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# Why We Can't "Just All Get Along": Dysfunction in the Polity and Conflict Resolution and What We Might Do About It

Carrie Menkel-Meadow<sup>2</sup>

## I. THE TROUBLE WE'RE IN

These are very troubled times. The polity is seriously divided; people who march for white supremacy and hate are called "nice and very good people" by an unhinged, but Constitutionally elected, President;<sup>3</sup> relations between citizens of color and police are at a high level of hostility and distrust; Congress is unable to pass virtually any legislation; and policy differences over immigration, trade, taxation, and health care are so great that even a ruling party cannot get anything done. Ordinary citizens can learn the news and follow their political preferences by insulating themselves in media "bubbles," seeking out websites, cable news channels and social media outlets, and even physical neighborhoods, that are consistent with their own views.<sup>4</sup> Universities, presumed sites of "free speech" and intellectual engagement are now marked by limited conversations mired in claims of "political correctness" and "trigger warnings,"<sup>5</sup> all of which have sharply limited our collective ability to talk to and really listen to each other. We, as a nation, (and perhaps

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1. This is a reference to the plaintiff cry of Rodney King, a black man, beaten by police in Los Angeles on March 3, 1991, resulting in days of civil unrest in Los Angeles and leading to two different prosecutions and lawsuits against the culpable police officers (in one of the first police abuse incidents to be fully captured on videotape). Karen Grigsby Bates, *When LA Erupted in Anger: A Look Back at the Rodney King Riots*, NPR (April 26, 2017, 1:21 PM), <http://www.npr.org/2017/04/26/524744989/when-la-erupted-in-anger-a-look-back-at-the-rodney-king-riots>. (I was hosting my Negotiation and Conflict Resolution UCLA law students for dinner at my home in Los Angeles when rioting broke out after the acquittal verdict of the police officers charged with the beating and the city was on curfew for some days after that. "Why can't we all just get along" became a popular call for both citizens and professionals in dispute resolution to seek ways to encourage productive dialogue across political and social differences.

2. Chancellor's Professor of Law and Political Science, University of California, Irvine and A.B. Jr. Professor of Law, Dispute Resolution and Civil Procedure, Emerita, Georgetown University Law Center. I thank my research assistant and conflict resolver in chief, and fellow traveler in all of life, Robert Meadow, for critical (and also supportive) comments and suggestions.

3. President Donald J. Trump, Press Conference at Trump Tower, New York (Aug. 15, 2017) (remarks made following "alt-right" march and protest in Charlottesville, Virginia in which three people died and nineteen were injured in a march to protest the taking down of Confederate General Robert E. Lee statue on August 12, 2017).

4. See Andrei Boutyline & Robb Willer, *The Social Structure of Political Echo Chambers: Variations in Ideological Homophily in Online Networks*, 38 POL. PSYCHOL. 551, 554 (2017); See also Shanto Iyengar & Sean Westwood, *Fear and Loathing Across Party Lines: New Evidence on Group Polarization*, 59 AM. J. POL. SCI. 690, 691 (2015); BILL BISHOP, *THE BIG SORT: WHY CLUSTERING OF LIKE-MINDED AMERICAN IS TEARING US APART* 6 (2008).

5. See generally MARK HUME, *TRIGGER WARNINGS: IS THE FEAR OF BEING OFFENSIVE KILLING FREE SPEECH?* (2015); see also Jeannie Suk, *Shutting Down Conversations About Rape at Harvard Law School*, THE NEW YORKER (December 11, 2015), <https://www.newyorker.com/news/news-desk/argument-sexual-assault-race-harvard-law-school>; ERWIN CHEMERINSKY & HOWARD GILLMAN, *FREE*

in the world<sup>6</sup>) do not seem to be able to learn from each other enough to frame issues for enough “common ground” to get things done, and find enough mutual understanding to co-exist with some appreciation for our human frailties, needs, and common destinies. These differences are important for the polity and our public lives, as well as our individual relationships in smaller units of workplaces, schools, families, and communities.

Perhaps the greatest challenge for our democracy now is learning how to deal with great value differences in the polity, enough so that we can make progress on modern challenges of poverty and inequality, health care, work, wages<sup>7</sup> and welfare policies, immigration, education, and environmental change, to name just a few difficult issues.<sup>8</sup> Some years ago, as we observed political party and citizen polarization on President Obama’s Affordable Health Care Act, characterized by unruly and disputed town hall meetings around the country, I wrote about the difficulties of “scaling up” lessons of conflict resolution theory and practice in larger deliberative fora.<sup>9</sup> Now, as class, party, race, ethnic, religious, citizen and migrant, and urban-rural cleavages divide us even more,<sup>10</sup> the call for reaching across differences is

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SPEECH ON CAMPUS (2017); Nathan Heller, *The Big Uneasy: What's roiling the liberal arts campus?*, THE NEW YORKER, May 30, 2016, at 48-57; Greg Lukianoff & Jonathan Haidt, *The Coddling of the American Mind*, THE ATLANTIC, September, 2015; <http://www.theatlantic.com/magazine/archive/2015/09/the-coddling-of-the-american-mind/3999356/>; Kate Manne, *Why I Use Trigger Warnings*, THE NEW YORK TIMES (Sept. 19, 2015), <http://www.nytimes.com/2015/09/20/opinion/sunday/why-i-use-trigger-warnings.html>; COMMITTEE A ON ACADEMIC FREEDOM AND TENURE, AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, ON TRIGGER WARNINGS, (Aug. 2014), <http://www.aaup.org/report/trigger-warnings>. In a recent acerbic summary of campus politics, lawyer Harvey Silverglate (representing one of Harvard’s exclusive male only social clubs), said of Harvard’s attempt to prohibit such clubs in the name of inclusion and diversity, “They want a campus where everybody looks different but thinks alike.” John Sedgwick, *What's Really Behind the Civil War to End Harvard's Fraternities?*, VANITY FAIR, (Sept. 2017), <https://www.vanityfair.com/style/2017/08/harvard-final-clubs-fraternities-end>.

6. I spend a lot of time teaching abroad and was in the UK for the Brexit vote and in France for its recent Presidential and legislative elections, as well as other countries with similarly divided polities and a growing division between right, center and left political parties. Though some of what I say here might be useful in other societies, I see enough cultural difference in the world to confine these remarks, at the moment, to the United States’ particular issues of value dissension and division.

7. In an act of particular mean-spiritedness, the Missouri legislature (at the behest of corporate lobbyists) has just passed a law pre-empting local legislation on minimum wage policies (intended to overrule St. Louis’ effort to locally raise the minimum wage). This action disrupted many lives as the immediate pay cut reduces housing mobility and other economic conditions, based on a close to \$3/hour raise mandated by the local law, now pre-empted. See David Jamieson, *Missouri Republicans Lower St. Louis Minimum Wage From \$10 to \$7.70*, HUFFINGTON POST, [http://www.huffingtonpost.com/entry/st-louis-minimum-wage\\_us\\_595a69bac4b0da2c7324d725](http://www.huffingtonpost.com/entry/st-louis-minimum-wage_us_595a69bac4b0da2c7324d725).

8. If you Google “polarization” and “political divide” for any time just after the election, you will see a vast outpouring of queries about and suggestions for how to “heal our troubled nation” or “how to have a productive political discussion.” See, e.g., a wide variety of TED Talks on the subject, including social and political psychologists and sociologists Jonathan Haidt, *Can a divided America heal?* TED (Nov. 2016), [https://www.ted.com/talks/jonathan\\_haidt\\_can\\_a\\_divided\\_America\\_heal](https://www.ted.com/talks/jonathan_haidt_can_a_divided_America_heal) and Robb Willer, *How to have better political conversations*, TED (Sept. 2016), [https://www.ted.com/talks/robb\\_willer\\_how\\_to\\_have\\_better\\_political\\_conversations](https://www.ted.com/talks/robb_willer_how_to_have_better_political_conversations).

9. See generally Carrie Menkel-Meadow, *Scaling Up Deliberative Democracy as Dispute Resolution in Healthcare Reform: A Work in Progress*, 74 L. & CONTEMP. PROBS. 1 (2011) [hereinafter *Scaling Up*].

10. See generally ARLIE RUSSELL HOCHSCHILD, *STRANGERS IN THEIR OWN LAND: ANGER AND MOURNING ON THE AMERICAN RIGHT* (2016); see also J. D. VANCE, *HILLBILLY ELEGY: A MEMOIR OF A FAMILY AND CULTURE IN CRISIS* (2016); JOAN C. WILLIAMS, *WHITE WORKING CLASS: OVERCOMING CLASS CLUELESSNESS IN AMERICA* (2017); SASHA ABRAMSKY, *JUMPING AT SHADOWS: THE TRIUMPH OF FEAR AND THE END OF THE AMERICAN DREAM* (2017).

even more fraught, as it grows increasingly dangerous as can be seen recently in more violent confrontations at demonstrations around the nation on Confederate statue removal,<sup>11</sup> racialized policing, immigration, women's rights and "free speech,"<sup>12</sup> not to mention how increased bellicosity at the international level (US-North Korea, Russia-Ukraine, Syria) have put us on a military (and possibly nuclear)<sup>13</sup> precipice not seen since the Cold War. I have written about the dangers of brittle adversarial thinking and behavior in the legal system and polity for decades,<sup>14</sup> now seemingly to little avail. Whatever we, problem solving negotiators, mediators, deliberative democrats, and public policy facilitators have accomplished in particular cases and matters,<sup>15</sup> our contributions to major culture change and paradigm shifts to thinking about each other and the world with a different framework, have largely failed. Here I offer some explanations of why, and what we might still do about it, though I remain sadly skeptical of my own optimism. We must bring together the learning and data of social science and behavioral research on how humans behave and process information together with the particular tools and techniques (and theories) of conflict resolution professionals. Either alone is not enough.

