karl Nickerson Llewellyn and Edward Adamson Hoebel on *The Cheyenne Way*, P.H.

Gulliver on *Disputes and Negotiations: Social Control in an African Society*, Leopold Pospisil on *The Anthropology of Law* (and, more broadly, on legal pluralism). While not expressly on legal anthropology, Bronislaw Malinowski's 1922 study of the patterns of trade in his *Argonauts of the Western Pacific* was seen rightly as the work that established ethnographic methodology even if we would now see many of his attitudes toward his subjects as, at best, paternalistic and, at worst, plain racist.

Sometime during that period I bought my first text on anthropology (while still pursuing the conventional pathways of law and history)—John Beattie's *Other Cultures of 1964*. This remains on my shelves as a study (perhaps dated, though I see it is still in print) of the "big" questions anthropologists ask, as well as, in the second part, specific studies of social ordering, kinship, law and political organization, and economics. History and biography are risky territory when read backwards in the search for explanations or excuses, but what stands out in reviewing that earlier reading is the continuity between the anthropologies of law and social ordering and the earliest influences in the development of modern mediation and "alternative" dispute resolution. The possibility of dispute resolution without the formal intervention of law or through the intervention of non-judicial third parties at least provided a procedural alternative to litigation—even if, as we have seen over four decades of development, modern mediation has developed its own kinds of formalism.

It will also come as no surprise to many that, despite law being essentially about interpersonal, social, and political ordering and the management of disputes and conflict, precious little attention was ever given to those issues. I think it was an American jurist named Holland who said something to the effect that, "if you can think about something that is related to something else, without thinking of

the thing to which it's related, then you have a legal mind." And here's the prime example: at least in that era, the study of law was effectively devoid of any attention to the reasons for law. The doctrinal jurists had set the agenda for the study of law; and now others—the anthropologists and sociologists—were presuming to have something to say about law and conflict. The stage was set for the appearance, through the 1970s, of the twin threads of critical legal studies and studies in dispute resolution and—crucially for the development of "alternative" dispute resolution—a critical concern with access to justice.

III.

A parallel branch of my reading habits which continues to this day is travel literature (anthropology without the footnotes, if you will). This of course is a wildly eclectic field and marked by significant variations in quality so, at the risk of sounding elitist, I underscore the "literature" part of that description: there is, in the best of the writers, a quality of writing that matches the depth of observation and humanity of engagement with the lives of others. Think here of Mark Twain, Johann Wolfgang von Goethe (on his travels in Italy), Wilfred Thesiger, George Orwell (down and out in Paris and London), Norman Douglas, Freya Stark, Colin Thubron (in Damascus, Tibet, Russia, central Asia, and elsewhere, an outstanding writer as well as traveler), Patrick Leigh Fermor, Laurie Lee, William Least Heat-Moon (see his wonderful *Blue Highways*), Alexander Frater (chasing monsoons), Paul Theroux (in his less grumpy modes), Jonathan Raban, Bruce Chatwin (though, as I've mentioned, the boundaries between fiction and fact are, at times, as blurred in his observations about travels as they are in his autobiographical moments), William Dalrymple, and Pico Iyer. I'm less inclined to include in such a list those whose style is redolent of the "I'm here and

you are not" smugness—especially if "here" is some envy-inducing location in Tuscany or the south of France or central Vietnam. But the best of travel literature can, I think, rank alongside the more formal cousins in anthropology in providing humanistic, empathetic, and thoughtful insights into the diversity of our shared condition.

IV.

There's a third strand to this story, expanding on one word in that previous sentence, and that is the development through the 1970s and into the 1980s of "humanistic legal education." By this time, I was teaching at law school in New Zealand, treading the line between the persistence of doctrinal law and legal education and the potentially destructive power of critical legal education that was threatening to undo a number of American law schools. Shaping this, too, were the disruptive (before Silicon Valley co-opted the word as its catchphrase) influences of feminist and minority and/or indigenous legal theory.

Three features of the time were, I think, outstanding influences: one is the engaging power of critical ideas that allowed, or even demanded, that law and other institutions be constantly re-examined; the second was the appearance in scholarly journals of a more reflective and engaged scholarship; and the third was the networks of colleagues who, even before the connecting power of the Internet and email, began to find each other. In the field of humanistic legal education, which today is perhaps less important as those ideas have become more mainstream, academics such as James Elkins, Jack Himmelstein, and Elizabeth Dvorkin began to write about thinking about law and legal education "from the bottom up," as it were. Much of this work sought to bridge the familiar gap in legal education between the practical and the theoretical—or, as William

Twining called it, the tension between "Pericles and the Plumber" (Twining, 1967).

