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Introduction to Symposium on “ADR’s Place in Navigating a Polarized Era”

NANCY A. WELSH*

Ours is not a nation built for harmony. We have three branches in our federal government, each equipped with tools to check (and balance) the other two—and the legislative branch is itself divided into two potentially competing parts. We have a system of federalism that ensures a significant degree of sovereignty for all 50 states’ governors, legislatures and courts. We have a population composed of many ethnicities, races, religions, and genders. I could go on, but like Walt Whitman, we contradict ourselves, we are large, we contain multitudes.¹

Yes, our nation is built for conflict, for friction. That can be painful, excruciatingly so, as amply demonstrated by recent events. And it can be good. In *Democracy: A Case Study*, David Moss presents nineteen case studies, each focused on a key decision point in the history of American democracy.² Noting that our system of government has always been a “contact sport” and indeed that conflict is “profoundly American,”³ Moss explores what has made conflict highly constructive at some points and severely destructive at other times.⁴ He concludes that what matters most fundamentally is “whether our common faith in the democracy itself is strong enough to hold us together, to make one out of many, however intense our differences and disagreements.”⁵

In other words, when our nation has faced crises—and there have been many more than those recounted in Moss’ book—our conflict-ridden system has fostered productive debate and tension and yielded good outcomes, often better than those that would have resulted from an autocracy or a one-party system, *as long as the key actors at some point decided that they cared more about preserving our nation and system of government than winning on a particular issue.*

And so conflict, within a nation—or a family or a workplace or an educational institution—can be good. It can even be *more* than good. Conflict can signal newfound agency, and it can be the catalyst for dialogue,

* Professor of Law and Director, Aggie Dispute Resolution Program, Texas A&M University School of Law.

¹ WALT WHITMAN, SONG OF MYSELF, 51 (“Do I contradict myself?/Very well then I contradict myself,/I am large, I contain multitudes.”).

² DAVID A. MOSS, DEMOCRACY: A CASE STUDY 3 (Harvard University Press, 2017).

³ *Id.*

⁴ *Id.*

⁵ *Id.* at 13.

customized and creative solutions, and ultimately progress. Many of us begin our classes on ADR, on negotiation, and on mediation with just this sentiment.

And yet, we seem to be caught in the midst of an extraordinarily polarized time, and the conflict surrounding us every day—on the radio, on television, on social media, in the newspapers—can be so ugly, so searing, so wearying. Many studies affirm our current state of polarization, and further affirm that it is worse than it was before. The Pew Research Center’s research indicates that only one third of Americans today hold a mix of conservative and liberal views; in the past, nearly half had mixed political values.⁶ Thus, our political center is hollowing out as more Americans gravitate right and left, and this ideological consistency is associated with greater partisanship. Ezra Klein, in *Why We’re Polarized*, has highlighted the dangers of stacked, mutually-reinforcing identities: “[t]he crisis emerges when partisan identities fall into alignment with other social identities, stoking our intolerance of each other to levels that are unsupported by our degrees of political disagreement.”⁷ In other empirical signs of our polarized times, Pew has found that a majority of Republicans and Democrats agree that they *can’t agree* on basic facts;⁸ that majorities of both Democrats and Republicans say they belong to their party in large part due to the *other* party’s harmful policies;⁹ that Democrats’ and Republicans’ top priorities for the U.S. are now further apart than was true in past decades;¹⁰ that while Democrats (and independents who lean Democratic)

⁶ Jocelyn Kiley, *In Polarized Era, Fewer Americans Hold a Mix of Conservative and Liberal Views*, PEW RESEARCH CENTER (2017), <https://www.pewresearch.org/fact-tank/2017/10/23/in-polarized-era-fewer-americans-hold-a-mix-of-conservative-and-liberal-views/>; *Political Polarization, 1994-2017*, PEW RESEARCH CENTER (2017), <https://www.people-press.org/interactives/political-polarization-1994-2017/>.

⁷ EZRA KLEIN, *WHY WE’RE POLARIZED* 25 (2020) (quoting Lilliana Mason, “*I Disrespectfully Agree*”: *The Differential Effects of Partisan Sorting on Social and Issue Polarization*, 59 AM. J. OF POL. SCI. 128 (2015); LILLIANA MASON, *A NEW IDENTITY POLITICS: HOW SOCIO-PARTISAN SORTING AFFECTS AFFECTIVE AND IDEOLOGICAL POLARIZATION IN AMERICAN POLITICS* (American Political Science Association conference paper, 2015); LILLIANA MASON, *UNCIVIL AGREEMENT: HOW POLITICS BECAME OUR IDENTITY* (University of Chicago Press, 2018).

⁸ John Laloggia, *Republicans and Democrats Agree: They Can’t Agree on Basic Facts*, PEW RESEARCH CENTER (2018), <https://www.pewresearch.org/fact-tank/2018/08/23/republicans-and-democrats-agree-they-cant-agree-on-basic-facts/>.

⁹ Hannah Fingerhut, *Why Do People Belong to a Party? Negative Views of the Opposing Party Are a Major Factor*, PEW RESEARCH CENTER (2018), <https://www.pewresearch.org/fact-tank/2018/03/29/why-do-people-belong-to-a-party-negative-views-of-the-opposing-party-are-a-major-factor/>.

¹⁰ Bradley Jones, *Republicans and Democrats Have Grown Further Apart on What the Nation’s Top Priorities Should Be*, PEW RESEARCH CENTER (2019),

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view the most heavily-relied-on news media platforms as credible, Republicans (and independents who lean Republican) do not, and instead view many of those sources as untrustworthy;¹¹ and that more Americans—particularly Democrats—are likely to say that they find talking about politics with people they disagree with “stressful and frustrating.”¹² Pew has even reported that many single people interested in relationships, especially people who are Democrats, do not even want to *date* someone who voted in 2016 for a presidential candidate in the opposing party.¹³

But if we all care enough and work hard enough and can find (or design) an appropriate forum, we can resolve these conflicts of ours—or at least manage them, right? That is part of the creed of the Dispute Resolution Field. It also sounds relatively consistent with David Moss’ account of American history.

Some say, though, that we are caught in the midst of larger structural forces that will make it extraordinarily difficult for any of us, as individual actors, to move toward the center. Richard Pildes identifies the passage of the Voting Rights Act as the point in time when the Democratic and Republican parties began “the process of ideologically realigning. . . and purifying. . . so that both parties are far more ideologically coherent, and differentiated from each other, than at any time in many generations.”¹⁴ Indeed, he urges that from 1937 to 1965, the U.S. really had a *four*-party system, composed of conservative Southern Democrats, moderate to liberal Democrats from other parts of the country, liberal and moderate Republicans from the Northeast and West Coast, and traditional, old-line conservative Republicans from the Midwest and rural areas. Because none of these four parties had a sufficient majority to legislate on their own, they were *required* to engage in bi-partisan compromise and bargaining. Pildes adds:

<https://www.pewresearch.org/fact-tank/2019/02/05/republicans-and-democrats-have-grown-further-apart-on-what-the-nations-top-priorities-should-be/>.

¹¹ Ark Jurkowitz, Amy Mitchell, Elisa Shearer & Mason Walker, *Deep Partisan Divisions Exist in the News Sources Americans Trust, Distrust, and Rely On*, PEW RESEARCH CENTER (2020) <https://www.journalism.org/2020/01/24/u-s-media-polarization-and-the-2020-election-a-nation-divided/>.

¹² *More Now Say It’s ‘Stressful’ to Discuss Politics with People They Disagree With*, PEW RESEARCH CENTER (2018) <https://www.people-press.org/2018/11/05/more-now-say-its-stressful-to-discuss-politics-with-people-they-disagree-with/>.

¹³ Anna Brown, *Most Democrats Who Are Looking for a Relationship Would Not Consider Dating a Trump Voter*, PEW RESEARCH CENTER (2020), <https://www.pewresearch.org/fact-tank/2020/04/24/most-democrats-who-are-looking-for-a-relationship-would-not-consider-dating-a-trump-voter/>.

¹⁴ Richard H. Pildes, *Why the Center Does Not Hold: Hyperpolarized Democracy in America*, 99 CALIF. L. REV. 273, 332 (2011).

This is the era being looked back upon nostalgically by those who exalt the prior generation's political leaders as those who were able to forge "compromises" and transcend party divisions. Such figures existed not as a matter of individual personality in isolation, but because the structural environment of parties and politics then meant that compromises existed to be had--and that compromise was recognized by all to be essential to legislate.¹⁵

Pildes could be talking to us, members of the dispute resolution community. We regularly proselytize regarding the value of "ADR thinking and skills"—encouraging dialogue and mutual consideration, asking open-ended questions, using reflective listening, trying to be relatively open-minded (and even neutral), identifying underlying interests, using those interests to develop mutually-beneficial solutions, etc. We have now trained many people in mediation and conflict resolution skills. A multitude of organizations have arisen to encourage or model deliberative democracy and respectful discourse. So why haven't we had more effect? Perhaps as Pildes suggests, it is just not realistic for us to expect people to behave differently when the surrounding structure, the balance of power, actively works against such discourse. Perhaps as Moss suggests, a state of conflict is "profoundly American."

And even within the dispute resolution community, there is discord. I am not writing here about disagreements over the meaning of "mediation" or whether med-arb is an ethical exercise. I am talking about disagreement over matters as basic as whether we should be willing to listen to someone we disagree with. During the divisive hearings over the Supreme Court nomination of Brett Kavanaugh, dispute resolution educators exchanged listserv messages regarding the potential value of using the hearings for class discussion and exercises, to help our students learn how to be curious about each other's views on very difficult topics and truly listen and learn from each other, without any intent or need to arrive at agreement. Some educators strongly supported such use of the Kavanaugh hearings. Others expressed equally strong fears of triggering students who had suffered some form of sexual abuse. Still other educators objected to any exercise that would encourage and enable the expression and tolerance of hateful views, thus indirectly affirming them despite their basic immorality.

¹⁵ *Id.* at 289.

INTRODUCTION

All of the evidence of our nation's polarization, coupled with apparent polarization even within the dispute resolution community, inspired plans for the March 20, 2020 annual dispute resolution symposium to be hosted by Texas A&M University Law School's Aggie Dispute Resolution Program. We titled the symposium "ADR's Place in Navigating a Polarized Era," and debated whether the title should end with a question mark. We wanted our symposium to consider when the use of "ADR thinking and skills" are and are not appropriate (or sufficient) in dealing with current, divisive issues. We also wanted to provide faculty (teaching ADR courses and non-ADR courses) with approaches and tools for modeling and teaching students whether, when and how to use ADR skills in responding to polarized situations.

We eagerly awaited the arrival of March 20, 2020 to discuss these issues. And then COVID-19 struck. We postponed the in-person symposium, but most of our presenters and moderators were able to rearrange their plans and meet by Zoom on March 20, 2020 to make their planned presentations and offer feedback on each other's draft articles. (Many thanks to all of the presenters and moderators for their willingness to participate in that day-long video meeting. Zoom has now become a major part of all our lives, but on March 20, 2020, we were in a steep learning curve regarding sharing screens, co-hosting, muting, and sustaining our internet connection.) Most of our presenters' articles are in this issue of the *Ohio State Journal on Dispute Resolution*. A companion article by Jennifer Reynolds has been published in the *Texas A&M Law Review*.

So let's return to the questions posed by the symposium and the responses contained in this symposium issue. When is the use of "ADR thinking and skills" appropriate (or sufficient) in dealing with current, divisive issues? What approaches and tools are available to model and teach students whether, when and how to use ADR skills in responding to polarized situations?

Many of the articles in this issue suggest that "ADR thinking and skills" are appropriate in dealing with current, divisive issues—but they are not sufficient in and of themselves. Noam Ebner draws our attention to Bernie Mayer's prescription that we should move from thinking in terms of "neutrals resolving conflicts" to "improv[ing] conflict engagement through encompassing a broader range of conflict roles, with system and ally roles complementing neutral roles."¹⁶ Harkening back to the Legal Process school, Deborah Eisenberg very provocatively observes that we should no longer be

¹⁶ See Noam Ebner, *Teaching the World: Educational Pivots for the Second Half of the ADR Century*, 35 OHIO ST. J. ON DISP. RESOL. 825, 834 (2020) (citing BERNARD MAYER, *BEYOND NEUTRALITY: CONFRONTING THE CRISIS IN CONFLICT RESOLUTION* (2004)).

thinking in terms of “ADR” (a term “so popular in name, fractured in practice, and jumbled in theory that it risks a metaphorical ‘genericide’”¹⁷) but instead “dispute process theory and strategy.”¹⁸ Nancy Rogers, Bill Froelich and Josh Stulberg emphasize the importance of translating dispute resolution concepts to make them useful and accessible for the deliberation and decision-making required of public officials and other local leaders. Besides providing very concrete and helpful advice to enable other dispute resolution programs to enter this arena, they make it clear that dispute resolution proponents need to be ready to work with local leaders on their—not our—terms.¹⁹ Sharon Press focuses on her experience with the collaboration of dispute resolution professionals and leaders in one community—Falcon Heights, Minnesota—following the shooting of Philando Castile. Press and her colleagues had planned to work with a couple of local communities to help them develop the relationships and conflict handling capacity that would enhance their resilience and ability to respond appropriately to future crises. But once this real crisis erupted in Falcon Heights, Press and her colleagues convened and conducted a series of Community Conversations to inform and support the work of the city’s Inclusion and Policing Task Force. Her article describes how the process unfolded and what they learned from it.²⁰ It is notable that none of these authors support limiting ourselves to *resolving* conflicts. Instead, we are encouraged to engage, respond, and learn resilience in handling conflict.

Jonathan Cohen, Jennifer Reynolds, Robert Baruch Bush, and Peter Miller, meanwhile, take on particular pillars of dispute resolution practice—empathy, understanding, listening, self-determination—to examine their relevance and usefulness today. Cohen urges that empathy, often a key to conflict resolution, is likely to be particularly difficult in situations involving “negative identity”—i.e., defining oneself through contrast to another. From the Pew research described earlier, we know that negative identity plays a significant part in our current polarized era. Cohen notes that when a person has defined himself as definitely “not you,” then trying to understand how the world looks from your perspective is likely to be difficult, if not destabilizing

¹⁷ Deborah Thompson Eisenberg, *Beyond Settlement: Reconceptualizing ADR as “Conflict Process Strategy”*, 35 OHIO ST. J. ON DISP. RESOL. 705, 707 (2020).

¹⁸ *Id.*

¹⁹ William Froelich, Nancy H. Rogers & Joseph B. Stulberg, *Sharing Dispute Resolution Practices for Leading a Divided Community or Campus: A Crucial Conversation about Crucial Conversations*, 35 OHIO ST. J. ON DISP. RESOL. 781 (2020).

²⁰ Sharon Press, *Using Dispute Resolution Skills to Heal a Community*, 35 OHIO ST. J. ON DISP. RESOL. 643 (2020).

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to that person's very sense of self.²¹ Cohen evokes the wisdom of the Biblical tale of Jacob and Esau to illustrate the rewards of wrestling down one's anti-self. He also offers several means of diminishing the power or salience of negative identity, including using a neutral to ask questions designed to enable each person to recognize their own and others' multiple identities.²² Jennifer Reynolds²³ introduces the "listening dilemma" which like the well-known "negotiator's dilemma," requires a person to make a difficult choice—i.e., whether to listen when listening has the potential to be beneficially transformative and terribly destructive. Using the emotional abortion debate as an illustrative public controversy, Reynolds urges us to recognize that neither a current controversy like this one nor the act of listening is monolithic. Very different sorts of conversations and interactions, involving very different people, contexts and relationships, occur within the abortion debate. Listening will be appropriate in some of these interactions and not in others. And even when listening is appropriate, how we listen and what we listen for should depend upon our intentional strategic goals. Robert Baruch Bush and Peter Miller focus on transformative mediation principles to argue that enabling human agency—a concept very similar to self-determination and evocative of voice—should be understood as mediation's primary purpose, an end in and of itself. Bush and Miller certainly express sympathy for many mediators' desire to promote understanding, empathy and connection to overcome conflicts large and small, but they suggest that our current degree of polarization can be traced to elites' and experts' over-reach, with resulting deficits in many people's ability to truly exercise agency. Dispute resolution neutrals should focus on remedying this deficit by offering forums for party empowerment, with recognition and settlement relegated to the status of desirable by-products.

Many of the symposium articles address the approaches and tools available to us in the classroom as we model and teach law and other students whether, when and how to use ADR skills—like asking the sorts of questions recommended by Cohen—in responding to polarized situations. Using her own experience in teaching a Ph.D. core seminar, Jill DeTemple demonstrates the value of using Reflective Structured Dialogue to plan, create appropriate questions, build in time for reflection, and even enter into communication agreements. The results of these interventions in her and others' classrooms are striking: greater student engagement, an increased sense of belonging and

²¹ Jonathan R. Cohen, *Negative Identity and Conflict*, 35 OHIO ST. J. ON DISP. RESOL. 737, 744 (2020).

²² *Id.*

²³ Jennifer W. Reynolds, *Talking About Abortion (Listening Optional)*, 8 TEX. A&M L. REV. 141 (2020).

willingness to speak and listen, and even more thoughtful papers. The potential results outside the classroom are even more exciting to consider. Her students have the opportunity to see that they do not need to accept their environments as they traditionally are, but can undertake concrete initiatives to restructure such environments to enhance connections, create a sense of safety, encourage vulnerability and curiosity, and increase the likelihood of productive dialogue and exploration.²⁴ In his contribution to this issue, Noam Ebner similarly urges restructuring of the curriculum but he goes well beyond the individual classroom. He discusses flipping the law school curriculum so that students understand that all of it—Civil Procedure, Contracts, Torts, Criminal Law, etc.—comes within *our* frame, the frame of dispute resolution. He also proposes thinking of our students, not in terms of who they are today, but in terms of who they will be in the future—lawyers, leaders, and our emissaries in spreading the philosophy, and practices of dispute resolution—and using the resources now available to us (e.g., MOOCs, Zoom, online games) to teach “ADR thinking and skills” to the entire world.²⁵ Deborah Eisenberg joins Ebner in ambitiously envisioning a recasting of the place of dispute processing and private ordering in the substantive law curriculum, but she also observes that we need “to examine, in Fullerian style, not only the uses, limits, and effectiveness of various processes but also the underlying morality and quality of the processes.”²⁶

I hope that you find the articles produced by this symposium to be as provocative, inspiring and ultimately useful as I do. In the days, weeks and months since March 20, 2020—as we have dealt with the continued onslaught of COVID-19, the challenges of long-term social isolation, the deaths of George Floyd, Breonna Taylor and too many others, the peaceful protests and deaths that have followed them, the twists and turns of the presidential election season, the attack on the Capitol—our need for the insights, critiques and proposals contained in these articles has become even more pressing.

Before closing, I also want to acknowledge the contributions of Deborah Hensler, Sarah Cole, and Howard Gadlin in making the symposium and this symposium issue happen. Professor Hensler played a key role in the early development of the goals for this symposium. Professor Cole wonderfully facilitated the discussions that led to the collaborative publication of symposium articles in the *Ohio State Journal on Dispute Resolution* and the *Texas A&M Law Review*. Retired Ombudsman and Director of the Center for Cooperative Resolution at the National Institutes of Health Howard Gadlin

²⁴ Jill DeTemple, *The Spaces We Make: Dialogic Classrooms and Social Transformation*, 35 OHIO ST. J. ON DISP. RESOL. 753 (2020).

²⁵ Ebner, *supra* note 16.

²⁶ Eisenberg, *supra* note 17 at 735.

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participated in our March 20, 2020 Zoom conference, including presenting and providing feedback to others. My thanks as well to the editorial boards and staff of the two law journals for their work and cooperation in publishing these articles, particularly under the trying circumstances occasioned by COVID-19.

Hiding in Plain Sight: Mediation, Client-Centered Practice, and the Value of Human Agency

ROBERT A. BARUCH BUSH* AND PETER F. MILLER†

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1. *SOMETHING WORTH PRAYING FOR*
2. *THE VALUE OF VOICE*
3. *DOING SOMETHING*
4. *SAYING NO*
- B. *Lights at the End of the Tunnel: The Value of Agency in Popular Culture*
 1. *A RASH ACTION, OR A DELIBERATE CHOICE*
 2. *A CHOICE TO CHANGE*
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 4. *A POWERLESS KING*

V. CONCLUSION: RESTORING THE PLACE OF AGENCY IN MEDIATION

I. INTRODUCTION: THE INVISIBILITY OF AGENCY

From the earliest years of the “modern” mediation field, the principle of party self-determination was seen and stated as the foundation of the mediation process.¹ Indeed, this core principle of party self-determination was seen as the distinguishing feature of mediation, by comparison to other third-party processes like arbitration or adjudication, in which a third party was the authoritative decision maker.² Only in mediation could disputing parties have the help of a third party who would help them make their own decisions, rather than making decisions for them. Even in mediator ethical codes, the principle of party self-determination was enshrined as a guiding principle from very early on.³

Nevertheless, despite its supposedly central role, the value of self-determination has always faced competition from other values in the world of mediation,⁴ and it has often fared badly in that competition. First, and most obvious, the pressure to achieve settlements—especially when mediation was linked to the courts—has often diluted the commitment to the principle of self-

¹ See, e.g., Nancy A. Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization*, 6 HARV. NEGOT. L. REV. 1, 15–21 (2001); Anne Milne & Jay Folberg, *The Theory and Practice of Divorce Mediation: An Overview*, in DIVORCE MEDIATION: THEORY AND PRACTICE (Jay Folberg & Anne Milne eds., 1998).

² See Robert A. Baruch Bush, *Efficiency and Protection or Empowerment and Recognition: The Mediator's Role and Ethical Standards in Mediation*, 41 FLA L. REV. 253, 262–63, 270–73 (1989); Welsh, *supra* note 1, at 15–18.

³ See, e.g., ABA STANDARDS OF PRACTICE FOR LAWYER MEDIATORS IN FAMILY DISPUTES, STANDARD I.C., III.C. (1984), 18 FAM. L. Q. 363, 363–65 (1984). See also Welsh, *supra* note 1, at 34–52 (analyzing the principle of self-determination in the mediator ethics rules of the Florida state mediation system, adopted in 1992).

⁴ Besides the value of reconciliation mentioned in the text, perhaps the most persistent competitor has been the value of justice, or protection of vulnerable parties. One classic example is the “debate” in 1981 between Joseph Stulberg, a leading mediator and trainer, and Lawrence Susskind, a prominent environmental and public policy mediator, about the mediator’s “accountability” for the fairness of settlements. In effect, the tension was between the value of self-determination and the value of justice or protection, and there was substantial disagreement about which value was superior. Susskind argued that in mediating cases involving interests of parties not at the table—like many environmental conflicts—mediators had an obligation to ensure fairness to unrepresented interests, and that they should block resolutions that lacked such fairness, even if that would attenuate self-determination for the parties at the table. Stulberg argued that mediators *could* not do so, because of their need for neutrality—and *should* not do so, because of the value of party self-determination. See Joseph B. Stulberg, *The Theory and Practice of Mediation: A Reply to Professor Susskind*, 6 VERMONT L. REV. 85 (1981); Lawrence Susskind, *Environmental Mediation and the Accountability Problem*, 6 VERMONT L. REV. 1 (1981).

determination. Many research studies have documented the way in which mediators exert pressure on parties—sometimes coming close to coercion—to settle their case, and few argue that this is rare or even uncommon.⁵

But beyond the goal of settlement, other values have also led mediation, and mediators, away from the supposedly foundational commitment to party self-determination. Another example is found in the areas of practice in which fostering inter-party understanding, and even reconciliation, is seen as a major goal. Once such arena is in restorative justice and victim-offender mediation, where a primary goal of the process is to promote understanding and empathy between the parties, and thereby heal or restore the relationship or community that was damaged by the original offense.⁶ There is ample evidence that practitioners in these areas use directive practices with the aim of promoting understanding and empathy, and evoking forgiveness and reconciliation. The same is true of both practice and theory in the area of divorce and family mediation, where mediators seek mutual understanding between the parties, if not reconciliation.⁷ In all these areas,

⁵ See Welsh, *supra* note 1; Deborah M. Kolb & Kenneth Kressel, *Conclusion: The Realities of Making Talk Work*, in WHEN TALK WORKS: PROFILES OF MEDIATORS 459, 468–70 (1994). See Leonard L. Riskin & Nancy A. Welsh, *Is That All There Is?: The “Problem” in Court-Oriented Mediation*, 15 GEORGE MASON L. REV. 863, 870–71 & nn.38–40 (2008); Bobbi McAdoo & Nancy A. Welsh, *Look Before You Leap and Keep on Looking: Lessons from the Institutionalization of Court-Connected Mediation*, 5 NEVADA L. REV. 399, 405–08 (2004); Nancy A. Welsh, *The Place of Court-Connected Mediation in a Democratic Justice System*, 5 CARDOZO J. CONFLICT. RES. 117 (2004); JONATHAN G. SHAILOR, EMPOWERMENT IN DISPUTE MEDIATION: A CRITICAL ANALYSIS OF COMMUNICATION 48 (1994) (reporting based on findings of detailed case studies of three mediations that, for two out of the three mediators studied, “everything the mediators do is geared toward ... the procurement of mediation’s product—an agreement,” and noting that mediators created their own meaning of a “good agreement.”); Stacy Burns, *The Name of the Game is Movement: Concession Seeking in Judicial Mediation of Large Money Damages Cases*, 15 MEDIATION Q. 359, 360–63 (1998) (describing various strategies that mediators use to pressure for settlements).

⁶ See John Paul Lederach & Ron Kraybill, *The Paradox of Popular Justice: A Practitioner’s View*, in THE POSSIBILITY OF POPULAR JUSTICE: A CASE STUDY OF COMMUNITY MEDIATION IN THE UNITED STATES 357, 358–63, 369–70 (Sally Engle Merry & Neal Milner eds., 1993); MARK S. UMBREIT, *MEDIATING INTERPERSONAL CONFLICTS: A PATHWAY TO PEACE* 137 (1995); Jennifer Michelle Cunha, *Comment, Family Group Conferences: Healing the Wounds of Juvenile Property Crime in New Zealand and the United States*, 13 EMORY INT’L L. REV. 283, 292–93 (1999).

⁷ See, e.g., Milne & Folberg, *supra* note 1, at 7–9 (Jay Folberg & Anne Milne eds., 1988); Susan S. Silbey & Sally E. Merry, *Mediator Settlement Strategies*, 8 LAW & POL’Y 7, 20–25 (1986). And this value plays a prominent role in several emerging new theories

many theorists and practitioners consider it appropriate to engage in practices that may limit party self-determination, in order to promote greater understanding, empathy, and improved relationships. In sum, from the early days of the mediation field, other values have worked to “lure” mediators away from their ostensible prior commitment to party self-determination.

The introduction in 1994 of a new “model” of practice called “transformative mediation” was in part a response to this trend in the field to subordinate the originally supreme value of party self-determination to other goals like those just described. Indeed, the book that introduced the model, *The Promise of Mediation*,⁸ was read by many—and fairly so—as a critique of the common practices used by mediators at that time, arguing that those directive practices were inconsistent and even contradictory to the unique values that had been espoused for mediation.⁹ *Promise* went on to call for a return to the primacy of party self-determination, and suggested an approach to practice that would embody that value.

However, it could be argued—and was, by some—that the model sketched out in the book was just as directive, in its way, as the practices it criticized.¹⁰ The first part of this article examines why that happened, and why it took many years to correct and to identify practices that genuinely further party self-determination. Tracing that history is the best foundation for understanding why party self-determination—party agency—is the real heart of the transformative mediation model, and why those who follow the model are committed to it. Practiced properly, transformative mediation can be a powerful vehicle for supporting party agency; and as discussed in the second Part of this Article, one fundamental justification for transformative mediation is the profound importance of human agency.

The immediate impetus for writing this Article is that, even today, talented students and practitioners of transformative mediation still underemphasize the importance of client “empowerment”—the opportunity

of mediation, including “insight mediation” and “understanding-based mediation.” See Robert A. Baruch Bush, *Staying in Orbit or Breaking Free: The Relationship of Mediation to the Courts over Four Decades*, 84 N. D. L. REV. 705, at nn. 115–119 (2008) (describing the key elements of these and other new models of mediation).

⁸ ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION* (1994) [hereinafter, *PROMISE*].

⁹ See, e.g., James B. Boskey, *Book Review: The Promise of Mediation*, The Alternative Newsletter, Mar. 1995.

¹⁰ One observed, “Bush has long been uncomfortable with mediators who take a directive stance in the mediation process, but by focusing on transformation he proposes an approach that is at least equally controlling.” *Id.*

for clients to recapture the sense of agency that conflict has compromised.¹¹ That is, those learning and using the skills of a client-centered process like transformative mediation tend to overlook and ignore the achievement of client empowerment, compared to other goals, whether involving outcome or process. Why does the achievement of client empowerment go unseen in this way, even when its value has been explained and emphasized in readings, written work, training, and otherwise? Addressing this “invisibility” of client empowerment is a major challenge for those who ascribe importance to the impact mediation can have on restoring clients’ sense of agency in the wake of conflict. That is one purpose of this Article

However, the effort to meet that challenge makes sense only if one accepts the premise that client agency—and human agency in general—is a core value whose preservation and furtherance should stand at the center of any client assistance process. That premise lies at the heart of transformative mediation theory and practice, and other related processes.¹² What justifies that premise? What is it that explains the value placed by transformative mediation adherents (and others) on this phenomenon of human agency per se? Answering that question, primarily but not only in the context of mediators’ work, is a second major aim of this Article.

To achieve these aims, this Article will begin, in Part One, by retracing the path that originally brought the authors and many others to study and practice mediation, and how that path changed its course several times over the past thirty years, in conjunction with changed perceptions of the importance of client agency. Part One will show first that the practice of mediation, even by those theoretically committed to the principle of self-determination, diluted that principle by placing less importance on client agency than on other values, especially the value of empathy and relationship. Second, it will show how practitioners of transformative mediation, through a process of reflection and self-critique, recognized their departure from the

¹¹ ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: THE TRANSFORMATIVE APPROACH TO CONFLICT* 60–61 (2d ed. 2005) [hereinafter *PROMISE 2*].

¹² Regarding transformative mediation, see BUSH & FOLGER, *supra* note 11, at 59–62, 250–56; Robert A. Baruch Bush, *Mediation Skills and Client-Centered Lawyering: A New View of the Partnership*, 19 CLINICAL L. REV. 429, 450–51 (2013). Regarding other processes, see, e.g., Robert D. Dinerstein, *Client-Centered Counseling: Reappraisal and Refinement*, 12 ARIZ. L. REV. 501, 512–17 (1990) (discussing lawyering); Spencer Rand, *Teaching Law Students to Practice Social Justice: An Interdisciplinary Search for Help Through Social Work’s Empowerment Approach*, 13 CLINICAL L. REV. 459, 485 (2006) (discussing social work); CARL R. ROGERS, *CLIENT-CENTERED THERAPY: ITS CURRENT PRACTICE, IMPLICATIONS AND THEORY* (1951) (discussing psychology); Dinerstein, *supra*, at 517–34, 538–44, 548–551 (discussing several other fields).

principle of self-determination and took steps to correct their actual practices in ways that did place primary value on client agency.

Part Two of the Article will explain the meaning of agency, as a basis for mediation and other social processes, as the self-aware and reflective assertion by an individual of the intentional choice to make decisions affecting their life circumstances. So agency and self-determination are related if not identical. It will be argued that the phenomenon of agency is at the core of human identity and consciousness; that is, the assertion of agency is an essential and existential meaning of being human, regardless of whether it achieves some other specific impact in the external world. Part Three of the Article will show that, although the value of client agency and client-centered practice is largely disfavored in the dominant practices of mediation and other “helping” professions,¹³ that value does find strong recognition among many in the society, as reflected in popular culture, and as voiced by the clients of transformative mediators.

The Article concludes that the stakes of raising awareness of the importance of agency, in mediation and other social processes, are very great—implicating the character of our civic culture and the viability of our democratic society; therefore, it is important that, in any process such as mediation where a client-centered approach is possible, that approach should be favored and promoted—since it will recognize and enact the central value of human agency.

II. PART ONE: SELF DETERMINATION –THE JOURNEY AWAY AND BACK

A. *The Promise of Mediation: Moving from Agency to Empathy*

The authors of this article met roughly three decades ago at one of the many “community mediation centers” that serve parties in conflict in the New York area. One of them was presenting a training program at that center, and the other was a coach in that program. In one of the simulated cases used to demonstrate the mediator’s methods, a slow-witted worker had been attacked and humiliated as a “bozo” by his impatient boss. The mediator, in a private “caucus”, pressed the boss to consider how hard the worker was trying to do

¹³ See, e.g., Bush, *supra* note 7, at 739–42 (2008) (discussing and citing research on the prevalence of directive practice in mediation); Dinerstein, *supra* note 12, *passim* (discussing directive practice in lawyering and other professions). See also *supra* text accompanying note 5.

his job, despite his limited capability, and to imagine the harsh effect the name-calling had on the worker's self-respect. The method was explained as a way of evoking understanding or empathy from the employer, which could obviously help promote a settlement of the case. But the response to this demonstration, from both the coach and the trainees, was that this practice of offering a sympathetic explanation of one party to the other had value independent of the effect on settlement. That was the value of the experience of empathy per se, as an expression of human connection despite the presence of great differences.¹⁴ For almost everyone present, realizing the power of mediation to evoke this kind of human connection explained why they were attracted to learn and practice this process—their desire to be the instruments of increasing understanding and empathy in situations where enmity was the starting point.

For the authors of this Article, this impulse to help parties move from enmity to empathy was a core motivation for their becoming mediators—and for adopting what came to be called the transformative model of practice, where the goal was not only settlement but also a “transformation” of the parties’ attitudes toward each other.¹⁵ That model of practice was introduced to the field in a book that influenced many mediators who resonated with this view of the goal and value of mediation—*The Promise of Mediation*.¹⁶ That book named two goals as central to the mediation process, both of which went beyond the goal of settlement per se—empowerment and recognition. The first focused on how the process could help clients reassert their sense of agency, the second on how they could activate their sense of empathy, both of which are often damaged by the experience of negative conflict.¹⁷ And while both

¹⁴ See Dorothy J. Della Noce, *Seeing Theory in Practice: An Analysis of Empathy in Mediation*, 15 NEG. J. 271 (1999) (explaining the relation of empathy to mediation practice).

¹⁵ See PROMISE 2, *supra* note 11, at 51–62; Bush, *supra* note 2, at 266–73.

¹⁶ PROMISE *supra* note 8.

¹⁷ See PROMISE 2, *supra* note 11, at 54–62. In transformative theory, the terms “empowerment” and “recognition” are shorthand for the shifts or movements parties make in mediation, as they regain their capacities for agency and empathy, both of which are inherent in human beings but likely to be compromised by negative conflict interaction. Supporting these shifts is the mediator’s goal in the process. Underlying this goal, in the “relational” theory that informs transformative mediation, is the value placed on party agency or self-determination and on interparty empathy or understanding. Where the terms “empowerment” and “recognition” are used in this Article, they are meant to refer to the dynamic *shifts* parties make that increase agency or empathy, even where the word “shifts” is not used. Increased agency or empathy are the valued *effects* of these shifts. In relational

were presented as core goals of this approach to mediation, in both the book itself and the training and practice that grew out of the book, the recognition goal soon emerged in practice as the driving value behind the kinds of practices suggested for “transformative mediators”. How that happened can be illustrated by reference to the book itself, and developments following its publication.

In the first published work on transformative mediation, there were inherent contradictions in the treatment of empowerment and recognition. Thus, in the article that first articulated the empowerment concept in 1989, it stated that the “empowerment-and-recognition” conception of the mediator’s role requires a “pushy mediator,” who will not be passive but will push the parties to make informed and deliberate decisions and to reexamine negative views of each other.¹⁸ Looking back, this obviously involves a contradiction. The kind of pushiness being called for would in itself undermine party self-determination in many cases—by insisting that “the parties consider and understand fully the consequences of either outcome, before they decide for or against agreement,” and by pushing “for each party to hear and understand the other’s position ... [and] express a measure of recognition of the other party’s situation.”¹⁹

When *Promise* was published five years later, it clarified that a “successful mediation,” is one in which, “the parties *have been helped* to make

theory as presented in *Promise 2*, agency and empathy are seen as co-equal and interdependent elements inherent in human nature, and this Article does not intend any departure from that premise. However, because of the tendency of even transformative mediators to undervalue party agency, the focus of this Article is on the empowerment shift and agency, and the negative impact of this undervaluation. (A parallel approach is taken by Della Noce, who focuses exclusively on the *empathy* element in the relational theory, while noting that agency is a co-equal element in that theory and in transformative mediation. See Della Noce, *supra* note 14, at note 8. Her focus on empathy is explained by her view that the meaning and importance of this element is given inadequate attention in mediation literature. See *id.* at 279–82. The focus of this Article on the agency element is based on a similar assessment regarding inadequate attention to the agency element). Other points made in this Article are also rooted in relational theory, such as the idea that the agentic self is not static but is actually constructed through interaction with the outside world, and especially with other selves in human interaction. See *infra* text accompanying notes 70–71. In short, nothing in this Article should be read as departing from or contradicting the theory of transformative mediation as articulated in *Promise 2*.

¹⁸ See Bush, *supra* note 2, at 277–83.

¹⁹ *Id.* at 279–81. Still, such inconsistency might be expected at such an early stage in the emergence of a new conception. The account given here of the history of the transformative model draws in part from Robert A Baruch Bush, *Taking Self-Determination Seriously*, in J.P. Folger et al. eds., *TRANSFORMATIVE MEDIATION: A SOURCEBOOK* 51 (Institute for the Study of Conflict Transformation, 2010).

informed, deliberate and free choices about how to proceed at every decision point” and “helped to give recognition whenever it was their decision to do so.”²⁰ This emphasis on “helping” rather than “pushing” the parties to make informed choices and to extend (or refuse) recognition is much more consistent with the primary value of party self-determination that underlies the transformative model.²¹ So is the clear statement that “the definition of empowerment per se reminds the mediator that even a ‘poor outcome’ produced by the party’s own process of reflection and choice strengthens the self more than a ‘good outcome’ induced by the mediator’s directiveness or imposition.”²² It appeared that the initial contradiction between “pushiness” and empowerment was resolved in favor of empowerment.

However, *Promise* also describes the patterns of transformative mediation practice as “encouraging deliberation and choice making” and “encouraging perspective taking.”²³ These two patterns could, depending on how they are carried out, involve the kind of “pushiness” that was advocated five years earlier. In fact, in the case study used in *Promise* to illustrate transformative practice, the mediator’s practices did just that. In the Landlord-Tenant case of *Promise*, the session began with a fairly standard “opening statement” in which the mediator set ground rules, which he later enforced. Later in the session, the mediator “stepped in and said that, if neither party objected, *he wanted* to speak to each privately.”²⁴ In these instances and many others in the session, the mediator’s interventions preempted party choices. Of course, the choices preempted were choices about process, not outcome. But the practices of the mediator in the case study could certainly be called “pushy” rather than supportive of empowerment and party self-determination.