## II. OUR DIFFERENCES CANNOT JUST BE "REASONED" AWAY

My basic point is simple: *rationality* will not necessarily bring us together. While much of legal thought, science, philosophy and Enlightenment-era epistemology has promised us that *reasoned argument*, when properly structured for larger deliberative settings in the polity,<sup>16</sup> will persuade decision makers (whether

11. See, e.g., Lulu Garcia Navarro, *Richmond, Va., Grapples With Fate of Confederate Monuments*, NPR (Aug. 13, 2017, 8:33 ET), <http://www.npr.org/2017/08/13/543197271/richmond-va-grapples-with-fate-of-confederate-monuments>; *The Alt-Right on Campus: What Students Need to Know*, SOUTHERN POVERTY LAW CENTER, (Aug. 10, 2017), <https://www.splcenter.org/20170810/alt-right-campus-what-students-need-know>.

12. A new issue is emerging to claim that regulation of some marches and demonstrations may be constitutionally permissible, e.g. the banning of weapons at mass gatherings, as the First Amendment protects only "peaceable assemblies," though any such regulation is likely to lead to litigation on the potential clashes of First and Second Amendment interpretations. See L.A. Times Editorial Board, *Editorial: Don't Restrict Free Speech. Restrict the Right to Carry Guns at Potentially Explosive Public Events*, L.A. TIMES (Aug. 23, 2017), <http://www.latimes.com/opinion/editorials/la-ed-firearms-charlottesville-texas-protest-20170823-story.html>.

13. Choe Sang-Hun & David E. Sanger, *North Korea Fires Missile Over Japan*, N.Y. TIMES (Aug. 28, 2017), <https://www.nytimes.com/2017/08/28/world/asia/north-korea-missile.html>.

14. See generally Carrie Menkel-Meadow, *The Lawyer's Role in Deliberative Democracy*, 5 NEVADA L. J. 347 (2004-2005); see also Carrie Menkel-Meadow, *The Trouble with the Adversary System in a Post-Modern, Multi-cultural World*, 38 WM. & MARY L. REV. 5 (1996); Carrie Menkel-Meadow, *Deliberative Democracy and Conflict Resolution: Two Theories and Practices of Participation in the Polity*, ABA DISP. RESOL. MAG. (2006), at 18.

15. For some great success stories, see SUSAN L. PODZIBA, *CIVIC FUSION: MEDIATING POLARIZED PUBLIC DISPUTES* (2012); see also LAWRENCE SUSSKIND, SARAH MCKEARNAN & JENNIFER THOMAS-LARMER, *THE CONSENSUS BUILDING HANDBOOK: A COMPREHENSIVE GUIDE TO REACHING AGREEMENT [hereinafter CONSENSUS BUILDING HANDBOOK]* (1999); CAROLYN J. LUKENMEYER, *BRINGING CITIZEN VOICES TO THE TABLE* (2013); JOHN FORESTER, *DEALING WITH DIFFERENCES: DRAMAS OF MEDIATING PUBLIC DISPUTES* (2009).

16. See JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY* (1996); see also *DELIBERATIVE DEMOCRACY* (James Bohman & William Rehg eds., 1997); JOHN DRYZEK, *DELIBERATIVE DEMOCRACY AND BEYOND: LIBERALS, CRITICS, CONSTESTATIONS* (2000); *DELIBERATIVE DEMOCRACY* (Jon Elster ed., 1998). AMY GUTMANN & DENNIS THOMPSON, *WHY DELIBERATIVE DEMOCRACY?* (2004); *DELIBERATIVE DEMOCRACY*

legislators, judges, or citizen-voters) to use facts and persuasion to reach good, if not perfect, decisions, the truth is that human beings actually use both more and “less” than reason in their thinking and decision making processes. Like those who raise their voices in English when traveling in other countries, expecting that louder English will make those who don’t speak it understand them better, much of deliberative democracy, and attempts to facilitate difficult political conversations, assumes that “more reason” and more and better arguments (and facts) will bring “others” around to see “the truth,” the “light,” or the correct or best policy.

For example, in a recent article in the *Los Angeles Times*, advice given on “how to talk to climate change skeptics”<sup>17</sup> suggested using seven arguments, based on science (take the long data view; don’t let skeptics cherry pick counterexamples; see the effects of greenhouse gases in particular, produced increasingly, since coal use began, by human agency; note the decreased solar activity; demonstrate the depth and extent of recent changes, beyond the “normal” variations; see that even if the Antarctic is not diminishing (it is, actually, I was just there), the Arctic is; and see that even though polls show that most people don’t know it, more than 95% of all climate scientists agree on its causes and effects and dangers). Although the article offered some good advice, “always ask skeptics about the data their argument is based on” (see below), it concluded with “as with any contentious issue, you have to realize when you are talking to someone who just wants to argue, and you should just stop.” In other words, if your rational arguments and science are not persuasive, just stop. This is better than religious warfare of most of human history when people killed those with whom they didn’t agree,<sup>18</sup> but even if you are from the “science” camp (as I am), is this the only way to get people to “understand” or rethink what they think or believe? Recently many commentators pointed out that many people “selectively believed” in science to expect and observe the total eclipse as predicted, and also did not doubt the arrival of Hurricane Harvey (although debates remain about whether this hurricane was “worse” because of climate change [more warm moisture in the air] or more damage resulted because of more development on flat land). My own view, as often, is that both can be true at the same time. So “reasoning” alone will not necessarily help people get along.

Instead, modern intellectual and scientific challenges to pure rationality include the work of cognitive scientists in chronicling “deviations” from rational thinking in common human cognitive errors<sup>19</sup> (including such now familiar “errors” as biases

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HANDBOOK: STRATEGIES FOR EFFECTIVE CIVIC ENGAGEMENT IN THE TWENTY-FIRST CENTURY (John Gastil & Peter Levine, eds., 2005); DAVID KAHANE, DANIEL WEINSTOCK, DOMINIQUE LEYDET & MELISSA WILLIAMS, *DELIBERATIVE DEMOCRACY IN PRACTICE* (2010). For an argument that deliberative democracy theorists are somewhat incompatible with conflict resolution theorists and practitioners, see Hiro N. Aragaki, *Deliberative Democracy as Dispute Resolution? Conflict, Interests and Reasons*, 24 OHIO. ST. J. DISP. RES. 407 (2009) (arguing that deliberative democrats regard interest-based “bargaining” as inferior to the public-minded searches for the “common good” through deliberation through reasoned argument).

17. LA Times, *How to talk to Climate Change Skeptics*, September 2, 2017, California Section, Science File, page B-2.

18. Still going on, of course, in some parts of the world.

19. See generally DANIEL KAHNEMAN, *THINKING, FAST AND SLOW* (2013); see also RICHARD NISBETT & LEE ROSS, *HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT* (1980); *JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES* (Daniel Kahneman, Paul Slovic & Amos Tversky eds., 1982); PAUL BREST & LINDA HAMILTON KRIEGER, *PROBLEM SOLVING, DECISION MAKING AND PROFESSIONAL JUDGMENT* (2010).

from vividness, primacy, recency, endowment effects, statistical probability illiteracy, reactive devaluation, anchoring and many others), post-modern questioning of “absolute” truths in theories of hermeneutic interpretations,<sup>20</sup> and most relevant to this essay, the power of emotions,<sup>21</sup> including religious commitments, feelings (fear and threat,<sup>22</sup> or generosity, and shared empathy,<sup>23</sup> among others) and *affective adherence* to deeply held and widely disparate values, which are often counter to or inconsistent with “rational” truths.<sup>24</sup> Social psychologists have labeled this the “tribal moral divide” where people act on moral “intuitions” before even seeking confirming or disconfirming facts or information, adhering strongly to belief systems, with possibly genetic or at least familial and religious bases.<sup>25</sup>

We, as conflict resolution professionals need to learn to structure communication around these complex ideas, as much as we focus on legal, social and economic issues, parties’ needs and interests,<sup>26</sup> and the more instrumental foci of much conflict resolution facilitation.<sup>27</sup> There are explanations for why “we can’t just all get along,” having to do with different world views and value systems and assumptions (from religious, familial, political, and ethical commitments) and from widely disparate life experiences, and reactions to those experiences.<sup>28</sup> (Consider the old saying, from my New York youth, “a liberal is a conservative who hasn’t been mugged yet.” Assuming, of course, that the experience of being mugged would lead one to stronger law and order values, as opposed to the “restorative justice”<sup>29</sup> and mercy values held by liberals who stay liberal, even after having been mugged!) Most human beings are a complex mix of using their brains (reason), their heart (values, commitments) and their stomachs (can I really digest (“live with”) this) when they speak, argue, make decisions, and act.