As James Elkins noted in his law review article "A Humanistic Perspective in Legal Education":

> The teacher with a humanistic perspective recognizes what the traditional teacher ignores. The humanistic teacher takes the effort to discover who the student is and what unique gifts she has that will help her pursue the life of a lawyer. By taking the effort to know her students, the humanistic teacher concentrates less on the curriculum, the skills, and the body of knowledge transmitted in legal education than does the traditional teacher. Instead, more time is spent teaching and learning the process of participation in an individual, personal, and subjective world of law and legal practice. In other words, the emphasis shifts from merely teaching the skills of a lawyer to teaching the law student to be a whole person. (Elkins, 1983:494-495)

If one feature can be extracted, even in retrospect, from the changes in legal scholarship in the 1970s, it was a change in the cast of characters who were now part of the story of law and disputing: law and disputing became far richer than simply the domain of legal doctrine and those who managed that narrative and now was peopled by those whose lives were intimately—and not always constructively—affected by it. If anything, it was that kind of shift that helped make mediation possible in that the notions of agency in the worlds of disputes and resolution permitted—even required—the active presence of those whose

disputes they were. While I might not have seen it at the time, the shift that was taking place, at least enough to permit the parallel development of mediation, was from the earliest ruler-centered dispute resolution (the divine right of kings) to rule-centered processes (the rule of law and of centralized justice) to disputant-centered processes in which disputants acquired agency in their own conflicts.

One example of this came from the world of criminology rather than law, in a seminal article by Norwegian criminologist Nils Christie writing about "Conflicts as Property" (Christie, 1977). The argument of that article became one of the core foundations of restorative justice and community empowerment movements, at the heart of which of course are actors other than just the familiar agents of state authority. There's a combined critique in this and related work: a critique of the presumed unique expertise of conventional authority, and an institutional critique that makes possible the imagination of alternatives to usual structures of power. Those familiar with the emerging literature on mediation will recognize a kinship in Carrie Menkel-Meadow's title, "Whose Dispute Is It Anyway? A Philosophical and Democratic Defense of Settlement (In Some Cases)" (Menkel-Meadow, 1995).

V.

> ". . . I'm glad you stood in my way."
> *—Leonard Cohen,"Famous Blue Raincoat"*

The preceding four sections of this chapter have set out some elements of the intellectual and bookish parts of my indirect route to mediation. If I extract the key elements of this exploration, they would have to be, first, the discovery through anthropology and travel literature of ways of doing things (governing, social order, dispute resolution, economic life, art, and so on) radically different from, but

as effective in their context as, those that formed the core of "conventional wisdom;" second, and related, the first glimmerings of pluralism, cosmopolitanism, and diversity and—though not then named as such—multiculturalism as shaping forces for the emerging "alternatives" to legal formalism and litigation; and third, the underpinning critical stance toward one's own ways of life or law.

Beyond those more intellectual elements, however, the enduring value came in the form of a network of authors, colleagues, and friends, a kind of parallel universe to life in the law school. I still recall, with some poignancy, seeing a student in the early 1980s at the University of California at Davis wearing a lapel badge with the words "Is there life after law school?" This parallel network indicated that there was almost certainly life alongside law school . . . and one poised to invade, in due course, as the marginal became mainstream and the "alternative" was dropped from descriptions of dispute resolution.

In the course of a sabbatical leave in the United States in 1980, I was in effect passed from one colleague to another, initially with Jack Himmelstein in the humanistic legal education universe at the City University of New York (later at Columbia Law School). The overlap between critical legal education and the emerging world of mediation led to an introduction through Jack to Gary Friedman in California—another lawyer who had moved from conventional legal practice to pioneering work in mediation. Oddly, in both cases, there was another introduction but from outside the worlds of both law and mediation: by pure coincidence I had been introduced to Edith Stauffer (1909-2004), a practitioner and trainer in Jungian psychosynthesis and forgiveness who was based in Pasadena but visiting Wellington. On hearing of my nascent mediation interests and plans to go to the United States, she said, "Well, you must meet Jack and Gary." Gary also insisted that I should

meet a friend and colleague, Harry Sloan, who had quit dentistry to lead workshops at the Esalen Institute at Big Sur—and it just happened that I'd already booked into one of his workshops on "Choosing to Change." If one were to believe in synchronicity, this might be it.

While in California I arranged to meet Carrie Menkel-Meadow, who was based at that time in San Diego. The initial contact was—perhaps oddly—through feminist legal theory, which I was teaching as part of a jurisprudence course, though with some apprehension about presuming to represent that critical voice in legal theory. Carrie, as will be well known to readers, has become one of the significant practitioners and authors in the field of dispute resolution and, on occasion, a colleague in Singapore.

There were, I think, two outstanding aspects of this period: one was the emergence of a network of colleagues, both in universities and mediation practice, who sought to combine a commitment to the emerging values of mediation and dispute resolution with a critical evaluation of the field, and the other was the opening up of academic publishing—whether in existing journals or new ones—to the study of non-doctrinal legal practice.