Beyond these process issues, the directiveness of the mediator was evident in his effort to “support” inter-party recognition shifts. The transformative mediator in *Promise* focused on interventions in which he would “reinterpret, translate, and reframe parties’ statements” and “ask parties to consider the significance of such reformulations.”²⁵ For example, in caucus with the tenant, the mediator asked how her once-friendly relationship with the landlord had soured, and she answered that the landlord had pressed her hard for the rent even though she had obviously been in the midst of some personal problems. After sympathizing, the mediator asked her:

²⁰ PROMISE, *supra* note 8, at 95.

²¹ See Bush, *supra* note 2, at 270–73.

²² PROMISE, *supra* note 8, at 88.

²³ *Id.* at 100–01.

²⁴ *Id.* at 151 (emphasis added).

²⁵ *Id.* at 101.

[W]hether she thought it was possible that the reason [the landlord pressed by] continuing to call her was not that he didn't trust her but that since it was wintertime, [the landlord] felt pressed himself to find out about the rent, because his bills were higher, so he couldn't be as flexible as he might have wanted to be.²⁶

In short, for the sake of trying to evoke recognition, this mediator was “pushing” the tenant quite a bit to consider things that she hadn't thought of—and probably wouldn't have—without the mediator's suggestions. He was in effect telling her that she *should* entertain reconsiderations like these. He was employing a measure of directiveness for the sake of producing a recognition shift. In *Promise*, this is offered as a good example of how transformative practice tries to support recognition shifts. The same kind of intervention is repeated several times with each party.²⁷

Thus, despite a clear theoretical commitment to the value of party self-determination and empowerment (client agency), the examples offered in *Promise* as transformative interventions actually involved a significant degree of mediator directiveness. And the strongest motive for this directiveness seems to have been the goal of “evoking recognition.”²⁸ To put it differently, as between empowerment and recognition shifts, the *recognition* shift emerged as the higher goal in actual practice, so that evoking recognition would justify directive interventions, even though they may have diluted party self-determination. Thus, while the stated theory claimed that empowerment had to be the foundation for recognition, the practices used by mediators trying to follow this “new model”—including the authors of this Article—displayed a willingness to move away from empowerment in order to evoke recognition.²⁹ The clear question is: Why did the goal of recognition/empathy

²⁶ *Id.*

²⁷ *Id.* at 163–78.

²⁸ *Id.* at 160.

²⁹ None of this escaped early critics of transformative mediation, whose criticisms seen in retrospect may be fairer than they seemed at the time. One observed, “Bush has long been uncomfortable with mediators who take a directive stance in the mediation process, but by focusing on transformation he proposes an approach that is at least equally controlling.” Boskey, *supra* note 9. This critic may have rightly sensed that it was the recognition value that was operating in *Promise* as the heart of transformation, and as thus justifying directive interventions. If this kind of critique arose from a serious reading of

seemingly displace the goal of empowerment/agency, in the practice of transformative mediation as originally enacted—especially since the theory behind that practice put these goals in precisely the opposite order?

B. *Placing the Emphasis on Recognition*

Answering this question involves looking at the larger context of the mediation field and its history prior to the advent of transformative mediation, as briefly described in the Introduction above. As noted there, despite its supposedly central role, the value of self-determination has always faced competition from other values in the world of mediation.³⁰ Also discussed above, one particular value that has long competed with self-determination for the minds and hearts of mediators, and worked to “lure” them away from their ostensible prior commitment to party self-determination, is the value of relationship or reconciliation.

This context helps to answer the question posed above: Why did early enactments of transformative practice display a directiveness that is inconsistent with party empowerment? The answer is that the lure of other values was difficult to identify and resist, even as transformative practice was being articulated on different grounds. In particular, for early transformative mediators the alluring competitor was the value of promoting understanding, empathy or relationship—in the terms of transformative theory, achieving inter-party recognition shifts. And the lure of this value worked to overpower the supposedly more basic value of empowerment. As described earlier, the mediator in the Landlord-Tenant case employed directive practices and did so out of a concern for promoting recognition,³¹ and so did many others who followed his example.

Indeed, for many mediators the great “successes” were the cases where the parties came to a new understanding of each other.³² Promoting

the illustrative interventions just described, it can be understood as a justified challenge to an inconsistency between the “rhetoric and reality,” theory and practice, of transformative mediation as presented in *Promise*.

³⁰ See *supra* text accompanying notes 4–7.

³¹ See *supra* text accompanying notes 23–28.

³² Indeed, when training was first offered in transformative mediation, the first exercise was usually one called “success stories,” in which the participants – usually experienced mediators trained in other methods – were asked to reflect on their past cases, identify for themselves their real “successes,” and then say what aspect of the case made it such a “success” in their eyes. The most frequent answer, expressed in various ways, was

understanding, empathy and connection between people separated by conflict—what could be more significant? It is thus understandable that transformative mediation practitioners, including the model’s originators, were initially drawn into focusing on recognition and giving less attention to empowerment, despite the fact that this contradicted the basic theory itself. And as the transformative model grew in popularity, a major reason for this growth was that people were very interested in the recognition shift. The appeal of the transformative model was the possibility that, through using it, parties’ attitudes towards each other would change for the better. Mediation would “get” parties to change the way they saw each other, so their relationships and lives would improve—in families, in communities, in the workplace.³³ It seems that it was natural for both the suppliers and the consumers of transformative mediation to implicitly take the view that the recognition shift was the main point, precisely because the empathy value is so alluring. So, if recognition tended to displace empowerment in the hierarchy of transformative practice, one reason was the great allure of the recognition shift. Another reason was the unobtrusiveness of the empowerment shift itself.

C. *Failing to Notice Empowerment*

Even the best transformative mediation students, when explaining why using their transformative skills has value, often refer to recognition rather than empowerment. For example, in a recent course, one simulated mediation in the course involved a Muslim worker and a white supervisor, and in the mediation the worker became very clear that the supervisor had no interest in understanding her isolation in the workplace because of her religion. The student’s self-assessment of the case was that the mediation was unsuccessful because “it failed to achieve increased understanding between the parties.” Another case involved two neighbors, a mother with young noisy

the moment in these cases where “the light went on” for the parties and they “saw each other differently.” See, e.g., Paul Charbonneau, *How Practical is Theory?* in DESIGNING MEDIATION: APPROACHES TO TRAINING AND PRACTICE WITHIN A TRANSFORMATIVE FRAMEWORK 37, 46–47 (Joseph P. Folger & Robert A. Baruch Bush eds., 2001) [hereafter, DESIGNING MEDIATION]. This exercise was very useful to draw mediators’ attention to the value they themselves saw in such “recognition,” and to then interest them into the study of how to practice mediation in ways that pursue this goal rather than the goal of agreement.

³³ This was part of what interested corporate agencies like the United States Postal Service in using transformative mediation for workplace conflict. See Cynthia J. Hallberlin, *Transforming Workplace Culture: Lessons Learned from Swimming Upstream*, 18 HOFSTRA LAB. & EMP. L. J. 375, 378 (2001) (“I knew almost any type of mediation could result in settlements, but the Postal Service wanted more...I needed more than ‘deals.’ I was looking for improved relationships.”).

children and a veteran counseling ex-convicts in his apartment. The student's reflection afterwards was that, although the mother became very clear that the veteran's counseling sessions were a threat to her family, the mediation did not succeed because she "failed to change her perspective" about those sessions. In these and other examples, students assessed their own work as unsuccessful because one or both parties did not make "recognition shifts"—even though one or both gained clarity and confidence about their situation and position. Essentially, although the mediations often showed empowerment shifts and increased party agency, they were seen as lacking because the parties did not make recognition shifts. Whereas, in cases where parties did become more understanding of each other during the session, the students saw these as successful mediations—but without mentioning that the parties also became clearer, more confident, and stronger in the mediation. In short, recognition shifts got the students' attention, while empowerment got little or none, even though it was just as significant in the mediations. In effect, empowerment shifts simply went unnoticed.

So, it is not just that empowerment got overshadowed by recognition; it was simply *overlooked* in itself. One reason for this is that empowerment shifts go unnoticed because they are harder to identify. This point can be explained by reference to the discourse studies concept of conversational "markers."³⁴ Markers are forms of expression, verbal or nonverbal, that signify a development in conversation that is considered important for some reason. As used here, "markers" are expressions in conflict conversation that are signs of a party shift from weakness to strength, or from alienation to connection.³⁵ Though conflict conversation usually contains both kinds of expressions, the markers of empowerment shifts are typically less obvious than those of recognition shifts. Apologies, statements of changed perspective, even changes in tone of voice and manner of address, are all markers of recognition shifts. These markers are all quite noticeable in a mediated conversation—not only because of the high value placed on recognition, but also because expressions of recognition usually involve a sharp contrast with the tone and substance of the conversation preceding them. Moreover, these expressions are themselves, most often, noticeably positive. It is not just that the negative of hostility or suspicion is lessened; rather, the positive of acceptance or

³⁴ See Dorothy J. Della Noce, *Ideologically Based Patterns in the Discourse of Mediators: A Comparison of Problem Solving and Transformative Practice*, Ann Arbor, Michigan: UMI Dissertation Services, 2002 (unpublished) (on file with author).

³⁵ See, e.g., Janet K. Moen et al., *Identifying Opportunities for Empowerment and Recognition*, in *DESIGNING MEDIATION*, *supra* note 32, at 112; *PROMISE 2*, *supra* note 11, at 167–69, 180–84.

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understanding appears quite visibly. So, these markers stand out, attract our attention, and seem central to mediation “successes.”

The markers of empowerment shifts, by contrast, tend to be less dramatic. When a party’s statements become less confused and rambling, more focused and articulate, this often comes as a relief to a mediator or observer. But it does not necessarily stand out as a dramatic change—although it is a marker of an empowerment shift. Similarly, when a party’s expressions become less hesitant and more confident, or less agitated and more measured, such changes are markers of empowerment shifts. But these also may attract less attention, both because they are often quite subtle and also because they are noticed as the absence or removal of a negative—less confusion, less agitation, less hesitancy—rather than the occurrence of a positive. The positive appearance of clarity, calm and confidence may simply be subsumed in the dissipation of the negative; and when this happens, the marker of an empowerment shift is missed. These reasons help explain why empowerment shifts and party agency, despite their foundational importance in transformative theory, tended to be overlooked and underemphasized in transformative practice.

In our most recent mediation class, the students’ difficulty in seeing empowerment shifts motivated us to offer them a “typology” of such transitions. Thus, we labelled different *types* of empowerment shifts and asked the students to identify points in their mediations where one or both parties:

- stood up for him/herself (*advocacy*)
- acknowledged his/her own problem (*awareness*)
- used an argument to persuade the other party (*persuasiveness*)
- realized his/her responsibility for the conflict (*responsibility*)
- became very clear about the problem/situation (*clarity*)
- suggested a solution/course of action (*problem-solving*)
- demanded self-protective measures (*self-protection*)
- used eloquent or powerful language (*self-expression*)
- engaged in “thinking it through” (*deliberation*)
- came to a strong decision (*decision-making*)

This typology definitely helped the students to notice the parties’ empowerment shifts, but the need for such a typology is further evidence that these shifts are not easy to notice by comparison to the recognition shifts that students saw so readily.

D. *Moving Back to Empowerment: Re-focusing the Model on Party Agency*

As described above, despite a strong theoretical commitment to party self-determination, the early practitioners of the model—including this Article’s authors—often focused more on recognition shifts as the primary goal, and tended to employ directive interventions in order to achieve that goal. The path to transformative practice led away from a focus of client empowerment and agency. However, a new period soon began in the development of transformative mediation practice, with the work of talented mediators who undertook to put their practice more in keeping with the theory articulated in *Promise*, especially as to client agency and empowerment. Prominent among these was Sally Pope, an experienced family and commercial mediator. After reading *Promise of Mediation*, Pope resonated with the transformative model and began to experiment with using it. In that process, she began to question many of the practices she’d learned earlier in her career and to look for different practices more consistent with the transformative model.³⁶ What she found were practices that went away from being directive and beyond the focus on recognition and empathy—instead moving toward a stronger focus on party agency. As close colleagues of Pope, the authors of this Article were impressed and influenced by her move toward greater client agency.

Pope’s earliest moves in this direction involved the opening of her mediation sessions, which she had always conducted using a standard opening statement describing the process, setting ground rules, establishing confidentiality, informing parties about caucusing, and so on. Gradually, she realized that every one of these elements in her opening was “supplanting” party decision-making, so she began to “throw open” the opening—inviting the parties into an “opening conversation” in which they themselves decided about ground rules, confidentiality, goals and reasons for using mediation.³⁷

³⁶ Pope had started her mediation career practicing the conventional, “facilitative” approach to the process. See Leonard L. Riskin, *Understanding Mediators’ Orientations, Strategies and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7 (1996). According to one authoritative view of the facilitative model, the mediator in that model acts as facilitator or manager of the parties’ negotiation or problem-solving process. She/he establishes ground rules, facilitates information exchange, defines issues and structures an agenda, and tries to generate movement toward agreement by various means – such as encouraging parties to focus on interests rather than positions, emphasizing areas of agreement, discouraging discussions of past incidents and limiting expressions of intense negative emotions.

³⁷ See Sally Ganong Pope, *Inviting Fortuitous Events in Mediation: The Role of Empowerment and Recognition*, 13 MEDIATION Q. 287 (1996).

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For Pope and others, this “rethinking” of how to begin a session was the beginning of an ongoing exploration of the concrete meaning of transformative practice.³⁸ Most significant for this chapter, much of this exploration focused directly on practices that supported party empowerment shifts and increased party agency. This new generation of work began to realign the development of transformative practice with the premise of the model that empowerment shifts, and party agency, were primary and foundational in transformative mediation.³⁹

Pope was also involved in a major initiative to train mediators in the transformative model, one part of which involved producing a video to demonstrate transformative practices in a simulated workplace conflict.⁴⁰ The authors of this Article partnered with Pope in the making of this video. By the time the video was made, Pope and others had developed considerable expertise using transformative interventions, and the practices shown on the video clearly demonstrated what it meant for a mediator to take seriously the principle of supporting and not supplanting party decision-making, and thus supporting increased party agency. The video was used for training beginning in 1998, and the impact on audiences was electric. They saw for the first time a set of practices that consistently supported party choices and agency at every decision point in a mediation session, and they saw how the impact of those practices was to facilitate empowerment shifts for both parties to the mediation. For some the picture was inspiring, and for some it was shocking; but for all the training participants, the centrality of empowerment and client agency in transformative mediation was made very clear.

This picture of “second generation” practice was crystallized and disseminated still further when two new publications emerged. The first was another video, *The Purple House Mediation*, featuring one of the authors of this Article as the mediator of an interracial housing conflict, and presenting another concrete picture of practice in which empowerment shifts are clearly seen as the foundation for conflict transformation.⁴¹ The second publication was a completely revised edition of *Promise of Mediation (Promise 2)*, which clarified the relative place of empowerment and recognition shifts in conflict

³⁸ See, e.g., James A. Antes et al., *Is a Stage Model of Mediation Necessary*, 16 MEDIATION Q. 287 (1999); Susan Beale & Judith A. Saul, *Examining Assumptions: Training Mediators for Transformative Practice*, in DESIGNING MEDIATION, *supra* note 32, at 1, 12–15. Erling O. Jorgensen et al., *Microfocus in Mediation: The What and How of Transformative Opportunities*, in DESIGNING MEDIATION, *supra* note 32, at 133.

³⁹ See *supra* text accompanying notes 20–22.

⁴⁰ DVD: SARAH AND BERNARD, R.A. Bush & S.G. Pope eds. (U.S. Postal Service 1997).

⁴¹ THE “PURPLE” HOUSE CONVERSATIONS, (Institute for the Study of Conflict Transformation 2001).

transformation and included the *Purple House Mediation* in transcript form as a case study.⁴² Like the response to Pope's original video, the response to the *Purple House* video was powerful and diverse. Some could not understand why the mediator in the case does not do more to bridge the misunderstanding between the parties and promote recognition.⁴³ Others understood that the reason for this is that the mediator works first and foremost to consistently promote party *empowerment shifts and agency*, and that it is on the foundation of these *primary* shifts that recognition shifts can—and *do*, in *Purple House*—subsequently take place. In the words of *Promise 2*:

*The mediator's primary goals are (1) to support empowerment shifts, by supporting—but never supplanting—each party's deliberation and decision making, at every point in the session where choices arise (regarding either process or outcome) and (2) to support recognition shifts, by encouraging and supporting—but never forcing—each party's freely chosen efforts to achieve new understandings of the other's perspective.*⁴⁴

⁴² PROMISE 2, *supra* note 11, at 131–214.

⁴³ See, e.g., Ran Kuttner, *Striving to Fulfill the Promise: The Purple House Conversations and the Practice of Transformative Mediation*, 22 NEGOT. J. 331, 340–45 (2006).

⁴⁴ PROMISE 2, *supra* note 11, at 66 (emphasis added). Our aim in this Article is not to summarize the whole of transformative mediation theory, but it is important to note here one central point about the meaning of “recognition”, “empathy” and “understanding” in this theory. These terms do not mean only major and positive shifts in a party's view of the other. Even slight positive changes in perceptions of the other party can qualify as recognition shifts. And even becoming clearer about a *negative* perception of the other can qualify – as when a party comes to realize in mediation that their relationship with the other party is not viable because of a negative in that party that is unlikely to change. In fact, this kind of realization represents both an empowerment and a recognition shift and is not uncommon in mediations. See *infra* note 90, for an extended discussion of such a case.

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The explanation made it clear that the empowerment shift, the exercise of party agency, is the condition on which all else in conflict transformation, including the recognition shift, depends.⁴⁵

Thus, the picture of transformative practice became clearer over the years—and more consistent with its underlying theory. And the early missteps, whether due to the allure of the recognition goal (increasing empathy) or the unobtrusiveness of the empowerment goal (increasing agency), were slowly corrected in training and in practice—including for the authors of this Article. The result is not only a theory, but a form of practice, in which empowerment comes first, in terms of its conceptual value and its practical importance. The picture of transformative mediation today is a picture that acknowledges and maintains the centrality of party self-determination and agency, not only in theory but in mediation practice.

And yet this raises the question stated at the outset, which has increasingly troubled the authors of this Article: Why do students and practitioners of this model, even now, assess success and failure based primarily on whether the parties showed empathy and made recognition shifts, rather than whether the parties acted with increased agency and gained clarity and strength in the process? That is the focus of the remainder of this Article.

III. PART TWO: MEDIATION AND HUMAN AGENCY

A. *The Problem: The Invisibility of Agency*

As noted earlier, even the most talented students and mediators regularly assess their mediations as successful or not based on whether the parties made “recognition shifts”—that is, whether they expressed greater understanding and empathy for each other. Where those kinds of shifts occur, transformative mediators feel gratified. Where they do not, the mediators often

⁴⁵ Comparison to the Landlord-Tenant case of *Promise* is instructive. There are certainly places in *Purple House* where the mediator could “suggest reinterpretations” to each party of the other’s current statements or past conduct, asking them to imagine more favorable motives for each other’s behavior. This was the key example given earlier to illustrate how the Landlord-Tenant mediator, to use the language of *Promise*, tries to “evoke recognition.” By contrast, there were no interventions of this kind by the mediator in *Purple House* – precisely because, to use the language of this newer picture, such suggested reinterpretations would risk both “supplanting party deliberation” and “forcing recognition.” That is, mediator reinterpretations would undermine rather than support empowerment shifts, as well as the genuine recognition shifts that might be built on them. Instead, the mediator was careful to “reflect” and “amplify” the conversation in ways that always supported the parties’ agency in making their own choices – including the choice of whether, when and how to extend recognition to each other.

see the session as frustrating and ultimately unsuccessful.⁴⁶ This identification of success with the achievement of increased inter-party understanding misses the importance of client “empowerment”—the extent to which clients and parties are offered, and then take, the opportunity the process affords to recapture the sense of agency and self-determination that conflict has compromised. Understanding this “invisibility” of client agency/empowerment, and addressing it, is a major challenge to those who ascribe importance to the positive effect mediation can have on restoring clients’ full sense of agency in the wake of conflict. This challenge has led the authors to realize their own deep commitment to the value of human agency. They have also realized that they cannot explain their commitment to the core principle of party self-determination in mediation without delving into and explaining their own larger commitment to the value of human agency.

Reflecting on the source of this commitment, the authors confronted each other with a question: If mediators “get” the practices of transformative mediation and perform them with real skill, *why does it matter to us* whether they recognize that what they are doing is increasing party agency, and that this is its real value? Searching for an answer led both of us to realize that our own real interest goes beyond the subject of mediation per se. What makes mediation important as a social process is that it is, or can be, a very good vehicle for increasing human agency. In other words, *human agency* is the truly important subject, and mediation puts a spotlight on that subject. Our real interest, and our real sense of what’s important to notice and support, is the value of agency itself.

B. *Defining and Understanding Human Agency*

In a course or training on transformative mediation, it is barely possible to mention, much less to explore deeply, the phenomenon of human agency and its enormous value, to individuals and to society as a whole. Yet, without understanding this value, advocating for transformative mediation—or any party-centered practice—will likely not succeed in changing the character of the field. This connection between transformative mediation and larger societal structures and processes was noted in the Foreword to *Promise of Mediation* twenty-five years ago.⁴⁷ Since then, most of the effort has been on explaining the process itself and teaching its specific client-centered

⁴⁶ See *supra* text accompanying notes 11–12.

⁴⁷ See Jeffrey Z. Rubin, *Foreword* to PROMISE, *supra* note 8, at XI–XIII.

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practices.⁴⁸ But those practices will continue to gain only limited traction unless the case is made for their larger societal impacts. This may explain why, in many professions, client-centered practice is a minority approach, while expert-driven modes of practice dominate.⁴⁹ Client-centered practices are undervalued because the gains in human agency that they foster are undervalued, in comparison to other goals. Therefore, at this juncture, what is needed is to focus directly on the larger societal implications of client-centered practices, which relate to the place our society affords or denies, and the value it ascribes or denies, to the phenomenon of human agency. That is the aim of this part of the Article, although some examples will be drawn later from the realm of transformative mediation.⁵⁰

Human agency is a concept that has been the focus of much study and discussion in multiple fields, including philosophy, psychology, sociology and others.⁵¹ In those fields, the concept has been defined and explained in multiple ways, and it is beyond the scope of this Article to examine or even summarize that multidisciplinary discussion. Instead, for purposes of this Article, a working definition of agency will be posited, drawn from sources in the fields mentioned above, as follows: *Agency is the self-aware and reflective assertion by an individual of the intentional choice to make decisions affecting their life circumstances.* In this sense, agency and the concept of self-determination are related if not identical. Also, in this definition, agency is not absolute; that is, individuals' agency is usually limited by their environment and surrounding social structures.⁵² Nevertheless, they can still exercise a measure of agency within those limits.

Working with this definition, the premise of this Article, supported by much of the literature on agency, is that agency is a core element of human identity, and that human well-being requires the assertion of agency for its

⁴⁸ See, e.g., PROMISE 2, *supra* note 11, at 131–214; Robert A. Baruch Bush & Sally Ganong Pope, *Transformative Mediation: Changing the Quality of Family Conflict Interaction*, DIVORCE AND FAMILY MEDIATION: MODELS, TECHNIQUES AND APPLICATIONS (2004), at 53.

⁴⁹ See, e.g., Bush, *supra* note 7, at 739–42 (discussing and citing research on the prevalence of directive practice in mediation); Dinerstein, *supra* note 12 *passim* (contrasting directive practices in traditional lawyering, counseling and other professions, with client-centered practices in those professions).

⁵⁰ See *infra* text accompanying notes 78–79.

⁵¹ See Julia Lerch, et al., *The Rise of Individual Agency in Conceptions of Society: Textbooks Worldwide, 1950–2011*, 32 INT'L SOC. 38, 38–54 (2017).

⁵² See Albert Bandura, *Social Cognitive Theory: An Agentive Perspective*, 2 ASIAN J. SOC. PSYCHOL. 21, 23–24 (1999) (adopting a similar definition of agency and a similar view of its relation to social structure).

fulfillment.⁵³ That is, agency is not simply a socially constructed concept, it is an inherent feature of human consciousness or identity; so that the restriction of agency violates the sense of self that human beings carry, and the support of agency enables the fulfillment of that sense of self.⁵⁴ In the words of Joseph Stulberg, a mediation scholar whose work regularly integrates philosophical concepts, “[A] person’s capacity to engage in the process of making such decisions, and to have her choices respected, is essential to her being; one cannot be a person without making such decisions and assuming responsibility for their outcome.”⁵⁵ In other words, agency is essential to human personhood, whether in mediation or in general. Moreover, according to celebrated psychologist Albert Bandura, an individual’s belief that s/he possesses agency is a necessary condition for her sense of self-efficacy, which is in turn a prime contributor to her overall well-being and success in life.⁵⁶ This view is consistent with cross-cultural research from all over the world which documents that autonomy and the ability to make choices that affect one’s life is a prime determinant of human wellbeing.⁵⁷ It is also consistent with sociological research documenting that people consistently prefer social processes that afford them high levels of participation and

⁵³ See PROMISE 2, *supra* note 11, at 59–62 (citing literature from multiple fields), 250–56. This is not to say that agency is the *only* core element of human identity or nature. In the *Promise of Mediation* and other key writings on transformative mediation, it was argued that another core element of human identity is empathy or compassion—and that full human development involves an integration of agency and empathy. See *id.* at 59–62. This Article does not abandon that view. Rather, it argues that the enactment of agency alone, even if empathy does not follow, is still an essential value and core element of humanity. Because of the tendency to overlook or undervalue agency, as discussed in this Article, that argument is the authors’ focus here. See *supra* text accompanying note 17 and *infra* text accompanying note 73. It is worth noting, however, that in any ordering of essential human values, there is a sound argument that agency is primary, because as described in the following section, other valued human impacts lose their significance if they occur without agency but as reactions to other forces.

⁵⁴ See *id.* Obviously, this view of agency accepts the notion that human beings do indeed exist as individuals, although within a social context, and that they are not solely the consequences or by-products of larger structures, whether economic, political or otherwise. See Lerch et al., *supra* note 51.

⁵⁵ Joseph B. Stulberg, *Mediation and Justice: What Standards Govern?*, 6 CARDOZO J. CONFLICT RESOL. 213, 230 (2005).

⁵⁶ Bandura, *supra* note 52, at 28–32.

⁵⁷ See, e.g., B. Ann Bettencourt & Kennon Sheldon, *Social Roles as Mechanisms for Psychological Need Satisfaction Within Social Groups*, 81 J. PERSONALITY & SOC’L PSYCHOL. 1131 (2001).

decision-making.⁵⁸ In all this work, human agency is “proven” to be central to human identity.

C. *What Agency Facilitates: A Comparison*

In fact, however, human agency is not a phenomenon that can be proven, even with the support of multidisciplinary sources. Even if studies show that human wellbeing, happiness, efficacy, etc., all require agency, this could be an effect or perception created by social structures themselves. Even if research “proves” that agency increases resilience and strength and diminishes “fragility” and dependency,⁵⁹ all this can be ascribed to the effect of culture or social forces. Indeed, opposed to the view that agency matters are those arguing that individual choice is itself a construction, an illusion, and that human beings and their choices are ultimately products of social forces, environment, brain wiring, and other factors unrelated to individual agency.⁶⁰

In fact, then, there is no way of *proving* empirically that agency is an essential element of human nature and consciousness. Rather, asserting the core value of agency is itself a choice, a belief, an assertion about how things are or should be. If this is so, how can one make a convincing case for the importance of valuing agency to anyone who doesn’t already hold this belief? One suggestion is through a mental exercise in comparison—through envisioning a world without agency and a world with agency, and comparing the character of the two, as in the following discussion.

If agency is dismissed as simply a social construction or convention, then nothing else in the realm of human conduct is really meaningful. What difference does it make if empathy is expressed, or generosity, or courage—or selfishness and cowardice? All are the

⁵⁸ See, e.g., E. ALLEN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* (1988).

⁵⁹ See *The Three Great Untruths that are Harming Young Americans*, HELEO (Oct. 23, 2018), <https://heleo.com/three-great-untruths-harming-young-americans/19321/?platform=hootsuite>; GREG LUKIANOFF & JONATHAN HAIDT, *THE CODDLING OF THE AMERICAN MIND: HOW GOOD INTENTIONS AND BAD IDEAS ARE SETTING UP A GENERATION FOR FAILURE* 19–32 (2018).

⁶⁰ See Bandura, *supra* note 52, at 21–23 (stating that in this view, “People are merely repositories for past stimulus inputs and conduits for external stimulation, but they can add nothing to their performance. They undergo actions rather than construct, select, and regulate them. . . . [S]tripped of consciousness and agentic capability of decision and action, people are mere automatons undergoing actions devoid of any conscious regulation, phenomenological life or personal identity.”).

products of deterministic forces, so what is the significance of these forms of human conduct? If there is agency, and choice, everything else has the potential for value and significance. Without agency, there is no significance and no responsibility—good and evil acts can be attributed to larger forces, and the individuals performing the acts deserve neither credit nor blame.

Said differently, without the belief in agency, all action is the result of compulsion, external or internal. If external, it is the result of outside forces; if internal, it is the result of irrational impulses or preferences. Either way, there is no significance or meaning in terms of individual intention or purpose. So, to envision a world without agency is to envision a meaningless, chaotic place, devoid of intention, purpose and meaning. Whereas, with a belief in agency, everything becomes meaningful and significant—and real. Empathy, generosity, etc. are all real phenomena, because they are intended and meant, and that is so because there is an agent behind them choosing and enacting them, asserting them into the world. The same is true for evil acts. So, there can be accountability and responsibility. There can be admiration and there can also be condemnation. All of this is possible when human agency is present and operating.⁶¹ None of it is possible when it is not.

In sum, without agency, no human action is real, all action is an artifact—like forced recognition in mediation.⁶² Given all the above, one can argue that even if agency is not a provable element of human identity, it makes sense to act as though it is—because this choice to see agency as real will ultimately construct a more decent, humane, livable world. This hypothetical comparison should help explain why agency—or the belief in it—does and should matter deeply.

D. *What Agency Itself Represents*

However, the above argument supports the value of agency by reference to the *effects* that its presence or absence produces. That is, it argues

⁶¹ Psychologist Viktor Frankel, who developed his theory of “logotherapy” while a prisoner in a Nazi concentration camp, argued that “A human being is not one thing among others; *things* determine each other, but *man* is ultimately self-determining. What he becomes – within the limits of endowment and environment – he has made out of himself.... In the concentration camps ... we watched and witnessed some of our comrades behave like swine while others behaved like saints. Man has both potentialities within himself; which one is actualized depends on decisions but not on conditions.” VIKTOR FRANKEL, *MAN’S SEARCH FOR MEANING* 133–34 (2006).

⁶² See *supra* text accompanying notes 25–31.

for the importance of agency as *instrumental* to the achievement of other, more fundamental values: human wellbeing, happiness, efficacy, empathy, etc. It does not argue or show that human agency has an *essential* value, in itself and without reference to its valued effects. To understand the depth of commitment to agency required in client-centered practices, the *essential* value of agency must be understood and recognized. Otherwise, if client-centered practices fail to achieve the *other* valued effects, then agency must be restricted in the pursuit of those other effects. This is the argument that explains the move away from client self-determination described in Part One of this Article, and well-documented in mediation and other fields.⁶³ Those who make this move believe that to achieve empathy, or justice, or even settlement, client agency can and sometimes must be abandoned.⁶⁴ However, the authors believe and argue the reverse—that even if supporting client agency *fails* to produce these results, the clients’ exercise of agency has essential value and takes priority in practice.

Our belief is that when a human being acts with agency, that action itself has an essential value—whether it is described as being part of human identity or in some other way. That value is captured, in one sense, by the terms first used above to define agency—“the *assertion* by an individual of the *intentional* choice to make a decision or take an action.” The term assertion implies that agency involves a *positive* action, from within the individual him/herself, to bring some internal intention into the world. That action, by definition, is taken freely; it is not a *reaction* to some external pressure or force, even if external factors may come into consideration in the decision.⁶⁵

⁶³ See *supra* text accompanying notes 14–33.

⁶⁴ In fact, this argument is fallacious, because where any of these other goals are achieved by imposition and not by party choice, the gains made are illusory. That is, recognition resulting from mediator pressure is not genuine; justice resulting from mediator imposition is unlikely to be truly equitable; and settlement/agreement achieved by mediator pressure is unlikely to be complete and sustainable. Nevertheless, mediators who do not value agency per se will often engage in impositional practices to “achieve” these other goals.

⁶⁵ See Bandura, *supra* note 52, at 22–23. On his website, Bandura summarizes his view of agency, which includes elements similar to those mentioned here in the text: “Agency refers to the human capability to influence one’s functioning and the course of events by one’s actions. There are four functions through which human agency is exercised. One such function is intentionality. People form intentions that include action plans and strategies for realizing them. The second function involves temporal extension of agency through forethought. People set themselves goals and foresee likely outcomes of prospective actions to guide and motivate their efforts anticipatorily. The third agentic function is self-reactiveness. Agents are not only planners and forethinkers. They are also

The term *assertion* also implies that the action requires some motivating energy within the self to bring it about. That is, even where there is no external pressure that produces a reaction, there are *internal* barriers or steps to be overcome before the intention emerges into action. That is implied by the term *intention*, which means that there is a gap to be bridged between the intention itself and the intended result. Those barriers may involve unclarity about what the intention involves or requires; they may involve uncertainty about how to express the intention; they may involve doubt about one's capacity to carry out the intention.⁶⁶ Agency represents an *assertion of the self itself* that overcomes those barriers and breaks through from an internal, contemplated intention to an externalized, realized action or decision.⁶⁷

In an earlier effort to describe the nature of agency, and in doing so establish its centrality to human identity, one of the authors wrote, "Agency involves an outward thrust of the self into the world. It occurs at the nexus of volition and action: the place where choice and the ability to exercise choice meets the capacity to act in some fashion."⁶⁸ Thus agency includes both choice and intentional action, both of which are essential to human identity. Reflecting further on this observation, the authors believe that this description of agency relates to another deep truth about human beings. Individuals' identity—*the self*—is not static and limited, but rather dynamic and

self-regulators. The fourth agentic function is self-reflectiveness. People are not only agents, they are self-examiners of their own functioning. Through functional self-awareness, they reflect on their personal efficacy, the soundness of their thoughts and actions, the meaning of their pursuits, and make corrective adjustments if necessary." Albert Bandura, *Agency*, <https://albertbandura.com/albert-bandura-agency.html> (last visited July 6, 2020).

⁶⁶ See *id.* In transformative mediation theory, barriers like those mentioned in the text are the "markers" of the weakness of self that characterizes the negative conflict cycle. See BUSH & FOLGER, *supra* note 11, at 49–50.

⁶⁷ For this reason, agentic action is even more significant when it is a response to barriers from within or without that seem powerful enough to block or frustrate its expression. The intentional self-assertion needed to break through those barriers comes from, and calls forth, a deeper level within the self, leading to a fuller expression of the self. This is one reason why the phenomenon of individuals overcoming a sense of their own weakness and connecting to their sense of strength—such as the empowerment shift in transformative mediation—has such a powerful impact on whoever experiences or witnesses it. Specific examples of this phenomenon, and its powerful impact, are given below. See *infra* text accompanying notes 79–87.

⁶⁸ Peter F. Miller, "Notes on Agency", manuscript on file with author.

venturesome.⁶⁹ The self seeks to develop its full identity and to find expression in the world.⁷⁰ And this need of the self to develop, and to bring itself into the world, is foundational to human nature. Thus, agency matters deeply because only through its exercise can the human self be constructed and expressed.⁷¹

⁶⁹ See PROMISE 2, *supra* note 11, at 251–54 (citing sources from different fields adopting the view that the self is not static but rather develops and is constructed through interaction with the world); see also Barbara Gray, *The Gender-Based Foundations of Negotiation Theory*, 4 RES. ON NEGOT. ORGS. 3, 24–25, 27–28 (1994) (arguing that feminist perspectives show that static conceptions of the self are invalid); Dorothy J. Della Noce, *supra* note 14, at 275–79.

⁷⁰ The need for expression accounts for—but is by no means restricted to—the creative impulse; and it accounts for the lonely stances artists sometimes take in support of or in defense of their work. Bob Dylan’s refusal to accede to the impassioned wishes of his fan base provides an example of an artist standing by his work, even leaning back into a sea of disapproval and opprobrium. As a folk singer Bob Dylan swiftly came to be one of the very foremost voices of youth and the counterculture. He performed within the established traditions of folk music by using an acoustic guitar and without being accompanied by percussion. That changed at the Newport Festival of 1965. He came on stage with an electric guitar accompanied by rock musicians who provided a rock underpinning to his songs. This evolution into what came to be called folk/rock dismayed his audience. People saw it as selling out to commercialism, and as a betrayal. (An apocryphal story circulated, much believed at the time, that Pete Seeger, an older icon of folk music, tried to cut Dylan’s electric guitar cord during the performance.) Not deterred, Dylan persisted in his new style. Controversy dogged Dylan when he toured Europe the next year. One moment epitomizes the fan base’s response to the change in Dylan’s music and his defiant response to that. At a concert in England, Dylan is greeted by a cascade of booing as he comes on stage accompanied by back-up musicians. (One concert goer is reputed to have yelled, “Judas!”). Dylan turns to one of the band members and can be heard to say, “Play it f***ing loud.” The scene is captured in Martin Scorsese’s 2005 documentary. NO DIRECTION HOME: BOB DYLAN (Paramount Pictures 2005).

⁷¹ See Robert P. Burns, *Some Ethical Issues Surrounding Mediation*, 70 FORDHAM L. REV. 691, 709–10 (2001) (citing the philosophical view that “the self is not obvious to the self,” but must be discovered or constructed.) But what is meant here by *the self*? To receive a fatal prognosis and go to pieces certainly qualifies as informing the world with one’s innerness. But to fall apart in the face of adversity is not to exert agency; rather it is to lose touch with it. *The self*, as we envision and use the term, means the *intended self*: who it is we wish to be and how it is we wish to comport ourselves. So, to extend the example of the fatal prognosis, *agency* would apply to the patient’s heroic efforts to regain composure after the diagnosis. And the force driving agency would be the *intended self*’s need or desire to meet adversity well. Frankel’s account of life in a concentration camp reflects a similar view of agency: “Every day, every hour, offered the opportunity to make a decision, a decision which determined whether you would or would not submit to those powers which threatened to rob you of your very self, your inner freedom; which determined whether or not you would become the plaything of circumstance, renouncing

In short, *agency is the phenomenon of the self's identifying and expressing the self*, and as such it is at the core of human identity and consciousness. The assertion of agency, in other words, is one essential meaning of being human. That is the value of agency—an essential value—regardless of whether it achieves some other specific impact in the external world.⁷²

To return to the original subject of this Article: This kind of assertion of agency is what occurs in mediation when a party makes an entirely self-determined decision—and it occurs whether or not that decision leads to settlement, justice, recognition, or any other valued end.⁷³ It is an end in itself,

freedom and dignity to become molded into the form of the typical inmate.” FRANKEL, *supra* note 61, at 66. He also recognizes the role of agency in developing the self in relation to external conditions, even in the camp: “Man is *not* fully conditioned and determined but rather determines himself whether he gives in to conditions or stands up to them. In other words, man is ultimately self-determining. Man . . . decides what his existence will be, what he will become in the next moment. . . . [O]ne of the main features of human existence is the capacity to rise above [biological, psychological or sociological] conditions, to grow beyond them.” *Id.*, at 131.