As I have suggested in many other fora, there are at least three “modes” of discourse in all decision making—the *rational-principled*, (brain) *interest-based bargaining and trading*, (stomach) and the *affective-emotional-value based* (heart)

20. See generally HANS GEORG GADAMER, *THE HERMENEUTIC TURN* (2004); see also Carrie Menkel-Meadow, *The Trouble with the Adversary System in A Postmodern, Multicultural World*, 38 *Wm. & Mary L. Rev.* 5 (1996).

21. JON ELSTER, *ALCHEMIES OF THE MIND: RATIONALITY AND THE EMOTIONS* (1999).

22. See ABRAMSKY, *supra* note 10.

23. See Douglas H. Yarn & Gregory Todd Jones, *A Biological Approach to Understanding Resistance to Apology, Forgiveness, and Reconciliation in Group Conflict*, 72 *L. & CONTEMP. PROBS.* 63, 66 (2009); see also Carrie Menkel-Meadow, *Is Altruism Possible in Lawyering?*, 8 *GA. ST. L. REV.* 385 (1992).

24. JONATHAN HAIDT, *THE RIGHTEOUS MIND: WHY GOOD PEOPLE ARE DIVIDED BY POLITICS AND RELIGION* (2013); see also JONATHAN HAIDT, *CAN’T WE ALL DISAGREE MORE CONSTRUCTIVELY* (2017).

25. *Id.*

26. See the teachings of ROGER FISHER, WILLIAM URY, & BRUCE PATTON in the classic, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* (3d ed. 2011); see also Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 *UCLA L. REV.* 754 (1984).

27. Some of those who work (I do not) in psycho-neurolinguistics in our field are already doing some of this, see Yarn & Jones, *supra* note 23.

28. Compare J. D. VANCE, *supra* note 10, with Betsy Rader, *I was born in poverty in Appalachia: Hillbilly Elegy Doesn’t Speak for Me*, *WASHINGTON POST* (Sept. 1, 2017), [https://www.washingtonpost.com/opinions/i-grew-up-in-poverty-in-appalachia-jd-vances-hillbilly-elegy-doesnt-speak-for-me/2017/08/30/734abb38-891d-11e7-961d-2f373b3977ee\\_story.html?hpid=hp\\_no-name\\_opinion-card-b%3Ahomepage%2Fstory&utm\\_term=.ed0ec58303e7](https://www.washingtonpost.com/opinions/i-grew-up-in-poverty-in-appalachia-jd-vances-hillbilly-elegy-doesnt-speak-for-me/2017/08/30/734abb38-891d-11e7-961d-2f373b3977ee_story.html?hpid=hp_no-name_opinion-card-b%3Ahomepage%2Fstory&utm_term=.ed0ec58303e7).

29. See generally Carrie Menkel-Meadow, *Restorative Justice: What Is it and Does It Work?*, 3 *Ann. Rev. L. & Soc. Sci.* (2007).

set of claims that people make on each other and within themselves, in different fora.<sup>30</sup>

### MODES OF CONFLICT RESOLUTION\*

MODE OF DISCOURSE	PRINCIPLED (REASONS) (Brain)	BARGAINING (INTERESTS) (Stomach)	PASSIONS (NEEDS/ EMOTIONS/ RELIGION) (Heart)
<b>FORMS OF PROCESS:</b>			
<i>Closed</i>	Some court proceedings; arbitration	Negotiation- U.S. Constitution; diplomacy	Mediation (e.g., divorce)
<i>Open</i>	French Constitution; courts; arbitration	Public negotiations; Some labor	Dialogue movement
<i>Plenary</i>	French Constitution	Reg-Neg	Town meetings
<i>Committees</i>	Faculty committees; task groups	U.S. Constitution/ U.S. Congress	Caucuses-interest groups
<i>Expert/Facilitator</i>	Consensus building	Mini-trial	Public conversations
<i>0Naturalistic (Leaderless)</i>			Grassroots organizing/WTO protests; Occupy Wall St.
<i>Permanent</i>	Government, institutions	Business organizations, unions	Religious organizations, Alcoholics Anonymous,
<i>Constitutive</i>	UN, national constitutions	National constitutions/ professional associations	Civil justice movements, peace
<i>Temporary/Ad Hoc</i>	Issue organizations/social justice	Interest groups	Yippies, New Age, vigilantes

Principles = reasons, appeals to universalism, law

Bargaining = interests, preferences, trading, compromises

30. *Scaling Up*, *supra* note 9, at 9-10; Carrie Menkel-Meadow, *From Legal Disputes to Conflict Resolution and Human Problem Solving: Legal Dispute Resolution in a Multidisciplinary Context*, 54 J. LEGAL EDUC. 7, 28 (2004);

CARRIE MENKEL-MEADOW, *MEDIATION AND ITS APPLICATIONS FOR GOOD DECISION MAKING AND DISPUTE* 37-38 RESOLUTION (2016);

\*Partially derived from categories specified by Jon Elster, *Strategic Uses of Argument*, in *BARRIERS TO CONFLICT RESOLUTION* 236 (Kenneth J. Arrow et al. eds., (1995).

Open = public or transparent meetings or proceedings

Closed = confidential, secret process or outcomes (settlements)

Plenary = full group participation, joint meetings

Committees = task groups, caucuses, parts of the whole

Expert-facilitator = led by expertise (process or substantive or both)

Naturalistic = leaderless, grassroots, ad hoc

Permanent = (Organizational, institutional),

Constitutive = constitutional

Temporary = ad hoc groups or disputants

Some predicted effects of process on outcome:

Closed = (confidential) proceedings allow more expression of interests, needs and passions = more "honest" and candid, allow more "trades," less posturing, open to vulnerability

Open (transparent) proceedings require more principled/reason justifications, produce more rigidity

Until and unless we take all three of these modes seriously to co-exist and be "managed" in political discourse we will not be able to get beyond polarization. We still may not be able to get beyond some basic value polarizations, (ever!), but if we don't learn to deal with these three discourses together, in the same room, in the same conversations, in the same media, we are, I think, doomed to continue to exist in our value-defined echo chambers.

### III. CAN WE THINK, FEEL, BELIEVE AND BARGAIN AT THE SAME TIME?

So, the issue for getting along and getting things done is how can we harness conflict resolution theory and practice to provide structures and processes that allow these discourses to be expressed and heard in different places in the polity—from the individual, to the family, to the workplace, to the political party, polling booth, media, legislatures, courts, executive offices, and embassies. For me, the answer is not "blowing in the wind,"<sup>31</sup> but can be found primarily in the empathy and human connections that allow people to talk and listen to each other, across great differences in a mutual desire for some understanding, if not agreement. These days, I find sources and examples of those possibilities more in literature, film, and the arts (rather than in real legal or political practice), where people are actually seen to learn from each other, and, occasionally and hopefully, transcend their committed

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31. BOB DYLAN, *Blowing in the Wind*, on *The Freewheelin' Bob Dylan* (Columbia Records 1963). The question there is "how long will it take for people to know that too many people have died?" and consider the horrors of war and death and the promise of peace, recounted in several verses and chorus.



understandings of the world. In those rarely glimpsed moments they may come to change their views and appreciate and take seriously “the Other.”<sup>32</sup>

When experienced or observed these are like “epiphanies” or “revelatory moments,” when people actually learn or radically change their mind or beliefs about something. As you read this, consider, *when did you ever totally change your views about something? How did it happen?*<sup>33</sup> I will review a few of those examples here and suggest how we might harness these examples to conflict resolution theory and practice, for more effective deliberation and decision making in our current polarized climate. And, at the same time, it is important to consider that such “epiphanies” and “revelations” cannot be assumed to be only one way, as is often assumed in our politically “liberal” field.<sup>34</sup> And, such emotionally revelatory moments described as “sacred” or “magical” by many mediators,<sup>35</sup> may also be momentary, if not harnessed to the public sphere from the private (and in political, as well as personal, decision making). So our challenge remains, when and if individualized conflict resolution strategies and tools can work at the individual level of understanding (such as with my peace work in Israel-Palestine at the personal level),<sup>36</sup> how and

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32. For those readers who are interested, I keep a list of films, novels and other materials which demonstrate such moments, see, for example, *DISTURBING THE PEACE* (Reconsider, 2016), a recent documentary on the founding of Combatants for Peace (founded by Israelis and Palestinians). As one former Israeli Defense Force soldier described, in the moment he was about to deny entrance across a check point for sick Palestinian children, and his wife called with news of his own children, he realized he “couldn’t do it anymore.” Children are children on both sides.