On my return from sabbatical to Wellington and Victoria University, I met Ted Becker, who was himself on leave from the political science department at the University of Hawai'i. Ted had been teaching a course in dispute resolution at UH and, over the course of several conversations, the plan emerged for me to go to Hawai'i during a university vacation to meet yet another in this network, Peter Adler. Peter, a fellow author in this volume, was at the time the director of the Neighborhood Justice Center of Honolulu. He might have been a little surprised (but nevertheless was welcoming) when I turned up on the doorstep to announce that I planned to apprentice myself to the mediators in the center for the next few weeks, which I did. Recall that this

was 1981 or 1982, before there were established training programs and standards in mediation. Over the course of about a month, I shifted—thanks to the welcome offered by the center's mediators—from being a mere observer to taking on a co-mediation role, across an array of domestic, neighborhood, consumer, and commercial disputes.

Through Ted and Peter I met John Barkai, a professor in the School of Law at the University of Hawai'i and another pioneer in developing courses in dispute resolution and negotiation—and in forging links between domestic and international conflict resolution.

As I write these paragraphs, I also recall the many occasions on which students in my courses in mediation and dispute resolution have asked about the career path to get into this kind of work, especially as my own path led to teaching in Italy, training for the World Health Organization in Sri Lanka, a mediation conference in Buenos Aires, workshops for the World Health Organization in Geneva, and annual workshops in Cologne, all of which must have seemed impossibly exotic. Writing this now allows me to realize that, apart from the acquisition of a solid foundation in mediation training, the essential component is the network of colleagues and mentors—which makes the work of the Young Mediators' Initiative (and the app-based mentoring scheme set up at the International Chamber of Commerce's annual mediation competition) in 2019 so vital.

Professor John Paul Lederach, who was initially at the Eastern Mennonite University and subsequently at the Kroc Institute for International Peace Studies at Notre Dame University, a prolific author and widely experienced practitioner in conflict resolution, has used the image and metaphor of "nets" to think about the "entanglement" in and resolution of conflict in Central America (Lederach, 1991: 165-186). There are three points I take from this: the first, as Lederach intended, is the reliance on the "folk"

language of actors in disputing, rather than on formal models of analysis, to understand and explain the processes observed; second is the important shift in thinking from conflict or dispute "management" to thinking of the dynamic of entangled and convoluted relationships; and third is the importance of nets and networks in supporting the work and growth of those of us who have taken this path.

For those reasons, too, this section of my chapter needs to be a kind of sustained appreciation for those with whom I crossed paths, several of whom are fellow authors in this volume.

VI.

At the heart of his 1979 wonderful collection of essays, *Mind and Nature: A Necessary Unity*, Gregory Bateson ponders "What is the pattern that connects the crab to the lobster and the primrose to the orchid, and all of them to me, and me to you?" Central to this question for Bateson is conversation—and not only what we might normally take to be a shared reflection on a topic or question but also a conversation about conversation itself, which Bateson called "metalogue," a process in which participants not only address the shared question but think about the structure of how they go about that engagement. Such metalogues are central to his 1972 collection of essays, *Steps to an Ecology of Mind*, in which he engages with the reader on a dizzying array of questions—as well as on the process of thinking itself.

The point of this reference and concluding section is twofold: first, to extend the metaphors from both Lederach and Bateson into the theme that, for me, exemplifies mediation practice; and second, to point to the direction that much of this work is now taking, in the virtual networks of the Internet and online dispute resolution. I will be brief on both.

First, as Bateson also asks when thinking about the "pattern which connects," we can (and should) ask what connects the natural to the cultural, the other to me, the familiar to the strange. And as Lord Bhikhu Parekh has observed, "We approach [others] on the assumption that they are similar enough to be intelligible and make a dialogue possible, and different enough to be puzzling and make a dialogue necessary" (Parekh, 2006: 124).

If I think about the intellectual and literary influences I referred to at the outset, they largely turn on finding the familiar in what is different, the normal in what might seem alien, and even the comfort in what might seem dangerous. Equally, the value of the network of colleagues and friends is that it served to support what was, at least at the outset, seen to be a delinquent form of professional activity. Does it stretch the analogies and metaphors too much to say, with Lederach and others that, unlike law's rendering of what is normal and normative, mediation becomes an exercise in constructing a Batesonian "pattern which connects?" Watch an experienced mediator at work, if you can, and observe the pattern of questions and interventions that disentangles the messed-up version of the net, and—ideally—mends the rips and tears in that net, which may then restore or reconstruct a pattern of connection between the parties, even if only sufficient to arrive at a working and workable outcome.