⁷² This is not to say that agency is the *only* essential value, or the *only* essential meaning of being human; another core element is empathy or compassion. *See supra* notes 17 and 53; *infra* note 73. But that element is not the focus in this Article, for reasons explained there. *See id.*

⁷³ For a concrete example of this phenomenon, *see infra* note 90. It may seem to some readers that our emphasis on client agency as a stand-alone value, regardless of whether it leads to other impacts, including recognition shifts and understanding, constitutes a shift from the relational character of transformative theory, and moves toward an individualist framework. That is, the focus on agency as stand-alone value means that the process will be aimed at increasing individuals’ self-defined satisfaction without regard to other, which is characteristic of the individualist theory underlying the conventional problem-solving, facilitative model. *See PROMISE 2, supra* note 11, at 239–47. However, this is neither the intent nor the impact of our “stand-alone” agency argument. If success is measured by increases in party agency—through parties exercising self-determination during the process even though no other result is achieved—this is far from the equivalent of an individualist framework. That framework is based on the view that satisfaction of individuals’ self-defined needs is the goal of conflict processes, whether that satisfaction is produced by self-determination or expert imposition. The outcome is valued, not some aspect of the process itself. That is one key difference between the problem-solving and the transformative frameworks, and the focus on client agency as stand-alone value retains that difference by holding that process rather than outcome is what matters. Second, although our sole focus on self-determination and agency seems to omit the second element in the relational framework—the other-oriented value of empathy/understanding—that too is neither the intent nor the impact of our argument. As noted repeatedly above, our claim is that agency is *an* essential value, not that it is the *only* essential value. Moreover, our

and because that is so, supporting client agency in mediation is of central importance, and trumps any other possible goal that the process might be used to achieve. In exploring our own commitment to self-determination in mediation, this is what the authors of the Article have realized about our deeper, underlying commitment to the value of agency: it is a supreme value that is either served or disserved by mediators, depending on how fully they support client decisionmaking. This realization is all the more important because of another dimension related to this discussion: the institutional context surrounding the practice of mediation and other client-centered processes.

E. *The Stakes in Choosing to Value Agency*

Another important factor that strengthens our commitment to the principle of client self-determination is the restriction of the space given for agency to function, in our current societal environment. That is, the organization of social processes, and especially the organization of professional expertise, makes the assertion of agency very difficult and almost impossible in many contexts. This obviously comes back to the specific subject of this Article, disregard for client agency in mediation. But beyond mediation, there is also a robust body of literature documenting, and criticizing, the culture of expertise that dominates many so-called “helping professions”—including law, medicine, counseling, education, and others. In

definition and explanation of agency makes clear that agents can only identify and construct their self-definition through engagement with the world—including interactions with others, in conflict and otherwise. *See supra* notes 69–71 and accompanying text. Finally, focusing on self-determination per se in no way suggests that parties will not exercise their power of choice to give consideration to the perspective of the other, and in doing so enact the value of empathy—based on party choice. So, the interactional focus of both the relational theory and the transformative model is not undermined at all by our argument – it is simply not the focus here. And the reason for that, also explained above, is that unless stand-alone value is ascribed to agency, intervenors will feel justified in undermining agency in order to pursue other values when self-determination “doesn’t work”—that is, doesn’t work as an instrument to achieve those other values. We have been down that road for many decades in the mediation field, and this Article is an attempt to prevent continuing further down that misguided path. The importance of clarifying the stand-alone value of agency is thus both rhetorical and practical—this clarification makes it much clearer why self-determination really is a supreme value, and at the same time makes it hard if not impossible to rationalize and justify mediator incursions on party self-determination. If self-determination is the heart of mediation, the argument offered in this Article offers the best chance of preserving and strengthening that heart—and the very life of the mediation process.

all these professions, the outside expert—lawyer, doctor, therapist, educator, or mediator—traditionally assumes a place of authority that automatically shrinks the realm of client agency, and many assume that this is the proper state of affairs.⁷⁴ This dominant culture of expertise makes the value of agency even more important to assert and explain, because it is a “minority” value that must fight for its place in society and in peoples’ consciousness. In short, because agency is often disregarded, and the opportunity for exercising it is so limited, asserting its value becomes correspondingly more important. That is certainly part of what has driven the commitment of the authors to make their claims about the value of agency.

The larger societal consequences of professional disregard for client agency are hard to overstate. When clients are denied agency by “experts”, they come to doubt their own capacity for agency in general. A self-fulfilling prophecy then takes over. In families, workplaces, communities, and civic life generally, people flounder in the face of problems and challenges, and they fail to realize and activate their own capacity for working through those challenges. The result is a culture of reliance on outside “helpers” and experts, in which people forfeit control over their own lives.⁷⁵

In a democratic society the results of that forfeiture cannot be overstated. Can we really be surprised by this moment in which our society finds itself—in which people view decisions that affect their lives as being foisted on them by detached or malign elites, in which theories of conspiracy abound, and in which there is broad skepticism of knowledge itself? The destructive impacts of inequalities in income to both individuals and societies

⁷⁴ See, e.g., Dinerstein, *supra* note 12, at 504, 506; see also *supra* notes 17–19 (regarding the weight given to professional expertise in traditional legal and medical practice); *supra* note 173 *passim* (regarding the weight given to professional expertise in traditional psychology practice). Dinerstein’s article is an exhaustive examination of the conceptual and practical differences between the traditional, expert-centered approach to practice, and the client-centered approach, in different fields, and at many different levels.

⁷⁵ An interesting example of this disregard for agency’s value has surfaced in the authors’ classes, when the subject of agency is discussed. Every year, a hypothetical deal is offered to the students: the student will surrender to the professor all decisionmaking power over his/her life for one year, and if the student does not agree at year’s end that their life is categorically better than if s/he had made his/her own decisions, the professor will pay a million dollars. Each year more than half the class accepts the hypothetical deal and surrenders their agency to the professor. Why? Because the culture of expertise has inculcated in the students the belief that the “expert” will get better results than they will on their own and the exercise of agency in itself—even their own agency—does not hold great enough value for them to resist the deal.

have been studied and documented. But what of the unevenly suffered harms that result from deficits—and inequities—in *agency*?⁷⁶

As argued in the *Promise of Mediation*, the stakes of rejecting agency in mediation are thus far greater than the impact on that field—they may ultimately contribute to a decline in the self-governing and democratic character of the society as a whole. However, it is equally true that accepting and enacting the value of agency in mediation can contribute to *strengthening* the society’s commitment to democratic processes and institutions, and the capacity of the citizenry to make those structures work. In *Promise*, that positive impact was identified as one of the public values of transformative mediation, and that value is as important today as it was 25 years ago.⁷⁷ It is also deserving of more widespread recognition and support, especially if we expect mediation to help us “navigate in a polarized era.”⁷⁸ Mediators can help do that by *supporting the agency* of diverse parties in deciding for themselves whether and when to see each other more favorably, rather than using directive practices to “get them” to do so. Freely chosen understanding can help bridge divides; “forced recognition” will only widen them. Supporting human agency in mediation and similar processes can be a first step in addressing polarization.

⁷⁶ The literature on client-centered lawyering raises this question explicitly and implicitly, in stressing the special importance of client agency for poor, disadvantaged and disempowered clients. See, e.g., GERALD P. LÓPEZ, *REBELLIOUS LAWYERING: ONE CHICANO’S VISION OF PROGRESSIVE LAW PRACTICE* (1992); DOUGLAS E. ROSENTHAL, *LAWYER AND CLIENT: WHO’S IN CHARGE?* 168–69 (1974) (stating that client-centered lawyering is intended to “promote[] the dignity of citizens as clients[,] . . . make[] the client a doer, responsible for his choices[,] . . . [and] increase[] the chance[s] for [the] client . . . achieving a measure of control over [his] own life”); Alizabeth Newman, *Bridging the Justice Gap: Building Community by Responding to Individual Need*, 17 CLIN. L. REV. 615, 627–31 (2011) (arguing that “if the lawyering process is to be an effective tool for social justice, the means cannot be inconsistent with the ultimate goals,” and suggesting that the client should be treated as “a vital partner, from the very outset,” and supporting “[t]he conception of the lawyer as coach and the client as a capable partner.”); Rand, *supra* note 12, at 485 (citing the social workers’ ethical code provision that “[p]eople empower themselves and our job is to assist them” and arguing that social justice lawyering must be based on the same principle).

⁷⁷ See PROMISE 2, *supra* note 11, at 80–83.

⁷⁸ See *supra* notes 44–45 and accompanying text. See also Erik Cleven, Robert A. Baruch Bush & Judith A. Saul, *Living with No: Political Polarization and Transformative Dialogue*, 2018 J. DISP. RESOL. 53, 56–62 (2018) (describing transformative interventions in several polarized communities). The subject of the Symposium that generated this Article was the potential for mediation (and ADR) to help in “navigating in a polarized era.”

IV. PART THREE: RECOGNIZING AND SUPPORTING THE VALUE OF AGENCY

A. *Lights at the End of the Tunnel: Portraits of Agency in Transformative Mediation*

At the same time as agency is restricted and disfavored by many current social and professional structures, the value of agency has found powerful expression and support in client-centered practices in some professions—including transformative mediation. Despite the serious challenges discussed in this Article, cases reported by transformative mediators confirm how parties value and seize the opportunity the process gives them to assert their own agency in the face of disempowering situations.

Transformative theory recognizes the corrosive impact that conflict has on people's capacity to exert agency. In the midst of conflict, parties become less clear in their thinking, less able to articulate their thoughts, less able to process and make decisions, and less confident of their own efficacy. Transformative theory also recognizes that this state of weakness is existentially discomfiting to disputants, to such a degree that, if properly supported in mediation, they will make every effort to recapture those essential attributes of agency, even as they contend with one another.⁷⁹ The following vignettes, drawn from actual mediation cases, use the voices of parties to demonstrate that people in conflict place great importance on the need to sustain or regain their agency in transformative mediation.⁸⁰

1. *SOMETHING WORTH PRAYING FOR*

Some years ago, one of the authors mediated a dispute between two managers in a business. For many years they worked closely, each with the same level of institutional authority and status. Then one of them was promoted, and the other became subordinate because he now reported directly to his former equal. The new arrangement so toxified their professional relationship that the subordinate manager filed a discrimination complaint against his new boss. The company they worked for has an internal process

⁷⁹ See PROMISE 2, *supra* note 11, at 49–53.

⁸⁰ It is important to note that, in each of the mediation vignettes in this section, and each of the film scenes in the following section, the story shows the essential and independent value of agency, without any further effect needing to occur. For further discussion of the significance of this point, see *infra* note 90.

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with which to handle complaints of discrimination. People filing complaints may opt for mediation as a potential means of resolving their issues. Mediation is mandatory for managers named in complaints.

In this case, there was a third manager present in the mediation that resulted from the subordinate's decision to mediate the matter. Both the boss and the subordinate had requested his presence. In introducing himself and describing his role in the mediation, this manager said, "I'm not here to help one of these guys right a wrong. They are both nice guys and I am here in support of both of them." The mediation that ensued was satisfactory to both boss and subordinate. In its aftermath, probably because of the presence of the third manager, the three engaged in a conversation of the sort that mediators seldom are privileged to hear. Disputants rarely articulate the feelings and thoughts they had experienced as they anticipated their approaching mediation. Here each of the two disputants did precisely that. Each related that they had gone to church after work the day before the mediation. Each had prayed. Each asked for the ability to be *firm and clear* in mediation the following morning. In sum, rather than focus on a desired outcome, each disputant asked that he not lose the capacity to act with agency, in a situation that each clearly saw as an imminent challenge that would require him to draw on reserves in order to surmount.

Little commentary is required here. Clearly conflict can be formidable and daunting because the experience of conflict challenges one's human capacities. Clearly the ability to meet the adversity of conflict with one's capacities at their best is something that matters to people. And clearly retaining or regaining those capacities is hard. In moments of great challenge, people do not pray for the inconsequential. What mattered to the parties here

was their agency. That is what they prayed for, and this mediation allowed and helped them to maintain it.

2. *THE VALUE OF VOICE*

One of the authors had a partner for many years with whom he mediated issues of divorce and other family matters. This case is drawn from that experience.

On a particular day the author's partner, Sarah, found herself in our locality's Supreme Court. She was there representing an association of mediators whose practices include divorce and sundry disputes that occur within families. The association had placed mediators at the Court's disposal that day in response to a joint initiative by the court system and various mediation groups called Mediation Appreciation Day. Mediation Appreciation Day is an annual one day event which attempts to demonstrate the capabilities of mediation to court personnel, principally judges and to litigators as well who happen to be in Court that day. The case the judge selected for mediation was a divorce case that was set to go to trial that afternoon. The judge literally threw the case's bundled paperwork to Sarah and ordered the spouses to "Go with the mediator and try to work this out" (A room had been set aside for mediation.) Those readers familiar with divorce will understand just how remote the possibility was of the spouses "working out" their issues. Few divorce actions get on court calendars; only a fraction of those cases actually go to trial. So, this husband and wife were among a small cohort of spouses whose issues had proved intractable in negotiation, whether conducted directly or through attorneys, or in mediation. Adding to the unlikelihood of resolution was

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the utter absence of choice by the spouses regarding the selection of mediation as a means of potential resolution.

Since Sarah is a transformative mediator, she gave the spouses the option of just sitting for a length of time rather than attempting to mediate their differences. After a short discussion the spouses opted for mediation, in effect saying, “As long as we have to be here, we might as well try.” And so, they opened a discussion of their issues. Their conversation was notable for its contentiousness and acrimony. Each spouse staked out ground and held it, often in spirited fashion. Neither moved an inch. In the words of another client of one of the authors, who is unrelated to this story, “They agreed to disagree about everything. They resolved nothing.” After an hour or so of sustained disagreement the spouses decided to suspend the mediation and return their case to the Court so as not to delay their trial.

The wife happened to see Sarah an hour or so later as Sarah was leaving the Courthouse. The wife crossed the wide corridor that separated them and proffered her hand. When Sarah gave the wife her hand, the wife said, “I want to thank you. I found my voice.”

To be without a voice is crippling to the sense of agency.⁸¹ The self is imprisoned and therefore incomplete. And finding one’s voice is powerful and restorative. These spouses were contending over the distribution of their marital assets. For the authors, this story raises the question, “What is worth more, gaining a greater share of assets, or gaining one’s voice, one’s agency?” For the wife here, the answer was clear. Parties value their agency, and they value a process that supports it. They find that in transformative mediation.

⁸¹ See *infra* notes 85–86 and accompanying text.

3. *DOING SOMETHING*

A young man, in his early to mid-20s, had agreed to participate in mediation at the request of a young woman of comparable age. Both the young man and young woman are deaf. Mediation had been suggested to the young woman by a staff member of a social agency—both the young people were long standing clients—which offers an array of services to the deaf community. The local community mediation center which had offered to host the young people's mediation provided an interpreter, fluent in American Sign Language. One of the authors of this Article was the mediator.

When the mediator invited the two young people to open their conversation, it was the young woman who chose to speak. She unfolded a lengthy narrative, the theme of which was the history and status of their relationship. She spoke at length of the value she placed on having been in emotional partnership with the young man. How his support and simply being with him had permitted her new insights into the motives that had governed the poor decisions she had made in the past. And how his support and being connected with him had equipped her with a deeper knowledge of herself, so that she had at last been able to take steps to stabilize her life, which had to that point been chaotic and disjointed. In continuing, the young woman spoke of the discomfort the young man's uncommunicativeness had caused her in their past and was especially causing her now. Even when things were going well between them, she said, his failure to communicate his feelings about her had caused her pain. He had never told her he loved her, had never said that he valued being in connection with her. Now, she was hearing from others in the community that the young man had told them that she and he "were no longer an item." She wanted him to know that, while still loving him, she could accept

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the end of their relationship if he told her that he wanted to end it. Painful as the ending would be, what was more hurtful was not knowing. And the awareness that he had been voluble *about her* with others, while remaining silent with her, was both hurtful and degrading.

Although the theme of the relationship occupied most of her narrative there were two other topics the young woman touched on. She was about to enroll in an in-patient course of therapy and counseling in order to address a persistent drug problem. The course of treatment was to run for six weeks. She had a court date immediately after its conclusion. She was to appear as a respondent in a custody action by the father of her young daughter—clearly she envisioned Court as an ordeal through which she had to pass. Would the young man support and accompany her, whether as mate or merely in the capacity of a friend? And there was the matter of her car. The young man had borrowed it and while driving had gotten into an accident. He had reimbursed her for the initial estimate of \$3,000.00, but it turned out that the actual cost of repairs had been \$6,000.00. Would he make up for the shortfall?

The young man had been attentive and connected by his gaze to the young woman throughout all she had said. But during this lengthy time, he had remained silent. At several points when the young woman had paused in her narrative, the author/mediator had asked the young man whether there were things he wished to raise, or did he prefer to just listen? The young man always answered, “I’ll just listen.” At one point, the young man

asked if we could take a break so he could exit the building in order to smoke a cigarette. The young woman opted to join him. When they returned some 20 minutes later, there was a markedly different quality in the young man's bearing and affect, manifest even before he spoke. He seemed at once lighter, yet more solid and present, and possessed of greater vitality. When he did speak, he told the author, "We worked it out."

A few minutes later the young woman and young man responded to the author's question "Have you had a complete conversation or is there anything else you want to say." She spoke aloud for the first time in the session; directing her gaze to the young man, she said, "It feels like *we* did a lot today." The young man answered her, also aloud, by saying, without a trace of theatricality or even emphasis, "Yeah, for the first time in my life." He then shifted his gaze to the author and said, "I like mediation."

Here the authors invite the reader to pause for a moment. If you can, imagine yourself, perhaps because of disability, perhaps not, as never having acquired the certain knowledge that you have the capacity to undertake doing things, and doing them well. In fact, if you can, imagine yourself as never having had the experience of having truly done something. Now picture yourself as having moved yourself, through the act and experience of *doing*, to a clear knowledge that you do indeed possess those powers—you have agency. Think of the difference that self-knowledge might make as you conduct your life going forward. You too might then find mediation an affirmation, as this couple did. In fact, this episode was salutary for the author/mediator as well, because it struck a resonant chord of memory. It was precisely the sort of dynamic change in clients, exhibited here by the young man—sometimes expressed physically, sometimes in words—that had drawn the author's attention years before. Those changes strongly suggested that there were benefits to clients inherent in the process of *doing mediation* that were of value and were independent of outcomes. It was the cumulative effect of those earlier, increasingly pressing

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observations that had led the author to explore transformative practice, and ultimately to adopt it, in order to support human agency in mediation.

4. *SAYING NO*

The following episode taught one of the authors a lesson about choice that may also have contributed to his transition to the transformative mode of practice. The mediation had been referred from Family Court. The petitioner - the father in a dispute over visitation—was a man in his late thirties or early forties. The respondent—the mother of the two girls who were the subjects of the petition—was a woman a few years his junior, in her mid to late thirties.

Shortly after fathering the two children, the man had entered into a marriage with another woman and had two other children with her. During the life of the marriage, the father, had been fiscally dutiful in a consistent way in supporting his two older children. Yet during this time he had expressed no interest in reviving a relationship with them. Indeed, he had gone a number of years without any sort of contact with these children, now about eight and nine years old. Recently the father's marriage had ended in divorce. With the end of the marriage there came a change in the father. He had become passionately interested in connecting with his two older children. Some months before, he had reached out to their mother and asked if he could come to her home to become reacquainted with their children. The mother had welcomed this surprising initiative because the two children, although they had scant memory of their father, frequently asked about him. She understood that her two girls badly missed the presence of a father. The father's initial visit had gone well all around. So had all the subsequent visits. The two girls and their father were clearly developing a connection that, from the mother's perspective, enriched the well-

being of her children. By the time the parents were in Court, the father had been visiting the children in their home for some months.

The parents' differences arose over whether the children could have overnight visits in their father's home. The father insisted on their being able to do so. The mother objected. Later, in negotiation, the mother had somewhat modified the position she had initially adopted. She stipulated that, if things continued to go well, they could revisit the question of overnight visits in six months or so. The father had continued to insist on immediate overnights. As do many fathers, he regarded the discretion the mother was attempting to exert as diminishing his status and prerogative as co-parent.

Now they were in mediation. The author had initiated a separate meeting with the mother. The stance she had adopted regarding visitation seemed to the author/mediator to be untenable in a legal sense, and he had wanted to explore that with her. Here the mother became expansive. She explained why she had adopted and committed to her stance. She said, "I understand how important his connection with my children is to them and I don't want to interfere with it. But right after each of the children were born, the father (she used his name) urged me to give them to his sister to raise. His sister lives in the Dominican Republic. We (meaning the United States) have no treaty with them about unlawful flight, so if he ever does get them to the D.R. they will never see me again."

She concluded, "I've met with a lawyer. I know I am going to lose the case, because of the father's legal rights. But if my children

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are going to lose their mother, it will happen because someone else permitted it to happen, (referring to the Court), not because I failed to protect them. I will not participate in that.” There was such dignity and calm, such clarity and purpose in what she said, that it stopped cold any incipient desire by the author to ask her for any reconsideration or moderation of the stance she had taken and held.

As we have suggested earlier in positing *choice* as a requisite for meaningful action, our participation only has value when we have the option of *not* participating; and our yeses only have meaning when we have the power to say no. Sometimes *the self* needs to hold itself in opposition, even with the knowledge that it is powerless to alter an outcome. Doing so is an eloquent expression of agency, and that was the heart of what happened in this mediation and the others reported on above.

B. *Lights at the End of the Tunnel: The Value of Agency in Popular Culture*

In teaching our courses on mediation, the authors have found that even when students notice the empowerment shifts that clients make, they underestimate the value these experiences have to clients—because the students find it hard to believe that agency really matters so much to people. In order to overcome this skepticism, we have increasingly turned to popular culture, narrative history, and realms unrelated to mediation. We have used stories from these realms as a vehicle to illustrate the importance of agency in peoples’ lives.

Unlike the actual world which unfolds willy-nilly, events in drama and film are structured by the dramatist’s need to stir his or her audience. In drama and film, events and characters’ responses to events are purposely sequenced so as to inspire emotion in viewers. Drama and film achieve those sorts of impacts because dramatists and directors have the power to create the world—that is, they can structure what the viewer sees and when s/he sees it in ways that support the development of unified and powerful themes.

Human agency is one such dramatically powerful and compelling theme, and for that reason it is repeatedly the subject of popular films. It is always heroically depicted: a protagonist is confronted by a challenge or series of challenges, he or she struggles with fear, or doubt or the inability to move forward as they wish to or need to, then he or she connects with internal

resources, and ultimately emerges from the struggle with new strength. Incidentally, that heroic progression from weakness to strength mirrors that of conflict participants as they move through mediation.

The authors believe that *agency*—its loss or potential loss, and then its assertion—has the power to deeply move audiences again and again, precisely because it is an essential part of our nature. In support of that belief, the authors present here a few short synopses of films in which protagonists who face challenges, nevertheless find and assert agency and in doing so, become stronger and gain the audience’s admiration.⁸² Recounting these stories here, together with comments on how we see agency demonstrated in them, will reinforce our exposition of the value of agency in earlier sections of the article—and suggest how skepticism about that value can be overcome.

1. A RASH ACTION, OR A DELIBERATE CHOICE

The 2004 film “*Crash*” depicts a series of confrontations faced by a group of unrelated characters in a tense urban environment.⁸³ One of the characters is an urbane, African–American film director, Cameron Thayer, married to an attractive and demanding woman, also African–American.

The couple is driving home from an award celebration, in evening clothes, in a brand-new black SUV, when they are pulled over by police. There is no reason for the stop, but the senior officer is a racist who uses the occasion to taunt Cameron and sexually fondle his wife, before letting them go “with a warning.” Cameron submits to this abuse rather than suffer arrest and jail, but his wife is enraged at his cowardice in not standing up to the cop, and she berates him mercilessly when they get home. The following day, on the set of his film, Cameron is criticized by his white producer because one of the actors has not used a “black” accent in a scene, and although Cameron objects that he knows what black people talk like, the producer

⁸² See *supra* note 67.

⁸³ Anonymouones, *Crash Movie Clip*, YOUTUBE (Sep. 19, 2008), <https://www.youtube.com/watch?v=IQ6RSu8dhPU>.

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forces him to re-do the scene. Through all this, Cameron is diminished, disrespected, and even degraded publicly. Finally, driving home from the studio, he is the victim of an attempted carjacking by two teen-aged black kids, one with a gun. As they struggle for control of the gun and the car, a patrolling police car notices them; Cameron wrests the gun from the teen and tries to drive away, but the police catch up and block his escape. They order him with a bullhorn to exit the car with his hands up, while the teen hides from view on the floor of the front seat.

Cameron sits for several moments thinking, while the bullhorn blasts its orders. Then he deliberately tucks the gun into his belt under his sweater and steps out of the car cursing and yelling at the police, all the while using an exaggerated “black” street-talk accent. Eventually, finding he has no record, the police allow him to leave, and he drives away. Stopping some distance away, he hands the gun back to the teen—who has hidden from view the entire time—and says to the teen, without a street accent and in a firm, calm voice: “You disrespect me; you disrespect yourself.” And he drives off, leaving the teen standing on the street in wonder at what has happened.

This scene can be viewed in different ways, as was likely the intention of the director. But the most compelling interpretation is that Cameron, having been subjected to several, successive withering assaults on his self-respect—from the cop, his own wife, his producer, and now the teen—firmly decides that he will not continue his submissive attitude, but will take affirmative control of the situation in the best way he can manage. So, he removes the gun from the teen’s reach, and then steps out and dramatically confronts the police, hoping they will focus on him and overlook the teen and hoping that he can successfully end the confrontation that he has intentionally begun. He does all this, and then leaves the teen with a powerful challenge —stop disrespecting

others and yourself. On this interpretation of the scene, the character of Cameron asserts his agency in a most powerful way, despite the risks involved and the constraints of his situation. The scene, one of the most gripping in a film full of dramatic scenes, affects the audience profoundly precisely because it presents a striking example of the assertion of human agency in the most challenging circumstances—and where this assertion derives its value from the act itself, rather than from any other impact it might have. A human being expresses his agency, and audiences understand the value embodied in this act.

2. A CHOICE TO CHANGE

Even in lighthearted films, human agency is found at the heart of the story and at its critical moments. The film *“Little Miss Sunshine”* portrays a largely dysfunctional family on a quixotic trip to help the 10-year old daughter, Olive, enter a pre-teen beauty pageant to improve her self-image.⁸⁴ The family includes teenaged older brother Dwayne, a self-styled intellectual who has sworn not to talk, since his opinion is that no one in his family is worth talking to. Dwayne’s dream is to enlist in the Airforce when he’s 18, and become a jet pilot, and he can hardly wait.

The whole family is driving in their old VW van on the way to the beauty pageant, and Olive is testing Dwayne on math problems and other items on the Airforce admission test. She shows him a test to determine visual acuity, but he fails to see the letters embedded in the colored images on the page. She and his uncle declare together, “Dwayne, you’re color-blind!” At this, Dwayne totally loses self-control, begins screaming and pounding on the windows and sides of the van trying to get out, and the family has to stop and let him out. His uncle explains to the shocked family that his colorblindness disqualifies Dwayne from ever being a jet pilot! Meanwhile, Dwayne jumps out and runs down the embankment at the side of the

⁸⁴ Starpaw7, *Little Miss Sunshine- Dwayne’s Meltdown*, YOUTUBE (Jun. 5, 2011), <https://www.youtube.com/watch?v=zcLlq4Lml7A>; cjtobolski22, *Little Miss Sunshine Hug Scene*, YOUTUBE (Aug. 19, 2012), https://www.youtube.com/watch?v=GJT_pAYaWB8.

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road, screaming and cursing, and sits in a field at the bottom, shaking and sobbing. He rejects approaches from his mother, uncle and father, waving them off or ignoring them, and they are stymied. Then little sister Olive climbs down the hill, approaches him silently, sits down next to him, and puts her head on his shoulder. A few minutes pass, and then Dwayne speaks to her, and simply says, “OK, let’s go.” They get up and he carries her up the hill, apologizes to his family, and they all get in the van and continue the trip, with Dwayne now engaging in normal communication with everyone.

Audiences are universally affected by this portrayal of Dwayne’s sudden emotional disintegration and then, his equally sudden shift to calmness and “normalcy”. However his shift, though sudden, is not reactive or automatic. It is clear that his time sitting at the bottom of the hill, after the screaming and cursing, has been spent in thought and deliberation; and he has realized that his jet-pilot dream is over. He sees that there is no point to sitting in the field and delaying his family’s journey, and instead he must swallow hard and go on with the trip, and with life. Dwayne’s decisions to get up, climb the hill with Olive, and re-join the family, enact self-determined choices about how to confront the unexpected and drastic alteration of his life prospects. His character displays an essential quality of agency that operates in all circumstances, and which is central to his identity. So lost aspirations do not fundamentally disable him from asserting himself, making choices, and moving forward. Witnessing this act of agency is what makes audiences find this scene so powerful and affecting. They recognize the value of human agency that it portrays.

3. A REDEMPTION THROUGH AGENCY

In an important sense, the assertion of agency is always redemptive—redeeming the self from the internal and external constraints that block its expression in the world. In “*The Shawshank Redemption*,” a film about a middle-class accountant wrongly convicted of murdering his wife,⁸⁵ agency is

⁸⁵ Iqbal Ali, *Shawshank Redemption Tarring Roof Scene with English Closed Captions*, YOUTUBE (Jul. 13, 2011), <https://www.youtube.com/watch?v=cMuam1MObtI>.

redemptive in the simple factual sense, when it leads Andy Dufresne from degradation in prison, to gradually reclaiming his capacity for decision and action, and ultimately to his freedom.

Thrown from a respected professional post into a situation of forced labor as a prisoner in a maximum security prison, Andy is working under harsh physical conditions and witnessing the brutality of the guards who supervise the work. One sweltering summer day he and his fellow inmates are covering the roof of a prison building with hot tar, while guards watch and taunt them. Andy overhears the head guard talking to the others angrily about property he inherited which, after the state takes a big “cut” in fees and taxes, will leave him with a pittance. After a few minutes listening, Andy drops his broom and walks straight over to the guards. His fellow inmates are shocked, as are guards, who instantly confront him with guns drawn. The head guard grabs Andy and pulls him to the edge of the roof, threatening to throw him off for coming too close to the guards. However, Andy remains calm and manages to say, “I can help you get all that money.” The head guard pulls Andy back from the edge, and Andy says, “Do you trust your wife?” The guard almost explodes at him, but Andy explains, with the guard’s hand on his throat, that if he trusts her he can make the inheritance a gift to her and they will keep it all. The next day, after a check with the IRS proves that Andy’s advice is true, the guard asks Andy what he wants in payment for the advice. Still tarring the roof in the heat with his fellows, Andy responds, “Cold beer for all of us,” and amazingly, the guards bring the beer for the inmates. From that moment in the film, with the guard’s recommendation, Andy advances little by

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little to become the accountant for the Warden, who uses his skills to embezzle funds from the state. Eventually Andy uses the trust he develops with the Head Guard and the Warden to escape—leaving evidence behind of the Warden’s illegal activities.

The scene described here is the dramatic turning point of this film, not because of the grave threat to Andy’s life from the guard, but because of the powerful impact of Andy’s deliberate decision to risk his life to gain the head guard’s confidence by using his expert knowledge, which was rendered useless in prison until now. In the moments before Andy rises to approach the guards, we see him noticing and listening to their conversation, thinking it over, and then deciding to act. From his situation as a helpless prisoner, Andy asserts himself to reclaim his self-respect and his place as a knowledgeable professional, and to use them strategically to gain a reward for his fellow prisoners and a long-term relationship with the Head Guard that leads to his “redemption”. Until this point in the film, Andy has been the hapless victim of circumstance—his wife’s murder, a prosecutor’s failure to consider exculpatory evidence, and the prison system’s brutal character. Despite all this, Andy’s agency remains intact, and it resurfaces at this point in the film—and continues to lead him through the remainder of the film to navigate his way out of the prison and to freedom. Audiences appreciate and admire Andy for this assertion of human agency and enjoy the triumph over circumstance and helplessness that it entails. The phenomenon of human agency is the real “star” of this film.

4. *A POWERLESS KING*

The King’s Speech is a dramatized account of the struggles of the young man whom circumstance forced to ascend to the throne as George VI.⁸⁶ Unlike his assured and socially facile older brother, Edward VIII, George VI had been from childhood introverted, shy, socially awkward, and badly incapacitated by what amounted to paralytic stuttering. The film begins at a moment in which the possibility of Edward’s abdication has become increasingly imminent.

⁸⁶ Movieclips, *The King’s Speech (11/12) Movie CLIP - I have a Voice!(2010) HD*, YouTube (Nov. 4, 2014), <https://www.youtube.com/watch?v=f7131IkiSCg>.

George (who by all accounts had always shunned the glare of public life) is confronted by the daunting possibility of being thrust into the role of Head of State. And that role has become especially demanding because tensions in Europe have been escalating, and the possibility of war is looming large. In sum, a young man who had always eschewed the focus that fame confers, and the demands that such focus requires, and who cannot speak with normal fluency, knows that, despite his fears, he must reconfigure himself because he might have to become a very public leader in a moment that is critical to the life of the nation. He simply has to master the ability to speak. For help George turns to Lionel Logue, an Australian speech therapist. (Logue, a commoner, and Australian to boot, is considered an unsuitable source of support by much of George's circle.) In the world constructed by directors, the protagonist's passage from weak to strong begins with a moment, dramatically highlighted, in which the protagonist hits bottom. In this film, such a pivotal moment takes place after an extended period in which Logue's efforts and George's efforts to make a dent in his difficulty have been without result. The stuttering is as bad as ever; it seems to be immovable. Now Logue, lounging on a seat George usually occupies, imitates and mocks George's failed attempts to express even a few words, so disabling is his stuttering at that moment. Both desperate and furious, George transcends decorum and yells. And in yelling, he manages to overcome his stuttering and express a short, but fluent sentence: *"I have a voice!"* Logue sits up and says, in a quiet and affirming voice, "Yes, you do." The moment is very moving. Someone with all the status and power

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society can confer, yet who has been, in a very real sense, powerless, in a moment of rage and desperation, has demanded recognition of his humanness: the self has demanded expression and emerged. George's struggles are not over. But something vital has changed, and it is from this moment that he gains command of his voice. The film ends, when as King, he gives a wartime address to the nation by radio right after Britain's declaration of war.⁸⁷

The pivotal moment when George gains his voice is very moving to audiences, and understandably so. Despite all the status and power society can confer, he has been, in a very real sense, rendered powerless; and then, in a moment of rage and desperation, the self has demanded expression and emerged. In the world constructed by directors, the protagonist's passage from weak to strong begins with a moment in which he or she hits bottom and then strives upwards, and that realization of agency holds great value for audiences.⁸⁸ The same

⁸⁷ A close analogue to these events is the heroic struggle of Winston Churchill, perhaps the 20th Century's most accomplished orator, as depicted in the recent (2017) cinematic version of his memoir, *The Darkest Hour*. The immense pressures resulting from Britain's military defeat in France and the increasing isolation in which Churchill finds himself, as he advocates for continuing the fight rather than seeking an accommodation with Germany, cause a contraction of both confidence and ability. At one point he woefully murmurs, "No one believes in me." At about that time, this supremely gifted speaker descends into inchoate, incomprehensible babble as he attempts to dictate a letter. Later, although nothing in his political situation nor Britain's military status has changed, two moments help him to regain his footing. He becomes clear and decisive about pursuing the course he had determined to follow. He then rallies Parliament and the nation by delivering his famous "*We shall fight*" speech, possibly the greatest war speech ever made outside of Shakespeare's Henry V. .

⁸⁸ History too provides dramatic vignettes which demonstrate the power that agency's presence can exert on observers. One such moment occurred during the American Revolutionary War. In the summer of 1777, the British tried to sever New England from the greater mass of Colonies and in doing so end the War. To accomplish this, General Bourgoigne and his Army of 10,000 troops invaded from Canada and moved south in order to meet General Howe and his Army which were to move up from the City of New York. For much of the journey Bourgoigne was able to move with relative ease by navigating Lake Champlain. But at Lake's end, in order to continue south he was forced to traverse a

movement occurs, with the same striking value, in actual transformative mediation sessions, as the examples in the previous section show.

V. CONCLUSION: RESTORING THE PLACE OF AGENCY IN MEDIATION

The earlier account of transformative mediation's development, buttressed by the examples just presented about the value of asserting and strengthening agency, should explain why we often find ourselves disappointed with talented students and practitioners of transformative mediation. When these students/mediators identify *empowerment shifts* in the mediations they conducted and participated in, they do so *only* when empowerment served as a harbinger of other changes, such as *recognition*, reconciliation or agreement. Certainly, they are not inaccurate in identifying empowerment as an essential forerunner of these other changes. Due to the debilitating impacts of conflict, reconnecting with one's efficacy is almost always a necessary prelude to the sorts of more visible changes of recognition that are easily grasped and valued. Flailing about in a state of unclarity and indecisiveness, and experiencing oneself as ineffectual, pretty much precludes

swampy wilderness. His Army emerged from the inhospitable terrain exhausted and badly in need of horses, having lost many to the swamp.

Bourgogne received word that Bennington, Vermont, 20 or 30 miles to his east, was lightly defended and had horses, other draft animals and ample provisions, all of which he desperately needed if he was to continue south to take Albany. With an eye to replenishing his stock, he dispatched a force of 700 troops, composed principally of Hessians. They were to march to Bennington and seize the Colonists' livestock and provisions. But as Bourgogne had moved south, Vermonters had appealed for help, and by this time Bennington was defended by a force of 1,500 militia from New Hampshire and Massachusetts. Before the 700 could reach Bennington, they were intercepted by the American militia. In the ensuing battle they were surrounded and then overwhelmed by the larger American force. As they were marched into captivity, the two Armies had a rare opportunity to observe one another, not across a field of battle, but at close hand.

There was something about the Americans that struck one of the British officers. It couldn't have been their physical appearance; their clothing was not uniform, and it was ragged. It must have been something in the way they held themselves, in their demeanor. Perhaps it was in the manner of their speech. But whatever its precise nature and origins, there was evident in the American troops a quality of self-possession and assurance that to this officer was both impressive and novel; commoners in Europe simply did not carry themselves in this fashion. In a letter home to his wife this officer was moved to write, "I have met the New Man," meaning "[t]here is a state to which people can attain that I had not seen 'til this day." That state, in a word, was agency. .

the possibility of reassessing the actions, motives and character of a conflict counterpart, whom one has typically demonized. One must find one's footing before those sorts of experiential and perceptual changes can occur in the interpersonal realm. We do not dispute any of this.