33. A recent such moment for me came on a return visit to Athens. I spent a full year living next door to the Elgin Marbles in the British Museum in London some years ago and often taught with the formal document used by the Museum to explain the “dispute” and why the Elgin Marbles were “better off” being taken care of and displayed in London, rather than Athens. Many of my students had written papers and made dispute resolution proposals for a variety of contested art ownership issues (post-colonial, contested provenance, Nazi art looting, University and archeological “thefts” some now governed by treaty. See Diane Orson, *Finders Not Keepers: Yale Returns Artifacts to Peru*, NPR (Dec. 18, 2011), <https://www.npr.org/2012/01/01/143653050/finders-not-keepers-yale-returns-artifacts-to-peru>. It took a visit *in situ* to the new museum across from the Parthenon (where the other “half” of the Marbles are displayed) to change my mind completely. The newly architected building, with archeologists permanently available for conversation, and the “epiphany” of seeing the sublime friezes in their “natural” home, made the “return” of all of them to their historical home seem the best outcome to me. (There are of course, very expensive other outcomes for such disputes- e.g. “rotation” of displays etc., but this time I think I have totally changed my mind). I was moved by the natural and historical habitat and the care with which Greek archeologists and scientists were managing their heritage.

34. In the founding days of ADR it was clear that many of the founders were the products of WWII and the Holocaust, the anti-Nuclear movement (SANE); the civil rights movement, the anti-War (Vietnam War) movement, the feminist movement and now gay and other civil rights movements. In an early meeting of SPIDR (now merged into ACR), we told personal stories and noted similar political commitments or social/familial experiences of alcoholism or abuse that led to a desire to “heal the world” and find “bridges” of understanding, mostly in service to what would be considered liberal or “progressive” values. Someone still needs to do an excavation of the first generation’s motivating influences; for just a bit of this, see Carrie Menkel-Meadow, *The Historical Contingencies of Conflict Resolution*, 1 INT’L J. OF CONFLICT ENGAGEMENT AND RESOL. 32 (2013); see also Carrie Menkel-Meadow *Why Hasn’t The World Gotten To Yes?: An Appreciation and Some Reflections*, 22 NEGOT. J. 485- (2006); Carrie Menkel-Meadow, *Roots and Inspirations: A Brief History of the Foundations of Dispute Resolution*, in *HANDBOOK OF DISPUTE RESOLUTION* 13 (Robert Bordone & Michael Moffitt, eds., 2005).

35. See Sarah Cobb, *Creating Sacred Space: Toward A Second Generation Dispute Resolution Practice*, in *Dialogue on the Practice of Law and Spiritual Values* (James F. Henry et al. eds.) 28 FORDHAM URB. L. J. 1017 (2001); see also PODZIBA, *supra* note 15.

36. See THE PARENTS CIRCLE-FAMILIES FORUM, <http://www.theparentscircle.com/> (last visited Nov. 13, 2017); see also COMBATANTS FOR PEACE, [www.cfpeace.org](http://www.cfpeace.org) (last visited Nov. 13, 2017); and films such as *ENCOUNTER POINT* (Just Vision Films 2006); Menkel-Meadow & Irena Nutenko, *The Next Generation: Creating a New Peace Process in the Middle East*, 25(4) NEGOT. JOURNAL 569 (2009).

when can these “moments” be scaled up to the political and policy making level? I offer some ideas here, but I remain skeptical on such deeply divided issues as in our own polity (immigration, health care, and race relations) and other issues on the world stage (EU-Brexit, migration policy, Israel-Palestine, Syria, North Korea, and many other international conflicts).

Since we cannot use the same processes and structures in all settings (individual disputants, families, legal disputants, workers and managers, political parties, communities and nations), we must also be conscious, in our attempts to scale up, of both “*process pluralism*,”—what process is appropriate for what kind of dialogue, conversation, relationship, decision environment or political act—and “*dispute system design*”—how can we as conflict resolution professionals design, build and plan appropriate formats, tools and experiences to encourage constructive and learning settings for real human engagement in such different settings. And we must also recognize that often those moments of “revelation” or deep understanding are more random, individualized moments that we must learn to “capture” and organize in some productive way.

When we see a disagreement, political or relational, what are the sources of the disagreement? Research in political science, sociology, and psychology all consider the impact of groups (sometimes called “tribes”) on both ideology (organized frameworks of thought) and individual opinions and actions. In legal and economic situations, the assumptions are most often that some form of self-interest and economic maximization is at play, seemingly assuming that all “rational” actors maximize in more or less the same way and with the same values, assuming conflicts over scarce resources or identity.<sup>37</sup> Having spent years reading, teaching, practicing with, and testing these theories in different contexts, I believe that there are complex interactions among and between *group* or “tribal” (religious, class, ethnicity,) inputs into *individual* thought processes and decision making, and the structures and constraints of *situations*,<sup>38</sup> all of which (no single determinant here) may structure particular reactions or views about political and social issues. Consider the wealthy who vote for higher taxes on themselves and the working poor who vote for political choices that reduce or eliminate government benefits. Not everyone conforms to group expectations or assumptions. How then can we harness what is good about human diversity to greater mutual empathy and understanding of others who do not share our own views? And, even more importantly, how can we agree to disagree, but still prevent violence, increase human well-being, and adopt some concrete policies?

Consider two recent examples, from two plays that emerged in Los Angeles in the post-Trump era. In *Building the Wall*,<sup>39</sup> it is post-Trump America (2019) and a highly educated African-American history professor, Gloria, is interviewing Rick, a security guard in a privatized prison who is awaiting sentencing for what has come

37. See AMARTYA SEN, *IDENTITY AND VIOLENCE: THE ILLUSION OF DESTINY* (2007).

38. See LEE ROSS & RICHARD E. NISBETT, *THE PERSON AND THE SITUATION: PERSPECTIVES OF SOCIAL PSYCHOLOGY* (1991); see also *THE STANFORD PRISON EXPERIMENT* (Abandon Pictures 2015) (depicting Philip Zimbardo’s Stanford Prison Experiment); *EXPERIMENTER* (BB Film Productions 2015) (depicting Stanley Milgram’s authority and obedience studies)—both of these studies have been subject to much substantive, methodological and ethical debates for many decades now.

39. ROBERT SCHENKKAN, *BUILDING THE WALL* (2017) Premiered in Los Angeles, Fountain Theatre with better reviews in LA (Hollywood Reporter) than when it opened in New York, NY Times, May 22, 2017. Playwright Schenckan is also the author of *The Kentucky Cycle* and co-writer of *Hacksaw Ridge*.

to be a mass murder and concentration camp-like carceral state for immigrants, following a national round-up of immigrants which overwhelms the detention centers. While the play builds on eerie resonances to the Holocaust and mimics many actual such interviews by journalists of war criminals,<sup>40</sup> as well as freedom fighters, to attempt to demonstrate, in dialogue, the underlying views of those with such commitments to “causes” (both good and bad), this play demonstrates the tropes of “moral tribes.” “No one was speaking for us” says Guard Rick, speaking of his white, working class, Texan, loss of employment “disenfranchised” figure, as if that explains the sliding decay into human depravity and structured loss of life to “those Others.” (Speaking to the now well-educated privileged African-American woman who has “triumphed” over an “earlier” racism and injustice in the United States—slavery and discrimination). Though dramatic, the dialogue here does not illuminate much human understanding on either side (where I hoped the play would go) and instead dramatizes the events—this “slippery slope” of Trumpian anti-immigrant feeling will lead the United States into the worse-than-“swamp” of Nazi-Germany with targeted hate and state power.<sup>41</sup> The protagonists argue with each other, describing why they feel the way they do based on their life experiences, but there is no “movement” of mutual recognition. We the audience are to be “shocked” by the revelation that if we don’t stop Trump’s policies, we will descend into genocides.<sup>42</sup>

In contrast, *The Cake*,<sup>43</sup> based loosely on the legal case now heading to the United States Supreme Court<sup>44</sup> in which a local baker refused to bake a wedding cake for a gay couple on the basis of his “Free Exercise of Religion” (Bible disapproval of gay marriage) under protection of the First Amendment, maintains the political and personal pain of difference across principled divides. A white woman, Jen, who returns home to North Carolina (from NY, where her fiancé, Macy, is a lesbian and African-American,) to ask the white woman (Della) who raised her after her mother’s death and who owns a bakeshop, to bake her wedding cake. Despite acknowledging that Jen is like a daughter to her, Della refuses to bake a cake based on her Biblical objections to gay marriage. In a much more subtle dramatization, the parties try to explain their different views, more complicatedly expressed by the

40. GITTA SERENY, ALBERT SPEER: HIS BATTLE WITH THE TRUTH (1995).

41. Recently former Governor Arnold Schwarzenegger posted an anti-hate, anti-Trump video decrying the President’s failure to detach himself from hate and Neo-Nazis. [https://m.youtube.com/watch?v=FN\\_YIBr0ELM](https://m.youtube.com/watch?v=FN_YIBr0ELM) (Schwarzenegger, a successful immigrant from Austria, “knew” real Nazis.)