One of the enduring features and challenges of mediation is that it has fostered—through private dispute resolution—a kind of "distributed" decision-making. While this has, on the one hand, served the ends of freeing parties to be authors of their own outcomes, it has also freed them from the normative anchor of legal and constitutional motherships. That relationship and tension between center and periphery, public and private, formal and informal, substance and process is unlikely to go away any

time soon. Indeed, it becomes an even greater issue in the world of information technology-based, at times algorithm-driven, online dispute resolution which is the field that—at the time of writing—largely preoccupies me. One of the leading authors on the contours of contemporary networked society, Professor Luciano Floridi, goes so far as to refer to a "distributed morality" as a feature of the changing patterns of moral agency—to which both private settlement and arm's-length dispute resolution contribute, the latter rendered increasingly necessary with the spread of online, cross-border commerce, and austerity-driven economies in the institutions of justice, as well as wider commitments to the use of digital technologies to enhance access to justice for hitherto remote and disadvantaged communities (Floridi, 2013: 727-743). The question arises then as to whether, and if so how, to create a degree of normative coherence to the processes of social ordering that emerge in this online context. It's a long way from dispute resolution and social ordering in pre-industrial societies, which provided some of the inspiration and moral courage to those laying the foundations for modern mediation, to an online world in which "social" ordering and governance are moot points (even if, at its most optimistic, it is called "social media").

Picking up on an earlier thread in this chapter, on the central role of networks of colleagues in creating pathways and connections, I can add that my own participation in the development of online dispute resolution over the last two decades has involved a strongly connected and widely distributed collection of ODR "pioneers." The significant difference between this online network and the one that fostered my original adventures in mediation is that I met most of these colleagues only "in real time" when I attended the annual ODR Forum in Paris in 2017. Many of them, of course, knew each other well, both in virtual

and physical spaces, as it's largely a northern hemisphere group at this stage; but the ease and immediacy of online communication meant that the social bonds were already established, professional and personal reputations known, and trust reinforced by the network of mutual connections.

Having begun with a borrowed question—"what am I doing here?"—I find that we are now in the practical and metaphorical position that "here" can be "here, there, and everywhere." "Here" is the world of familiar, everyday, face-to-face interactions, in which we seek to turn a "blooming, buzzing confusion" of disputes into orderly and agreed results. "There" is the more complicated world, across borders, outside the familiar, in someone else's physical, national, and cultural space, in which our pursuit of agreement and understanding is likely to be mediated or muddied by differences in perception, language, and priorities. "Everywhere" is the non-physical space of the Internet, not yet three decades old and both unfamiliar because of the rapidity of changes wrought and yet entirely familiar as it's the world many of us occupy for much of our time, through email, web searches, social media, and, mobile communication. The single—and simple—point is that context matters. Context shapes relations, perceptions, and communication preferences. And context matters when we shift from the reasonably familiar world of our own comfort zones into someone else's territory and then into the contemporary world of virtual negotiation and interaction.

When we think and talk about mediation, whether as mediators, trainers, or commentators, we probably end up with two kinds of questions. The social, legal, and political question centers on the contributions that mediation can make to access to justice, social peace, efficiency and economies in justice systems, disputant autonomy and responsibility, and so on. The second question is the more personal one—why do *we* mediate, why do *we* prefer to

work this way? If I draw together some of the threads of the preceding paragraphs and experience in mediation, my own responses turn on the challenges of working in culturally diverse settings (which are the ones that have taught me the most, especially about naïve and culturally limited assumptions I might have relied on); working out ways to foster essential conversations; and—at a more existential level perhaps—eliciting mutual recognition, even if only enough to arrive at a workable outcome.

One example may illustrate this. A couple of decades ago my wife and I were asked to run a workshop on conflict resolution at the University in Pisa, where I was visiting professor at the time. The participants—whose identities must remain confidential—were all men, all military, all recently involved in violent and bloody conflict with the other groups represented in the room. We had one instruction from the workshop organizer: don't talk about the war. After most of a day spent exploring conflict and resolution in generalized terms, and with little engagement around the room, one participant stood up—perhaps at some risk to himself—and said, in effect, "We have spent the day not talking about what it is we need to address. Please help us find a way to talk to each other." This was the moment at which we realized that the preceding process of dialogue on conflict and resolution had made it possible for one person to take that kind of risk; and those are the breakthrough moments that explain mediation's appeal.

The traditional, conventional, cultural, and now online versions of mediation capture, for me, some sense of what it means to be connected to others. In the emerging world of online democracy, Jay G. Blumler and Stephen Coleman suggest that two versions of democracy or participation are captured (Blumler and Coleman, 2001). One is the "inert and sulky" version of minimal (and complaining) engagement. The second conception, they write, "envisages the

active citizen, enabled by effective, accessible technologies as well as effective, accessible representative institutions, to feel democratically empowered."

The latter, I hope, is what we're doing here.

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