However, where we differ from our students and from many in the mediation field, in both our focus and our understanding of success, is that we believe *empowerment shifts have stand-alone value*—because they enact *agency*.⁸⁹ We believe that when parties are able to reconnect with their capabilities, to stand up for themselves, to do so in thoughtful, articulate, decisive and resolute ways, something good and valuable and essential has occurred, *even should nothing else follow*.⁹⁰ In other words, the enactment of

⁸⁹ See *supra* note 73 and accompanying text.

⁹⁰ There is one change in the way disputants regard their conflict counterparts that always attends the recapture of agency—but it is really part of empowerment, not a separate effect of recognition or empathy. That change in perception is related to the ways in which disputants tend to demonize one another. Beyond ascribing malign motives to one another, the weakened capacities of conflict participants cause them to endow one another with heightened powers to destabilize, overwhelm, thwart, or vanquish in some fashion. Thus, as a party regains efficacy and experiences themselves as stronger, the capacity of their conflict opponent to affect them negatively is diminished in commensurate measure. When the full range of change that is available in mediation is realized, disputants come to see one another more positively. Often, they choose to extend compassion and empathy to one another. Those changes, termed *recognition shifts*, involve seeing one's counterpart as somehow *better*. The change we are describing here involves seeing one's counterpart as *smaller in their ability to inflict harm*. In that sense, they become in one's eyes, not better, but more manageable.

Describing a particular simulated mediation will demonstrate the correspondence between the increase of capacity in a disputant and the decrease of the perceived powers of their counterpart. The mediation, titled, *The Purple House*, was conducted by one of the authors. It appears in transcript form in *Promise 2*. See *PROMISE 2*, *supra* note 11, at 133. There are three parties in the mediation, a homeowner, Elizabeth and her daughter Bernice, and a second homeowner, Julie, who is also a representative of the Home Owners Association which governs the development in which they all live. The parts were played by professional actors, who were given a fact pattern, but not a script to follow. Thus, there was no predetermined direction the parties would move in, nor was there a predetermined outcome. Elizabeth and Bernice are African American. Julie is of European descent. Their dispute arises from the purple color with which Elizabeth and Bernice have painted their home: Julie and other home owners have adopted the stance that the color selection violates the rules governing the range of discretion available to home owners; Elizabeth and Bernice, with the support of others, maintain that the rules do not place boundaries on color selection. To illustrate our point, we will focus only on Elizabeth. Elizabeth has been unsettled and agitated in her demeanor and her speech from the outset. At one point in her interaction with Julie, her agitation intensifies as she addresses Julie, "You know Julie,

agency in itself has profound and essential value—and it can be witnessed in mediation over and over again. We remain hopeful that mediation students and practitioners will come to fully appreciate this. Indeed, furthering that goal has been our purpose in writing this Article.

In conclusion, the above discussion has made the case for several propositions:

First, the practice of mediation, even by those theoretically committed to the principle of self-determination, diluted that principle by placing less importance on client agency than on other values, especially the value of empathy and relationship.

Second, practitioners of transformative mediation, through a process of reflection and self-critique, recognized their departure from the principle of

ever since we have moved into the community you've been on a personal vendetta. Is it because we are the only blacks on your block? . . . It is a racist, we are the only family you are attacking! There is nothing. You are the racist! You are the one!" Beyond being angry, Elizabeth is distraught as she articulates and holds up what for her is the core of the dispute, and what she believes to be Julie's actual motivation. She flails in her movements. Her thoughts are scattered, and her speech fragmented. She is volatile and without command of herself. And she depicts Julie (and clearly experiences her) as monstrous in her impact on Elizabeth's life.

Elizabeth and Julie continue to interact (with interventions by the mediator) for some time. During this period, Elizabeth demonstrates small, incremental shifts in her capacity for clarity of thought and in her ability to be articulate. Her demeanor becomes solid and centered. She becomes calm. Then she says to Julie, "I'm really hard pressed to accept any decision by your committee. . . . It becomes a matter of control that at this point in my life that I am simply unwilling to deal with. I mean no animosity; I mean no disrespect. But we've gone as far as we can go." Elizabeth's thinking has become cogent and clear, and her speech both rich and measured. In this moment, she is a superb advocate; she has stood up for herself with calm, forceful dignity. And clearly, Julie has been correspondingly reduced in her ability to overwhelm Elizabeth. She has become, to Elizabeth, manageable.

In actuality, the mediation continued on for some 40 minutes beyond this point. During those 40 minutes Elizabeth affirmed that she saw Julie as a racist, so there is confirmation that after this moment of calm, forceful advocacy, Elizabeth's experience of Julie's character and motives is unchanged. She does not see Julie as "better."

This mediation could very well have ended at the point of Elizabeth's speech to Julie. Indeed, mediations often end at similar junctures. The sort of "visible changes" involving recognition or agreement that students hold as the standard of success have not taken place. Yet, Elizabeth has made strides. She has named the essential wrong as she sees it; she is clear as to where she stands and where she will not go; she has gathered herself in such a way as to both oppose the wrong effectively and to convey that opposition to Julie with dignity and quiet force. The self has entered the world to inform it, and if need be, to meet adversity well. Agency has been enacted, and its value is clear – even if nothing else followed.

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self-determination and took steps to correct their actual practices in ways that did place primary value on client agency.

Third, the meaning of agency, as a basis for mediation and other social processes, is the self-aware and reflective assertion by an individual of the intentional choice to make decisions affecting their life circumstances—so agency and self-determination are related if not identical. Moreover, the phenomenon of agency is at the core of human identity and consciousness; that is, the assertion of agency is an essential meaning of being human, regardless of whether it achieves some other specific impact in the external world.

Fourth, although the value of client agency and client-centered practice is largely disfavored in the dominant practices of mediation and many other “helping” professions—nevertheless that value does find strong recognition among many in society, as reflected in popular culture, and as voiced by the clients of transformative mediators reported in this Article.

Finally, the stakes of raising awareness of the importance of agency, in mediation and other social processes, are very great—implicating the character of our civic culture and the viability of our democratic society.

Together, these propositions show how important it is that, in any process such as mediation where a client-centered approach is possible, that approach should be favored and promoted—since it will recognize and enact the central value of client agency. Transformative mediation is such a client-centered approach to mediation. It has gained a following and grown slowly but steadily in the 25 years since its first introduction. However, given the societal stakes, it is important to accelerate the acceptance of this model, and to draw more practitioners toward following it—for the sake of clients in mediation, and for the sake of our larger social and political environment. The time has come for the transformative model to receive more recognition and greater practical emphasis, both in mediation and beyond, since it will bring the value of human agency out of hiding and into the full light of societal recognition.

Using Dispute Resolution Skills to Heal a Community

SHARON PRESS*

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ABSTRACT

On July 6, 2016, Philando Castile, an African-American male, was shot and killed by a police officer during a traffic stop in Falcon Heights, Minnesota. In the aftermath of this shooting, there were several challenging meetings of the City Council where protestors demanded answers. In response, the Mayor of Falcon Heights reached out to dispute resolution professionals to help him design a two-track process which included a Task Force to propose policy changes to the City Council and a Community Conversations series to provide an opportunity for healing.

In this article, I will describe the process design for the community conversations, the challenges and highlights of the conversations, and how the conversations fit within the broader context of systemic change, including thoughts on replication.

USING DISPUTE RESOLUTION SKILLS TO HEAL A COMMUNITY

I. SETTING THE STAGE

In 2015, the Dispute Resolution Institute (DRI) held its biennial symposium entitled *An Intentional Conversation About Public Engagement and Decision Making: Moving from Dysfunction and Polarization to Dialogue and Understanding*. The final portion of the 2015 Symposium included an invitation for all participants to identify personal post-symposium plans.¹

On behalf of the DRI and myself, I expressed my commitment to continue working on issues of public engagement and decisionmaking. This took several forms including the publication of a Symposium Issue of the Mitchell Hamline Law Review² and a grant proposal to the AAA-ICDR Foundation³ submitted by DRI and the Office of Collaboration and Dispute Resolution (OCDR).⁴ The grant proposal, entitled *Talk with Purpose: Using Dispute Resolution to Engage Communities and Foster Relationships for Constructive Change*, was awarded in April 2016.⁵ The stated goals of the grant were to:

[E]ngage in a transformative project to produce qualitative change in the type of engagement currently taking place between dominant and non-dominant communities in Minnesota [and to] . . . serve as a demonstration of the viability of dispute resolution mechanisms for these types of serious equity issues and conflicts. Through the pilot, we will 1) help to establish dispute resolution mechanisms as a “go to” tool for challenging conflict in the community; 2)

¹ Jessica Dubois & Sharon Press, *An Intentional Conversation About Public Engagement and Decision-Making: Moving from Dysfunction and Polarization to Dialogue and Understanding*, 42 MITCHELL HAMLINE L. REV. 1439, 1447 (2016). The 2017 DRI Symposium continued this theme and was entitled *An Intentional Conversation About Community Engagement: Weaving Threads to Strengthen the Fabric of Our Communities*. It took place on October 5–7, 2017.

² *Id.* at 1448.

³ Grants, AM. ARB. ASS’N INT’L CTR. FOR DISP. RESOL., <https://www.aaicdrfoundation.org/grants> (last visited Sept. 25., 2020).

⁴ *Examples of State and Local Government Projects*, MINN. DEP’T ADMIN., <https://mn.gov/admin/government/ocdr/projects/other-issues/> (last visited Sept. 25, 2020).

⁵ Office of Collaboration & Dispute Resolution Inst., *Talk with Purpose: Using Dispute Resolution to Engage Communities and Foster Relationships for Constructive Change*, 2 (awarded Apr. 8, 2016) (grant proposal on file with the author).

build capacity in and among organizations working to address these issues; and 3) build relationships between organizations (including those groups often in adverse positions).⁶

Our intent was to identify a community which would be willing to work “upstream” to build capacity and relationships before (the inevitable) conflict erupted. We framed the plan in the grant proposal as follows:

While each of the potential pilot sites we will be considering have had a recent conflict situation(s), we believe that the value of our project will be to use the situation to identify and consider underlying patterns, relationships, and the context in which the presenting conflict has emerged in order to develop a conceptual framework for understanding the conflict “while creating a platform to address both the presenting issues and the changes needed at the level of the deeper relational patterns.”⁷

We also believe that future conflicts are inevitable—no matter how effectively the current issues are resolved. Thus, the goal of our project is to create relationships between and among the people in communities in crisis and also to build capacity in these communities to address future conflicts before they become destructive. These relationships and increased capacity will give these communities the resilience to handle the inevitable future conflicts.

A significant underlying premise of our grant proposal is that we cannot approach communities in a top-down fashion, assuming that we have all of the answers. During the first phases of the project, 1) we will determine if our assistance is widely welcomed . . . ; and 2) assuming it is, we will work closely with the communities to identify thought leaders who will work with us to identify challenges, mechanisms within the community which have worked (and not worked), and additional community members with whom to engage.

⁶ *Id.*

⁷ JOHN PAUL LEDERACH, THE LITTLE BOOK OF CONFLICT TRANSFORMATION: CLEAR ARTICULATION OF THE GUIDING PRINCIPLES BY A PIONEER IN THE FIELD, 11 (2003).

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This model is based on an iterative process of engaging with, learning from, and working with the people for whom the model of engagement is being developed.⁸

Upon receiving notification that our proposal was funded, Mariah Levison, Program Manager of OCDR, and I reached out to the communities we had identified as potential partnership sites. These included: North Minneapolis to work on police–community tensions; Saint Paul School District to work on teacher–administrator–community tension around violence in the schools; and Saint Cloud to work on Somali immigrant community–“locals” tension.⁹

As we stated in the Interim Report we filed with the American Arbitration Association International Center for Dispute Resolution (AAA-ICDR) Foundation in October 2016, “[t]he inevitability of future conflict proved to be true in each of the potential sites we had identified.”¹⁰ In Saint Cloud, the President of Saint Cloud University, who we had expected to be a strong ally for our project, died unexpectedly in a car accident on June 13, 2016.¹¹ On September 17, 2016, a Somali man stabbed several people in a Saint Cloud mall.¹² As the investigation into the stabbing continued, tensions in the community intensified. Given these events and our hope to work upstream and not amid active conflict, we concluded that Saint Cloud would not be a good site for our project.

The Saint Paul Public Schools (SPPS), also experienced a significant event. On June 21, 2016, the superintendent was fired by the School Board and an interim superintendent was hired. Following the superintendent’s departure, fifteen top administrators also left the district.¹³ Initially, we were concerned SPPS would not be a good site for our project until the new

⁸ Office of Collaboration & Dispute Resolution Inst., *supra* note 5, at 10.

⁹ *Id.* at 8–9.

¹⁰ Office of Collaboration & Dispute Resolution Inst., *Talk with Purpose: Using Dispute Resolution to Engage Communities and Foster Relationships for Constructive Change Interim Report*, 2 (Oct. 2016) (on file with the author).

¹¹ Mick Hatten, *SCSU President Potter Dies in Crash*, SC TIMES (June 14, 2016, 2:46 AM), <http://www.sctimes.com/story/news/local/2016/06/14/scsu-president-potter-dies-crash-brooklyn-center/85857088/>.

¹² *Police: 8 Stabbed, Suspect Dead in St. Cloud Mall Incident*, CBS MINN. (Sept. 17, 2016, 9:11 PM), <http://minnesota.cbslocal.com/2016/09/17/police-respond-to-st-cloud-mall-on-reports-of-stabbing-victims/>.

¹³ Josh Verges, *Fired as Superintendent, Silva to Get \$787,500 in Separation Agreement*, PIONEER PRESS (June 22, 2016 12:38 PM), <http://www.twincities.com/2016/06/21/st-paul-school-board-valeria-silvas-firing-tonight/>; Jay Kolls, *St. Paul Interim School Superintendent Makes Strong Commitment to Racial Equity*, ABC NEWS (June 22, 2016), <http://kstp.com/news/st-paul-interim-school-superintendent-roseville-superintendent-john-thein-board-valeria-silva/4177532/>.

superintendent was in place. However, after preliminary conversations with the School Board Chair, the Interim Superintendent, and the leadership of the Saint Paul Federation of Teachers, we came to believe that the situation presented an opportunity to design a multi-phased process for SPPS. During the first phase, we would focus on community engagement, which everyone agreed was necessary to inform the superintendent search. The later phase(s) would focus on developing a shared vision and implementation plan for the district's commitment to equity, continued stakeholder engagement, collaborative decisionmaking, and improved labor-management relations.¹⁴ We believed that starting with the superintendent search would provide the stakeholders with a concrete, manageable task. The search would begin their process of healing the hurt feelings which had developed, re-build trust, build capacity, and lay the foundation for the more difficult work of developing the shared vision and implementation plan for equity and engagement.

Regarding police–community relations, we initially suggested working with Minneapolis in the aftermath of the death of Jamar Clark, an unarmed Black male, by police in 2015.¹⁵ This changed on July 6, 2016, when Philando Castile, a Black male, was killed by a police officer after being stopped while driving through the City of Falcon Heights, a suburb of

¹⁴ The SPPS phases correspond with, but are not identical to, the project phases we proposed in our grant application. Specifically, phase one of the SPPS plan (assist in the community engagement process for the superintendent search) fits in phase two of our grant proposal (develop with partners the specific plan to develop the community capacity to build relationships for constructive change and to promote dialogue and problem-solving; and begin initial implementation).

¹⁵ Office of Collaboration & Dispute Resolution Inst., *supra* note 5 (In our grant proposal, we stated: “Tension between the police and the community has been building for years. According to a recent study by the ACLU, African-Americans are nearly nine times more likely than Whites to be arrested for low-level offenses in Minneapolis. *ACLU Finds Severe Racial Disparities in Low-Level Arrests by Minneapolis Police*, ACLU (May 28, 2015), <https://www.aclu.org/news/aclu-finds-severe-racial-disparities-low-level-arrests-minneapolis-police>. The tension between the community and police intensified at the end of 2015 when an unarmed Black man was shot by police and died of the gunshot wound to the head. The U.S. Department of Justice investigated whether the shooting was a civil rights violation. The shooting also prompted an 18-day protest and encampment outside the Minneapolis Police Department by a coalition which included church leaders, members of the Minneapolis NAACP, Black Lives Matter Minneapolis, and many other community members of all ethnic backgrounds. Before the protest was shut down by the city, four men were charged with shooting protesters.”). For news articles regarding the death of Jamar Clark, see Peter Cox, *Jamar Clark Protesters March to Downtown Minneapolis*, MPR NEWS (Dec. 19, 2015, 7:19 PM), <http://www.mprnews.org/story/2015/12/19/jamar-clark-march>; see also Elizabeth Mohr, *Four Men Charged in Shooting at Jamar Clark Protest*, PIONEER PRESS (Nov. 29, 2015), <http://www.twincities.com/2015/11/29/4-men-charged-in-shooting-at-jamar-clark-protest/>.

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Saint Paul, Minnesota. His girlfriend, Diamond Reynolds, live-streamed the incident,¹⁶ which touched off public outrage and protests.¹⁷

The Falcon Heights City Council, led by then-Mayor Peter Lindstrom, attempted to address the situation for which they were completely unprepared. By September 2016, the frustration had reached a boiling point as the City Council work session “turned into a shouting match between protestors who demanded their voices be heard, residents who were just as angry and a mayor who briefly tried to talk over the verbal melee”¹⁸ until the council, the mayor and the city administrator “fled the room.”¹⁹

The Mayor had proposed the creation of a twelve to fifteen-member Inclusion and Policing Task Force to advise the City Council and had made clear that there would be no public comment at this meeting.²⁰ The conversation between members of the public continued after the City Council left, and Mayor Lindstrom decided he needed to engage with the public in a different way. He reached out to Kathy Quick,²¹ an Associate Professor at the Humphrey School of Public Affairs; Ken Morris,²² a consultant who was working with the City on diversity issues; OCDR; and DRI. The four of us added Professor Raj Sethuraju²³ to our “design team” (hereinafter referred to as the Design Team) and worked together to advise the city on a process for moving forward which would involve a series of community conversations to accompany the Inclusion and Policing Task Force.²⁴

¹⁶ ABC News, *Philando Castile Shooting Livestream Video*, YOUTUBE (July 7, 2016), <https://www.youtube.com/watch?v=p5Pt1nkw3Mk>.

¹⁷ Susan Du, *Protesters Surround Governor’s Mansion After Philando Castile is Killed by Police*, CITY PAGES (July 7, 2016), <http://www.citypages.com/news/protesters-surround-governors-mansion-after-philando-castile-is-killed-by-police-8415357>; Brandon E. Patterson, *Facebook Live Video Shows Black Man Dying After Police Shoot Him During Traffic Stop*, MOTHER JONES (July 7, 2016), <https://www.motherjones.com/politics/2016/07/falcon-heights-fatal-police-shooting-philando-castile/>.

¹⁸ Pat Pheifer, *Castile Protesters Angry with Falcon Heights Police Task Force Plan*, STAR TRIBUNE (Sept. 7, 2016, 10:59 PM), <http://www.startribune.com/castile-protesters-clear-falcon-heights-city-council-meeting/392669251/>.

¹⁹ *Id.*

²⁰ *Id.* (there had been two public comment sessions already and one listening session).

²¹ Kathy Quick, U. MINN., <https://www.hhh.umn.edu/directory/kathy-quick> (last visited Sept. 25, 2020).

²² Kenneth Morris, HAMLINE UNIV. SCH. L., <https://mitchellhamline.edu/biographies/person/ken-morris/> (last visited Sept. 25, 2020).

²³ Raj Sethuraju, METROPOLITAN ST. UNIV., <https://www.metrostate.edu/about/directory/raj-sethuraju> (last visited Sept. 25, 2020).

²⁴ Kathy Quick and Ken Morris served as facilitators of the Task Force.

While both the SPPS and the City of Falcon Heights Project were part of our AAA-ICDR Foundation Grant and we worked together on both projects, Mariah Levison took the lead in organizing our efforts with the City of Falcon Heights and I took the lead on the SPPS project. This article will focus on our community engagement work with the City of Falcon Heights.

II. THE CITY OF FALCON HEIGHTS INCLUSION AND POLICING TASK FORCE

The City of Falcon Heights Inclusion and Policing Task Force (Task Force) is not the subject of this article, but it is important to understand the Task Force because the Community Conversations were designed to support its work—to both inform the Task Force and to be informed by the Task Force.

The Task Force was comprised of 11 individuals “with diverse experiences and perspectives” who met beginning in December 2016 for 13 regular task force meetings.²⁵ The official charge to the Task Force from the City Council was for it to “articulate community values, identify community needs, and recommend programming and policies to be an inclusive and welcoming place for residents and guests of Falcon Heights.”²⁶ The City Council adopted the Task Force recommendations on policing on May 24, 2017 and the recommendations on inclusion on June 14, 2017.²⁷ A report containing the Task Force recommendations along with a Statement of

²⁵ THE CITY OF FALCON HEIGHTS INCLUSION & POLICING TASK FORCE, OVERVIEW OF RECOMMENDATIONS, 2 (2017) [hereinafter RECOMMENDATIONS], https://mn.gov/admin/assets/Falcon%20Heights%20Final%20Recommendations_tcm36-392008.pdf (last visited Sept. 25, 2020).

²⁶ *Id.*

²⁷ *Id.*

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Community Values²⁸ and summaries of each of the five community conversations is available on the City of Falcon Heights website.²⁹

The Task Force used what was learned from the Community Conversations³⁰ as well as its own research and thoughts to make four recommendations relating to inclusion:

- Sustain City commitment through creating a Truth, Racial Conciliation, and Healing Committee of some kind; dedicating substantial City staff time to this work; and re-framing existing City resources to bring attention to equity.
- Invest significantly to address persistent sources of disparities and exclusion.
- Promote reconciliation, healing and inclusion through connecting Falcon Heights with community partners doing excellent work in these areas.
- Support and sponsor events within the community to foster inclusion.³¹

The Task Force also developed an “Overarching Value to All Inclusion Recommendations:”

²⁸ *Id.* at 4. The Task Force adopted a “Statement of Community Values” that included:

- Leadership. . . [L]eadership in creating community relationships of mutual respect and welcome equity in service to the community and . . . recogniz[ing] and heal[ing] historic patterns of disparity and exclusion.
- Trust, transparency, and accountability . . .
- Equity, justice, and anti-discrimination . . .
- Welcome and inclusion . . .
- Awareness . . . [S]eeking diverse perspectives, listening with an open mind, and taking time to learn from others.
- Courageous Action . . . [H]aving the courage to name and confront problems and to pursue solutions and healing when these values are not upheld . . .
- Safety. . . [R]espect for life and minimizing harm to all . . .

In the Overview of Recommendations, the Statement of Community Values were each assigned a color. Each of the Inclusion and Policing Recommendations include a color-coded line to correspond with the Value the recommendation honors.

²⁹ *Id.* at 19–42.

³⁰ The connection between the Community Conversations and the Task Force Inclusion Recommendations will be further described below.

³¹ RECOMMENDATIONS, *supra* note 25, at 6.

Address the sources of exclusion. The context and premise of these recommendations is that fundamental issues of inclusion and exclusion have left many people feeling that they do not fully belong in our community. As we pursue specific implementation actions, we need to sustain an all-encompassing commitment to fight racism and other kinds of discrimination and exclusion. The following implementation suggestions are starting points for comprehensive work that needs to be done to build relationships across difference, to build trust in the community among those who have felt left out, and to work on building the financial, legal, and occupational recourses of excluded groups.³²

The Task Force also recommended the policing contract focus on five areas: Police–Community Relationships; Training and Capacity; Data and Transparency; Priorities for Policing Activity;³³ and Ownership.³⁴

Police–Community Relationships:

- Mutual Safety is built through Mutual Trust
- Community engagement.
- Creation of Community–Police Work Group for trend monitoring, relationship building and problem solving.³⁵

The three main purposes of the group would be to: 1) serve as a channel for community members to give feedback or register complaints on police conduct; 2) to support public safety by monitoring policing and public safety trends; and 3) to safeguard the integrity of the police department’s internal affairs process.³⁶

³² *Id.* at 6.

³³ *Id.* at 11.

³⁴ *Id.* at 18.

³⁵ *Id.* at 13.

³⁶ *Id.* at 14.

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Training and Capacity

- Mental health care for people in crisis and officers, for mutual safety and well-being.
- Training, with a focus on de-escalation, cultural competence, and explicit and implicit bias.
- Hiring and workforce development to emphasize community relationship-building and reflect the diversity of the Falcon Heights community.³⁷

Data and Transparency

- Data collection, sharing, and monitoring to detect and respond to trends.
- Public Feedback: surveys, multiple feedback channels, and information/feedback cards.
- Prompt, thorough, and open communication in case of serious incidents to build more community trust.³⁸

Priorities for Policing Activity

- Respect for all is the foundation for policing in [the] community. The highest priorities for policing are:
 - Emergency response.
 - Cultural competence and community engagement.
 - Informative policing.
 - Traffic policing.³⁹

Ownership

- Ensuring that the police department respects community values is “more important than the specific structure of the arrangement”

³⁷ *Id.* at 15.

³⁸ *Id.* at 16.

³⁹ *Id.* at 17. The Task Force noted that one of the most common crimes in Falcon Heights, property issues, was not mentioned as a priority during the community conversations. The Task Force speculated that this was in part because the community takes such policing endeavors for granted, rather than the conversation not being a priority.

between the City of Falcon Heights and the contracted police department.⁴⁰

- “Falcon Heights needs to have appropriate authority with the police department serving [the] community, beyond annual reporting.”⁴¹

The Task Force also adopted “Guiding Principles for Implementing Policing Recommendations” that include: 1) the need for everyone in the community to adopt an “anti-discrimination culture;” 2) respect for life and minimizing harm to all; 3) everyone in the community, including public safety officers, should uphold and advance all of the community’s values; 4) police profiling is contrary to the community’s values and damage community–police trust and the protection of everyone’s well-being.⁴²

III. PLANNING THE COMMUNITY CONVERSATIONS

In order to have a greater understanding of how these recommendations came to be, it is useful to understand how the Community Conversations informed the Task Force’s work. The Design Team decided early on to schedule five community conversations, one each month from February through June, in coordination with the work of the Task Force.⁴³ The frame for these conversations was “community problem solving rather than input sessions or listening sessions.”⁴⁴ Community members were encouraged, but not required, to attend all five sessions.⁴⁵

Prior to hosting the conversation, the Design Team identified the dates and themes for all five conversations; designed the process for each session; identified facilitators; provided training for the facilitators; and developed

⁴⁰ *Id.* at 18. Resolving the status of the Saint Anthony Police Department contract with the City of Falcon Heights was a high priority for participants in the Community Conversations. As discussed further below, these Community Conversations were successful in helping the community understand that the City Council had the ultimate authority and responsibility for continuing the policing contract and managing the external constraints and situational realities for creating an alternative policing option. This recommendation reflects this work.

⁴¹ *Id.* at 13.

⁴² *Id.* at 12.

⁴³ *Id.* at 19. The Task Force was scheduled to present its recommendations at the May 3, 2017 City Council meeting.

⁴⁴ *Id.*

⁴⁵ *The City of Falcon Heights Community Conversations Announcement* [hereinafter *Announcement*] (on file with author) (“Participants are encouraged to attend all five sessions as they will build on each other but may attend as many or as few as they are able.”)

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facilitation materials. The Design Team also worked with the City Manager, Sack Thongvanh, to ensure that he publicized the Community Conversations, secured appropriate space for the conversations, and provided some food and beverages for each conversation. The Design Team included the Task Force Facilitators, which enabled us to coordinate the Community Conversations with the Task Force's work.

A. Dates, Time, Location, and Themes

The Design Team opted to schedule the conversations in the early evenings. The sessions were scheduled for two hours, beginning at 6:30, to make it as easy as possible for people to participate.⁴⁶ We chose the dates for the conversations based on the work of the Task Force and attempted to keep the conversations moving forward without being overly burdensome on participants. The dates and themes for the conversations were:

- “Conversation 1 – February 16, 2017: . . . [P]ersonal and community values”;
- “Conversation 2 – March 2, 2017: . . . [O]ptions for how the City can live out the Community's values in its activities, policies, and policing policies and practices”;
- Conversation 3 – April 3, 2017: Review and Feedback on Draft Policing Policies;
- “Conversation 4 – May 1, 2017: . . . [W]hat is needed for transformational change” and Personal Commitments;
- “Conversation 5 – June 19, 2017: Commemoration of the work accomplished and development of next steps”⁴⁷

The plans for the final session were modified when Officer Yanez was acquitted of the charge of second-degree manslaughter on June 16, 2017.⁴⁸ The

⁴⁶ We attempted to set the time so that people would have the opportunity to get home from work and eat a quick dinner, since we did not have the resources to provide dinner. We were also concerned about starting too late in the evening, especially for parents.

⁴⁷ Elizabeth Dressel, *Evaluation of the Falcon Heights Community Conversations Process*, DRI PRESS 1, 3 (Nov. 30, 2017), https://mn.gov/admin/assets/Falcon%20Heights%20Evaluation%20Report_tcm36-390876.pdf.

⁴⁸ Ralph Ellis & Bill Kirkos, *Officer Who Shot Philando Castile Found Not Guilty on All Counts*, CNN (Jun. 16, 2017, 9:22 PM), <https://www.cnn.com/2017/06/16/us/philando-castile-trial-verdict/index.html>.

Design Team decided that it would be important for participants to be able to process their feelings about the acquittal before discussing next steps and commemorating the work of the conversations. The first conversation was held at an elementary school in Falcon Heights. While this space was large enough to accommodate everyone who wished to participate, the acoustics in the gym were very challenging. Consequently, the final four conversations were held at a Falcon Heights Church that describes itself as “an intergenerational church with [a] strong focus on . . . community outreach, service and social justice.”⁴⁹ This space proved to be a better option, as the design team could spread the small groups throughout the church enabling participants to experience a more intimate (and easier to hear) conversation.

B. *Session Design*

Because of the sensitive nature of the conversations and the goal of promoting community healing, the Design Team opted to use a circle-type process for a significant portion of each conversation.⁵⁰ The circles were described on the informational material about the Community Conversations as “guided by restorative values that foster deep, courageous, honest, and self-reflective dialogue.”⁵¹

When participants arrived at the Community Conversation, they checked-in at a registration desk. Participants were asked to sign-in so that we had a count of who attended and could contact them after the conversations for evaluation purposes. In addition, the registrars made group assignments (of approximately eight to ten participants, one facilitator, and one note-taker) in an attempt to provide a diversity of perspective and background in each group.

Each evening began with opening remarks. These remarks were from elected City officials, members of the Task Force, or both. The Design Team tried to keep these remarks brief in order to allow participants as much time as possible to engage directly with each other in their assigned small group. The goal was to balance the need for participants to hear from members of the Task Force and the City about the progress outside the conversations while enabling everyone who attended to speak and to be heard in an intentional manner. For some of the conversations, participants came back together for the final thirty minutes of the session so there was some opportunity for everyone to hear about the conversations that took place in other groups.

⁴⁹ FALCON HEIGHTS CHURCH, UNITED CHURCH OF CHRIST, <https://www.falconheightsucc.org/> (last visited Sept. 25, 2020).

⁵⁰ *Announcement*, *supra* note 45.

⁵¹ *Id.*

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C. *Facilitators*

The Design Team sought a diverse pool of facilitators for this project. We believed it was important, given the nature of the conversation, that the facilitators mirror the diversity of the community. The conversations were open to everyone regardless of whether they lived or worked in Falcon Heights, both because the death of Philando Castile impacted so many people, not all of whom lived in Falcon Heights, and because the location of the shooting is a major thoroughfare from Saint Paul to Minneapolis. Members of the African-American community reported that they routinely were pulled over on this street for what is commonly described as “driving while black.”⁵² The population of Falcon Heights is 72.1% White, 14.4% Asian, and 7.88% Black or African-American.⁵³ The median property value in Falcon Heights is \$284,900.⁵⁴ All facilitators were volunteers. Most had previous facilitation and/or circle keeping experience. In addition, the design team provided a training for facilitators on February 7, 2017⁵⁵ and met with the facilitators and note-takers thirty minutes before each conversation began to review the plan for the session. The facilitators received detailed information on the questions to pose to their group and the information they were to collect.⁵⁶

D. *Facilitation Materials*

The Design Team put together a Table Facilitator Handbook⁵⁷ which can be viewed in Appendix B. A similar Handbook was developed for the SPPS and the Falcon Heights projects. The roles and responsibilities of the Table Facilitators were defined as:

- “promote constructive conversation and capture the input given by the participants”;

⁵² Christopher Ingram, *You Really Can Get Pulled Over for Driving While Black*, *Federal Statistics Show*, WASHINGTON POST (Sept. 9, 2014), <https://www.washingtonpost.com/news/wonk/wp/2014/09/09/you-really-can-get-pulled-over-for-driving-while-black-federal-statistics-show/?arc404=true>.

⁵³ *Falcon Heights, MN*, DATA USA, <https://datausa.io/profile/geo/falcon-heights-mn> (last visited Apr. 10, 2020) (defining “Community” broadly for purposes of the Community Conversations).

⁵⁴ *Id.*

⁵⁵ Dressel, *supra* note 47, at 12.

⁵⁶ See Appendix A for the circle questions which were used in each of the Community Conversations.

⁵⁷ See *infra* Appendix B, at 675.

- “[m]eet at the sign-in table by 6:00 pm for a brief orientation”;
- “[f]acilitate small group conversations”;
- “[b]e aware of your own biases and strive to facilitate and take notes in an omni-partial manner—meaning that you are not favoring any one person or perspective and are supportive of everyone in the room.”⁵⁸

E. *Community Conversations Key Themes*

The Design Team was very aware that the Community Conversations were taking place during a challenging time for the City of Falcon Heights and the community in general. A goal of the Community Conversations was to “develop the relationships and will to facilitate the implementation of the recommendations . . .” from the Task Force.⁵⁹ To accomplish this goal, the Design Team decided that transparency would be extremely important. After each meeting, the notes from the small groups were analyzed by Elizabeth Dressel⁶⁰ and the themes were posted on the Falcon Heights website.⁶¹

F. *Community Conversations Evaluation*

Thanks to funding from the AAA-ICDR Foundation, we were able to conduct and publish an *Evaluation of the Falcon Heights Community Conversations Project*.⁶² I will use this evaluation to describe the highlights and challenges of this project. The evaluation included two aspects:

1. The evaluation team⁶³ emailed a survey to all 158 participants who had attended at least one community conversation session and had provided an email address. The survey completion rate was 39%.⁶⁴

⁵⁸ *Id.* at 678.

⁵⁹ *Id.* at 677.

⁶⁰ At the time, Elizabeth was obtaining a Master of Arts in Urban and Regional Planning at the University of Minnesota, Humphrey School of Public Affairs.

⁶¹ *See infra* Appendix C at 681.

⁶² *See* Dressel, *supra* note 47.

⁶³ The evaluation team was led by Elizabeth Dressel, who was supported by Kathryn S. Quick and Chen Zhang, a PhD candidate at the Humphrey School of Public Affairs.

⁶⁴ The survey had a total of 57 respondents. The completion rate does not include the 13 emails that bounced back due to incorrect addresses. *See* Dressel *supra* note 47, at 4.

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The survey contained ten substantive questions⁶⁵ and three demographic questions.⁶⁶

2. The evaluation team also conducted four focus groups, two for participants and two for facilitators. The first focus group of each type was held in June and was intentionally created by the evaluation team to represent the diversity of participants/facilitators in terms of number of conversations they attended, where they were from, gender, race and ethnicity.⁶⁷ The second focus group of each type was open to anyone who was interested in participating.⁶⁸ Twenty-three people participated in the focus groups: thirteen community conversation participants and ten facilitators.⁶⁹

In the focus groups, the evaluation team asked the following questions to both community conversation participants and facilitators:

1. Why did you participate in the community conversation(s)? What was your key interest or concern that initially brought you to participate?

⁶⁵ The survey questions included: 1) the total number of sessions, and in which session(s), the respondents participated; 2) the top three things the respondents wanted to accomplish (from a drop down list) before participating in the community conversations; 3) an opportunity for the respondents to rate their feelings from strongly disagree to strongly agree about three statements including: "I believe this process had an impact on the community in Falcon Heights;" "I believe I changed other participants' perspectives;" and "I learned something new from participating;" 4) an opportunity for respondents to rate their level of satisfaction with the process and format of the community conversations; 5) an opportunity for the respondents to rate their feelings as to whether participating in the community conversations was a valuable way to spend their time; 6) an open-ended question for respondents to share why they felt the community conversations were or were not a valuable way to spend their time; 7) whether the participants changed their minds in some way through the community conversations, and if so, how?; 8) what were the respondents' next steps?; 9) an opportunity for participants to identify three dominant feelings they had before and after the community conversations from a drop down list including optimistic, cynical, trusting, distrusting, energized, fatigued, anxious, angry, and sad; and 10) after the community conversations, what are the top three things the respondents now want to accomplish (from the same drop down list as question 2). *Id.* at 15–22.

⁶⁶ The demographic questions included gender (respondents were 49% male; 51% female; 0% other); and ethnicity (81% of the respondents identified as White/Caucasian; 9% as Black or African-American; 2% American Indian or Alaskan Native; 9% as Other; and 0% for both Hispanic or Latino and Asian or Pacific Islander). *Id.* at 22.

⁶⁷ *Id.*

⁶⁸ *Id.* at 5.

⁶⁹ *Id.* at 5.

2. Please share the moment during the community conversations that most impacted you. What happened, and how did it impact you?
3. Please share your one or two key “takeaways.”⁷⁰

The following questions were asked only of the facilitators:

1. When things were working really well, what was going on? What specifically was happening, what was positive about it, and do you have an explanation of what/how it was working?
2. Conversely, when things were not working well, what was happening?
3. Did you notice any variation in how accessible . . . or meaningful . . . or burdensome this process was to people?
4. What suggestions do you have about improving accessibility for everyone?
5. If you were to rethink this process, what is one suggestion you would make?
6. How can you imagine using a process like this in another setting? Please imagine a particular place or topic where you would like to try some part of this. What is the setting? What would you carry forward from this process? What would you change?⁷¹
7. Did you have the support and preparation you needed? Are there any additional things you wished you would have had or known?⁷²

The following questions were asked only of the participants in the conversations:

1. Do you feel the community conversations were a valuable way to spend your time? Why or why not?
2. Did anything change for you, as you went through this process? What do you attribute that to?
3. Do you feel that the community conversations made a difference for the community as a whole? Why or why not? What kind of change did you observe? Or, if you did not see a change, what kind of change do you feel was missing?
4. Would you say that you started and ended with more (or less) confidence or hope about your community? If you were to participate

⁷⁰ *Id.* at 23.

⁷¹ Focus group participants were given a few minutes to think silently about this question before being asked to respond.

⁷² *Id.* at 23.