42. As I write this, we seem to have moved someone closer to that mean-spirited dystopia. President Trump has just announced the ending of Deferred Action for Childhood Arrivals (DACA immigration amnesty program created by President Obama as an Executive Order). See Michael D. Shear & Julie Hirschfeld Davis, *Trump Moves to End DACA and Calls on Congress to Act*, N.Y. TIMES (Sept. 5, 2017), <https://www.nytimes.com/2017/09/05/us/politics/trump-daca-dreamers-immigration.html>.

43. BEKAH BRUNSTETTER, *THE CAKE* Produced and premiered by the Echo Theatre Company, Los Angeles and Ojai, California (2017).

44. *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm’n.*, 85 USLW 3593 (2012), in which the Colorado Civil Rights Commission held that it was a violation of state anti-discrimination law to refuse to bake a wedding cake for a homosexual couple, whose marriage is now recognized by American Constitutional law, *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015), despite counterclaims by the bakeshop’s owner, Jack Phillips, that it is his right, under the First Amendment guarantee of Freedom of Exercise of Religion, to refuse to bake a cake for a wedding he regards as contrary to the Bible and his religious beliefs. See Adam Liptak, *Justices to Hear case on Religious Objections to Same-Sex Marriage*, N.Y. TIMES (June 26, 2017), <https://www.nytimes.com/2017/06/26/us/politics/supreme-court-wedding-cake-gay-couple-masterpiece-cakeshop.html>.

more radical (also a journalist) New Yorker on the one hand, and the “gentler” version of asking for personal acceptance (not political) from the young woman who returns home to her “adoptive” mother. As the parties engage with each other (and their own sexual and relationship demons), maintaining their clear, strong, emotional and political, if stereotypic, views for most of the play, with Della refusing to bake a cake or go to the wedding, by the end, Macy (who hates sugar), and Della (the baker) find a personal common ground in their love for Jen, which allows Macy to enjoy a sugar cake made, finally, in the bakeshop (not wedding), as both begin to speak across their value differences. This is a more classic play of “resolved conflict” and “changed circumstances” that is the stuff of formal drama (which is as formulaic and structured as our mediation and facilitation “scripts”) which demonstrates that time, conflictual conversation,<sup>45</sup> high drama, and yes, direct confrontation (and finally love, not reason) can often lead to “break-through” revelations of human understanding and “acceptance” if not agreement. Drama and emotion, not rational or political argument, bring these people of different value systems together. Whether it will have a lasting impact in either of their differing communities remains to be seen. And, whether anyone who is not already committed to gay marriage will see this play is another issue. Theatre is not the place where complex economic and political policy can be made, of course, even if personal connections can be made.<sup>46</sup> Though, with such issues I am more hopeful—at some point almost every human family will see there is likely a gay person in their midst they love. I can hope that such familial love might warm to or stretch to changed relationships and then, maybe, changed political views.<sup>47</sup> This will not work for all issues of difference, though some day, if not yet, it should work for immigration and inter-racial and religious marriage too.

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45. DOUGLAS STONE, BRUCE PATTON, & SHEILA HEEN, *DIFFICULT CONVERSATIONS: HOW TO DISCUSS WHAT MATTERS MOST* (1st ed. 1999).

46. For arguments that pursuit of the humanities in reading literature and being exposed to art can, in fact, induce more “altruistic” empathy of others, see, for example, MARTHA C. NUSSBAUM, *POETIC JUSTICE: THE LITERARY IMAGINATION AND PUBLIC LIFE* (1997); see also ROBIN WEST, *CARING FOR JUSTICE* (1999); but cf. RICHARD A. POSNER, *LAW AND LITERATURE: A MISUNDERSTOOD RELATION* (1988) (literature has both good and bad characters and one cannot assume it will make us understand others better or develop empathic understandings that will cause us to behave better).

47. See Jennifer Gerarda Brown, *Peacemaking in the Culture War Between Gay Rights and Religious Liberty*, 95 IOWA L. REV. 747 (2010).

#### IV. HOW WE MIGHT TRY TO GET ALONG: LINKING THE PERSONAL TO THE POLITICAL<sup>48</sup>

##### A. *Getting To Know You*

One place to begin is with the processes and protocols now used by many community and policy mediators.<sup>49</sup> No matter how large disputing groups may be (though small is almost always better here) beginning with *personal statements* of who a person is, what the *sources of their identity and beliefs* are, what *major experiences* have molded them (in their own views) and *what concerns or "curiosities" or questions* they have about their own views, often opens up the often hidden assumptions or rigid backgrounds of particular views for further exploration. In such a first stage of engagement the idea is not to challenge the "stickiness" of moral, political, religious, or other values and commitments, but just to listen to their sources as each individual frames them. As Arlie Hochschild describes it "I had a keen interest in how life *feels* to people on the right."<sup>50</sup> Those of us who are such mediators and facilitators use many tools of such human engagement—asking groups of 2's or 3's to share something surprising about themselves (in small groups, rather than large) to broaden a sense of human "knowing" about each other, and often to uncover non-ideological alliances—commonalities around parenting, disability, loss, hobbies, love of animals, shared talents, the arts, sports, and other human connections. The greatest of these forces (and sometimes, of course, also the most destructive), is cross-group love; think Romeo and Juliet, Tony and Maria in *West Side Story*, and more recently, the doomed lovers in Bosnia in Angelina Jolie's *The Land of Blood and Honey*.<sup>51</sup>

These activities are not only instrumental "ice breakers," they are intended to form *bridges* of human connections and perhaps some trust across the very values that divide us. This is important for the one instrumental process that later can be used to bridge differences: *bargaining and trades*, and some compromise, in a positive way.<sup>52</sup> Excavating sources of beliefs and commitments can be both troublesome (crystallizing and hardening such commitments) and an opportunity for exploration, exposing the possibilities that even if there is never agreement on big picture "worldviews," there can sometimes be agreement on more concrete and practical issues (e.g. abortion dialogue leading to practices regarding clinic protests

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48. This old political slogan belongs to the feminist movement demanding political recognition for legal and other social issues located in the private sphere and family life, but here I recall it to make the point that political disagreements of all kinds are now experienced on a personal, affective level and appeals to reason alone, assuming cognitive or conceptual attention to issues that people have strong "feelings" about will not suffice to encourage engagement across political and policy divides. I am not saying that "facts don't matter," but rather that they are not enough alone. (Note how effective President Ronald Reagan was in attracting support by using "personal anecdotes".)

49. See PODZIBA, *supra* note 15; ESSENTIAL PARTNERS, About Us, <https://www.whatisessential.org/about-us> (last visited Nov. 13, 2017).

50. HOCHSCHILD, *supra* note 10, at ix.

51. Carrie Menkel-Meadow, *In the Land of Blood and Honey: What's Fair or Just in Love and War Crimes? Lessons for Transitional Justice*, in FRAMING LAW AND CRIME: AN INTERDISCIPLINARY ANTHOLOGY (Caroline Joan S. Picart, Michael Hviid Jacobsen & Cecil Greek, eds., 2016).

52. Carrie Menkel-Meadow, *The Ethics of Compromise*, in GLOBAL ENCYCLOPEDIA OF PUBLIC ADMINISTRATION, PUBLIC POLICY AND GOVERNANCE (Ali Farazmand, ed., 2016).

and safety,<sup>53</sup> HIV-AIDS policies,<sup>54</sup> environmental siting and policy,<sup>55</sup> and perhaps in present times disaster (hurricane) relief, re-building infrastructure in current US, and maybe even Congressional action on DACA reform and renewal).

The protocols developed by such groups as Public Conversations, now Essential Partners, and other community and public policy facilitators,<sup>56</sup> offer guidelines for having parties in dispute and conflict approach each other with human respect and mutual curiosity to consider such questions, with respect to any disputed issue:

1. From where do your views on that topic come? (your personal experience, education, religion, profession, community, etc.);
2. What forces/people influence your views? (opinion leaders, clergy, family, colleagues, professional community);
3. What questions (points of curiosity) do you have for others who have different views?
4. What doubts or uncertainties do you have about your own views?
5. What other information would you need/like to have to answer some of these questions?

### *B. Engaging on all Cylinders: Empathy*

Responses to and engagement with these questions include facts, arguments, belief systems, personal experiences and acknowledgement of the relational nature of knowledge and understanding. When discussed, in facilitated and structured dialogic formats, the answers to these questions involve aspects of cognitive knowing (brain), affective knowing (heart) and even physical knowing (stomach) as people relate their personal histories and their relation to broader worldviews and opinions on particular issues. Slow and skillful management of guided conversations around these questions in different size groups on different issues often exposes the sources of people's views that come from different life experiences and sources, and can permit human questioning and curiosity to see others from where they are literally "coming from." Most of us have experienced those moments of emotional recognition—empathy—that allows us to "be" with someone's else's reality, even if we don't agree with them and don't share their life experiences.