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in this again, what is one thing that you would keep the same and one thing you would do differently?⁷³

G. *Evaluation Highlights*

In designing the Community Conversations, the Design Team hoped the conversations would have a positive impact on the community—specifically, that the community would experience some healing and ability to come together. The Design Team was gratified to see that 91% of survey respondents indicated that they agreed (strongly or slightly) that “participating in the community conversations was a valuable way to spend their time.”⁷⁴ The evaluation also showed a “positive change in the emotional state of the participants.”⁷⁵ Specifically, participants “felt more optimistic and trusting and less cynical, sad and angry after participating in the conversations.”⁷⁶

Another positive outcome from the evaluation related to what participants wanted to accomplish through the Community Conversations. The Design Team hoped that the conversations would provide an opportunity to impact the community both interpersonally and intra-personally.⁷⁷ The evaluation documented shifts in prioritization. “Challeng[ing] myself to understand the role I play in injustices within my community” and “mak[ing] new connections with people in my community” both had substantial increases in prioritization while “get[ing] the City Council to end the contract with Saint Anthony Police Department” decreased in prioritization.⁷⁸ This shows that participants in the conversations developed a better understanding of the complexity of the policing contract while at the same time, became more open to looking at what they could do as individuals. This is significant because it shows a shift from feeling disempowered and weak (by seeking others to make needed changes) to becoming aware of their own capacity and power to effectuate change.⁷⁹ The number one priority both before and after the conversations remained “chang[ing] the way the city handles policing structure and practices”⁸⁰ but how this could be accomplished shifted from a

⁷³ *Id.* at 23.

⁷⁴ *Id.* at 3.

⁷⁵ *Id.* at 2.

⁷⁶ *Id.* Participants also reported feeling both more energized and more fatigued after the conversations.

⁷⁷ *Id.*

⁷⁸ *Id.* at 3.

⁷⁹ *See generally* INSTITUTE FOR THE STUDY OF CONFLICT TRANSFORMATION, <http://www.transformativemediation.org/about-transformative/> (last visited Sept. 25, 2020).

⁸⁰ Dressel, *supra* note 47, at 1.

focus on ending the Saint Anthony Police Department contract to developing specific recommendations for a police contract with the City of Falcon Heights.⁸¹

H. *Evaluation of Process*

Participants were asked about their satisfaction with the quality of the dialogue, the circle format, the diversity of participants, and the quality of facilitation. The participant satisfaction level with the quality of the dialogue, the quality of facilitation, and the circle format was overwhelmingly positive with 88% expressing satisfaction (somewhat or very) with the quality of the dialogue⁸² and 84% expressing satisfaction (somewhat or very) for both the quality of the facilitation and the circle process.⁸³ The evaluation did not provide any further insight into the results relating to the quality of the facilitator or the quality of the dialogue, but the discussion in the focus groups provided additional information about the circle format.⁸⁴

On the positive side, participants liked that the circle process allowed people to have a safe space for an uninterrupted opportunity to speak, to have a voice, and to become closer by being vulnerable. Another participant noted that it was a “focused process where people have to be engaged and respectful.”⁸⁵ On the negative side, many members of the first group of community conversation participants found the circle process to be “overly constrained, too polite, and a structure that did not allow people to really get to know one another, transform their own and each other’s thinking through genuine dialogue with one another.”⁸⁶ These participants wanted to have the opportunity for cross-talk and dialogue⁸⁷ which typically does not happen in a circle process.⁸⁸

⁸¹ *Id.*

⁸² *Id.* at 16–17. 39% were very satisfied, 49% were somewhat satisfied, 4% were neutral, 4% were dissatisfied, and 5% were very dissatisfied with the quality of the dialogue.

⁸³ *Id.* at 16–17. For the quality of the facilitation, 61% were very satisfied, 23% were somewhat satisfied, 7% were neutral, 7% were somewhat dissatisfied, and 2% were very dissatisfied. For the circle format, 51% were very satisfied, 33% were somewhat satisfied, 11% were neutral, 5% were somewhat dissatisfied, and 0% expressed that they were very dissatisfied.

⁸⁴ *Id.* at 9–10.

⁸⁵ *Id.* at 9.

⁸⁶ *Id.* at 10.

⁸⁷ *Id.*

⁸⁸ KAY PRANIS, *THE LITTLE BOOK OF CIRCLE PROCESSES* 11–14 (2005).

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Timing was an area of concern that participants surfaced during the evaluation. Specifically, participants felt both rushed and constrained.⁸⁹ Participants expressed concern that there were too many questions.⁹⁰ The strength of a circle process is that it slows conversation down and enables everyone to participate. This also means that it takes more time. The evaluation appears to support the decision to use a circle process, but it is important to note the concerns that were raised in future process design work.⁹¹

The area which had the strongest level of dissatisfaction with the process (although 58% still were very or somewhat satisfied) was regarding the diversity of the participants.⁹² Respondents to the survey provided the following demographic information:

Gender: 49% male, 51% female, 0% other

Ethnicity: 81% identified as White/Caucasian; 9% as Black or African-American; 2% American Indian or Alaskan Native; 9% Other and 0% for both Hispanic or Latino and Asian or Pacific Islander

Age: Under 18: 0%

18–24: 2%

25–34: 2%

35–44: 16%

45–54: 12%

55–64: 20%

over 65: 49%⁹³

In terms of ethnicity, the Community Conversations underrepresented the Asian population of Falcon Heights by a significant margin and overrepresented the White and Black population by a lesser degree.⁹⁴ However, the dissatisfaction with the diversity of the participants probably is a reaction to the fact that participation in the Community Conversations was not limited to residents of Falcon Heights. In contrast to Falcon Heights, the demographics of Saint Paul are 56.71% White; 18.39% Asian; and 16.05% Black or African American,⁹⁵ and the demographics of Minneapolis are

⁸⁹ Dressel, *supra* note 47, at 10.

⁹⁰ *Id.* at 11.

⁹¹ *Id.*

⁹² *Id.* at 16. 23% were very satisfied with the diversity of the participants, 35% were somewhat satisfied, 9% were neutral, 26% were somewhat dissatisfied, and 7% were very dissatisfied.

⁹³ *Id.*

⁹⁴ DATAUSA, *supra* note 47.

⁹⁵ *St. Paul, Minnesota Population 2020*, WORLD POPULATION REV. (Mar. 30, 2020), <https://worldpopulationreview.com/us-cities/st-paul-population/>.

63.79% White; 19.36% Black or African- American; 6.13% Asian; 4.67% Other race.⁹⁶ When one considers the demographics of the Twin City region,⁹⁷ the conversations attracted disproportionately more White participants than other ethnicities. Conversation participants were split nearly evenly between males and females, but 69% of the participants were over the age of 55 and nearly half (49%) were over the age of 65. In contrast, only 4% were under the age of 35.

IV. LESSONS LEARNED

While the overall results of the Community Conversations were positive, there were many lessons we learned along the way. In this final section, I will discuss what worked and what we would do differently next time.

A. *What Worked*

1. *COORDINATED EFFORTS*

Most significantly, the concept that a community can come together in the aftermath of a tragic event, talk about it, and collectively develop a path forward is sound. It was very important that the community not just come together to talk, but that the Community Conversations were paired with a specific commitment from the City to take action and there was a plan in place to do so, namely a Task Force with a concrete charge and timeline. While the evaluation surfaced that participants wanted “more action, accountability, and interaction with [the City Council and Task Force],”⁹⁸ some participants expressed that “the conversations were a way to start informing recommendations and [they felt] their voices were acknowledged and matter.”⁹⁹ I believe that this coordinated effort was extremely important for participants because it enabled them to see that their input had consequences.

Part of the reason that this worked so well was because the facilitators of the Task Force and the designers of the Community Conversations worked together to plan both. This enabled there to be absolute coordination with both

⁹⁶ *Minneapolis, Minnesota Population 2020*, WORLD POPULATION REV. (Feb. 17, 2020), <http://worldpopulationreview.com/us-cities/minneapolis-population/>.

⁹⁷ Falcon Heights is a suburb between Minneapolis and Saint Paul (on the north border of the City of Saint Paul and on the east border of Minneapolis).

⁹⁸ Dressel, *supra* note 47, at 6.

⁹⁹ *Id.*

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projects. Utilizing a strong, coordinated design team was critical to the success of this project.

2. *TRANSPARENCY*

Another important aspect of the process design that was effective was our commitment to transparency and our ability to deliver on that promise. Information that was collected was analyzed and conversation summaries were posted on the City's website. Often handouts were provided to participants with draft recommendations so that the participants were informed about what Task Force members were considering and the participants were able to provide direct feedback to them.

B. *Challenges*

There were many challenges with the project. I include a description of each along with recommendations as to what I would do differently in the future.

1. *PARTICIPATION*

One process challenge we had was not knowing how many people would attend each conversation. We did not ask individuals to RSVP in advance because we did not want to discourage anyone from participating and we feared that creating an expectation that you had to "register" would suppress participation. These decisions meant that we had to prepare for more people than actually participated on any given evening.¹⁰⁰

We also had a challenging time attracting a true diversity of opinion and cross section of the community. This problem is not unique to this project. Anyone who has attempted interreligious dialogues, conversations around race, or other challenging conversations knows that the people who attend these opportunities are predisposed to want to learn and to talk with others. It

¹⁰⁰ Preparation included ensuring that there were enough facilitators and note-takers available no matter how many people attended and finding and setting up the space for larger number of groups than we anticipated. In order to provide diversity in the groups, this also meant that assigning groups was a bit chaotic. Specifically, registrars did an initial guesstimate on how many groups we would need and then would fill them at the same time (in other words, group 1 was not complete until all six initial groups were filled). Inevitably, participants would arrive late, and we had to decide whether to add them to an existing group or to start a new group in the hopes that a sufficient number of additional participants would also arrive late.

is not surprising therefore, that the demographics of who participated showed that it was not as diverse as we would have wanted or hoped. We found that repeated personal invitations were one way to get people to the conversation who were more skeptical about the process. In the future, I would be even more intentional about inviting people to the conversation. Ideally, one should find a champion for the conversation who has credibility with and comes from the population you wish to engage. For example, in the future I recommend identifying a couple of members of the group you wish to include, e.g., young people, who are interested in the conversation, recruit them to participate and then have them reach out to their peers.

Time. The evaluation highlighted that both participants and facilitators raised concerns that the process felt “rushed and constrained.”¹⁰¹ This suggests that the Design Team was overly ambitious as to what could be accomplished during each conversation. There is a clear tension between providing as much time as *some* would want and honoring other’s desire to be involved but having competing obligations such that they were unable to commit to longer or additional sessions. Another tension was whether all groups should move through the same questions as opposed to allowing groups to spend more time on a single question if there was interest in deeper exploration. We opted to have strict time limits for each question so that all groups would have the same opportunity to provide feedback to the Task Force. While I appreciate the frustration our decision caused, I believe it was the right one. To improve the process, I would add another half hour to each session and be even more strict with the amount of time devoted to opening remarks.¹⁰²

2. FACILITATORS

In their focus groups, facilitators expressed concern about “the tension they felt between the roles they were asked to play as circle keepers sharing a piece of their own stories versus a more traditional neutral facilitation role.”¹⁰³ This tension started with the Design Team. We were not completely in consensus regarding the “facilitators” role. In the Handbook provided to the facilitators (Appendix B), they were instructed that their “number one role is to promote constructive conversation and capture the input given by the participants.”¹⁰⁴ This is quite different than the underlying philosophy of

¹⁰¹ Dressel, *supra* note 47, at 11.

¹⁰² *But see infra* IV.B.3. Participants wanted more interaction *and* more time to talk. One way to reconcile these would be to ensure that the Task Force members actively participated in the Community Conversations.

¹⁰³ Dressel, *supra* note 47, at 12.

¹⁰⁴ *See infra* Appendix B, at 675.

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Circles which is that “we are all in need of help and that helping others helps us at the same time. . . . Participants are not divided into givers and receivers: everyone is both a giver and receiver.”¹⁰⁵ Traditionally, circle keepers are more involved in the process as a co-equal. Most of us believed that for this project, given the short amount of time we had and the specific desired outcomes of providing input to the Task Force, the volunteers should be “neutral facilitators” and not “circle keepers.” One member of the Design Team felt that the subject matter of the conversations demanded a more restorative response and therefore a traditional circle process with a circle keeper would be more appropriate.¹⁰⁶ In the future, organizers of conversations need to be intentional about determining the role of the “facilitators” and then provide consistent messaging and information on how the process will run.

As described above, because we did not know how many people would attend each conversation, we were prepared for at least 100 (a minimum of ten groups meaning a minimum of ten facilitators and ten note takers). Some of the conversations were considerably smaller.¹⁰⁷ This meant that some volunteers who had planned to work with a group were not needed. The volunteers were invited to join a group as a participant but in the focus groups, they expressed that they sometimes felt “underappreciated.”¹⁰⁸ They suggested that when this happens, which it inevitably will, the organizers should use language that “thanks them for their commitment and acknowledges that they may be disappointed” rather than being told “you have their night free now.”¹⁰⁹

3. INTERACTION WITH THE TASK FORCE

The evaluation surfaced a clear desire for “more action, accountability, and interaction with [the City Council and Task Force].”¹¹⁰ Participants in the focus groups felt that their personal goals of “hearing the final recommendations, having time to discuss them, and then moving to personal next steps” were not met.¹¹¹ The evaluator recommended “a design

¹⁰⁵ PRANIS, *supra* note 88, at 6.

¹⁰⁶ *See generally* Dressel, *supra* note 47, at 11.

¹⁰⁷ *Id.* at 14.

¹⁰⁸ *Id.* at 8.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 6.

¹¹¹ *Id.* at 7. The participants were particularly critical of the final session. While not an excuse, it is important to note that the plans for the final conversation had to be readjusted when Officer Yanez was acquitted. As organizers, we did not feel that we could hold the conversation as planned and just focus on the future, without providing for some time for participants to process together as a community.

that includes direct feedback and interaction with the task force/city council.”¹¹²

4. RESOURCES

“Participants observed and bemoaned that limited resources had negative impacts on communication, childcare, and food.”¹¹³ Hosting community conversations requires an investment of resources—even when utilizing volunteer facilitators and where, in this case, the organizers were not seeking to be paid by the City.¹¹⁴ At a minimum, resources required for community conversations include: childcare, food, and advertisement. For the Falcon Heights Community Conversations, the City arranged to have childcare, but it was not well advertised so it was not well utilized.¹¹⁵ For example, the flyers announcing the Community Conversations did not state that childcare would be available.

The focus groups also commented on the lack of adequate food options at the conversations.¹¹⁶ The City provided sweets, such as cookies and doughnuts, and limited beverages but no substantial dinner-type food.¹¹⁷ The focus group participants suggested that “healthier and more robust dinner options” would have been better.¹¹⁸ Another suggestion was to pay attention to culturally specific foods.¹¹⁹ Organizers should pay careful attention to the timing of the conversations in order to provide sufficient options and to who attends in order to be culturally appropriate in the offerings.¹²⁰ I note here another tension between providing food (and an opportunity to eat) versus the desire for more time in conversation. My recommendation would be to focus on “finger foods” which would not require participants to eat at tables and could potentially be combined with participation in conversation.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ Given the AAA-ICDR Grant, no member of the Design Team sought payment from the City for organizing the Community Conversations.

¹¹⁵ Dressel, *supra* note 47, at 8.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ The Falcon Heights Community Conversations overlapped with Ramadan in 2017 which began on May 26 and ended on June 24. Focus group participants specifically noted that it was important that pork not be offered during Ramadan and that the timing of when food would be available should be considered since Ramadan observers cannot eat until after sunset. *Id.*

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V. CONCLUSION

Overall, the Community Conversations project was a success.¹²¹ The final policing and inclusion recommendations of the Task Force, informed by the Community Conversations, were adopted by the City of Falcon Heights. Beginning in January 2018, the Ramsey County sheriff's office took over policing responsibility for Falcon Heights.¹²² The contract with Ramsey County included provisions for "indemnification, data sharing and personnel" and the Mayor reported, when the contract began, that the sheriff's office is "open to the recommendations put forth by the Falcon Heights Task Force."¹²³ The five member City Council now includes two former members of the Task Force, Melanie Leehy and Kay Andrews.¹²⁴ The city hosts multiple community events including its annual ice cream social which now is co-sponsored by the Ramsey County Sheriff's Office and includes "Hotdog with a Deputy."¹²⁵ Current Mayor Randy Gustafson explains in a video on the Falcon Heights website that the gathering allows people to get to know the deputies and the deputies to get to know the people [of Falcon Heights].¹²⁶ On July 6, 2019, the anniversary of Philando Castile's death, Falcon Heights held its second annual "Restoration Day" featuring Philando's mother, Valerie

¹²¹ Dressel, *supra* note 47, at 15. Nearly 100 people attended the first, second, and fifth conversations; 70 people attended the third conversation; 56 people attended the fourth conversation. *Recommendations*, *supra* note 25, at 19, 22, 26, 34, 41. Based on the survey data, 39% of respondents attended just one conversation; 12% attended two; 16% attended three; 12% attended four and 21% attended all five conversations.

¹²² Jamie Delage, *Falcon Heights Chooses Ramsey County to Provide Policing After Cutting Ties With St. Anthony*, PIONEER PRESS (Oct. 25, 2017), <https://www.twincities.com/2017/10/25/falcon-heights-chooses-ramsey-county-to-provide-policing-after-cutting-ties-with-st-anthony/>.

¹²³ *Id.*

¹²⁴ *Falcon Heights City Council*, FALCON HEIGHTS, <https://www.falconheights.org/government/city-council-three-column-test> (last visited Apr. 11, 2020). The current Mayor, Randy Gustafson, served as co-chair (with Melanie Leehy) of the Task Force.

¹²⁵ CITY OF FALCON HEIGHTS, REGULAR MEETING OF THE PARKS AND RECREATION COMMISSION, AGENDA (2019), <https://www.falconheights.org/home/showdocument?id=572>.

¹²⁶ *Id.*

Castile, Philando's good friend, John Thompson,¹²⁷ and Hawa Samatar, an active resident, volunteer and member of the City Planning Commission.¹²⁸

¹²⁷ Thompson participated in the Community Conversations and is very vocal about how the process transformed him from "an angry Black man" to someone who is MAD—Making a Difference. Shortly after the death of Castile, Thompson created Fight for Justice LLC. See FIGHT FOR JUST. ENTERPRISES LLC., <https://www.ffjllc.com/> (last visited Apr. 11, 2020). To hear him tell his story see *Thanks for Listening: Rebuilding After Crisis Community Conversations in Falcon Heights, MN*, HARVARD NEGOTIATION AND MEDIATION CLINICAL PROGRAM (July 2, 2019), <http://hnmcp.law.harvard.edu/hnmcp/podcast/thanks-for-listening-ep3-rebuilding-after-crisis-community-conversations-in-falcon-heights-minnesota/>.

¹²⁸ Admin., *Falcon Heights holds second Restoration Day*, LILLIENEWS (Jun. 25, 2019), <https://www.lillienews.com/articles/2019/06/25/falcon-heights-holds-second-restoration-day>.

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Appendix A: Community Conversations – Small Group Facilitator Questions¹²⁹

Community Conversation #1: Personal and Community Values

- 1: Why did you come to the Community Conversation and what is your most important personal value?
- 2: What is the value you would most like your neighbors and public officials to demonstrate and why?
- 3: How has the community failed to live up to these values?
- 4: How would you like to see the City of Falcon Heights heal and how would you like to see yourself, your neighbors, and the public officials demonstrate these values?

Community Conversation #2: Options for how the City can live out the Community's Values in its Activities, Policies, and Policing Policies and Practices

At the second Community Conversation, facilitators shared the frequently expressed values identified at the first community conversation¹³⁰ before posing the small group questions.

- 1: What are the barriers to honoring the values identified at the first conversation in city and community activities and policies, and policing policies and practices?
- 2: What would it look like for the City of Falcon Heights to live out these values in city and community activities and policies, and policing policies and practices?

Community Conversation #3: Review and Feedback on Draft Policing Recommendations

¹²⁹ RECOMMENDATIONS, *supra* note 25, at 19–20, 23, 27–31, 34–35 & 41.

¹³⁰ *Id.* at 22. No attempt was made at the first conversation to develop consensus, so the list represented the commonly identified values. The values were grouped into the following themes: Educate Selves and Seek Diverse Perspectives; Embrace the Greater Good; Empathy and Compassion; Equity and Equality; Forge Strong Relationships and Have Meaningful Communication; Honesty and Accountability; Honor Shared Humanity; Take Courageous Actions.

1. The Task Force has identified the following as the highest priorities for policing activity: Response; Community policing; Cultural competence and community engagement; and Dangerous moving violations for traffic policing. Are there other areas or priorities to consider?
2. The Task Force has recommended that “officers will uphold and advance our community values.”¹³¹ Specifically, the Task Force is recommending “equity” and that “revenue generation should never be a factor in enforcement.”¹³² Reactions?
3. The Task Force recommends that the police department will collect comprehensive data on all police interactions and crime; the City of Falcon Heights will gather public feedback; reports on the data collected by the police department will be made monthly to the City Council and will be published on the City’s website; when serious incidents occur, “the police department and the City of Falcon Heights will communicate promptly, openly, and decisively, in a manner appropriate to the incident.”¹³³ Reactions?
4. The Task Force recommends: Falcon Heights should have law enforcement officers who work specifically and routinely in Falcon Heights and who get to know the community; police officers will participate in community-led trainings on interaction, community-police mutual listening sessions, and other community events in order to build relationships and “to be aware of and appreciate the diversity” of Falcon Heights;¹³⁴ the police department will strive to constitute a workforce that represents the broad diversity of the community. Reactions?
5. The Task Force recommends: Officers will have regular training to build their capacity for de-escalation of themselves and others, for interacting effectively and respectfully with diverse persons, for recognizing and preventing bias, and for minimizing the use of lethal weapons; a social worker or trained mental health professionals will be on call at all times to provide on-site support.¹³⁵ Reactions?
6. The Task Force recommends: Oversight by the City to include regular reviews and an “out” clause and/or penalty for non-compliance if policing is provided by an externally contracted agency. The Task

¹³¹ *Id.* at 27.

¹³² *Id.* at 28.

¹³³ *Id.*

¹³⁴ *Id.* at 29.

¹³⁵ *Id.* at 30.

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Force “invites community input about the *idea* and/or the *structure* of civilian oversight.”¹³⁶

7. The City Council has authority and responsibility for keeping a contract with the Saint Anthony Police Department (SAPD) or moving to some other arrangement. The options being discussed are renegotiate with SAPD; issue a new request for proposals to contract with a police department; create a new Joint Powers Authority. How important is it to enhance the City’s ownership of the police department? Which options do you prefer and why? If there were tradeoffs between acting quickly and accomplishing more systemic change, do you have an opinion about how to balance those tensions?¹³⁷

Community Conversation #4: Transformational Change and Personal Commitments

1. What would it take, beyond policing, for truly transformational change to take place in Falcon Heights and to genuinely fulfill community values?
2. What will it take to get more residents involved in the process of engaging in dialogue to explore value and how to improve the city?
3. What specific steps or actions do you plan to take to be a champion of the community’s values?¹³⁸

Community Conversation #5: Processing the Events of the Past Year and Discussion of Next Steps for Action

1. Reflect on your feelings and personal journey given the events of the last year including the death of Philando Castile; the response including the Task Force and community conversations; and the acquittal of Officer Yanez.
2. What are your personal next steps?¹³⁹

¹³⁶ *Id.*

¹³⁷ *Id.* at 31.

¹³⁸ *Id.* at 34–35.

¹³⁹ *Id.* at 41.

Appendix B

Falcon Heights Community Conversations on Inclusion and Policing

Table Facilitator Handbook

Contact:

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Thank you for helping to staff the Falcon Heights
Community Conversations on Inclusion and Policing.
We really appreciate your time and effort!

BACKGROUND

Falcon Heights Task Force on Inclusion and Policing

Following the shooting death of Philando Castile by St. Anthony Police Officer Jeronimo Yanez, the Falcon Heights City Council created the Falcon Heights Task Force on Inclusion and Policing.

Task Force Charge:

To articulate, affirm and operationalize our values as a community to be inclusive and welcoming environment for residents and guests of Falcon Heights, with an emphasis on policing values, policies and procedures.

USING DISPUTE RESOLUTION SKILLS TO HEAL A COMMUNITY

Task Force will review and make recommendations on:

Inclusion

- Opportunities to strengthen inclusivity and recognize the importance of diversity.

Policing

- Data collection;
- Emerging and best practices on police policy, procedures, and technology focusing on use of force and policies that help build trust;
- Police training, especially implicit bias and de-escalation training; and
- Community-based policing strategies to strengthen links with residents and guests.

Composition

A diverse group of nine (9) persons who are either: residents; owner of business or owner of business designee and Two (2) City Council Member liaisons. Mayor recommends co-chairs from the group and the City Council approves. The City Administrator will be the staff liaison to the Task Force. Task Force is selected through an application process and selected by the City Council via a method established by the City Administrator.

Role

Advisory to the City Council. The Task Force will provide recommendations to the City Council. The Council will provide their final recommendations to the Police Chief. The City Council will request a response from the Police Chief as needed and establish a timeline for a response.

Community Conversations on Inclusion and Policing

Purpose of Community Conversations

To engage the collective wisdom of interested Twin Cities residents in better understanding and developing solutions for issues of inclusion and policing in the city of Falcon Heights. Members of the Falcon Heights Inclusion and Policing Task Force, will utilize this collective wisdom in developing recommendations for the Falcon Heights City Council. Additionally, the engagement process will develop the relationships and will to facilitate the implementation of the recommendations.

Overview of Community Conversations

The Task Force will engage interested citizens in a collaborative problem-solving process that consists of five meetings. Participants will be encouraged but not required to attend all five meetings. Topics of the meetings:

1. Community Values
2. Implementing the Community's Values
3. Policing Recommendations
4. Inclusion Recommendations
5. Commemoration

LOGISTICS

All meetings will take place from **6:30-8:30 p.m.** The **First** meeting will be held at:

Falcon Heights Elementary – Gym
1393 Garden Avenue West
Falcon Heights, MN 55113

Subsequent locations are TBA

1. February 16th
2. March 2nd
3. April 3rd
4. May 1st
5. TBD

TABLE FACILITATOR ROLES AND RESPONSIBILITIES

- ✓ Your number one role is to promote constructive conversation and capture the input given by the participants.
- ✓ Meet at sign-in table by 6:00 pm for a brief orientation.
- ✓ Facilitate small group conversations
 - Manage the time to ensure that you move through the full agenda.
 - If there are two facilitators one should monitor time and lead the conversation and the other should take notes on the notepad. The notetaker should attempt to capture each speaker's central concern or desire. Do not attempt to take word for word notes.
 - Ensure that all participants have an equal opportunity to and are encouraged to participate. Speakers may pass but should be given the opportunity to speak. You should give a time parameter at the beginning of each go around (i.e. each

USING DISPUTE RESOLUTION SKILLS TO HEAL A COMMUNITY

participant will have about 2-3 minutes to answer the following question). If a participant is dominating the conversation you will need to remind he or she of the time parameter and the goal of hearing from everyone.

- Manage conflict or strong emotions by using active listening, reflecting, and reframing. Strive to identify the underlying concern or desire of the speaker, and let him or her know that you have captured it for the record. For example, if a participant says that SPPS is a dangerous place and nothing is being done about it. The facilitator could respond by saying, “It sounds like safety is top priority for you.” And safety should be added to your notes about concerns. Additionally, participants can be directed to leave feedback for the City at comment table.
- If you are having trouble managing conflict or time, send someone to the sign-in table and you will be provided with facilitation support.
- Issues of equity and race are likely to come up. Be aware of your own biases and strive to facilitate and take notes in an omnipartial manner – meaning that you are not favoring any one person or perspective and are supportive of everyone in the room.
- ✓ Help to clean up.
- ✓ Submit notes to Mariah.Levison@state.mn.us within 48 hours. Following the meeting, your job is to synthesize the notes you took into a concise list of the themes that emerged from the conversation and submit those themes along with your detailed notes. Salient themes may be a) things that multiple people expressed; b) there was a sense of consensus in the group for a statement made; c) there was a high level of emotion attached to the statement; or d) it is an integration of several statements made by members of the group. Please note, **you are to provide both your detailed notes and your list of themes**. Submit your detailed notes and list of themes for each question, rather than one list of themes. Please take the time to do a thoughtful analysis of the themes that you submit.

MEETING ONE – COMMUNITY VALUES

Participants will be gathered in groups of 8 to 10 people and seated in a circle (chairs, no tables).

- **6:30-6:45** Task Force co-chairs will give a welcome, overview of the Task Force process and overview of the community engagement process. City Council and Task Force members will be asked to wave.
- **6:45-7:00** Lead facilitators will go over the process for the evening including conversation guidelines
- **7:00-7:05** Table facilitators will introduce themselves including that they are volunteer community members.
- **7:05-7:25** First circle. Ask participants to write their most important personal value on a notecard. Then go around the circle asking each participant to share their value and why it is their most important personal value. Ask them to place the notecard in the middle of the circle after they speak.
- **7:25-7:40** Second circle. Ask participants to write on a notecard the value that they would most like their neighbors and public officials to demonstrate. Then go around the circle asking each participant to share their value and why. Ask them to place the notecard in the middle of the circle after they speak.
- **7:40-8:00** Third circle. Ask participants to share how they feel the community fails to live up to these values.
- **8:00-8:20** Fourth circle. Ask participants to share how they would like to see the City of Falcon Heights demonstrate the values that they would like to see their neighbors and public officials demonstrate?
- **8:20-8:30** Allow for open reflection on what has been shared.
- **8:30** Remind participants that the next conversation will be March 2nd and that the topic will be developing options for how the City can live out the community's values in its activities, policies, and policing policies and practices.
Remind participants that they will have 2-3 minutes to answer each question. At the beginning of each round adjust the amount of time based on the number of participants and how far ahead or behind schedule you are.

QUESTIONS AND ANSWERS

1. What do I need to bring?
Please bring a notepad and pen for taking notes and a talking piece if you would like to.
2. What if I have an emergency and can't make it at the last minute?
Call Mariah Levison at 952-255-9419.
3. What should I wear?
Dress is business casual. Please be mindful to wear clothing that does not indicate your personal beliefs, politics, philosophy, etc.

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4. What if the weather is bad?
In the event that the City cancels the event due to weather conditions you will be notified by email.

THANK YOU!

Appendix C: Excerpts from The City of Falcon Heights Inclusion and Policing Task Force Overview of Recommendations

Community Conversation 1¹⁴⁰

First Circle: Participants shared why they came and their most important personal value.

Why did people come?

- *Resident of Falcon Heights*
- *Out of love for the community.*
- *Participation is a way to be active and involved.*
- *Feel dismay, shock, outrage, anger, upset over Philando Castile's death*
- *Want to solve problems and see change*

Personal Values

- *Compassion, Caring, Empathy, Love: Treating others as you want to be treated. Caring for others. Being open to others' perspectives. Some referred to their religious faith in this context.*
- *Equality and Equity: Ensuring all have equal opportunities and that laws apply equally regardless of race.*
- *Honesty and Openness: Being open, thoughtful, truthful, having difficult conversations.*
- *Integrity*
- *Relationships, Community, Connection: Building understanding through relationships. Being connected with others and sharing experiences.*
- *Respect, Dignity, Tolerance, Inclusion: Creating mutual respect. Honoring others. Treating people with dignity.*
- *Other personal values, not easily grouped with larger themes: Learning. Courage. Forgiveness. Professionalism. Hope.*

Second Circle: Participants shared the value they would most like their neighbors and public officials to demonstrate, and why.

- *Educate Selves and Seek Diverse Perspectives: Seeking out others [sic] perspectives and being genuinely open-minded. Listening to others, especially those we might not want to listen to. Recognizing our own individual implicit biases.*

¹⁴⁰ *Id.* at 19–21.

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- *Embrace the Greater Good:* Creating a community beyond oneself and thinking beyond individual values. Working to harmonize the needs of all while understanding different individuals need different things.
- Empathy and Compassion: Upholding that we all want the same things as human beings. Insisting that officers need to engage and care.
- Equity and Equality: Fairness, inclusivity and equal justice.
- Forge Strong Relationships and Have Meaningful Communication: Creating a community by welcoming more diversity and welcoming new people into neighborhoods. Making all feel welcome and important regardless of race or age. Having honesty, creativity, and transparency in communication.
- Honesty and Accountability: Expecting honesty from elected officials. Holding everyone accountable for actions. Upholding honesty and transparent communication in all directions.
- Honor Shared Humanity: Having mutual respect. Recognizing the value of everyone and treating everyone as human beings. Finding a shared dignity and positive regard for neighbors and officials.
- Take Courageous Actions: Speaking up when we see something happening. Challenging others when we see or hear hurtful actions and comments. Being engaged and take action. Sensing that it is our responsibility to fix this.

Third Circle: Participants shared how they feel the community fails to live up to these values.

- Complacency: People not speaking up, asking questions, and taking action.
- Lack of knowledge, understanding, and awareness in the community: Privilege playing into not knowing that things were different for people of color and into feeling like things were great in Falcon Heights. Not seeing the disparities in traffic stops and acknowledging bias.
- Lack of integrity and accountability; Eroded trust: Breakdown in communication, transparency, and honesty from elected officials. Police who don't represent values.
- Frustration, anger, and disappointment: Feeling that police and officials have failed them, linked by some to disappointment in themselves for not looking and noticing.

- Fear and lack of safety: People of color fear for personal safety and security.
- Police values: Need to find ways to support police officers in living up to community values. Need to examine the goals of the police, the revenue streams of the police, and pay attention to abusive practices by police and damaging incentives from revenue structure.
- Fourth Circle: Participants shared how they would like to see the City of Falcon Heights heal and how they would like to see themselves, their neighbors, and their public officials demonstrate the values.
- Community Engagement, Conversations, Communication: Conversations are important; these should be shared with the wider community. Let's get to know others and make time to connect. There should be diverse participation and events.
- Measurements, Accountability, Transparency: Make concrete decisions and have accountability and transparency. Leadership should be held accountable. Use statistics and feedback to create measurements.
- Possible actions: Something should be done with the police contract. There needs to be better police training. Let's explore restorative justice models. Police should be out of the cars and in the community.
- Take Action and Build Trust: There needs to be action and communication by Mayor/City Council/Police. The community also needs to take action. Police should be part of the conversation.

USING DISPUTE RESOLUTION SKILLS TO HEAL A COMMUNITY

Community Conversation 2¹⁴¹

Circle: Participants shared barriers to honoring the values (above) in city and community activities and polices, and policing policies and practices. These are frequently expressed statements, grouped by theme. They are not consensus statements.

- Challenge of Sustained Change and Action: New solutions and actions are needed to create change.
- City Government Structures: Policies within the city and a lack of mechanisms understand and monitor what is taking place within the community creates a barrier.
- Complacency and Apathy and Inertia: It can be easy to become tired, feel a lack of control, and not expend the energy to be involved. Change needs sustained energy and momentum and can be lost when people become consumed with daily lives. There is a long history of no change and status quo.
- Fear and Discomfort: Change can be scary and uncomfortable which can create resistance to moving forward.
- Need for Accountability: More accountability is needed for policy and city to realize values. There is blame being pointed at multiple people and groups.
- Personal Responsibility to Get Out of Circles: There is a need for personal action and desire to get to know other people when living out community values. Individuals need to interact and get to know others [sic] perspectives. Making the time and commitment to get out of personal circles often does not happen.
- Policing Structures: Current structure and values of policing stand in the way of living out the community values.
- Privilege, Bias, and Racism: Oppression, racism, white privilege, and biases must be recognized and addressed in order for the community values to be honored.

Circle: Participants shared ideas on what it would look like for the City of Falcon Heights to live out these values in city and community activities and polices, and policing policies and practices.

¹⁴¹ *Id.* at 22–25.

Strongest Themes

- Community Based Policing: Policies put in place to end stops for minor traffic offenses such as speeding and equipment malfunctioning and remove the monetary incentives for this type of enforcement. Move to a model of community policing where officers are out of their cars and engaging with community members. Police officers lead and organize neighborhood events where they can interact with community members and have a commitment to community involvement. Increase the communication between police officers and community members including ongoing listening session between the community and police.
- Community Events and Activities that Foster Broadening Perspectives: Numerous ideas shared for events to build community and foster learning about each other. Ideas included: community reading groups, workshops to explore cultural similarities and differences, inter-active culture sharing events that celebrate diversity, programs and opportunities for mutually beneficial exchanges between community members of different ethnicities and on-going community conversations.
- Training for Police, City Staff, and Community Members: Increase the amount and types of training offered to police. Training topics included implicit bias, diversity, de-escalation skills, healing and restorative justice, trauma-informed services, and individual coaching. Comments also reflected the need to offer training to city staff and community members.

Very Strong Themes

- City Accountability: Accountability and honesty by decisionmakers. Encourage the City Council to clarify their expectations of police officers and resource allocation. Action encouraged by the City Council to establish a community board or task force that has ability review and monitor police and the power to affect change and create accountability for law enforcement officials. Create continued space for citizen voice and participation.
- Collect, Share, and Utilize Data on Policing Practices: Report on policing to community members to ensure the values are being met and action is being taken when necessary. The city should monitor police data and increase the timeliness and visibility of data on the city website.

USING DISPUTE RESOLUTION SKILLS TO HEAL A COMMUNITY

- Neighborhood Level Community Building: Encourage community members to get [to] know your neighbors' stories, say hello to one another, and care about the welfare of neighbors. Ideas to create a neighborhood engagement toolkit to encourage citizen participation and a neighborhood welcome letter to new community members inviting them to be involved.
- Policing Policies and Practices that Align with Falcon Heights Values: Use of de-escalation tactics. Increased level of transparency. Recognize difficulties and dangers police face. Create a culture of reflection and compassion.

Strong Themes

- Consider Alternatives to Contracting with St. Anthony Police Department: End the contract with St. Anthony Police and consider contracting with the Ramsey County Sherriff's Office or creating a small Falcon Heights only police force.
- Forums for Truth and Reconciliation: Council should publicly apologize and take responsibility for death of Philando Castile. A specific idea is to have the city council commission a writer to create a case study, story, or play about the killing of Philando Castile that becomes a part of school curriculum, and could be part of wider community events. Forums for police to hear about the experiences of people of color.
- Hire Diverse and Reflective Police Officers
- Housing: Create more affordable housing in the community and create opportunities for disparate groups to purchase homes in Falcon Heights.
- Personal and Collective Commitment to Education, Reflection, Reflection and Dialogue: Create opportunities for youth to learn about diversity and inclusiveness at a young age. Individual and collective commitment to learn about each other and explore our own assumptions.
- Utilize Terms of the Contract to Ensure that the City's Contracted Police Force Demonstrates the City's Values: When considering future contracts, incorporate community values and create policies for steps to be taken when policing practices fail to meet these values.

Community Conversation #3¹⁴²

Community Input: Themes Cutting Across All Recommendations

Communicate Goals and Values: There was a strong desire that the City's goals and values be clearly articulated in any type of contract or arrangement for police services. The City must achieve clarity on those goals and values. Previous Task Force and community meetings have led to the draft statements of community values circulated at the meeting.