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53. See PODZIBA, *supra* note 15, at 75-96; see also Michelle LeBaron & Nike Carstarphen, *Finding Common Ground on Abortion*, in CONSENSUS BUILDING HANDBOOK 1031 (Carrie Menkel-Meadow, commentator at 1034-1050).

54. See John Forester, *Dealing with Deep Value Differences*, in CONSENSUS BUILDING HANDBOOK 463; see also Michael Hughes et al., *Facilitating Statewide HIV/AIDS Priorities in Colorado*, in CONSENSUS BUILDING HANDBOOK 1011.

55. See Judith Innes & Sarah Connick, *San Francisco Estuary Project*, in CONSENSUS BUILDING HANDBOOK 801; see also Edward Scher, *Negotiating Superfund Cleanup at the Massachusetts Military Reservation*, in CONSENSUS BUILDING HANDBOOK 859.

56. See International Association for Public Participation, <http://www.iap2.org> (last visited Nov. 13, 2017) (which provides protocols, assistance and leadership on facilitating community, group and political meetings to manage such proceedings)

As I tell my clients and students, to “walk a mile in another’s shoes” may give you some feelings of *sympathy* (you are still using your own feet [read own values to filter your experience]), but you need to “walk a mile with the other person’s feet” (their values) in order to experience true empathy. “I feel your pain” can be heard as patronizing to one who has not lost a loved one, felt actual discrimination, been in a car crash or been deported, so more authentic experiences and words of empathic understanding must be found for listening to other’s sources of information and belief. Consider President Obama’s famous race speech in which he acknowledged his own experience of both his black and white parents and grandparents, and his own “cringing” at racist statements made by his white grandmother, but also his discomfort with some of the racist statements made by some of his black mentors and clergy.<sup>57</sup> Honest acknowledgement and self-confrontation about complex and very sensitive issues brings difficult issues to the fore and suggests what we can learn from how complicated and *different* our own experiences can be. President Obama, as a modern mixed race individual, has the human advantage of actually being able to experience “both sides now”<sup>58</sup> from inside and out. In a peace project I have worked with in Israel-Palestine, attempts to get parties on different sides of the conflict to be empathic with each other failed when Palestinians did not see what Yad Vashem (Museum of the European genocide of the Jews) had to do with their own pain in their diaspora from their displacement after the Israeli war of Independence and removal from their own homeland. Empathy is not false equivalence—it is a form of “feeling into” the “other” (from the German – *einfihlung*), which is one of the sources of the modern use of the word, derived from the Greek *pathos* (feeling, emotion). It is a state of understanding others “from their own frame of reference.”

The use of these questions to broaden out conflictual positions is not to reach “equivalence” of views or necessary agreement on ultimate truth, but rather to really “understand” where the other person or “side” is coming from in order to develop questions, agendas, and searches for new insights, information and only later, and not in all cases, some concrete actions. When used in complex disputes such personal engagement can be followed with fact-gathering, agreements to pursue joint expert or science panels<sup>59</sup> for more information, followed by intensive and structured bargaining to reach concrete, but often *contingent* agreements on particular issues or tasks.

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57. Senator Barack Obama, *A More Perfect Union* (May 18, 2008), (transcript available at <http://www.nytimes.com/2008/03/18/us/politics/18text-obama.html>).

58. JONI MITCHELL, *BOTH SIDES NOW* (Reprise 1969) (my favorite version was sung by Judy Collins on her album *WILDFLOWERS*, released in 1967) (my anthem for life and mediation!) “I’ve looked at life, love and clouds from both sides now, from win and lose, but I still really don’t know life/love/clouds at all” (curiosity and continued engagement anyone?).

59. See, for example, Gina Kolata, *Panel Can’t Link Breast Implants To Any Diseases*, N.Y. TIMES (Dec. 2, 1998), <http://www.nytimes.com/1998/12/02/us/panel-can-t-link-breast-implants-to-any-diseases.html>, for the use of the Expert Epidemiology Panel in the Silicon Breast Implant Litigation appointed by federal Judge Sam Pointer to resolve the science in the mass tort class action involving breast implants and auto-immune disease.

Different structures and processes which use these techniques have been used in empathy training in divorce mediation and collaborative law,<sup>60</sup> personal relations,<sup>61</sup> defusing and managing community disputes,<sup>62</sup> as well as political disputes within and between nations<sup>63</sup> (often used intuitively by the best of international peace mediators).<sup>64</sup> The challenge is to permit enough time for the sharing and “processing” of roots and grounds (sources) of people’s ideas and commitments, with appropriate acknowledgement and respect,<sup>65</sup> and then to “move forward” (not “move on,” which is dismissive), with this knowledge and emotional engagement, to more concrete attempts, where possible, to work out, bargain about and trade (negotiate and sometimes compromise productively) particular elements to create some concrete agreement or action. As one of our most gifted practitioners and theorists, John Paul Lederach, has suggested, to “transform” a conflict one has to want to create a better state of the world, from sitting in the middle of the conflict and “bad” state. In retrospect, many have credited sage leaders as those who were able to “imagine” (with empathy) how their counterparts were thinking, from their (the counterpart’s) value systems, to strategize, negotiate, and act. See reports of John F. Kennedy and Robert Kennedy in the Cuban Missile Crisis<sup>66</sup> and Jimmy Carter at Camp David.<sup>67</sup> These leaders knew what would “work,” with their negotiating partners—threats, but also more palatable intermediate steps, concessions, and agreements (e.g. removal of US missiles from Turkey and “neutralized return” of the Sinai to Egypt)—because they imagined how the “other” leader would have to respond to their own constituent’s needs and interests (and emotions!). How individuals, groups, organizations, parties, and nations can move themselves from an undesired state of conflict and pain to a more desirable (and achievable) state (even if temporary, or contingent) often requires a skillful manager of process, and transition from an individualized process of emotional sharing to a more functional and practical problem-solving (trading, bargaining) and instrumental process of guided negotiation.

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60. See generally GARY FRIEDMAN & JACK HIMMELSTEIN, *CHALLENGING CONFLICT: MEDIATION THROUGH UNDERSTANDING* (2008).

61. See generally MARSHALL B. ROSENBERG, *NON-VIOLENT COMMUNICATION* (3d ed. 2015); see also SAM HORN, *TONGUE FU: HOW TO DEFLECT, DISARM, AND DEFUSE ANY VERBAL CONFLICT* (1996).

62. See generally JAY ROTHMAN, *RESOLVING IDENTITY BASED CONFLICTS IN NATIONS, ORGANIZATIONS AND COMMUNITIES* (1997); see also Nancy H Rogers, *When Conflicts Polarize Communities: Designing Localized Offices That Intervene Collaboratively*, OHIO ST. J. OF DISP. RESOL. 2015; Lela P. Love, *Glen Cove: Mediation Achieves What Litigation Cannot*, in *STORIES MEDIATORS TELL* 117 (Eric R. Galton & Lela Love, eds., 2012).

63. JOHN PAUL LEDERACH, *BUILDING PEACE: SUSTAINABLE RECONCILIATION IN DIVIDED SOCIETIES* (1997); JOHN PAUL LEDERACH, *THE LITTLE BOOK OF CONFLICT TRANSFORMATION* (2003).

64. See, e.g., GEORGE J. MITCHELL, *MAKING PEACE* (1999).

65. See Carrie Menkel-Meadow, *Remembrance of Things Past? The Relationship of Past to Future in Pursuing Justice in Mediation*, 5 CARDOZO J. OF CONFLICT RESOL. 97 (2004).

66. See ROBERT KENNEDY, *THIRTEEN DAYS: A MEMOIR OF THE CUBAN MISSILE CRISIS* (1969); see also DEEPAK MALHOTRA, *NEGOTIATING THE IMPOSSIBLE: HOW TO BREAK DEADLOCKS AND RESOLVE UGLY CONFLICTS (WITHOUT MONEY OR MUSCLE)* (2016) (see Ch. 13, “The Power of Empathy” reporting JFK’s empathic responses to Nikita Khrushchev’s political dilemmas).

67. See LAWRENCE WRIGHT, *THIRTEEN DAYS IN SEPTEMBER: THE DRAMATIC STORY OF THE STRUGGLE FOR PEACE* (2014) (recounting the peace negotiations at Camp David 1979-80); see also JIMMY CARTER, *KEEPING FAITH: MEMOIRS OF A PRESIDENT* (1995).



### C. Contact Theory and Perspective Taking

Research in the behavioral sciences and some evaluation of work done by public policy mediators suggest some fruitful avenues to pursue and also some pitfalls of which to be aware. In sociology and social psychology, “contact theory” has long posited that increased “positive” contact opportunities between distrusting or conflictual groups can improve inter-group attitudes and behavior.<sup>68</sup> Researchers in post-conflict, reconciliation-seeking societies (Colombia, South Africa, Israel-Palestine, Cambodia, Argentina, Chile,<sup>69</sup> and others) are now producing mixed evaluations of how such structured contacts—truth and reconciliation events, and various forms of narrative “perspective taking” events—are working.<sup>70</sup> Such processes entail psychological and social processes (heart, stomach, and brain) as painful experiences are recounted and “repeated” for understanding (active listening and other techniques) which are intended to “reframe” cognitive understandings of past events, “heal” emotional harm, and “reorient” parties to each other, sometimes with the hope of creating “new” narratives to accompany, if not supplant, older narratives of conflict and distrust. At a political level, such “encounters” have more instrumental goals—to form new group, national and even individual identities, and to create new policies (e.g. the South African constitutional process),<sup>71</sup> legislation and action plans for projects at various levels.