Community Responsibility: There is support for the community to continue to be involved and a sense that solutions are the responsibility of the entire community. There should also be structured review and space for continued public feedback on the values and next steps. Numerous comments addressed the ideas that "the police" and "the community" is a false dichotomy and that police should be a part of our community and vice versa.

Measurable and Actionable: Across all of the recommendations there was strong support for ensuring recommendations and expectations are measurable and actionable. There were some concerns raised that some recommendations are not measurable and specific enough.

Ownership: Support for stronger ownership of the police force was expressed relating to all of the recommendations -stronger ownership will be needed in order to set priorities for training hiring, policing activities, etc. The idea of having designated Falcon Heights officers was expressed frequently.

Positive Reactions: Many community members felt positively about the recommendations as a whole and felt that this was a good start. People were thankful of the work that had been put in and said it was nice to see the alignment of values and the recommendations.

Resources and Funding: Comments and concerns were raised about financial resources and revenue streams for policing and the resources needed to support the policing.

TASK FORCE'S ORIGINAL DRAFT RECOMMENDATIONS

¹⁴² *Id.* at 26–33.

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The highest priorities for policing activity are:

- Response. Responding to violent crimes and 911 calls.
- Community policing. Officers need to get out of their cars to engage regularly with people.
- Cultural competence and community engagement: Training for cultural competency must be linked with positive cultural and community engagement to build relationships.
- In traffic policing, dangerous moving violations. Conversely, policing for minor traffic violations are very low priority, and the policy for these should be to issue a warning.

Are there other areas or priorities to consider?

COMMUNITY FEEDBACK ON THESE DRAFT RECOMMENDATIONS

Focus of Police Actions: There was support among groups that police should focus on critically important responses including 911 calls and emergency calls with less focus on or changes to traffic stops and equipment failure issues. Comments included seeing a stop to racial profiling stops and no more stops for “driving while black,” no more shootings, and ensuring safety and respect for all.

Support of Community Policing: There was support among groups that seeing police get out of their cars and interacting with residents and having officers designated to Falcon Heights so people can know and build relationships with officers is important. Clarification was requested for what officers getting out of their cars would look like and mean in practice.

Police Participation and Acknowledgement: Including police in the dialogue on establishing priorities for policing activities was raised to ensure the final recommendations are realistic and include the ideas of the police. There was a desire to have the police acknowledge that inequity exists in policing and that the police could improve. There was a desire for mutual learning.

Culture and Values

TASK FORCE’S ORIGINAL DRAFT RECOMMENDATIONS

Community values. Officers will uphold and advance our community values.

Equity. All residents and guests of the city are to be treated fairly and equally under the law, across racial and ethnic groups, generations, places of origin, socioeconomic status, religion, gender identity, sexual orientation, etc.

Motivations. Revenue generation should never be a factor in law enforcement.

COMMUNITY FEEDBACK ON THESE DRAFT RECOMMENDATIONS

Comments on Values: There was support for ensuring the values can be measured and implemented. Concern raised by groups about the treatment of people of color and women and that life needs to be valued above all.

Equity: Equity was expressed as important but a group would like to see justice added to the statement. Desire was expressed for a stronger equity statement.

Healing: A need for a healing process was expressed.

Data and Transparency

TASK FORCE'S ORIGINAL DRAFT RECOMMENDATIONS

Policing data collection: The police department will collect comprehensive data on all police interactions and crime, to include: the impetus for the interactions (e.g., response to call for service), the nature of the interaction (e.g., vehicle and pedestrian stops, searches, citations, arrests); location; and any demographic information that the subjects offer.

Public Feedback: The City of Falcon Heights will gather public feedback on policing through at least two mechanisms. Annually, the city will conduct a survey of households to solicit feedback on policing. In addition, in every interaction, police officers will give the person with whom they are interacting a card that identifies the officer by name and provides a phone number and website to submit complaints, concerns, or questions about the policing interaction.

Reports and review: Reports on the data collected by the police department will be made monthly to the City Council and published on the City's website in as much detail as possible without violating privacy. These reports and synthesis of any public feedback collected will be reviewed by the Council, Police Chief, and Community Engagement Commission at least quarterly to identify and respond to concerning patterns regarding crime and public safety and/or biases and disparities in enforcement.

Serious incidents: When serious incidents occur, including use of deadly force, or incidence of possible police misconduct, the police department and City of Falcon Heights will

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communicate promptly, openly, and decisively, in a manner appropriate to the incident.

COMMUNITY FEEDBACK ON THESE DRAFT RECOMMENDATIONS

Data Collection: Overwhelming support around the importance of data collection and support for the recommendations on data collection. Data collection should include race and demographic information on officers and civilians. Strong request that there be clarity around who collects, analyzes, and reports on the data so that the community can trust that information is unbiased.

Transparency and Accountability: There is consensus that transparency and accountability is important. Comments included the need for space and process for community input and grievances to be easily heard and concern about whether there is a way for residents' concerns to be heard.

Community Relationships

TASK FORCE'S ORIGINAL DRAFT RECOMMENDATIONS

Presence. We want to know our officers and have them know and be attached to our community. Falcon Heights should have law enforcement officers who work specifically and routinely in Falcon Heights and who get to know our community.

Community engagement. From initial training through their ongoing work, their duties will include participating in community-led trainings on interactions (before officers begin service in Falcon Heights), community-police mutual listening sessions, and other community events. The purpose is to build relationships and to be aware of and appreciate the diversity of our community.

Hiring and workforce. The police department will continually strive to constitute a workforce that represents the broad diversity of the community that interacts with the police. For example, the department could have a hiring priority for candidates who speak one of the top 5 non-English languages spoken in the Roseville school district, or for candidates with demonstrated experience with community service organizations or community engagement skills, as well as their formal prior training and policing experience.

COMMUNITY FEEDBACK ON THESE DRAFT RECOMMENDATIONS

Presence and Community Connection: There was very strong support of the recommendations of having Falcon Heights officers and having a relationship between the community and officers. Concern was raised that the recommendation does not do enough to address relationships with people who drive through Falcon Heights. There was a suggestion to make the profiles of officers' available online/social media so people can know their backgrounds and be more comfortable with those protecting them.

Hiring and Workforce: There was support for the focus on hiring and ensuring that officers are diverse and/or culturally competent. Comments also centered on the need education and training of the officers.

USING DISPUTE RESOLUTION SKILLS TO HEAL A COMMUNITY

Training and Capacity

TASK FORCE'S ORIGINAL DRAFT RECOMMENDATIONS

Training: Officers will have regular training to build their capacity for de-escalation of themselves and others, for interacting effectively and respectfully with diverse persons in our community, for recognizing and preventing bias (including implicit bias), and for minimizing the use of lethal weapons. Conversely, training emphasizing a “warrior” or similar mindset should not be permitted.

Mental health. A social worker or trained mental health professional will be on call at all times to provide on-site support for de-escalation and assistance to or with persons with mental illness.

COMMUNITY FEEDBACK ON THESE DRAFT RECOMMENDATIONS

Training: Overwhelming support training specifically de-escalation and a need to have experts in the field determining and leading training.

Mental Health: Groups expressed support for the focus on mental health training and social worker component. One group was split on roles of police and social workers where some wanted police officers who did not act as social workers and others in the group wanting officers to have social work-like training.

Oversight

TASK FORCE'S ORIGINAL DRAFT RECOMMENDATIONS

Oversight. Falcon Heights needs to have significant authority over our law enforcement officers and police department. The current situation of a brief annual report and review of an externally contracted agency does not provide sufficient oversight of a police department and its officers. The City needs to be able to respond in a timely and effective fashion if there is a serious (acute or persistent) concern, for example about police misconduct or a pattern of bias. If policing will be provided by an externally contracted agency, the city should have provisions for regular review and an out clause and/or penalty for non-compliance.

Civilian oversight: An entity independent of the police department will serve as a channel for community members to give feedback on police conduct. The existing Community Engagement Commission or an ombudsperson could

accept and investigate complaints. This would require resources to conduct investigations and the buy-in of the police department. *The Task invites community input about the idea and/or the structure of civilian oversight.*

USING DISPUTE RESOLUTION SKILLS TO HEAL A COMMUNITY

COMMUNITY FEEDBACK ON THESE DRAFT RECOMMENDATIONS

Support for Civilian Oversight: There was general support for civilian oversight but lack of consensus on the form it should take.

Related Suggestions: Some ideas that were expressed include: A stand-alone review committee; a panel that meets on an on-going basis; in addition to residents include visitors to the community and membership should be diverse; ombudsperson role would need clear definition.

Ownership

TASK FORCE'S ORIGINAL DRAFT RECOMMENDATIONS

Ultimately the City Council has authority and responsibility for keeping a contract with SAPD [Saint Anthony Police Department] or moving to some other arrangement. Here are some of the major options being discussed in the community. They offer varying levels of direct control by Falcon Heights over the police department. All of these options would take time to implement, some probably more than others.

- Renegotiate with SAPD to implement changes that reflect community values and improve service and control.
- Issue a new Request for Proposals to contract a police department. The RFP would reflect community values and be a transparent foundation for negotiating the policing contract. One negotiable item would be having a Falcon Heights representative on the hiring panel for hiring officers serving our city.
- Create a new Joint Powers Authority: Falcon Heights could join with other small cities to create a police force over which Falcon Heights and others would have joint ownership and oversight. Saint Anthony and/or other cities might be a partner in a JPA.

The Task Force does not have a strong, unified opinion on this topic, and invites community input to inform our next steps:

1. How important is it to enhance the City's ownership of the police department?
2. Which options you prefer? Why?
3. If there are tradeoffs between acting quickly and accomplishing more systemic change, do you have an opinion about how to balance those tensions?

COMMUNITY FEEDBACK ON THESE DRAFT RECOMMENDATIONS

Importance of Ownership and Contract Language: There was consensus among groups that there is a need for greater ownership and control. Many comments signaled that the desire for ownership and ensuring our values were met was more important than the structure. Additionally, many community members stressed the importance of the contract language and detailed goals and values that should be included.

- Issue a new Request for Proposals to contract a police department. *This option had the most and substantially more support from community members than any other ownership option presented in the draft recommendations.* Comments expressed that this option allowed for our values and priorities to be met. Questions were raised about the number of responses the city would receive and what would happen if SAPD was the only bidder. Renegotiating a contract with SAPD or creating a joint powers authority were roughly equally supported by participants. There was not strong support for a Falcon Heights PD.
- Renegotiate Contract with SAPD: Support was expressed from numerous community members that the focus should be to renegotiate the current contract. Some community members would like to see the community values expressed in the contract and if the renegotiation does not work then open up a RFP. A very small number of participants were completely opposed to renegotiating with SADP.
- Create a new Joint Powers Authority: There is split support for this option of ownership. There was some support among community members for exploring this option, but others felt that this was an unrealistic option as it is expensive, challenging, and takes time.

Tradeoffs between acting quickly vs. systematic change: Community members are split on this tradeoff. Some community members expressed a need for action to be taken now. There were also frustration and anger over the question because the city has already not taken quick action in the past nine months. Other community members expressed support for taking time to make systematic changes and that the task force should take its time and not make hasty or knee jerk reactions.

The most support was expressed for a combination of both short and long term actions and that there cannot be one over the other.

USING DISPUTE RESOLUTION SKILLS TO HEAL A COMMUNITY

- Actions that were expressed as options for the short term include: change in traffic stop procedures; warnings vs. tickets; data collection; hear and valuing people.
- Actions that were expressed as options for the long term include: cultural change in police force; long term continuous improvement.

Other Community Input (not directly tied to recommendations)

Keep the Conversations Going: Some community members expressed support for continuing these conversations and ensuring conversation doesn't end with this process. There is a sentiment that there is still a long way to go and that hard conversations need to be continued.

Anger and Frustration: Community members shared their stories of harassment and mistreatment, and expressed anger and frustration. There is anger and frustration around the lack of change and action.

Other Models/Ideas Proposed: Community members shared ideas for other recommendations or models to look to. Ideas include: bold action and real innovations including using the restorative justice process on all cases including police conduct review; Columbia Heights, MN –inviting everyone to be a part of the community and having officers visiting mosques and other things in the community; Camden, NJ –looking at their de-escalation techniques; considering the Department of Justice report and best practices; thinking about kids and arrest rates for kids; adding a statement to the values that includes “do no harm” policing.

USING DISPUTE RESOLUTION SKILLS TO HEAL A COMMUNITY

Conversation #4¹⁴³

First Circle: Participants shared what they think it would take, beyond policing, for truly transformational change to take place in Falcon Heights and to genuinely fulfill community values.

- **Acknowledge Racism:** People expressed the need to acknowledge racism and understand white privilege. Comments ranged from addressing racism within systems to a personal level understanding of bias and privilege. Important for white people to understand their implicit bias and be aware of the experiences of others. People who have experienced pain and trauma need to be heard and supported.
- **Be Inclusive and Intentional:** This work needs to be inclusive and respectful of all. It is important to be intentional to make change, to be aware, and talk with people who are different from you. The values may change when you have conversations with people outside of your circle.
- **Events to Bring People Together:** A variety of events were suggested for building community and to better understand diversity. Some ideas included: block parties; Night to Unite; events with food such as picnic in the park or a day of celebration highlighting ethnic foods; movie nights; book clubs; using the schools to engage youth and parents; documentaries of local citizens for cable TV; storytelling sessions.
- **Personal Commitment:** Many expressed a personal commitment to stay engaged, show up to events, and continue to have conversations at neighborhood or one to one level. Personal experiences telling personal stories can bring people together. A change in the community starts at the individual level.
- **Sustain the Work in the Future:** A desire to see this work continue beyond the Task Force and see it sustained and connections within the community strengthened. Many would like to continue having courageous community based conversations. There is a sense that this needs [to] continue to feel urgent and community members need to stay engaged. It was also acknowledged that this work cannot be solved easily or immediately and must be in it for the long-haul.
- **Transparency and Accountability from the City:** There should be transparency from the city so people can hold institutions accountable. Comments shared to put pressure on the city council and mayor to make changes and address what has been discussed at the community

¹⁴³ *Id.* at 34–40.

meetings. People expressed a desire to see diverse perspectives in positions of power.

Second Circle: Participants shared ideas for what they think it will take to get more residents involved in the process of engaging in dialogue to explore values and how to improve the city.

- Engage with Youth: Start engaging youth and focusing on events and conversations at schools. Starting with youth can provide a path to engage parents.
- Personalize Invitations: The method of how people are invited to events has an impact on whether or not they attend. People suggested personal invitations, knocking on people's doors, and having a phone tree to alert people of meetings and events as a way to increase the number of people who attend.
- Opportunities to Learn and Hear Others' Perspectives: In order to understand the need for participating, people need more opportunities to realize that there are a variety of experiences and perspectives in our community. Provide opportunities to hear different perspectives and to learn different cultures from community members. Continue to have conversations with neighbors about race and inequity. Ensure there is a range of housing options in the community to strengthen the diversity within neighborhoods.
- Ownership of the Problem: People raised questions about how to make everyone feel like they have a stake in this problem. It is important to get everyone to understand their stake in the situation. White people need to speak up and take action when they see injustices occurring and stand up for people of color.
- Results Orientated: To keep people engaged, there needs to be tangible and measurable results to show community members that progress is being made. This includes putting energy into actions that can happen in the short term to show visible progress. Changing the dynamic of interaction and engagement between the police and community is important to getting residents involved.
- Variety and Accessibility of Events: Different types of events (intimate conversations, social gatherings, speakers, etc.), with different focuses (dialogue, decisionmaking, education), with different hosts (city, commission, community) will appeal to different people. Look at making the conversations and events easier to access by providing childcare and food, holding them at different times of day, going to people versus having them come to you.

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Third Circle: Participants shared specific steps or actions they plan to take to be a champion of the community values.

- Personal Actions and Conversations with Neighbors: People expressed a personal commitment to talk with neighbors and strangers and seek out diverse perspectives.
- Plan and Participate in Events: People made commitments to host events including block parties, reconciliation and healing events, and to attend community sponsored events.
- Uncover Racial Covenants in Falcon Heights: People are looking into the racial covenant deeds and redlining practices that relate to properties in Falcon Heights.
- Write: People committed to write op-eds for local papers, letters to officials, and blog about events and activities.
- Speak Up Against Racism: People are committed to speaking up against hateful and racist comments and actions they witness.
- Advocate and Engage with City Council and Commissions: People committed to being involved in local politics through showing up to council meetings and commission meetings and events. People also plan to support and encourage people to run for local office.
- Engage with Youth and Schools: People committed to engaging with schools and youth to be a part of the change process and build community.

Conversation #5¹⁴⁴

First circle: Reflections on participants' feelings and personal journey:

- **Commitment to moving forward and making changes.** Participants expressed their commitment to moving forward, connecting with others in the community, and becoming a part of the solution. There is a desire to not lose the urgency of this work.
- **Feelings of pain, sadness, anger, frustration, and loss of trust.** Participants shared a range of personal emotions. Some people expressed shock over the verdict, while others were not surprised. Many people are struggling and processing the emotions of the past year. Others did express feelings of hope and gratitude from the community conversation process.
- **Reflections on racism and white privilege.** Participants shared personal experiences as a person of color and the need for white people to address privilege and the racial disparities that exist. Many shared that racism is being shoved under the rug or denied and that there is a need to bring it to the forefront of discussion and the need for white people to take this on.
- **Reactions to officer Yanez's actions and police accountability.** Participants are concerned with the language that the officer had no choice and feel that prejudice feeds unwarranted fears. There is a desire for accountability for his actions and future accountability for police officers.
- **Systematic concerns within the justice system.** Participants shared a range of feelings and conflicts about the legal process. People expressed that there are a national and systematic inequities that need to be addressed across the country.

Second Circle: Personal Next Steps

- **Address racism, bias, and discrimination.** People asserted their commitment to work on speaking up against racism, bias, and discrimination within the community. Some made a personal commitment to address internal bias and continue to talk about race.
- **Advocate for changes in laws and policies.** Some participants plan to become more politically active and working to change laws related to policing and officer training.

¹⁴⁴ *Id.* at 41–42.

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- **Continue to connect with others through conversations.** Some participants expressed an interest in continuing conversations across various ideologies to build relationships and a stronger community.
- **Engage with the community in personal and professional roles.** Some participants shared commitments to get involved within the community and their personal networks to be a part of the solution. Some specific commitments shared were: hosting a block party; being involved in the church; connecting with community outreach groups.
- **Engage youth.** There is concern for children; people want to work more with youth.
- **Focus on accountability from the city and implementation of the Task Force recommendations.** Participants plan to pay attention and work to ensure these recommendations are implemented and enforced by the City Council.
- **Mourn, heal, and process emotions.** People want to take time to mourn, process emotions, and heal as individuals. Some expressed a desire to not forget and to create a monument to facilitate remembering, mourning, and healing.

Thematic Resource / Action Circles: Based on the commitments shared in the fourth community conversation, this meeting concluded with five circles focused on specific topics for follow-up action. Invited resource people assisted the discussion.

City Involvement and Implementation Committee. This group discussed the need for resources and staff time to be invested to ensure implementation of the recommendations. Ideas were shared to get feedback from people on costs for implementation and to lay out the financing options visually to allow people to understand the costs and tradeoffs of different actions.

Courageous Conversations: Talking about race and privilege. This group shared ideas on having conversations on race and learning how to listen and learn with openness, vulnerability, and non-judgement.

Educational Programming. The following specific ideas were shared:

- Host a public showings of documentary films on bias and racism at a library or other suitable location, with a community discussion following.

- Engage youth through positive interactions and trips with police officers to humanize each other and remove fear. Match young and old, interactive multi-generational activities.
- Record community member stories and reactions and post videos on city website.

Engaging Youth. This group talked about ways to listen and engage young people. Some of the ideas they discussed include:

- Have circle conversations for kids to discuss racism.
- Promote ethnic studies and diversity curriculum within the schools.
- Promote learning about racial equity across ages and with parents. St. Paul and Roseville
- schools have a model.
- Coordinate with other programs and initiatives in the Twin Cities.

History Project. This group reflected that history is not only in the past and that actions, such as redlining, effect the current reality. The group shared ideas for the next steps that include:

- Encourage history in art, such as a competition that involves schools and youth or a play.
- Do projects mixing policy and history, for example with a theme, “Why are we so
- white?”
- Document the popup peace gardens and other things that have been put together since
- Philando Castile’s death.
- Make an educational presentation or website.
- Use Ramsey County Historical Society as a resource and venue.

Beyond Settlement: Reconceptualizing ADR as “Conflict Process Strategy”

DEBORAH THOMPSON EISENBERG*

I. INTRODUCTION

II. WHAT’S IN A NAME? THE MUDDLE WE CALL “ADR”

- A. *“Alternative:” A Grounding but Confusing Term*
- B. *“Dispute:” A Central, but Incomplete, Part of the Story*
- C. *“Resolution:” A Limiting Frame*

III. RECONCEPTUALIZING ADR AS “CONFLICT PROCESS STRATEGY”

- A. *Legal Process: Early ADR Theory?*
- B. *Lawyer as “Conflict Process Strategist”*
- C. *The “Science” of Conflict Process Strategies*
- D. *The Morality of Conflict Process Strategies*

IV. CONCLUSION

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I. Introduction

“Alternative dispute resolution” or “ADR” has reached a paradoxical moment: it is both ubiquitous and at risk of extinction as a distinct concept and field. The use of ADR has expanded exponentially since the Pound Conference of 1976, the event recognized as a catalyst for the widespread development of ADR in the United States.¹ ADR is no longer “alternative,” but mainstreamed throughout courts, legal institutions, government, corporations, and society.² Every law school offers ADR courses and specialized programs to varying degrees.³ Given its focus on conflicts and process, dispute resolution weaves through every area of substantive law.⁴

ADR’s pervasive “success” may have the unintended consequence of diluting its distinctiveness and quality. ADR has become synonymous with myriad processes—negotiation, mediation, settlement conferences, arbitration, restorative justice, collaborative law, dispute system design, private judging, negotiated rulemaking, and the list continues.⁵ For some, ADR essentially means “anything but litigation”—with much confusion about the differences between various types of disputing processes and the relationship of ADR to the law.

The problem gets worse within particular branches of ADR, in which underlying process definitions and theoretical underpinnings are unclear. Mediation, for example, often equates to any attempt to settle a case outside of court, regardless of the quality or coerciveness of that process. As Nancy Welsh once observed, mediation “has become the new ‘Kleenex’ or the new ‘Xerox.’” Those breakthrough products became so successful and ubiquitous

¹ See THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE (A. Leo Levin & Russell R. Wheeler eds., 1979).

² See, e.g., Thomas O. Main, *Mediation: An Unlikely Villain*, 34 OHIO ST. J. ON DISP. RESOL. 537 (2019) (arguing that mediation led federal courts to abandon trials and promote settlement).

³ Every law school offers ADR courses as upper-level electives, some have incorporated ADR components into the required curriculum, and others have ADR specialty programs and centers. See Michael Moffitt, *Islands, Vitamins, Salt, Germs: Four Visions of the Future of ADR in Law Schools (and a Data-Driven Snapshot of the Field Today)*, 25 OHIO ST. J. ON DISP. RESOL. 25 (2010) (analyzing survey of ADR curriculum at U.S. law schools).

⁴ See *id.* at 45 (noting ADR professors teach across the law school curriculum).

⁵ The American Bar Association Dispute Resolution Section identifies at least twenty-two different dispute resolution processes. See *Dispute Resolution Processes*, ABA SECTION OF DISPUTE RESOLUTION, https://www.americanbar.org/groups/dispute_resolution/resources/DisputeResolutionProcesses/ (last visited May 1, 2020).

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that others quickly copied them,” but in ways that undermine the quality and unique characteristics of the original product.⁶

ADR has become so popular in name, fractured in practice, and jumbled in theory⁷ that it risks a metaphorical “genericide.”⁸ In trademark law, “genericide” occurs when a product name is used so widely, and incorrectly, in the public lexicon that the mark becomes generic and confusing.⁹ Instead of being a product of distinct quality, excessively popular brands such as Kleenex, Aspirin, Xerox, Band-Aid, etc., become coterminous with an entire category of (potentially inferior) goods, no longer unique and worthy of special protection. In short, the mark loses its ability to act as a source identifier.¹⁰ Ironically, the more successful a brand name, the more likely it suffers genericide.

Analogously, the ADR name has been applied to so many different processes and concepts that its meaning has become rather muddled and its

⁶ Nancy A. Welsh, *Musings on Mediation, Kleenex, and (Smudged) White Hats*, 33 U. LA VERNE L. REV. 5, 11 (2011).

⁷ This is true not only for ADR generally, but also for the constituent branches of ADR, especially negotiation and mediation. See KIMBERLEE K. KOVACH, *MEDIATION: PRINCIPLES AND PRACTICE* 26 (3d ed. 2004) (noting that within the ADR field “few items spark more controversy than the definition of mediation”); Adrian Borbély, Noam Ebner, Chris Honeyman, Sanda Kaufman & Andrea Kupfer Schneider, *A “Grand” Unified Negotiation Theory . . . in Context*, 2017 J. DISP. RESOL. 145, 157 (noting cacophony of negotiation theories and concluding that a “grand,” unified negotiation theory would be difficult because negotiation theory is context-specific).

⁸ For a simple explanation of genericide, see Whitson Gordon, *How a Brand Name Becomes Generic*, N.Y. TIMES (June 24, 2019), <https://www.nytimes.com/2019/06/24/smarter-living/how-a-brand-name-becomes-generic.html> (“If a brand name is understood by the public to refer broadly to a category of good and services rather than a brand’s specific good or service, a company may be at risk of losing its trademark.”).

⁹ See U.S. PATENT & TRADEMARK OFFICE, *TRADEMARK MANUAL OF EXAMINING PROCEDURE* § 1209.01(c) (2018) <https://tmap.uspto.gov/RDMS/TMEP/current#/result/TMEP-1200d1e6993.html?q=1209&ccb=on&ncb=off&icb=off&fcb=off&ver=current&syn=adj&results=compact&sort=relevance&cnt=10&index=5>.

¹⁰ See, e.g., *Bayer Co. v. United Drug Co.*, 272 F. 505 (S.D.N.Y. 1921) (ASPIRIN generic for acetyl salicylic acid); *DuPont Cellophane Co. v. Waxed Prods. Co.*, 85 F.2d 75 (2d Cir. 1936) (CELLOPHANE generic for plastic wrap); *King-Seely Thermos Co. v. Aladdin Indus.*, 321 F.2d 577 (2d Cir. 1963) (THERMOS generic for insulated vacuum containers). Additional examples can be found in the “Trademark Graveyard.” *Trademark Graveyard*, U.S. PATENT & TRADEMARK OFFICE, <https://www.uspto.gov/kids/graveyard.html> (last visited Oct. 21, 2020).

governing principles diluted.¹¹ Judicial, commercial, and institutional enthusiasm for and propagation of ADR processes outpaced the development of an ADR academic field in the legal academy and body of theoretical literature.¹² Many ADR processes—instituted largely based on efficiency grounds—developed as “atheoretical enterprises,”¹³ with the underlying normative values, ethical constraints, and governing standards unclear or perverted when institutionalized.¹⁴

In 1985, nearly a decade after the Pound Conference, political scientist Christine Harrington observed that the broad scope and fragmentation of the ADR movement made it “difficult to talk about alternative dispute resolution as a movement or field.”¹⁵ In 2020, the ADR field is well embedded in the legal academy. ADR derives from a “rather promiscuous or multi-heritage ancestry” that includes intellectual and theoretical influences from a “broader pastiche of the social sciences (anthropology, political science, international relations, sociology, psychology, history, economics, and game theory) and

¹¹ See Moffitt, *supra* note 3, at 29 (“Like many areas, ADR struggles with boundary definition”).

¹² See Richard C. Boldt, *Problem-Solving Courts and Pragmatism*, 73 MD. L. REV. 1120, 1125 (2014) (exploring how “problem-solving” courts emerged as an “atheoretical enterprise”); Jennifer W. Reynolds, *Games, Dystopia, and ADR*, 27 OHIO ST. J. ON DISP. RESOL. 477, 484 (2012) (“The market economy of alternative processes has produced a dizzying array of dispute resolution offerings. Whether these offerings represent actual progress or just additional ‘gaming of the system’ is an important inquiry for ADR scholars to undertake.”).

¹³ Boldt, *supra* note 12, at 1125 (noting that the development of problem-solving courts has been an atheoretical enterprise guided by a “pragmatic set of instincts”); see also Katherine R. Kruse, *Learning from Practice: What ADR Needs from a Theory of Justice*, 5 NEV. L.J. 389, 394 (2004) (“Alternatives to litigation are institutionalized, not because they are most appropriate,” but because they are the most expedient). That is not to say the field lacks a theoretical canon. The point is that ADR innovations and practice often developed more quickly than the theorization of the field. A forthcoming book, *DISCUSSIONS IN DISPUTE RESOLUTION: THE FORMATIVE ARTICLES* (Art Hinshaw, Andrea Kupfer Schneider & Sarah Rudolph Cole eds., forthcoming 2021), collects some of the seminal articles with commentaries from ADR scholars.

¹⁴ See Carrie Menkel-Meadow, *Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-Opted or the “Law of ADR,”* 19 FLA. ST. U. L. REV. 1 (1991) [hereinafter *Pursuing Settlement*]; Nancy A. Welsh, *Do You Believe in Magic?: Self-Determination and Procedural Justice Meet Inequality in Court-Connected Mediation*, 70 SMU L. REV. 721 (2017) (analyzing potential reforms to promote procedural justice in court-based mediation); Nancy A. Welsh, *Making Deals in Court-Connected Mediation: What’s Justice Got to Do with It?*, 79 WASH. U. L. REV. 787 (2001).

¹⁵ CHRISTINE B. HARRINGTON, *SHADOW JUSTICE: THE IDEOLOGY AND INSTITUTIONALIZATION OF ALTERNATIVES TO COURT* 1 (1985).

their more multidisciplinary social activist spinoffs, such as peace studies, social movement theory and practice, and conflict resolution.”¹⁶

As a relatively young field within law schools, however, we continue to grapple with who we are, where we fit, and what we *should* be in our teaching and scholarship.¹⁷ From its inception, the field has been mired in a bipolar “litigation” versus “settlement” straw man sketched by ADR critics.¹⁸ This intellectual scrimmage is healthy to the extent it forces the ADR field to continuously reexamine and articulate its purpose and relationship to governing legal norms and legal institutions more precisely. But it also has been a distraction. Framing the field as “anything but litigation” keeps the field saddled by the misperception that the ADR field is universally anti-litigation and settlement-centric.

The objective of the theoretical debate about “adjudication” versus “settlement” has never been a zero-sum game.¹⁹ The debate serves the valuable

¹⁶ Carrie Menkel-Meadow, *From Legal Disputes to Conflict Resolution and Human Problem Solving: Legal Dispute Resolution in a Multidisciplinary Context*, 54 J. LEGAL EDUC. 4, 11–12 (2004) [hereinafter *From Legal Disputes*] (footnotes omitted). See also Carrie Menkel-Meadow, *Mothers and Fathers of Invention: The Intellectual Founders of ADR*, 16 OHIO ST. J. ON DISP. RESOL. 1 (2000) [hereinafter *Mother and Fathers of Invention*] (exploring the interdisciplinary theoretical roots of the ADR field).

¹⁷ See Thomas J. Stipanowich, *ADR and the “Vanishing Trial”: The Growth and Impact of “Alternative Dispute Resolution,”* 1 J. EMPIRICAL LEGAL STUD. 843, 845 (2004) (“The first obstacle to an understanding of the role of ADR is the sheer breadth and diversity of activities to be taken into account, a breathtaking range of approaches and strategies that we lump under the heading of ‘ADR’ (an outdated acronym that survives as a matter of convenience).”) Some ADR scholars and practitioners engaged in an online “theory of change” conversation about the future of the ADR field. See THEORIES OF CHANGE FOR THE DISPUTE RESOLUTION MOVEMENT: ACTIONABLE IDEAS TO REVITALIZE OUR MOVEMENT 19 (John Lande ed., 2020).

¹⁸ Andrew W. McThenia & Thomas L. Shaffer, *For Reconciliation*, 94 YALE L.J. 1660, 1660, 1663 (1985) (criticizing Fiss’s *Against Settlement* as attacking “a straw man” and a “caricature”). See Owen M. Fiss, Comment, *Against Settlement*, 93 YALE L.J. 1073 (1984). See also Carrie Menkel-Meadow, *Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (In Some Cases)*, 83 GEO. L.J. 2663, 2663–64 (1995).

¹⁹ See Amy J. Cohen, *Revisiting Against Settlement: Some Reflections on Dispute Resolution and Public Values*, 78 FORDHAM L. REV. 1143, 1145 (2009) (proposing that “Fiss’s overarching allegiance was less to specific institutional forms than to particular moral ideals. His arguments therefore transcend a straightforward distinction between adjudication and ADR.”); Michael Moffitt, *Three Things to Be Against (“Settlement” Not Included)*, 78 FORDHAM L. REV. 1203, 1245 (2009) (“Because settlement and litigation are coevolved, symbiotic processes, to stand against one is to stand against the other.”) In the words of Mary Parker Follett, who theorized the notion of constructive conflict in the 1920s, “We should never allow ourselves to be bullied by an ‘either-or.’” Mary Parker

purpose of scrutinizing the underlying normative values, uses, limitations, and impacts of various disputing processes on law and society.²⁰ ADR raises important questions about whether courts and legal institutions are the only valid “authority” for the generation and enforcement of community norms. Should individuals have the choice to opt out of judicial adjudication and develop their own self-determined approach to their conflict? Is it appropriate to *mandate* non-judicial methods of dispute processing?²¹ The question of whether private dispute processing options undermine public values and legal rights, or provide a valid alternative source of decision-making authority, remains an important one to explore. That nuanced perspective often gets lost at the intersection of the rapid institutionalization of ADR based largely on “efficiency” grounds, and the critical interrogation of these processes in ADR scholarship.

Defining ADR as *any* non-litigation process renders ADR rather generic and not particularly distinctive. The lack of an overarching theoretical conception and scope portends the field’s potential genericide. While this metaphor may be dangerous in suggesting that ADR is simply a brand (which it is not), it is unquestionable that there is much confusion, in both theory and practice, about ADR generally and its constituent parts. We need to reclaim and clearly define the field’s overarching focus, theoretic precepts, and scholarly agenda. We need a clear answer to the question: what does the ADR field study and teach and why does it matter to the law and legal education?

We need a robust dispute resolution field in law schools now more than ever. Our society is experiencing intense political polarization²² and

Follett, *Constructive Conflict*, in MARY PARKER FOLLETT: PROPHET OF MANAGEMENT: A CELEBRATION OF WRITINGS FROM THE 1920S 86 (Pauline Graham ed., 2003).

²⁰ Menkel-Meadow, *supra* note 18, at 2664 (observing that the adjudication vs. settlement debate “while useful for explicitly framing the underlying values that support our legal system, has not effectively dealt with the realities of modern legal, political, and personal disputes”); *See id.* at 2655 (the question has always been “*when, how, and under what circumstances* should cases be settled?”) (emphasis in original).

²¹ To make my biases on this question clear, I believe ADR processes should be voluntary, not mandatory. That includes mandatory pre-dispute arbitration in employment and consumer adhesion contracts, which impairs access to justice, and mandatory mediation. *See* Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court’s Preference for Binding Arbitration*, 74 WASH. U. L. Q. 637 (1996). *But see* Roselle L. Wissler, *The Effects of Mandatory Mediation: Empirical Research on the Experience of Small Claims and Common Pleas Courts*, 33 WILLAMETTE L. REV. 565 (1997).

²² Of course, as historian David Moss writes, democracy “has always been a contact sport.” DAVID A. MOSS, *DEMOCRACY: A CASE STUDY* 3 (2017). He continues: “Words like ‘cooperation’ and ‘consensus’ may sound appealing and even comforting, but American democracy has survived and thrived from one generation to the next on the basis not

social isolation,²³ challenging norms of democratic civil discourse. Community-based, dialogic ADR processes, such as restorative justice, are being applied to promote social justice goals in many different areas of substantive law.²⁴ Online dispute processes are emerging at break-neck speed, presenting profound normative questions for the law and legal institutions.²⁵ And, of course, ADR is the way that nearly all legal matters are resolved.²⁶ *We study and teach this stuff*—the sources, cycle, and psychology of conflict;²⁷ the forms, normative goals, design, and impacts of various methods of dispute and conflict processing in legal, organizational, and community-based contexts;²⁸ the theory and practice of negotiation and facilitated communication in bilateral, multi-party, institutional, and international contexts.²⁹

To prevent “genericide” of their brands, companies invest tremendous effort to protect their marks so the public uses them accurately. As the ADR

principally of harmony but of conflict—sometimes intense conflict—mediated, generally, by shared ideals.” *Id.* See Pew Research Center, Political Typology Reveals Deep Fissures on the Right and Left (Oct. 24, 2017), <https://www.people-press.org/wp-content/uploads/sites/4/2018/09/10-24-2017-Typology-release.pdf>; Pew Research Center, The Partisan Divide on Political Values Grows Even Wider (Oct. 5, 2017), <https://www.people-press.org/wp-content/uploads/sites/4/2017/10/10-05-2017-Political-landscape-release-updt..pdf>.

²³ ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* (2001). This sense of social isolation has been compounded by the 2020 coronavirus pandemic, which has forced us to remain “socially distanced” from each other.

²⁴ See *infra* Part I(C).

²⁵ See, e.g., ONLINE DISPUTE RESOLUTION: THEORY AND PRACTICE: A TREATISE ON TECHNOLOGY AND DISPUTE RESOLUTION (Mohamed S. Abdel Wahab, Ethan Katsch & Daniel Rainey eds., 2012); Robert Condlin, *Online Dispute Resolution: Stinky, Repugnant, or Drab*, 18 CARDOZO J. CONFLICT RESOL. 717 (2016).

²⁶ See *infra* Part I(A).

²⁷ See, e.g., BERNARD MAYER, *THE DYNAMICS OF CONFLICT RESOLUTION: A PRACTITIONER’S GUIDE* (2000); JAMES A. SCHELLENBERG, *CONFLICT RESOLUTION: THEORY, RESEARCH, AND PRACTICE* 39–102 (1996); Jean R. Sternlight & Jennifer Robbennolt, *Good Lawyers Should Be Good Psychologists: Insights for Interviewing and Counseling Clients*, 23 OHIO ST. J. ON DISP. RESOL. 437 (2008); Menkel-Meadow, *Mothers and Fathers of Invention*, *supra* note 16.

²⁸ See *infra* Part II.