In political, post-conflict restorative work, exercises in “perspective taking,” narrative and dialogue groups, and reframing in social and political terms (formal role-reversal in mediation or truth and reconciliation settings) is sometimes effective as an emotional exercise before the hard work of bargaining or co-existence can occur, but this too can be dangerous and make things worse, if not well-managed. In some highly conflictual settings, power sharing (from compromise processes) may be more effective (as in Northern Ireland) or formal division (think Cyprus or Virginia and West Virginia before the Civil War). The research arm of the conflict resolution and peace studies field is now busily studying, in many venues, how different contact protocols and peace interventions are working around the world.<sup>72</sup> We should have many opportunities for case studies here in the United States.

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68. See GORDON W. ALLPORT, *THE NATURE OF PREJUDICE* (1979); see also T.F. Pettigrew & L.R. Tropp, *A meta-analytic test of intergroup contact theory*, 90(J. OF PERSONALITY AND SOC. PSYCHOL. 751 (2006).

69. Carrie Menkel-Meadow, *Process Pluralism in Transitional/Restorative Justice: Lessons from Dispute Resolution for Cultural Variations in Goals beyond Rule of Law and Democracy Development (Argentina and Chile)*, 3 INT’L J. OF CONFLICT ENGAGEMENT AND RESOL. 3(2015).

70. See, e.g., Juan E. Ugarriza & Enzo Nussio, *The Effect of Perspective-Giving on Postconflict Reconciliation, An Experimental Approach*, 38 POL. PSYCHOL. 3 (2017); Daniel Bar-Tal & Gemma H. Ben-nink, *The Nature of Reconciliation as an Outcome and as a Process*, in FROM CONFLICT RESOLUTION TO RECONCILIATION 11 (Yaacov Bar-Siman-Tov ed., 2004).

71. See, e.g., James Gibson, *Does Truth Lead to Reconciliation? Testing the Causal Assumptions of the South African Truth and Reconciliation Process*, 48 AM. J. OF POL. SCI. 201 (2004); see also THE POST-APARTHEID CONSTITUTIONS: PERSPECTIVES ON SOUTH AFRICA’S BASIC LAW (Penelope Andrews & Stephen Ellmann eds., 2001).

72. See, e.g., CRAIG ZELIZER & ROBERT A. RUBINSTEIN, *BUILDING PEACE: PRACTICAL REFLECTIONS FROM THE FIELD* (2009); see also HERDING CATS: MULTIPARTY MEDIATION IN A COMPLEX WORLD (Chester A. Crocker, Fen Osler Hampson & Pamela Aall eds., 1999).

*D. Moral and Political Reframing*

Recent work in the field of moral psychology suggests that a sort of “moral reframing” of arguments (a mixture of cognitive and affective appeals) on particular issues to appeal to the values of “the other” (e.g. using conservative versions of arguments for health care, immigration, tax reform), rather than to more arguments of one’s own (more facts and information from a “liberal” perspective) can be more effective for acceptance of particular policy ideas than simply recasting arguments with more information or data from one’s own side.<sup>73</sup> This form of “reframing” is both “effective,” but also potentially objectionable to those who feel it is a “compromise” of one’s own values. For me, this is both a question of desired instrumentalism and expediency, as well as testing our moral limits.<sup>74</sup>

*E. Bargaining and Compromise*

Some “compromise” is absolutely essential (and moral, in my view) to get things done. In the words of the United States Magistrate Judge (who first inspired my work) in a federal lawsuit settlement conference, “to sue (fight) is human, to settle divine.”<sup>75</sup> For those who work with the Thomas-Kilman MODE instrument, the choice for one conflict strategy (in some settings) to “I will let him/her have some of his/her views, if s/he will let me have some of mine”<sup>76</sup> expresses how political agreements can be made to accomplish legislation and other arrangements, without full agreement on underlying values. Most tax legislation reflects such “compromise,” as has immigration and health care regulation. In ordinary contract formation, as well as treaty negotiation, studied ambiguity and a failure to fully agree on the actual meaning of all terms and goals and purposes of such documents, reflects the fact that sometimes having an agreement is better than none at all. This often puts off to a later time particular conflicts about interpretations, by avoiding detailed specification of ultimate purposive and value-based meaning. This is the middle column of my chart above—between principles (reason) and values (heart) we use bargaining and trades (and our “guts”) to get things done—stop the violence, provide disaster aid, raise money for the common good, and pay for our public services, all while still arguing about “optimal” health, education, and foreign policy.

As any negotiation teacher and practitioner well knows, the more issues the merrier. The fact that we have different values or different desiderata is a good thing for trading and bargaining. Yes, mediators ask us to look for “common ground,” but actually I am most often interested in non-competing “complementary” goals (I like the icing or orange peel, you like the cake or juice). Where, even with different reasons or values, can we get something done (shared, expandable, transformable resources, items and yes, even views). Della doesn’t have to come to a wedding she disapproves of, but if she makes a cake for her lesbian “daughter” and partner she may come to appreciate their relationship. And you can be sure if

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73. Matthew Feinberg & Robb Willer, *From Gulf to Bridge: When Do Moral Arguments Facilitate Political Influence?*, PERSONALITY & SOC. PSYCHOLOGY BULL. 1665 (2015)

74. See my work on “compromise”, Menkel-Meadow, *supra* note 49.

75. See Menkel-Meadow, *supra* note 26, at 754.

76. See Kenneth Thomas, *Conflict and Conflict Management*, in HANDBOOK OF INDUSTRIAL AND ORGANIZATIONAL PSYCHOLOGY (Marvin D. Dunnette ed., 1976).

the couple “expands” their family to children, Della is very likely to want a relationship with her grandchild. I have seen it happen—with gay, inter-racial, inter-class, and inter-religious couples and families. My German refugee father, who served in the United States Army in World War II in Hawaii, strongly believed the answer to all racism and intolerance was intermarriage. The US Census now has to deal with just how much of this is happening.<sup>77</sup> Observing how all the “modern families” are negotiating their differences (in real life, as well as on TV and in the movies—see *Loving*<sup>78</sup> and *This Is Us*<sup>79</sup>), we can see how daily life is negotiated across all spheres, directly and often with a lot of legal and emotional conflict.

#### F. Expert Facilitation: A Democratic/Legitimacy Issue?

The design and management of such processes raise an important and ironic question for conflict resolution and deliberative democracy—the *need for expertise and facilitation*, in what many democratic theorists suggest may be a distortion in purely democratic processes (e.g., the legitimacy of unelected leaders, leaders at all). Our field has considered these issues before and recent critiques of leaderless political movements (think Occupy Wall Street<sup>80</sup>) suggest that many have come to appreciate the value of our profession—groups and individuals in conflict need help to sort out their differences politically, socially, and emotionally. Our own Constitutional formation processes benefitted greatly from the process expertise of George Washington (leader), James Madison (recorder and agenda manager), and Benjamin Franklin (affective political facilitator and observer).<sup>81</sup> And the contact theory, discussed above, which reports on conditions under which positive reinforcement and reconciliation may occur, documents that such encounters are more successful when conducted in the presence of an external and skilled outsider.<sup>82</sup> So, we should explore the technical aspects of our craft and also delve deeply into the legitimacy of “consent” and other justifications for such work.

Using the tools of multiple “consciousnesses” reviewed here (the rational-principled, mediated and negotiated bargaining, and appreciation of affective and moral commitments), professional facilitators and mediators can probe substantive facts (and science and data!) like experts or investigatory bodies,<sup>83</sup> counsel and guide bargaining and trades based on needs and interests, and provide structured engagement over difficult emotional, moral, religious and value based commitments (as Howard Bellman says, “having an ear”).<sup>84</sup> Modern forms of facilitated dialogue (unlike debates or legislative votes or executive decrees) do allow all of these levels to be explored in the same room. If there is negotiated agreement on procedural

77. See generally Naomi Mezey, *Erasure and Recognition: The Census, Race and the National Imagination*, 97 NW. U. L. REV. 1701 (2003).

78. *LOVING* (Raindog Films 2016).

79. *This is Us* (NBC Television Broadcast 2016).

80. Nathan Heller, *Out of Action: Do Protests Work?*, THE NEW YORKER 70, 77 (Aug. 21, 2017).

81. For a masterful description of our Constitutional framing process as an exercise of facilitated negotiation, see Dana Lansky, *Proceeding to a Constitution: A Multi-Party Negotiation Analysis of the Constitutional Convention of 1787*, 5 HARVARD NEGOT. J. 279 (2000); for a fuller historical elaboration of the process rules, deliberations and complex interest group negotiations, see MICHAEL J. KLARMAN, *FRAMER'S COUP: THE MAKING OF THE UNITED STATES CONSTITUTION* (2016).