²⁹ See, e.g., Amy J. Cohen, *Negotiation, Meet New Governance: Interest, Skills, and Selves*, 33 LAW & SOC. INQUIRY 501 (2008); Andrea Kupfer Schneider, *Shattering Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Style*, 7 HARV. NEGOT. L. REV. 143 (2002); Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979); Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754 (1984) [hereinafter *Toward Another View*]; Gerald B. Wetlaufer, *The Limits of Integrative Bargaining*, 85 GEO. L.J. 369 (1996).

field approaches a symbolic “mid-life” moment—nearly fifty years after the Pound Conference—it is time for renewed critical self-reflection about what ADR is, is not, and should be in modern legal thought and education. We need to define today’s dispute resolution field—which now reaches far beyond the traditional trifecta of negotiation, mediation, and arbitration—and reexamine its foundational normative values and governing principles. This project is urgent: as many of the pioneers of the ADR field retire, some law schools are not replacing them in a time of budget constraints.³⁰

This article explores the modern scope and relevance of dispute resolution in law and legal education. Part I considers what ADR is, and equally important, is not. It seeks to clarify several points of confusion about the dispute resolution field that arise, in part, from the three words that comprise our abbreviation. Part II reconceptualizes the work of the modern ADR field as “conflict process theory and strategy,” drawing lessons from Legal Process theory. A “conflict process” framing of the field may help to define and guide our collective scholarly and teaching agenda into the future. This project is too large for one article. My hope here is to present a unifying framing of the field as a starting point for continued scholarly conversation as the next generation of ADR scholars takes the helm.

II. WHAT’S IN A NAME? THE MUDDLE WE CALL “ADR”

Ask anyone in your law school what ADR means and you may get an oversimplified,³¹ wrong,³² or very long answer that recites myriad processes and concepts, without a clear unifying theoretic conception.³³ Few incoming law students know what ADR means. Many people outside of our field typically view ADR as one “black box,” lumping all processes together without appreciating the nuances between them. Worse, they view us as Pollyannaish proselytizers who believe that ADR can magically erase human conflict and produce a peaceful utopia.³⁴

³⁰ See John Lande, *What Will Be the Future of ADR in US Legal Education?*, INDISPUTABLY BLOG (Jan. 24, 2019), <http://indisputably.org/2019/01/what-will-be-the-future-of-adr-in-us-legal-education/>.

³¹ This takes the form of thinking that ADR consists of only one process, typically mediation.

³² This typically takes the form of confusing different processes, such as thinking mediation and arbitration are identical.

³³ I am guilty of this. It results from knowing *too much* about ADR.

³⁴ My esteemed colleague and friend Bob Condlin has written extensively about this perception of ADR and communitarian negotiation theories. See Robert J. Condlin, *ADR: Disputing with a Modern Face, or Bargaining for the Bargaining Impaired?*, 21 CARDOZO

This confusion comes as no surprise. Semantically, we are a bit of a puzzle. We are the only field in the legal academy represented by an initialism.³⁵ Psychologists teach us that such abbreviations can be alienating and mentally taxing for those outside of the field.³⁶ Furthermore, all three words that comprise our field's moniker—Alternative, Dispute, and Resolution—are incomplete and define us in limiting ways. I do not advocate for a new name per se. There is great value, after all, in having broad name recognition.³⁷ ADR is a convenient shorthand (especially with word limits in law reviews). Nevertheless, unpacking the misperceptions arising from our descriptor may help us to identify a unifying conception of the field and put our future agenda into sharper relief.

A. “Alternative:” A Grounding but Confusing Term

First, let us consider “alternative,” which, on the one hand, serves as a helpful reminder that a range of processes—formal, legal adjudication to informal, self-determined approaches—exist for addressing conflicts and legal claims. “Alternative” emphasizes that the rule of law and judicial process are the predominant means for vindicating legal rights, maintaining social order, and resolving disputes in a democratic society. With courts as the guiding standard-bearer and enforcer of the law, individuals may opt for informal,

J. CONFLICT RESOL. 291, 299–300 (2020) [hereinafter *ADR: Disputing with a Modern Face*] (arguing that some in ADR field assume that “ADR methods and systems” will transform “disputants themselves from ‘risen apes’ to ‘fallen angels’” and form a “peaceable kingdom” or utopia); Robert J. Condlin, *Bargaining with a Hugger: The Weaknesses and Limitations of a Communitarian Conception of Legal Dispute Bargaining, or Why Can’t All Just Get Along*, 9 CARDOZO J. CONFLICT RESOL. 1 (2008). Jennifer Reynolds urges ADR scholars to unpack “the utopian mythology of ADR” and critically examine the potential harm of ADR processes on participants and society. Reynolds, *supra* note 12, at 483.

³⁵ Technically, ADR is an “initialism” rather than an acronym. See *Initialism*, MERRIAM WEBSTER ONLINE DICTIONARY, <https://www.merriam-webster.com/dictionary/initialism> (last visited May 1, 2020).

³⁶ Andrew H. Hales, Kipling D. Williams, & Joel Rector, *Alienating the Audience: How Abbreviations Hamper Scientific Communication*, OBSERVER (Jan. 31, 2017), <https://www.psychologicalscience.org/observer/alienating-the-audience-how-abbreviations-hamper-scientific-communication>.

³⁷ “The Artist Formerly Known as Prince,” a rock icon from the 1980s, offers a cautionary tale about how difficult it is to change one’s well-recognized public persona. After all of the hubbub, he changed his name back to Prince. See Emily VanDerWerff, *Why Did Prince Change his Name to a Symbol?*, VOX (Apr. 21, 2016), <https://www.vox.com/2016/4/21/11481686/prince-name-change-symbol-why>. Hat tip to Professor Lydia Nussbaum for this observation.

private, and self-determined processes. If those processes do not result in an agreement, judicial process and the rule of law remain as a safety net and the final word.³⁸

“Alternative” processes allow the parties most involved in a conflict to develop their own mutually agreeable outcomes, perhaps to blunt the potentially harsh or unsatisfying results that may result from judicial adjudication.³⁹ For example, a tenant may prefer to negotiate a payment plan with a landlord rather than have an eviction judgment on her record; divorcing parents may wish to work out custody and visitation plans on their own; companies with on-going dealings may prefer to negotiate a deal to retain positive business relations; an offender may want a chance to make amends and avoid a criminal record. For others, the notion of an alternative system prompts mistrust and concerns about a potentially abusive regime that will force uninformed or unrepresented parties into settlements, trading legal rights and justice for harmony and peace.

Yet, “alternative” is misleading to the extent it suggests that informal dispute processing is unusual. That is certainly inaccurate in modern society,⁴⁰ and may have never been true.⁴¹ A study of religion, philosophy, and the

³⁸ I frequently reassure students in the Mediation Clinic who express frustration if the parties do not reach agreement in a day-of-trial mediation: the mediation process is not a failure if the parties do not settle. That is what self-determination means. The worst thing that happens if the parties do not reach agreement is that a smart judge down the hall decides their case according to the rule of law.

³⁹ Here I am referring to consensual negotiation-based processes rather than arbitration, which is an adversarial adjudicative process.

⁴⁰ Judith Resnik, *Procedure as Contract*, 80 NOTRE DAME L. REV. 593, 597 (2005) (noting that adjudication practices “have shifted” and that ADR “increasingly dominates the landscape of procedure”); Marc Galanter, *World of Deals: Using Negotiation to Teach About Legal Process*, 34 J. LEGAL EDUC. 268, 268–69 (1984) (stating that “[o]n the contemporary American legal scene the negotiation of disputes is not an alternative to litigation[;] . . . it is the central core.”).

⁴¹ KOVACH, *supra* note 7, at 28–29 (noting that mediation and informal dispute processes trace back thousands of years in ancient China, Japan, Greece, and many other cultures). *See also* Robert D. Garrett, *Mediation in Native America*, 49 DISP. RESOL. J. 38, 38 (1994) (discussing peacemaking processes used in Native American culture); KOVACH, *supra* note 7, at 31 (explaining that much of the modern ADR movement built upon the mediation and arbitration processes developed in the early 1900s to avoid labor-management strikes and industry shutdowns); WILLIAM E. SIMKIN & NICHOLAS A. FIDANDIS, *MEDIATION AND THE DYNAMICS OF COLLECTIVE BARGAINING* 25 (2d ed. 1986) (explaining that Congress created the Department of Labor in 1913, authorizing the Secretary of Labor to serve as a mediator for labor disputes); DEBORAH M. KOLB, *THE MEDIATORS* 7 (1983) (explaining that in 1947, Congress created the Federal Mediation and Conciliation Service, which continues to mediate labor disputes for companies engaged in interstate commerce, private non-profit health facilities, and federal government agencies).

common law reveals that humankind has always used informal processes as the predominant way to address conflicts and promote a range of normative objectives.⁴² Given the imprecision of the term, many in the field use the descriptor “dispute resolution”⁴³ or change the “A” in ADR to mean “appropriate” dispute resolution.⁴⁴

Under this (non-alternative) framing, the quintessence of the law itself is dispute resolution.⁴⁵ Litigation is one process among a continuum of dispute processing strategies. As Jeffrey Seul observed: “The popular image of litigation has become so bleak, one can easily forget that an essential purpose of litigation is to resolve disputes, not to perpetuate them.”⁴⁶ Indeed, Robert Pushaw has examined how the role of the court as a “dispute resolver” for

⁴² Douglas Lind, *On the Theory and Practice of Mediation: The Contribution of Seventeenth-Century Jurisprudence*, 10 *MEDIATION Q.* 119, 120 (1992) (explaining that “[e]ven a casual review of jurisprudential history shows that legal philosophers have for centuries pondered the practical forms and theoretical justification of various ADR techniques” such as mediation and arbitration); Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 *YALE L.J.* 950 (1979) (discussing the relationship of law to private ordering); Condlin, *ADR: Disputing with a Modern Face*, *supra* note 34, at 296 n.15 (observing that the differences between litigation and ADR “bleed into one another, of course, so that litigation and informal dispute resolution systems work in tandem with, as much as independently from, one another and have done so since the days of the Common Law and Equity.” (citing Henry Smith, *Equity as Second Order Law: The Problem of Opportunism* (Harv. Pub. L. Working Paper No. 15–13, Jan. 15, 2015) (describing the relationship of Equity to the Common Law))). See also Carli N. Conklin, *Lost Options for Mutual Gain? The Lawyer, the Layperson, and Dispute Resolution in Early America*, 28 *OHIO ST. J. ON DISP. RESOL.* 581 (2013) (providing a historical analysis of arbitration in colonial America).

⁴³ John Lande & Jean R. Sternlight, *The Potential Contribution of ADR to an Integrated Curriculum: Preparing Law Students for Real World Lawyering*, 25 *OHIO ST. J. ON DISP. RESOL.* 247, 248 n.2 (2010) (arguing “[t]he term ADR gives the false impression that litigation is the norm and all other forms of dispute resolution are unusual. Also, grouping all non-litigation approaches together under one rubric is problematic because mediation and arbitration, just to name two processes, differ tremendously from one another.”).

⁴⁴ Janet Reno, *Lawyers as Problem-Solvers: Keynote Address to the American Association of Law Schools*, 49 *J. LEGAL EDUC.* 5, 8 (1999) (urging lawyers to practice “appropriate dispute resolution”); Menkel-Meadow, *supra* note 18, at 2689–90 (arguing that “appropriate” should replace “alternative” to describe dispute resolution processes).

⁴⁵ STUART HAMPSHIRE, *JUSTICE IS CONFLICT* 35 (2000) (“[T]he skillful management of conflicts is among the highest of human skills.”); *ADR: Disputing with a Modern Face*, *supra* note 34, at 305 (“Conflict is one of the defining features of much legal work and resolving it is one of the legal system’s principal tasks.”).

⁴⁶ See Jeffrey R. Seul, *Litigation as a Dispute Resolution Alternative*, in *THE HANDBOOK OF DISPUTE RESOLUTION* 336, 336 (Michael L. Moffitt & Robert C. Bordone eds., 2012).

private “controversies” is embedded in Article III of the Constitution.⁴⁷ Private ordering—or contracting for specialized tribunals or procedural rules—is common in most areas of law, especially in international and commercial contexts.⁴⁸ Of course, most disagreements do not evolve into formal legal “disputes” or cases, with most people “lumping it” or using informal or community-based ways to address the matter.⁴⁹

The word “alternative” creates another misimpression for law students: it suggests that there is a binary, static choice between litigation and ADR in legal practice.⁵⁰ To the contrary, there is an interdependent, fluid relationship between formal and informal processes.⁵¹ Throughout the life of a complex civil case, for example, the parties and their counsel may attempt to negotiate or mediate, then proceed with discovery and motions for summary

⁴⁷ Robert J. Pushaw Jr., *Article III’s Case/Controversy Distinction and the Dual Functions of Federal Courts*, 69 NOTRE DAME L. REV. 447, 531 (1999) (explaining that while the phrase “cases or controversies” has been collapsed over time into one concept for justiciability doctrine, this merging of “cases and controversies” is historically inconsistent with the framers’ understanding of the terms. “Cases” were matters that required exposition and reasoned analysis by the court to establish precedent. “Controversies” required the court to be a neutral “umpire” and perform a dispute resolution function. In other words, “[t]he federal courts’ primary function in ‘Cases’ is exposition, whereas in ‘Controversies’ it is dispute resolution.”).

⁴⁸ See Resnik, *supra* note 40.

⁴⁹ William L.F. Felstiner, Richard L. Abel & Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming...*, 15 LAW & SOC’Y REV. 631, 649 (1980–1981).

⁵⁰ Jean R. Sternlight, *Separate and Not Equal: Integrating Civil Procedure and ADR in Legal Academia*, 80 NOTRE DAME L. REV. 681, 689 (2005) (explaining that the separate teaching of litigation and dispute resolution processes gives students the false impression that “there is little or no fluidity between litigation and other processes. That is, law students often imagine that lawyers say to clients: ‘We will negotiate or mediate rather than litigate this dispute.’”).

⁵¹ See Jeffrey R. Seul, *Settling Significant Cases*, 79 WASH. L. REV. 881, 881 (2004) (arguing that “[l]itigation and negotiation are complementary, mutually reinforcing social processes, and each has a legitimate role to play in our nation’s moral discourse and the evolution of social norms.”); MARTIN SHAPIRO, *COURTS: A COMPARATIVE AND POLITICAL ANALYSIS*, at viii (1981) (arguing that “mediation and litigation are invariably intimately interconnected and interactive rather than distinct alternatives for conflict resolution.”). This is true in the criminal context as well, with most cases resulting in a negotiated plea bargain rather than a trial. See *Missouri v. Frye*, 566 U.S. 134, 144 (2012) (observing that plea bargaining “is not some adjunct to the criminal justice system; it is the criminal justice system.”); Andrea Kupfer Schneider & Cynthia Alkon, *Bargaining in the Dark: The Need for Transparency and Data in Plea Bargaining*, 22 NEW CRIM. L. REV. 434 (2019).

judgment, followed by additional attempts at settlement negotiations or mediation before, during, and even after a trial.⁵²

“Alternative” also incorrectly implies that those in the field oppose litigation as a method of dispute resolution. Most ADR legal scholars⁵³ are not “against litigation,” adversarial processes, or competitive negotiation tactics. Many come to the field from litigation backgrounds and understand the interconnection among all disputing processes. Indeed, some private ADR processes involve adversarial litigation—such as arbitration, private judging, and neutral evaluation—albeit in a conference room rather than a courtroom, with a private third-party decision maker rather than a judge, mediator, or facilitator.

Thus, ADR explores the notion of “process pluralism”⁵⁴ or “fitting the forum to the fuss.”⁵⁵ ADR legal scholars study and teach the theoretical underpinnings, uses, limitations, design, impacts, and risks of various dispute processing options—from self-determined, problem-solving based models (negotiation, mediation, collaborative law, restorative justice), to authoritative adjudicative processes (arbitration and litigation), to pre-dispute systems design and conflict prevention.⁵⁶ This pluralistic approach is consistent with the view that conflict is inevitable and can be a constructive or destructive force, depending upon how the parties involved handle it.⁵⁷

As every litigator and procedural scholar understands, the structure, governing rules, and quality of process profoundly affect outcomes. *Process matters*—procedural rulings have, over time, affected everything from the

⁵² See Moffitt, *supra* note 19, at 1244 (suggesting that “[p]erhaps the future of law school curricula will be one in which the line between litigation-focused courses and settlement-skills-focused courses will be blurred. Litigation and settlement are so intertwined in practice that I would think it difficult to teach them as though they were distinct.”).

⁵³ I say “ADR legal scholars” here deliberately. An “anti-law” sentiment exists among some non-lawyer conflict resolution practitioners and scholars who theorize that those most involved and affected by the conflict should determine norms and social order. See, e.g., Nils Christie, *Conflicts as Property*, 17 BRIT. J. CRIMINOLOGY 1, 3–4 (1977).

⁵⁴ Menkel-Meadow, *From Legal Disputes*, *supra* note 16, at 10–11.

⁵⁵ Maurice Rosenberg, *Resolving Disputes Differently: Adieu to Adversary Justice?*, 21 CREIGHTON L. REV. 801 (1987); Frank E.A. Sander & Lukasz Rozdeiczer, *Matching Cases and Dispute Resolution Procedures: Detailed Analysis Leading to a Mediation-Centered Approach*, 11 HARV. NEGOT. L. REV. 1, 10–32 (2006); Frank E.A. Sander & Stephen B. Goldberg, *Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure*, 10 NEGOT. J. 49 (1994); ROBERT MNOOKIN, BEYOND WINNING 367 (2000) (discussing how lawyers use a multitude of procedural skills).

⁵⁶ See *infra* Part II(A).

⁵⁷ See *infra* Part I(B).

initial consideration of who has “voice” and the opportunity to be heard,⁵⁸ to questions about who has decisionmaking authority,⁵⁹ to the range of available remedies, to the ultimate outcome.⁶⁰ ADR scholars are proceduralists who study and teach the impact of process choices, including dynamics “for designing, choosing, and advising about what processes to use for what purposes.”⁶¹

In the final analysis, “alternative” may be most useful in keeping alive the continual juxtaposition of the underlying values, operation, and outcomes of judicial process with private and community-based conflict processes. Alternative means different, but not necessarily better. Judicial and informal dispute processes can serve as mirrors and checks on each other’s failures and excesses. The creation of alternative processes, for example, offers insights into the perceived procedural or substantive shortcomings of the law and traditional litigation. Likewise, legal norms inform the ethical limits and potential process dangers of private conflict structures. As Amy Cohen observed, the word alternative “signals that the field, as it changes over time, remains a window into how scholars and reformers conceptualize the problems with the center and imagine possibilities for transformation.”⁶²

⁵⁸ See generally Welsh, *supra* note 14; Rebecca Hollander-Blumoff & Tom R. Tyler, *Procedural Justice and the Rule of Law: Fostering Legitimacy in Alternative Dispute Resolution*, 1 J. DISP. RESOL. 1, 2 (2011) (exploring how “psychological construct” of “procedural justice, provides an important perspective on how ADR systems can help maintain societal values that are consistent with the rule of law.”); Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545 (1991); Amy J. Cohen, *Dispute Systems Design, Neoliberalism, and the Problem of Scale*, 14 HARV. NEGOT. L. REV. 51 (2009) (arguing that scaling certain dispute resolution models may perpetuate existing social inequalities); Deborah R. Hensler, *Suppose It’s Not True: Challenging Mediation Ideology*, J. DISP. RESOL. 81 (2002); Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court’s Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637 (1996).

⁵⁹ This is the adjudication versus settlement debate discussed *supra* pp. 3–4.

⁶⁰ Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 367 (2011) (restricting class actions); AT&T Mobility, LLC v. Concepcion, 563 U.S. 333, 351–52 (2011) (expanding the scope and enforceability of mandatory arbitration in consumer and employment contexts); Ashcroft v. Iqbal, 556 U.S. 662, 686–87 (2009) (limiting the ability of civil rights plaintiffs to seek redress by heightening pleading standards).

⁶¹ Carrie Menkel-Meadow, *Peace and Justice: Notes on the Evolution and Purposes of Legal Processes: Inaugural Lecture of the A.B. Chettle, Jr. Chair in Dispute Resolution and Civil Procedure*, 94 GEO. L.J. 553, 580 n.113 (2006) (urging that the theory and practice skills associated with “process diversity and variation” should be taught as “[p]rocess in law schools”). See also Lande & Sternlight, *supra* note 43, at 248.

⁶² E-mail from Amy Cohen, Professor of Law, Ohio State University Moritz College of Law, to author (May 7, 2020) (on file with author).

B. “Dispute:” A Central, but Incomplete, Part of the Story

The bulk of ADR theory and practice focuses on, in the words of Frank Sander, “varieties of dispute processing.”⁶³ The word “dispute” accurately describes the core of the field, but is incomplete. “Dispute” sounds reactive in nature, focused on matters that have already evolved into an oppositional posture or litigation. The broader concept of “conflict” better captures the full scope of our work.⁶⁴ Although most, including Merriam-Webster, would consider “conflict” and “dispute” to be synonymous terms, in ADR theory a conflict is simply a difference of some sort that may, or may not, transform into a formal legal dispute.⁶⁵ As Carrie Menkel-Meadow explains, “dispute resolution in law has expanded to include the fuller story of human conflict situations.”⁶⁶

Mary Parker Follett, one of the adopted intellectual founders of the field, explained that conflict is “neither good nor bad” and can be a constructive or destructive force.⁶⁷ Follett theorized: “[a]s conflict—difference—is here in the world, as we cannot avoid it, we should, I think, use it. Instead of condemning it, we should set it to work for us.”⁶⁸ Follett posited “three main ways of dealing with conflict: domination, compromise and integration.”⁶⁹ Domination means “a victory of one side over the other.”⁷⁰ In Follett’s account, domination “is the easiest way of dealing with conflict, the easiest for the moment but not usually successful in the long run.”⁷¹ The use of compromise or settlement—in which “each side gives up a little in order to

⁶³ Frank E.A. Sander, *Varieties of Dispute Processing, in Addresses Delivered at the Nat’l Conference on the Causes of Popular Dissatisfaction with the Admin. Of Justice*, 70 F.R.D. 111 (1976).

⁶⁴ See Menkel-Meadow, *From Legal Disputes*, *supra* note 16, at 7.

⁶⁵ FOLLETT, *supra* note 19, at 67 (defining “conflict” as “difference”). See also William L.F. Felstiner, Richard L. Abel & Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .* 15 LAW & SOC’Y REV. 631 (1980-81) (analyzing how legal disputes emerge and transform); and John Burton, *Conflict Resolution as a Political Philosophy*, 3 GLOBAL CHANGE, PEACE & SECURITY 62 (1991) (defining a dispute as a short-term disagreement revolving around conflicting, but negotiable, interests, and a conflict as a more deep-seated, nonnegotiable issue of basic ontological human needs).

⁶⁶ Menkel-Meadow, *From Legal Disputes*, *supra* note 16, at 7.

⁶⁷ FOLLETT, *supra* note 19, at 67; see also Menkel-Meadow, *Mothers and Fathers of Invention*, *supra* note 16, at 7 (discussing Follett’s work).

⁶⁸ FOLLETT, *supra* note 19, at 67–68.

⁶⁹ *Id.* at 68.

⁷⁰ *Id.*

⁷¹ *Id.*

have peace”⁷²—is “the accepted, the approved, way of ending controversy.”⁷³ Although the most common way of resolving conflict, “no one really wants a compromise, because that means a giving up of something.”⁷⁴ Using compromise or domination to squelch conflict will “achieve only a brief respite; the conflict will go underground and will eventually resurface in a more virulent form. A better way is to find the integrative solution, the approach that solves a conflict by accommodating the real demands of the parties involved.”⁷⁵

In the 1920s, long before *Getting to Yes*⁷⁶ popularized interest-based bargaining, Follett advanced the concept of an integrated approach to conflict, particularly in organizational contexts.⁷⁷ The integrated approach views conflict as a path to progress, which Follett explained in scientific terms as “setting friction to work, making it *do* something.”⁷⁸ In her theory of integration, conflict is not a negative force to be extinguished, but a sign of health in organizations. She wrote, “[I]t is hoped that we shall always have conflict, the kind which leads to invention, to the emergence of new values.”⁷⁹ The goal is not to eliminate conflict, but to find the “plus-value” or what she called the “plusvalent” that emerges from exploring, and potentially integrating, differences.⁸⁰

Interest-based negotiation and mediation theory echo these themes of using an integrative approach to conflict. Integration seeks to reconcile multiple interests and, when possible, create a new understanding or approach. This may be most achievable in the context in which Follett was working—labor and employment relations and business organizations, where on-going relationships matter, and where settling an isolated claim may not resolve on-going systemic problems that are likely to reemerge if ignored or suppressed. She acknowledged, however, that integration is not “possible in all cases.”⁸¹

The dispute resolution field examines this potential for “‘creativity’ in human conflict resolution.”⁸² In this account, conflicts—in all their messy rawness—can be vehicles for norm creation. Nils Christie, recognized as one

⁷² *Id.*

⁷³ *Id.* at 69.

⁷⁴ *Id.*

⁷⁵ *Id.* at 21 (describing Follett’s theory of conflict integration).

⁷⁶ ROGER FISHER, WILLIAM URY & BRUCE PATTON, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* (Houghton Mifflin 2d ed. 1991).

⁷⁷ Menkel-Meadow, *Mothers and Fathers of Invention*, *supra* note 16, at 7.

⁷⁸ FOLLETT, *supra* note 19, at 71.

⁷⁹ *Id.* at 72.

⁸⁰ *Id.* at 49, 50, 52.

⁸¹ *Id.* at 72.

⁸² Menkel-Meadow, *From Legal Disputes*, *supra* note 16, at 8.

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of the theoretical founders of the restorative justice movement, argues that communities do not have *too many* conflicts, but *too few*.⁸³ He viewed conflict as “social fuel” and lawyers and courts as “professional thieves” that “steal” conflicts and norm-clarification opportunities away from the individuals and communities most affected by and involved in the conflict.⁸⁴

Thus, we see at least two paths in ADR thought. The “dispute” resolution strand examines various modes of processing conflicts and legal disputes. This may include statutes or regulations, judicial adjudication, community-based or in-house mediation programs, court-based ADR, private ADR, or a range of other process configurations that supplement or supplant litigation. The dispute processing function seeks primarily to resolve the matter, through negotiation, mediation, or a decision by a third party (judge, private arbitrator, or neutral evaluator). Dispute resolution processes also explore proactive, “upstream” conflict prevention strategies, before the conflict arises or snowballs into a larger, more complex dispute.

The second, more ambitious and sometimes controversial,⁸⁵ sect in the ADR field analyzes the norm-creating, justice-promoting, equity-enhancing, and relationship-building potential of conflicts and the processes through which they are funneled. This includes dialogic processes such as restorative justice⁸⁶ and mediation,⁸⁷ as well as ombuds programs that provide “feedback

⁸³ Christie, *supra* note 53, at 3–8.

⁸⁴ *Id.*

⁸⁵ See, e.g., BERNARD S. MAYER, *BEYOND NEUTRALITY: CONFRONTING THE CRISIS IN CONFLICT RESOLUTION* (2007).

⁸⁶ See, e.g., RESTORATIVE AND RESPONSIVE HUMAN SERVICES (Gale Burford, John Braithwaite & Valerie Braithwaite eds., 2019); Carrie Menkel-Meadow, *Restorative Justice: What Is It and Does It Work?* 3 ANN. REV. L. & SOC. SCI. 161 (2007); Lydia Nussbaum, *Realizing Restorative Justice: Legal Rules and Standards for School Discipline Reform*, 69 HASTINGS L.J. 583 (2018).

⁸⁷ Some mediators use a directive, settlement-focused approach, and others use a relational, problem solving approach. See Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7 (1996) (analyzing mediator orientations along an axis from a narrow focus on legal claims to a broad focus on relational concerns and mediator interventions along an axis from directive to facilitative); Kenneth Kressel et al., *The Settlement-Orientation vs. the Problem-Solving Style in Custody Mediation*, 50 J. SOC. ISSUES 67, 68 (1994) (a study comparing mediators who use a settlement-oriented style (SOS) and problem-solving style (PSS) and finding that PSS “produced a more structured and vigorous approach to conflict resolution during mediation, more frequent and durable settlements, and a generally more favourable attitude toward the mediation experience. SOS was not necessarily bad, but PSS was better”). Some mediation frameworks articulate specific social goals beyond the facilitation of dialogue and negotiation. Maryland Community Mediation has developed an “inclusive mediation” model to “bring the radical inclusion already deeply woven into

loops” about systemic issues that need to be addressed in a workplace or agency.⁸⁸ This branch also encompasses public conversation and dialogue initiatives,⁸⁹ public policy conflict resolution,⁹⁰ and dispute system design.⁹¹ As Carrie Menkel-Meadow explained: “While ‘disputes’ may be about legal cases, conflicts are more broadly and deeply about human relations and transactions. Conflict ‘handling’ may be both more and less involving and complicated than ‘dispute settlement’ or ‘conflict management.’”⁹²

C. “Resolution:” A Limiting Frame

Finally, “resolution” may be the most undertheorized and limiting—yet most important—word in our descriptor. Nancy Welsh has cautioned that there has been too much focus on the “A” in ADR, but not on the other letters.⁹³ She observes, “the evolution and institutionalization of mediation—as well as the courts’ embrace and enforcement of mandatory arbitration outside of the commercial context—reveal the danger of defining our field solely in terms of

the community mediation movement to the mediation table as a core belief and practice.” Caroline Harmon-Darrow, Lorig Charkoudian, Tracee Ford, Michele Ennis & Erricka Bridgeford, *Defining Inclusive Mediation: Theory, Practice, and Research*, 38 CONFLICT RESOL. Q. 305 (2020). Transformative mediation is based on surfacing “empowerment” and “recognition” in conflicts. ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: THE TRANSFORMATIVE APPROACH TO CONFLICT* 13 (2d ed. 2004). Narrative mediation combines principles of family therapy and storytelling with mediation. John Winslade et al., *A Narrative Approach to the Practice of Mediation*, 14 NEGOT. J. 21, 24–27 (1998).

⁸⁸ Susan Sturm & Howard Gadlin, *Conflict Resolution and Systemic Change*, 2007 J. DISP. RESOL. 1, 10.

⁸⁹ See The federal Community Relations Service uses structured dialogue to advance civil rights, address community divisions, and de-escalate conflicts. See BERTRAM LEVINE & GRANDE LUM, *AMERICA’S PEACEMAKERS: THE COMMUNITY RELATIONS SERVICE AND CIVIL RIGHTS* (2020). See also Richard Chasin et al., *From Diatribe to Dialogue on Divisive Public Issues: Approaches Drawn from Family Therapy*, 12 MEDIATION Q. (1996).

⁹⁰ See, e.g., The Ohio State Moritz College of Law’s Divided Community Project. See William Froehlich, Nancy H. Rogers & Joseph B. Stulberg, *Sharing Dispute Resolution Practices with Leaders of a Divided Community or Campus: Nine Strategies for Two Crucial Conversations*, 35 OHIO ST. J. ON DISP. RES. 781 (2020).

⁹¹ Cathy A. Costantino & Christina Sickels-Merchant, *DESIGNING CONFLICT MANAGEMENT SYSTEMS: A GUIDE TO CREATING PRODUCTIVE & HEALTHY ORGANIZATIONS* (1995); William L. Ury et al., *GETTING DISPUTES RESOLVED: DESIGNING SYSTEMS TO CUT THE COSTS OF CONFLICT* (1988).

⁹² Menkel-Meadow, *From Legal Disputes*, *supra* note 16, at 12.

⁹³ Nancy A. Welsh, *Remembering the Role of Justice in Resolution: Insights from Procedural and Social Justice Theories*, 54 J. LEGAL EDUC. 49, 51 (2004).

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‘resolution.’”⁹⁴ Welsh has urged the field to refocus on the role of *justice* in resolution.⁹⁵ Carrie Menkel-Meadow has described *process* as “the human bridge between justice and peace.”⁹⁶

“Resolution” perpetuates the stereotype that a conflict or dispute needs to “settle” for a process to be successful. ADR has been criticized as elevating harmony and peace over concerns about inequality, legal rights, and power imbalances.⁹⁷ Resolution sounds coercive in nature and mushy in result. As Mary Parker Follett put it: “no one really wants compromise, because that means giving up of something.”⁹⁸ More recently, Bernard Mayer has observed that defining a field based on the “resolution” of conflict “misread[s] the essential nature and challenge of conflict.”⁹⁹ He proposes that the conflict resolution field focus instead on “conflict engagement,” which would involve “helping people to raise, escalate, and continue a conflict” as well as resolve them when appropriate and desired.¹⁰⁰

Mayer was discussing the non-law conflict resolution field, not ADR in the legal context. His point has greater salience for lawyers, however, who are in the powerful position of being able to design dispute processes, advocate for clients in adversarial, litigation contexts, and negotiate for clients in deal-making and problem-solving contexts. Most people seek out lawyers when they have a crisis or conflict because they want the attorney to help them vindicate or protect their rights, seek redress for injury, be made whole, or solve a problem. The lawyer must understand the conflict from the client’s perspective, what Bernard Mayer called a “client-centered conflict

⁹⁴ *Id.*

⁹⁵ *See id.*; *see also* Welsh, *supra* note 14 (analyzing mediation and procedural justice). Ellen Waldman has examined mediation and substantive justice. Ellen Waldman & Lola Akin Ojelabi, *Mediators and Substantive Justice: A View from Rawls’ Original Position*, 30 OHIO ST. J. ON DISP. RESOL. 391 (2016) (analyzing the applicability of Rawls’ theory of justice to mediation). Dispute resolution scholars have analyzed questions of access to justice and ADR. *See* Ellen E. Deason et al., *ADR and Access to Justice: Current Perspectives*, 33 OHIO ST. J. ON DISP. RESOL. 303 (2018).

⁹⁶ Menkel-Meadow, *supra* note 61, at 579.

⁹⁷ Jerold S. Auerbach, *Justice Without Law?*, 33 CATHOLIC U. L. REV. 517 (1983); *see* Laura Nader, *Controlling Processes in the Practice of Law: Hierarchy and Pacification in the Movement to Re-Form Dispute Ideology*, 9 OHIO ST. J. ON DISP. RESOL. 1 (1993) (criticizing informal dispute resolution as elevating harmony and peace over concerns of substantive justice).

⁹⁸ Follet, *supra* note 19, at 69.

⁹⁹ MAYER, *supra* note 85, at 120.

¹⁰⁰ *Id.* at 39.

specialist.”¹⁰¹ When a person feels wronged and angry, the idea of a settled “resolution” rather than court victory may seem insulting and inadequate.¹⁰²

Indeed, sometimes the best resolution of a conflict is no resolution at all. The desired objective may be best achieved through protest, storytelling, or dialogue, without a settlement. This has been explored as the “deliberative democracy” function of ADR.¹⁰³ The conflict has intrinsic value in demanding attention and raising public consciousness (about injustice, inequality, etc.), inviting dialogue, and challenging or clarifying community norms.¹⁰⁴ This notion echoes Nils Christie’s characterization of conflicts as valuable “property” that are necessary for the clarification of societal norms outside of formal legal processes.¹⁰⁵ The Black Lives Matter and #MeToo movements offer recent examples of conflicts that have power in their own right—the goal is not necessarily to *resolve* a particular dispute, but to surface and examine the larger systemic problem of racial and gender oppression to raise public awareness and prompt social change.

There has been increased attention in legal scholarship and practice about a broader range of process approaches that can facilitate authentic participation by voices left out of traditional legal systems¹⁰⁶ and promote

¹⁰¹ *Id.*

¹⁰² Robert J. Condlin, *The “Nature” of Legal Dispute Bargaining*, 17 CARDOZO J. CONFLICT RESOL. 393 (2016) (analyzing the implications of cognitive neuroscience on legal dispute bargaining).

¹⁰³ Kruse, *supra* note 13, at 395–96 (questioning whether “harmony” is the goal of ADR theory and practice and noting that “in a pluralistic society, the features of fluidity and openness to continued challenge may be just as important as quelling of disputes.”); Carrie Menkel-Meadow, *The Lawyer’s Role(s) in Deliberative Democracy*, 5 NEV. L.J. 347, 348 (2004–2005) (exploring the “articulation of a process-oriented model of democratic deliberation and discourse”).

¹⁰⁴ Kruse, *supra* note 13, at 396 (describing the concept of “authentic participation” as part of the theory of justice in a deliberative democracy). *See also* David Bohm et al., *Dialogue—A Proposal*, INFED (1991), http://infed.org/archives/e—texts/bohm_dialogue.htm (describing the purpose of meaningful dialogue is to expose the incoherence in our thought and generate “collective learning”); JÜRGEN HABERMAS, *THE THEORY OF COMMUNICATIVE ACTION: VOLUME 2, THE CRITIQUE OF FUNCTIONALIST REASON* (Thomas McCarthy trans., 1987).

¹⁰⁵ Christie, *supra* note 53, at 13.

¹⁰⁶ Kruse, *supra* note 13, at 392 (arguing that ADR theory needs to have “a vision of ‘authentic participation’ that can distinguish legitimate . . . engagement in a process from its strategic manipulation”); Welsh, *supra* note 93, at 54 (applying social justice theory to mediation and ADR and exploring “the potential of the meditation process to empower and organize the powerless”).

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systemic legal reform.¹⁰⁷ The most recent example centers on the application of restorative justice, mediation, and other conflict engagement strategies to a range of complex social issues such as intimate partner violence,¹⁰⁸ sexual harassment and assault,¹⁰⁹ criminal legal reform,¹¹⁰ school discipline and the “school-to-prison pipeline”,¹¹¹ the foreclosure crisis,¹¹² the eviction crisis,¹¹³ community polarization and violence,¹¹⁴ and workplace discrimination.¹¹⁵

Thus, the “R” in ADR should not simply mean “resolution” in the sense of a settlement or case closure. “R” also may mean process strategies

¹⁰⁷ Jennifer W. Reynolds, *The A is for Activism*, in 2 THE NEGOTIATOR’S DESK REFERENCE 743 (Chris Honeyman & Andrea Kupfer Schneider eds., 2d ed. 2017) (exploring the relationship between activism and ADR); Jennifer W. Reynolds, *The Activist Plus: Dispute Systems Design and Social Activism*, 13 U. ST. THOMAS L.J. 334 (2017). See also Howard Gadlin & Susan Sturm, *Conflict Resolution and Systemic Change*, 2007 J. DISP. RESOL. 1.

¹⁰⁸ See LEIGH GOODMARK, *DECRIMINALIZING DOMESTIC VIOLENCE: A BALANCED POLICY APPROACH TO INTIMATE PARTNER VIOLENCE* (2018); Leigh Goodmark, *Restorative Justice as Feminist Practice*, 1 INT’L J. RESTORATIVE JUST. 372 (2018); C. Quince Hopkins, *Tempering Idealism with Realism: Using Restorative Justice Processes to Promote Acceptance of Responsibility in Cases of Intimate Partner Violence*, 35 HARV. J.L. & GENDER 311 (2012).

¹⁰⁹ Kathleen Daly, *Restorative Justice and Sexual Assault: An Archival Study of Court and Conference Cases*, 46 BRIT. J. CRIMINOLOGY 334 (2006); Mary P. Koss, Jay K. Wilgus & Kaaren M. Williamsen, *Campus Sexual Misconduct: Restorative Justice Approaches to Enhance Compliance with Title IX Guidance*, 15 TRAUMA, VIOLENCE & ABUSE 242 (2014).