82. Ugarriza & Nussio, *supra* note 70, at 5.

83. See PODZIBA, *supra* note 15, at 178-79.

84. *Id.* at 180.

ground rules and decision rules, such groups have been more likely to transcend differences to accomplish effective decision making, in both big matters (abortion, AIDS policy, animal rights)<sup>85</sup> and more local (land-use, zoning, community relations).<sup>86</sup> Voting rules, of course, matter enormously and we should all be experts in the effects of different voting choices.<sup>87</sup> Many (non-legislative) situations don't even require formal votes, as some settings may be better serialized for different meetings for learning and engagement, before deciding anything. Acknowledging that there are great variations within groups (Conservative Libertarians [think William Buckley] sometimes have more in common with some Liberals—free speech and press, government out of social life) allows incremental or smaller agreements to occur or “cross alliances” on particular issues. Consider Republican Conservative John McCain's role in anti-torture legislation, supported by Democrats, because of his own personal experience as a war prisoner. Legislation, deals, treaties, contracts and relationships are all made when we each get something of what we want, in return for the others getting some of what they want. Sometimes agreement on *why* we want those things may not even have to be resolved. Consider, for the moment, the few big issues we could possibly make some progress on now, even given the totally polarized nation we inhabit—a public-private partnership on infrastructural building and repair; immigration policy (at this writing, some renewal of DACA); potential amendments to the Affordable Care Act; tax reform; emergency disaster relief...<sup>88</sup>

Being heard at all these levels, being gently, but acutely, questioned about where one's facts and assumptions come from, often allows new ideas to emerge in “safe zones” for trying out of new contingencies and solutions, and, as mediators say, “reality testing” of ideas that may be counter to the old ways of doing things or simply different from the assumptions or starting points of a particular dispute.

### *G. Can We Get Beyond Reactive Devaluation?*

More difficult, of course, is dealing with groups (like current “reds” or “blues”) who assume so much value difference or conflict (e.g., identity conflict) that they cannot credit anything offered by “the other side,” known to us as “reactive devaluation” bias.<sup>89</sup> When we automatically discount or don't even hear others, any engagement may be impossible. Enter the mediator to reframe proposals, ideas and arguments in more “neutral” terms so the parties can then evaluate without attribution to a particular “enemy”. Other tools available for trust building—or as one of

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85. JEFFREY CRUIKSHANK & LAWRENCE SUSSKIND, *BREAKING THE IMPASSE: CONSENSUAL APPROACHES TO RESOLVING PUBLIC DISPUTES* (1987).

86. See, e.g., Susskind, et. Al., *CONSENSUS BUILDING HANDBOOK*, *supra* note 15, Cases 1, 4, 10, 11, 12.

87. Carrie Menkel-Meadow et al., *DISPUTE RESOLUTION: BEYOND THE ADVERSARIAL MODEL* 581-627 (2<sup>nd</sup> ed. 2010); LAWRENCE SUSSKIND & JEFFREY CRUIKSHANK, *BREAKING ROBERT'S RULES: THE NEW WAY TO RUN YOUR MEETING, BUILD CONSENSUS AND GET RESULTS* (2006).

88. At this writing President Trump has agreed with Democrats to raise the debt ceiling, in light of the vast amount of federal aid that will be needed to deal with two enormous Hurricanes (Harvey and Irma) affecting two (Republican) states—Texas and Florida. See Peter Baker et al., *Trump Bypasses Republicans to Strike Deal on Debt Limit and Harvey Aid*, N.Y. TIMES (Sept. 6, 2017), <https://www.nytimes.com/2017/09/06/us/politics/house-vote-harvey-aid-debt-ceiling.html>.

89. Lee Ross, *Reactive Devaluation in Negotiation and Conflict Resolution*, in *BARRIERS TO CONFLICT RESOLUTION* 26 (Kenneth J. Arrow et al. eds., (1995).

my mentors, gestalt therapist Janet Lederman, used to say, “get the focus off the focus”—involve disputing parties in a joint activity or task that has nothing to do with their conflicts (think of the cross-group alliances after disasters—in hospitals, playing with children, charitable arts, and sports events, etc.). All of the intellectual and social energy that has gone into restoring some of the “lost” social capital observed by Robert Putnam and his colleagues in *Bowling Alone*,<sup>90</sup> by encouraging cross-class, interfaith, citizen dialogue, and other social groupings is an effort to “return” to a society of great complexity and diversity with more locations of inter-group interaction. Recent Pew surveys and other data<sup>91</sup> seem to suggest that we are in fact living further and further apart from those who are different from us, so that it is perhaps only the workplace, and for some of us still, public education, where we can truly encounter each other to try out these many suggestions for better engagement. But I continue to worry.

## V. A FEW CONCERNS: WHEN AND WHY WE SOMETIMES JUST CAN'T GET ALONG

I have spent a good part of my professional life as an educator and mediator, in both roles acting from a place where I believe that people can learn new things, analyze old things, and come to new understandings of how to make the world a better place. I have facilitated hundreds, probably thousands, of classes, lawsuits, disputes, and meetings in which people of different values, information and views have come together in some common enterprise (by definition they have entered the same room, even if the room is only virtual these days) to listen to each other and often, to do something—settle a lawsuit, improve a relationship, reconfigure an organization or make a strategic plan. Never since I have been on this earth have I been so discouraged about our current polity. (I was born in the same year and right next to the United Nations, and grew up with the children of its diplomats; my parents were refugees from Hitler's Germany, so we were optimistic cosmopolitans, hoping that the world could be made a better place.) Unfortunately, Donald Trump grew up very near me in New York and was already a bully when he was a very young man.<sup>92</sup> For the first time in recent history, we have a president with no experience in governmental discourse, deliberation, purpose, and management. Even Republican presidents who wanted less government did incredible things (think Nixon founding EPA and opening relations with China). I watched the “take no prisoners” Gingrich Revolution destroy cordial relations in the US Congress and Washington D.C. generally, even as skilled facilitators tried to create a “harmony” retreat (in Hershey, Pennsylvania) for members of Congress, but things have never been the “same” since.

All that I (and many others) have described here—using empathy, personal stories and narratives, data gathering, curiosity sharing, reality testing—all of these things require good will and trust and a willingness to be in the same room! As

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90. ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* (1st ed. 2001).

91. See Charles Babington, *A Polarized America Lives as It Votes*, TRUST MAG., (Sept. 1, 2014), <http://magazine.pwetrusts.org/en/archive/summer-2014/a-polarized-america-lives-as-it-votes>.

92. See Donald J. Trump & Tony Schwartz, *TRUMP: THE ART OF THE DEAL* (1987); see also Jane Mayer, *Donald Trump's Ghostwriter Tells All*, THE NEW YORKER (July 25, 2016), <http://www.newyorker.com/magazine/2016/07/25/donald-trumps-ghostwriter-tells-all>.

others have explored when we “should not bargain with the devil,”<sup>93</sup> I now wonder whether we can truly talk and hear each other across such great value divides. When a President says there were some “very good people” among Neo-Nazis and race-baiters and haters, I wonder where our national good will has gone. I have been an “unbiased” mediator and facilitator, as well as a protest marcher and political activist, an educator and a governmental consultant, always looking for common “human” ground, across differences, and enjoying both human commonalities and shared destinies, and also reveling in our human differences while learning from those who are different from me. I do experiments in my head to try to imagine how Donald Trump and some of his supporters would do in a “healing circle,” negotiated rule-making, facilitated strategic planning exercise for the West Wing, family mediation, or simply a “brainstorming” Cabinet meeting, and I can’t even conjure up a good fantasy movie. As Charles Dickens famously said, “it was the worst of times” (I am leaving out “the best of times”<sup>94</sup>), for us, at least at the national policy implementation level.

But, I remain somewhat optimistic, that in the interstices of federal, and many state, agencies and offices, and in private work settings, universities and organizations, people who care about each other will use the techniques of conflict resolution and sensible policy management to continue to set the table, sow the land, clean the machinery, and practice their scales to keep ourselves ready, not rusty, to work wherever we can—to keep doing facilitation, empathy trainings, personal narrative workshops, consensus building exercises, mediated negotiation, (and for me, teaching and working with my students on our annual Global Justice Summit) in order to innovate new policy solutions to seemingly intractable problems, provided the weather and geo-politics allow it.

Inside of cursing the darkness, I will light a candle and ask a question of curiosity. I hope you will too.

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93. ROBERT MNOOKIN, *BARGAINING WITH THE DEVIL: WHEN TO NEGOTIATE, WHEN TO FIGHT* (2010); AVISHAI MARGALIT, *ON COMPROMISE AND ROTTEN COMPROMISES* (2010).

94. CHARLES DICKENS, *A TALE OF TWO CITIES* (1859).