¹¹⁰ Amy J. Cohen, *Moral Restorative Justice: A Political Genealogy of Activism and Neoliberalisms in the United States*, 104 MINN. L. REV. 889 (2019); DANIELLE SERED, *UNTIL WE RECKON: VIOLENCE, MASS INCARCERATION, AND A ROAD TO REPAIR* (2019).

¹¹¹ See MARYLAND COMMISSION ON THE SCHOOL-TO-PRISON PIPELINE AND RESTORATIVE PRACTICES: FINAL REPORT AND COLLABORATIVE ACTION PLAN (2018), https://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=1003&context=cdrum_fac_pubs.

¹¹² Lydia Nussbaum, *ADR’s Place in Foreclosure: Remedying the Flaws of a Securitized Housing Market*, 34 CARDOZO L. REV. 1889 (2013).

¹¹³ Deborah Thompson Eisenberg & Noam Ebner, *Disrupting the Eviction Crisis with Conflict Resolution Strategies*, 41 MITCHELL HAMLINE L. J. PUB. POL’Y & PRAC. 125 (2020).

¹¹⁴ Nancy H. Rogers, *When Conflicts Polarize Communities: Designing Localized Offices that Intervene Collaboratively*, 30 OHIO ST. J. ON DISP. RESOL. 173 (2015).

¹¹⁵ Deborah Thompson Eisenberg, *The Restorative Workplace: An Organizational Learning Approach to Discrimination*, 50 U. RICH. L. REV. 487 (2016); Elayne E. Greenberg, *Bridging Our Justice Gap with Empathic Processes that Change Hearts, Expand Minds About Implicit Discrimination*, 32 OHIO ST. J. ON DISP. RESOL. 441 (2017).

that advance rights, relationships, reform, responsive regulation,¹¹⁶ reconciliation,¹¹⁷ restoration,¹¹⁸ reclamation,¹¹⁹ or reckoning.¹²⁰ As political scientist Christine Harrington observed in her analysis of neighborhood justice centers: “Taking rights seriously can mean taking problem solving seriously.”¹²¹ She urged:

We need to turn our attention to the substantive rights and claims for justice that are expressed in the dispute-processing context. Once we understand that the exercise of rights, making claims of rights, is an expression of social problems (e.g., social and economic inequality), then we can move forward with the view that rights are one context or framework in which social problem solving takes place.¹²²

III. RECONCEPTUALIZING ADR AS “CONFLICT PROCESS STRATEGY”

Unpacking common misconceptions about ADR helps us to take stock of the historical roots and modern breadth of our work. As we look into the future, our challenge is to situate the field under a unified frame that captures the vast, diverse, impressive, and motley array of our scholarly and teaching

¹¹⁶ JOHN BRAITHWAITE, *RESTORATIVE JUSTICE AND RESPONSIVE REGULATION* 29 (2002) (defining responsive regulation).

¹¹⁷ Truth and Reconciliation Commissions have been characterized as a form of alternative dispute resolution. See Michal Alberstein, *ADR and Transitional Justice as Reconstructing the Rule of Law*, 2011 J. DISP. RESOL. 1.

¹¹⁸ Restorative justice theory combines the notion of holding an offender who has violated community norms accountable while repairing the harm and reintegrating the offender and the person(s) harmed back into the community. See Allison Morris, *Critiquing the Critics: A Brief Response to Critics of Restorative Justice*, 42 BRIT. J. CRIMINOLOGY 596, 598–600 (2002).

¹¹⁹ Michael Pinard, *Race Decriminalization and Criminal Legal System Reform*, 95 N.Y.U. L. REV. ONLINE 119, 135 (2020) (“[R]eclamation changes the narrative from individual to collective responsibility by obligating institutions, systems, and decisionmakers to not only understand the ways in which Black men, women, and children are criminalized in various aspects of their lives, but also to take the affirmative steps necessary to detach them from their interactions with the criminal legal system.”).

¹²⁰ DANIELLE SERED, *UNTIL WE RECKON: VIOLENCE, MASS INCARCERATION, AND A ROAD TO REPAIR* (2019).

¹²¹ HARRINGTON, *supra* note 15, at 173.

¹²² *Id.*

interests. A “conflict process strategy” framing helps us to explain the scope and relevance of the field to law, as well as to alternatives to traditional legal approaches.

Overall, ADR tends to be a *how*-focused field—how the trifecta of negotiation, mediation and arbitration processes are used, how they should be conducted, how these processes impact the parties and other stakeholders, and how these processes compare to litigation.¹²³ We also expound on the *when* of ADR—the considerations and criteria to examine to evaluate when a particular process may be appropriate for a particular type of conflict or dispute. Given our focus on process, this makes sense. In addition to continued exploration of *what* is happening in practice and *how* those processes affect parties, courts, and other constituencies, as a field we must remain ever vigilant about interrogating the *why* (and why not) of ADR.

How do we look beyond the traditional “how” and “when” analysis of ADR processes and articulate a unifying theory that captures the full scope, purpose, and potential of our work? A common theme running through dispute resolution scholarship is, of course, *process*. Much like other legal scholars who focus on procedure, ADR legal scholars study and teach the theoretical underpinnings, uses, limitations, design, impact, and risks of various disputing processes. In this regard, we echo themes from the “Legal Process” movement from the 1950s.¹²⁴ The next section explores lessons that this school of thought may offer to the modern ADR field.

¹²³ Roselle Wissler’s empirical mediation work has been formative in the field. *See, e.g.,* Roselle L. Wissler, *Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research*, 17 OHIO ST. J. ON DISP. RESOL. 641 (2002); *see also* Lorig Charkoudian, Deborah Thompson Eisenberg & Jamie Walter, *What Difference Does ADR Make? Comparison of ADR and Trial Outcomes in Small Claims Court*, 35 CONFLICT RESOL. Q. 7 (2017). For empirical work regarding arbitration, *see*, Thomas J. Stipanowich & J. Ryan Lamare, *Living with ADR: Evolving Perceptions and Use of Mediation, Arbitration, and Conflict Management in Fortune 1000 Corporations*, 19 HARV. NEGOT. L. REV. 1 (2014); Hiro N. Aragaki, *A Snapshot of National Legislation on Same Neutral Med-Arb and Arb-Med Around the Globe* (Loyola Law Sch. Legal Rsch. Paper No. 2020-11, Apr. 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3583173.

¹²⁴ For an extensive analysis of Lon Fuller’s theorization of different modes of dispute processing, and the Legal Process work by Hart and Sacks, *see* Menkel-Meadow, *From Mothers and Fathers of Invention*. She writes:

The old Legal Process school has now given birth to several strains of “new legal process” sensitivity, recognizing that process is pluralistic and that different institutional arrangements of process are necessary to meet different kinds of individual and

A. Legal Process: Early ADR Theory?

Legal Process scholars attempted to synthesize a unified grand theory of the law and its institutional manifestations, including not only court adjudication, but also private ordering and public law. Henry Hart and Albert Sacks, leaders in the field, viewed law as “the aggregate of the processes of social ordering . . . [w]ith a view to promoting ends accepted as valid in the society.”¹²⁵ Hart viewed the law’s role as “the task of creating and maintaining the conditions for collaboration among the members of society.”¹²⁶

This view, like modern ADR theory, is rather optimistic in its view that the goal of the law “is ‘not [] dividing up a pie of fixed size but [] making a larger pie in which all the slices will be bigger.’”¹²⁷ Hart continued: “in any situation of conflict of interest within a society it is always possible to work out a solution in which all interests are better off than they were before.”¹²⁸ If this sounds like the principles underlying *Getting to Yes*, that is no accident. Michal Alberstein has traced the lineage from the legal process school of thought of the 1950s to Roger Fisher’s negotiation and problem solving mediation theories of the 1980s, noting that “Roger Fisher himself acknowledged the influence of the legal process school on his work, and claimed to have adopted their attitude.”¹²⁹

While the Legal Process movement focused primarily on public law and the institutional relationship between legislative and judicial process, Hart and Sacks emphasized the importance of private ordering as part of law and the “broad dispersion of decisionmaking.”¹³⁰ They argued that “private

institutional needs. In one sense, the “new legal process” represented by ADR is a direct descendant of Hart and Sacks’s Legal Process school, recognizing a greater diversity of legal processes that are responsible for maintaining social order.

See Menkel-Meadow *supra* note 16, at 29.

¹²⁵ William N. Eskridge, Jr. & Philip P. Frickey, *The Making of the Legal Process*, 107 HARV. L. REV. 2031, 2037 (1994).

¹²⁶ *Id.* at 2039.

¹²⁷ *Id.* at 2037 (citing Hart’s Legislation teaching notes).

¹²⁸ *Id.*

¹²⁹ MICHAL ALBERSTEIN, PRAGMATISM AND LAW: FROM PHILOSOPHY TO DISPUTE RESOLUTION (2002); Michal Alberstein, *The Jurisprudence of Mediation: Between Formalism, Feminism and Identity Conversations*, 11 CARDOZO J. CONFLICT RESOL. 1, 11 (2009) (internal citations omitted).

¹³⁰ Eskridge & Frickey, *supra* note 125, at 2043.

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ordering is the primary process of social adjustment,"¹³¹ dedicating a chapter to private ordering in their posthumously-published *Legal Process*. Hart and Sacks recognized court adjudication as "the slender tip of 'the great pyramid of legal order' and examined many other ways that disputes were resolved."¹³² They argued: "Speedy, orderly and amicable adjustments of private affairs are always to be preferred to controversy. Avoidable litigation never serves to maximize the satisfaction of human wants, or to promote the common good in any other way."¹³³

Given their emphasis on private ordering, Hart and Sacks viewed negotiation as a core competency for lawyers. They observed: "Negotiation is informal and flexible in its procedure whereas the procedure of adjudication is formal and rigid. Negotiation is far better adapted than adjudication to securing the pre-condition of a satisfactory agreement —namely, a sympathetic understanding of the other party's point of view."¹³⁴ They advised that lawyers must develop "skill in negotiation in finding the common ground of mutual advantage between the parties."¹³⁵

Sounding much like modern ADR professors, Hart and Sacks urged: "The principles and modes of autonomous ordering and its limitations, are of utmost importance for a lawyer to study and understand."¹³⁶ Specifically, their teaching materials emphasized that lawyers need to understand the range of public and private process options and select the best process for the unique circumstances. As Anthony Sebok noted: "A recurrent theme in *The Legal Process* is the idea that a good lawyer should develop the judgment needed to pick the technique appropriate for the type of problem at hand. The book, thus, frequently asks the student to weigh the comparative advantages of decision making through private agreement, majority voting, administrative dictate, arbitration, or adjudication."¹³⁷ As Kent Roach observed in his analysis of *The Legal Process*: "Hart and Sacks's defence of private ordering resembles contemporary advocacy of ADR. This includes not only praise for the speed and flexibility of negotiation, but also the tendency to subject adjudication to cost-benefit analysis without being concerned that private solutions may

¹³¹ HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 77 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

¹³² Kent Roach, *What's New and Old About the Legal Process*, 47 U. TORONTO L.J. 363 (1997).

¹³³ HART & SACKS, *supra* note 131, at 24.

¹³⁴ *Id.* at 645.

¹³⁵ *Id.* at 373.

¹³⁶ *Id.* at 132.

¹³⁷ Anthony J. Sebok, *Reading The Legal Process*, 94 MICH. L. REV. 1571, 1577–78 (1996).

replicate existing power distributions.”¹³⁸ Like those in the ADR field, “they were aware that self-regulation could preserve privacy, speed, good will, and continuing relationships.”¹³⁹

Lon Fuller, another member of the Legal Process school, expounded on various process-based forms of social ordering, including adjudication, mediation, arbitration, and more. Fuller conceived of law as “a ‘problem solving activity’” that included a range of different disputing processes, each with their own uses, morality, and limitations.¹⁴⁰ Like Hart and Sacks, Fuller explored: “What kinds of human relations are best organized and regulated by adjudication, and what others are better left to other procedures, such as negotiation and voluntary settlement, majority vote, or expert managerial authority?”¹⁴¹ Fuller urged that a lawyer served an important function as “architect of structure”¹⁴² or “process architect.”¹⁴³

Fuller likewise theorized that private dispute processes are part of the infrastructure of the law and provide opportunities for norm creation.¹⁴⁴ He observed, for example, that “mediation is commonly directed, not toward achieving conformity to norms, but toward the creation of the relevant norms themselves.”¹⁴⁵ He suggested that “[a] serious study of mediation can serve . . . to offset the tendency of modern thought to assume that all social order must be imposed by some kind of ‘authority’.”¹⁴⁶

Fuller, as well as Hart and Sacks, did not simply set forth a taxonomy of process options. They were not *against* adjudication *or* settlement but for a multiplicity of processes to improve the overall human condition and social order. They theorized the benefits and limits of adjudication and other private

¹³⁸ HART & SACKS, *supra* note 131, at 372–73.

¹³⁹ *Id.*

¹⁴⁰ Lon L. Fuller, *Mediation: Its Forms and Functions*, 44 S. CAL. L. REV. 305 (1971). Carrie Menkel-Meadow eloquently summarizes Fuller’s work as “purposively directed towards enabling voluntary transactions and contracts, preventing violence, defining ideals and standards for civil participation, as well as providing a means for settling disputes and preserving social harmony.” Menkel-Meadow, *Mothers and Fathers of Invention*, *supra* note 16, at 315.

¹⁴¹ LON L. FULLER, *The Lawyer as Architect of Social Structures*, in THE PRINCIPLES OF SOCIAL ORDER: SELECTED ESSAYS OF LON L. FULLER 281 (Kenneth Winston ed., 2001).

¹⁴² See Fuller, *supra* note 141, at 285–92.

¹⁴³ Carrie Menkel-Meadow has synthesized Fuller’s impressive body of work and applied it to the modern dispute resolution field. See Menkel-Meadow, *Mothers and Fathers of Invention*, *supra* note 16.

¹⁴⁴ Ellen Waldman has explored the norm-creating role of mediation. See Ellen Waldman, *Identifying the Role of Social Norms in Mediation: A Multiple Model Approach*, 48 HASTINGS L.J. 703 (1997).

¹⁴⁵ Fuller, *supra* note 140, at 308.

¹⁴⁶ *Id.* at 315.

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process structures and sought to develop in lawyers the ability to assess when disputes are best resolved by courts, and when they should be addressed by the parties most involved in the matter, who must abide by the result. Hart and Sacks wrote, for example: "To the extent that the resolution of the dispute depends essentially upon what Professor Fuller calls the principle of order by reciprocity, as distinguished from the principle of order through common ends (including the maintenance of a regime of reciprocity), the method of adjudication operates to eliminate the *best judges of a satisfactory exchange—namely, the parties to the exchange themselves . . .*"¹⁴⁷

Fuller appreciated the relational aspects of mediation. He recognized the "central quality of mediation [is] its capacity to reorient the parties toward each other, not by imposing rules on them, but by helping them to achieve a new and shared perception of their relationship, a perception that will redirect their attitudes and dispositions toward one another."¹⁴⁸ His view of mediation was formed largely by the collective bargaining context, in which the purpose of the mediator is:

[T]o induce the mutual trust and understanding that will enable the parties to work out their own rules. The creation of rules is a process that cannot itself be rule-bound; it must be guided by a sense of shared responsibility and a realization that the adversary aspects of the operation are part of a larger collaborative undertaking.¹⁴⁹

Fuller observed the "mutual understanding produced by the process of negotiation itself."¹⁵⁰ In a sentence perhaps well-known to contracts professors, he observed: "If you negotiate the contract thoroughly, explore carefully the problems that can arise in the course of its administration, work out the proper language to cover the various contingencies that may develop, you can then put the contract in a drawer and forget it."¹⁵¹ That is essentially what mediation entails—the negotiation of a contract (i.e., settlement agreement), with the potential to improve the parties' relationship and mutual understanding into the future. This may partly explain studies finding that

¹⁴⁷ HART & SACKS, *supra* note 131, at 645 (emphasis added).

¹⁴⁸ Fuller, *supra* note 140, at 325.

¹⁴⁹ *Id.* at 326.

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 326–27.

agreements reached through mediation are less likely to require future court involvement or enforcement actions as compared to judge-imposed orders.¹⁵²

The Legal Process movement faded in the 1960s and 1970s in part because of the fracturing of legal theory between law and economics and critical legal theory, and perhaps because the field's leaders passed on without publishing their casebook and fully addressing issues of equality and civil rights.¹⁵³ Nevertheless, its fundamental precepts remain influential and provide several lessons and cautionary tales as the ADR field looks to the future. While this is only a brief snapshot of a deep and rich field of study,¹⁵⁴ the next sections explore how the insights about the relationship of informal dispute processing to the law from the Legal Process school may help the ADR field clarify its purpose and continuing relevance to law and legal education.

D. Lawyer as “Conflict Process Strategist”

The first lesson is that the theory of *process* and the practice of *process strategy* are central components of law and core competencies for lawyers. The Legal Process school did not view process options as a zero-sum, “adjudication versus private settlement” dichotomy. They did not simply list a taxonomy of process options and blanket criteria for the selection of each process. Rather, they theorized the potential uses, limits, and morality of each process as it pertained to the overall operation and development of the law. They recognized private disputing processes as core components and complementary sources of norm creation and social ordering in the law.

Legal Process theory did not view private dispute resolution as necessarily *better* than adjudication for all purposes and contexts. Rather, it depended upon the case and client-specific context. In their view, lawyers must understand the normative underpinnings of various adjudicative, legislative, and private dispute resolution processes. They also needed to develop the judgment and skills—both advocacy and negotiation skills—to navigate these processes.

¹⁵² See Charkoudian, Eisenberg & Walter, *supra* note 123.

¹⁵³ For a discussion of the decline of Legal Process and its modern relevance, see Eskridge & Frickey, *supra* note 125, at 2049–55.

¹⁵⁴ For a deeper analysis of the legal process and its connection to ADR theory, see ALBERSTEIN, *supra* note 129, and Menkel-Meadow, *Mothers and Fathers of Invention*, *supra* note 16.

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Likewise, modern ADR theory emphasizes the importance of process choices,¹⁵⁵ examining the fluidity between private and public processes and the lawyer's role as process strategist in various contexts. Situating ADR under the broader rubric of conflict process theory and strategy helps to account for the field's advancement beyond the traditional trifecta of negotiation, mediation, and arbitration. The conflict process conceptualization of the ADR field emphasizes the lawyer's role as process architect, advisor, advocate, negotiator, and problem solver within different process structures.

A process strategy frame emphasizes what we hope law students learn as they transition into their work as lawyers, judges, and leaders; that is, the processes they use to accomplish client goals, address conflicts, or effect positive change are as important as the governing substantive law. Without wise process decisions, substantive rights cannot be vindicated. At the same time, focusing on substantive rights to the exclusion of other considerations, such as financial and relational costs, can sometimes be counterproductive or harmful. In addition, the design and navigation of process choices have profound normative implications for access to justice, procedural justice, remedies, and public values. In this regard, ADR has much in common with public interest lawyering theory, which recognizes that a range of process strategies beyond litigation are necessary to facilitate legal reform and social justice.¹⁵⁶

E. *The "Science" of Conflict Process Strategies*

The ADR field has been criticized as being rather evangelical, advocating that certain types of processes are universally better than others,

¹⁵⁵ This theme of process choice was part of the early efforts to integrate ADR into the first-year curriculum at some law schools in the mid-1980s. See Leonard L. Riskin, *Disseminating the Missouri Plan to Integrate Dispute Resolution into Standard Law School Courses: A Report on a Collaboration with Six Law Schools*, 50 FLA. L. REV. 589 (1998).

¹⁵⁶ Scott L. Cummings & Deborah L. Rhode, *Public Interest Litigation: Insights from Theory and Practice*, FORDHAM URB. L.J. 603, 611 (2009) (describing how public interest attorneys "view legal advocacy as part of comprehensive campaign that deploys multiple strategies to advance local policy reforms"); Deborah L. Rhode, *Public Interest Law: The Movement at Midlife*, 60 STAN. L. REV. 2027 (2008) (describing use of litigation and collaborative strategies by public interest attorneys); William H. Simon, *Solving Problems vs. Claiming Rights: The Pragmatist Challenge to Legal Liberalism*, 46 WM. & MARY L. REV. 127 (2004) (comparing legal liberalism and legal pragmatist approaches in public interest lawyering).

regardless of context.¹⁵⁷ Within some subfields of ADR (mediation or restorative justice, for example), some claim that their approach to the practice is always superior. More ADR—or any particular process or practice framework—is not necessarily beneficial for all cases and contexts, and may present significant dangers or harms for some.

The ADR field must continue to turn the mirror inward, inviting scrutiny of the limitations, quality, and unintended consequences of various process strategies. The next generation of ADR scholarship is already digging into the “black box” of ADR to empirically test¹⁵⁸ and gather transparent data¹⁵⁹ about various processes. Rigorous research about the use and impact of various informal processes is underway, including examination of litigant process preferences,¹⁶⁰ empirical analysis of the impact of specific mediator techniques in various case contexts,¹⁶¹ and closer scrutiny of the use and outcomes of court-based mediation and arbitration. This research improves the quality of disputing processes and informs ADR theory and practice.

F. *The Morality of Conflict Process Strategies*

This leads to a final lesson from the Legal Process movement or, more importantly, from its ultimate demise: the ADR field must shift “beyond

¹⁵⁷ See Jeffrey W. Stempel, *The Inevitability of the Eclectic: Liberating ADR from Ideology*, 2000 J. DISP. RESOL. 247.

¹⁵⁸ See Deborah Thompson Eisenberg, *What We Know and Need to Know about Court-Annexed Dispute Resolution*, 67 S.C. L. REV. 245 (2016) (summarizing ADR studies). For a compendium of recent ADR empirical studies, see also James Coben & Donna Stienstra, *ADR Empirical Studies (Summer 2013-Summer 2018)*, MITCHELL-HAMLINE DISP. RESOL. INST. (Mar. 2018), https://open.mitchellhamline.edu/cgi/viewcontent.cgi?article=1000&context=dri_empirical.

¹⁵⁹ Nancy A. Welsh, *We Need Good Data to Know Whether What We Are Doing—and Espousing—Is Good*, in THEORIES OF CHANGE, *supra* note 17, at 254; Nancy A. Welsh, *Dispute Resolution Neutrals' Ethical Obligation to Support Measured Transparency*, 71 OKLA. L. REV. 823 (2019); Judith Resnik, *The Contingency of Openness in Courts: Changing the Experiences and Logics of the Public's Role in Court-Based ADR*, 15 NEV. L.J. 1631 (2015); Judith Resnik, *A2J/A2K: Access to Justice, Access to Knowledge, and Economic Inequalities in Open Courts and Arbitrations*, 96 N.C. L. REV. 605, 629–30 (2018).

¹⁶⁰ Donna Shestowsky, *Inside the Mind of the Client: An Analysis of Litigants' Decision Criteria for Choosing Procedures*, 36 CONFLICT RESOL. Q. 69 (2018).

¹⁶¹ See the empirical studies cited in ABA SECTION OF DISPUTE RESOLUTION, REPORT OF THE TASK FORCE ON RESEARCH ON MEDIATOR TECHNIQUES 62–64 (2017), https://www.americanbar.org/content/dam/aba/administrative/dispute_resolution/med_techniques_tf_report.authcheckdam.pdf.

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settlement” and neutrality to tackle normative questions about the impact of process choices on substantive justice and the generation of public norms. Here, the ADR field must continue to examine, in Fullerian style, not only the uses, limits, and effectiveness of various processes but also the underlying morality and quality of the processes.

The ADR field sometimes asks: Do we teach ADR as it is practiced, or do we teach ADR as it *ought to be*? In our scholarship and in our teaching, the *ought to be*—the purpose, governing values, ethical limits, and integrity of the process—is essential. Returning to the genericide theme with which I began, if we do not continually question and theorize what ADR ought to be (and what it should not be), ADR will be reduced to a commodified, diluted product that equates to *whatever you want it to be*. When the legal system is adopting, and especially, requiring private dispute processes, we must continually interrogate their operation, including how they interact with legal norms and a lawyer’s “special responsibility for “the quality of justice.”¹⁶² These questions have been explored in prior ADR scholarship, and there is more work to do in this regard into the future.

A focus on conflict process theory and strategy provides a more comprehensive and nuanced account of how private and community-based dispute strategies intersect with traditional legal systems to prevent and engage conflicts and address injustice. It frees us to be nimble, adapting to changing societal and client needs, new process structures, and technologies.¹⁶³ A broader process lens frees us to explore not only *reactive* processes that respond to disputes but also *proactive and preventive* conflict processes (such as restorative justice, dispute system design, policy reform, processes aimed at consensus-building and organizational change).

The application of conflict process strategies to promote equity and social justice is likely to be the next frontier of ADR interdisciplinary scholarship. This work is animated by concerns of the voices left out of traditional legal, and conventional ADR, processes and is influenced by critical and feminist legal theory, deliberative democracy, and intersectionality. Legal scholars across many disciplines are studying and applying new process frameworks to systemic social issues to, for example, empower survivors of violence and assault, reform the criminal legal system, stem the school-to-prison pipeline, disrupt evictions, de-escalate violence, and reduce workplace discrimination. While no process is a panacea for any problem, conflict process theory and strategy provides a lens through which to

¹⁶² MODEL RULES OF PROF’L CONDUCT PREAMBLE & SCOPE 1 (AM. BAR ASS’N 2000).

¹⁶³ See Noam Ebner, *Teaching the World: Educational Pivots for the Second Half of the ADR Century*, 35 OHIO ST. J. ON DISP. RESOL. 825 (2020).

examine the uses, benefits, and shortcomings of various process structures in accomplishing social goals, such as equity, accountability, and justice.

IV. CONCLUSION

The dispute resolution field is in a time of transition, with many of the pioneers who blazed trails for us moving on or close to retirement. While we celebrate the tremendous growth of ADR over the past few decades, some are concerned, if not downright panicked, that the future of ADR in the legal academy and in the courts looks bleak.

Consistent with our field's mantra of turning crisis into opportunity, let us welcome this challenge with the same candid self-reflection and open-minded creativity that we ask of mediation participants. This article takes stock of what the ADR field is, and is not, to help identify our future path. In many ways, that picture is hopeful: ADR is well embedded within legal education and implemented in courts, legal institutions, businesses, and communities. But there are ominous signs. Rapid institutionalization of ADR practices without clear governing norms has diluted the quality of some processes and often outpaced theorization and scholarly scrutiny. In addition, our descriptor misrepresents the field as remaining in opposition to litigation, while our work has expanded far beyond the traditional trifecta of negotiation, mediation, and arbitration.

Drawing lessons from Legal Process theory and the increasing interest in alternative processes as affirmative means to vindicate rights and promote social justice, one path forward is to reconceptualize the work of the ADR field with a simple unifying theme: *conflict process theory and strategy*. This framing is both broader and more precise, capturing the focus and scope of our collective teaching, scholarship, and practice. With this conceptual foundation, the ADR field can continue to explore the uses, benefits, limitations, dangers, and morality of various conflict process strategies and structures to accomplish a range of goals in law and society "beyond settlement." In a world full of inevitable conflict, we will always have much work to do.

Negative Identity and Conflict

JONATHAN R. COHEN^{*}

- I. INTRODUCTION
- II. NEGATIVE IDENTITY
- III. SOME PROBLEMS CAUSED BY NEGATIVE IDENTITIES
- IV. CONFLICT RESOLUTION IN THE CONTEXT OF NEGATIVE IDENTITY
- V. A LITERARY EXAMPLE – JACOB AND ESAU
- VI. CONCLUSION

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ABSTRACT

This article explores an aspect of identity that can be particularly challenging for conflict resolution—negative identity. By negative identity, I mean an identity in which a party implicitly or explicitly defines itself in a negative way, specifically, by way of contrast to some other party. This phenomenon occurs in conflicts ranging from small, interpersonal ones to large-scale conflicts between national, ethnic, and religious groups. Negative identities may make conflicts more likely to arise and also make them more difficult to resolve when they do. Fortunately, there are steps that both parties and neutrals can take to foster conflict resolution in the context of negative identity. These include processes that help parties listen to one another with open minds, engage in self-examination of their own identities, and embrace the range of identities that they hold.

NEGATIVE IDENTITY AND CONFLICT

I. INTRODUCTION

There can be little doubt that identity is a factor in many conflicts. In broad conflicts between members of different national, ethnic, and religious groups, this is an all-too-common pattern. As Amartya Sen observes, “The cultivated violence associated with identity conflicts seems to repeat itself around the world with increasing persistence.”¹ Identity is also a core element of many microscopic conflicts. Douglas Stone, Bruce Patton, and Sheila Heen have argued that beneath our most difficult conversations with others often lies an internal wrestling with ourselves.² Here, I examine a special feature of identity that is particularly challenging for conflict resolution. I call this feature “negative identity.” By negative identity, I mean the situation where one party implicitly or explicitly defines itself by way of contrast to the other party. What does it mean to be a Democrat? For some, it means in essence to be against the Republicans rather than for certain policies. What does it mean to be an American? For some, it means to be opposed to “illegal aliens” rather than, say, in favor of a free society. Sometimes negative identities define parties fully, and sometimes they only do so in part. In either case, when negative identities are present, the challenges for conflict resolution are acute. Negative identities may increase the chances of conflicts arising. When conflicts do arise, negative identities may also make those conflicts harder to resolve, for in addition to the many ordinary barriers to conflict resolution,³ parties may be required to rethink their very sense of self.

This paper works in four stages. First, I begin by defining negative identity. Second, I examine why negative identities may make conflicts more likely to arise and why conflicts involving parties with negative identities may be particularly difficult to resolve. Third, I suggest several approaches to fostering conflict resolution when parties hold negative identities. Fourth, I offer a famous literary example, the biblical narrative of Jacob and Esau, to illustrate the concept of negative identity and the value of identity redefinition to conflict resolution. I end with several concluding observations.

II. NEGATIVE IDENTITY

Identity is a complex phenomenon. Most of us hold not one identity but many. I, for example, am a human, a man, a parent, a son, a spouse, a

¹ AMARTYA SEN, *IDENTITY AND VIOLENCE: THE ILLUSION OF DESTINY* 3 (2006).

² DOUGLAS STONE ET AL., *DIFFICULT CONVERSATIONS: HOW TO DISCUSS WHAT MATTERS MOST* 111–28 (1999).

³ See KENNETH ARROW ET AL., *BARRIERS TO CONFLICT RESOLUTION* (1995) (on common barriers to resolving conflicts).

professor, an American, a Jew, a vegetarian, a Red Sox fan, and a music lover . . . and this is only a partial list. Different identities may become salient depending on the time and context. It may not matter much that I am a parent when I enter a classroom to teach law students, but it may matter a great deal on one of my children's birthdays. Some identities are inherited or externally imposed (e.g., by being born in the United States, I became an American), and some identities we obtain through our actions (e.g., I became a spouse when I got married).⁴ Some identities are deeply embedded while others are more malleable. It would be much easier for me to give up being a Red Sox fan than to cease being a vegetarian. Note, too, that identities are not static over the course of our lives. We can reason about what it means to hold a particular identity (e.g., what does it mean for me to be a son now that my father is deceased?) or even whether we wish to hold certain identities. Indeed, choosing who we are to be is one of the deepest human freedoms,⁵ a freedom many of us fail to exercise as often as we might. So, too, choosing which identities shall guide us when is an important responsibility. From a conflict resolution perspective, such choice of identity is especially important. As Amartya Sen rightly describes, far too much violence exists in our world because people reduce the complexity of who they are and who others are to single variables.⁶ We mistakenly believe unitary identities must lead to certain destinies (e.g., "We must be in conflict because I am a member of group X and you are a member of group Y.") and too often sidestep the deep challenge of wrestling with the complexities of who we are and who we might be.

What is negative identity? Negative identity occurs when a person or group defines themselves by way of contrast to others, either implicitly or explicitly.⁷ What does it mean to be a member of religion X? For some, it

⁴ Externally-imposed identities can create distinct challenges, especially in the context of group conflict, for groups, particularly socially-dominant groups, may be invested in preserving such identities as an aspect of preserving social power. On challenges to navigating identity issues in such contexts, see, e.g., Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259 (2000) (examining identity-related challenges racial minorities, especially Blacks, often experience when working in predominantly White institutions).

⁵ See Harry G. Frankfurt, *Freedom of the Will and the Concept of a Person*, 68 J. PHIL. 5 (1971).

⁶ As Sen writes, "[W]e have to draw on the understanding that the force of a bellicose identity can be challenged by the power of *competing* identities. These can, of course, include the broad community of our shared humanity, but also many other identities that everyone simultaneously has." SEN, *supra* note 2, at 4. See also *id.* at 18–39.

⁷ My use of the term "negative identity" differs from Nancy Leong's, whose definition focuses on social marginality, viz., "identity marked by indifference or antipathy to something that much of society considers fundamental" such as being "atheist, asexual,

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means in part *not* to be a member of religion Y. “Who am I?” asks a teenager. One possible answer, even if never consciously articulated, is “I am *not* my parents.” The teenager or religious adherent could of course define their identities positively, e.g., “I follow religion X because I accept its tenets.” Yet for many people, who we are *not* is critical to our self-definition. We define ourselves, in whole or in part, negatively against an *anti-self*—the person or group whom we see ourselves as not being. On occasion, this may be valuable. As a step toward individuation, the teenager recognizing that “I am *not* my parents” may be useful. So, too, members of different social groups frequently make in-group versus out-group distinctions in the subconscious pursuit of safety, a process with neurobiological roots.⁸ However, as discussed below, as a place to dwell permanently, negative identities come with significant risks.

Having a negative identity is different from simply holding different preferences from another person or group. All the time people disagree because one wants a certain outcome and the other wants a different outcome. One lobbyist hopes that the proposed legislation passes while the other hopes that it fails. Two friends disagree about which movie to see because they have different tastes. Such situations, however, do not necessarily reflect negative identities. While people holding different preferences may have negative identities, and while negative identities may lead people to hold different preferences, neither is a necessary condition for the other. At root, negative identity is not about whether we want different outcomes but rather how one constitutes oneself.

Having a negative identity is also different from simply being members of different groups. Yin may be a diehard Yankees fan, and Dara may be a diehard Dodgers fan, but that does not mean that they define themselves against one another. However, Roger, a diehard Red Sox fan, may despise the Yankees so much that being anti-Yankee is a significant part of his Red Sox fan identity. Imagine that the Yankees are playing a game against a fourth team, say the Cardinals. Dara, the Dodgers fan, may not much care

single, or childfree.” Nancy Leong, *Negative Identity*, 88 S. CAL. L. REV. 1357, 1357 (2015).

⁸ See Mina Cikara & Jay J. Van Bavel, *The Neuroscience of Intergroup Relations: An Integrative Review*, 9 PERSP. ON PSYCHOL. SCI. 245, 245–53 (2014) (reviewing psychological and neurobiological research concerning in-group versus out-group relations). In the past decade, the legal dispute resolution literature has paid increasing attention to such findings. See Elizabeth E. Bader, *The Psychology and Neurobiology of Mediation*, 17 CARDOZO J. CONFLICT RESOL. 363 (2016); Richard Birke, *Neuroscience and Settlement: An Examination of Scientific Innovations and Practical Applications*, 25 OHIO ST. J. ON DISP. RESOL. 477 (2010); Jeremy Lack & Francois Bogacz, *The Neurophysiology of ADR and Process Design: A New Approach to Conflict Prevention and Resolution?*, 14 CARDOZO J. CONFLICT RESOL. 3 (2012).

whether the Yankees win or lose, but Roger may take great joy if the Yankees lose.⁹ Simply being members of distinct groups is not the same as holding negative identities, though it may sometimes lead to such. Rather defining oneself through contrast to another lies at the core of negative identity.

Frequently there is a backward-looking quality to negative identities.¹⁰ Why do I define myself as “not you”? Often it is because of something that has happened in the past, and holding a negative identity helps its holder cling to that past. An adult (rather than a teenager) who regularly defines herself as “I am not my parents” may be nursing old wounds. A divorced person who regularly sees himself as his former spouse’s “ex” may be doing the same. Note, too, that negative identities can wax and wane. Initially two parties may simply disagree with one another, but if they have enough disagreements for a long enough time, and especially if a measure of insult is added, they may come to define themselves as adversaries.

Research suggests that over the past two decades members of both major American political parties are increasingly defining themselves in negative ways; to be a Democrat means to be opposed to the Republicans and vice versa.¹¹ In my view, such polarization goes beyond simply being skeptical about what the other side says¹² or seeing the world through zero-sum lenses,¹³ but is rather about seeing them and us fundamentally as adversaries. I note that building a group’s negative identity has repeatedly been used throughout history as a winning political formula.¹⁴ “Why should you follow me?” asks the strongman politician, “because I will protect *us* from *them*.” Intergroup conflict, of course, makes that message more appealing. Social dislocation can be an important factor in this dynamic as well. In times of significant change when old roles and identities no longer seem to “work,” people often seek to

⁹ The taste for another’s suffering, though certainly not necessary for negative identity, may well indicate one.

¹⁰ I thank Robin Davis for this insight.

¹¹ See EZRA KLEIN, WHY WE’RE POLARIZED 8–10, 60–64, 75–79 (2020) (on the rise of negative partisanship in America over the past several decades); Alan I. Abramowitz & Steven W. Webster, *Negative Partisanship: Why Americans Dislike Parties But Behave Like Rabid Partisans*, 39 ADVANCES IN POL. PSYCHOL. 119, 119–23 (2018); Thomas B. Edsall, *The Audacity of Hate*, N.Y. TIMES, (Feb. 19, 2020), <https://www.nytimes.com/2020/02/19/opinion/trump-anger-fear.html> (on the strategic use of negative partisanship for political gain).

¹² Such skepticism relates to what social psychologists call “reactive devaluation,” the phenomenon of devaluing a proposal made by the opposing side in a conflict because *they* were the ones to suggest it. ARROW ET AL., *supra* note 4, at 26, 26–42.

¹³ See Jonathan R. Cohen, *A Genesis of Conflict: The Zero-Sum Mindset*, 17 CARDOZO J. OF CONFLICT RESOL. 427 (2016).

¹⁴ See generally PANJAK MISHRA, *THE AGE OF ANGER: A HISTORY OF THE PRESENT* (2017) (on the rise of nationalistic leaders following periods of social dislocation).

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redefine themselves, and defining themselves negatively against some evil “other” can be especially attractive.¹⁵

III. SOME PROBLEMS CAUSED BY NEGATIVE IDENTITIES

What is wrong with such negative self-definition? There are many problems. Holding a negative identity can be unnecessarily self-constraining. Imagine, for example, a man who defines what it means to be a man as “not being a woman.” Such a man may suppress important human qualities such as compassion, nurturance, and sensitivity because he sees them as “womanly” rather than simply human qualities, and thereby lose out on the joys that such qualities may help produce.

Holding a negative identity may increase the odds that one will adopt hostile views about and actions toward one’s anti-self. The teen who defines himself as “not my parents” may be more likely to fight with his parents. Members of group X who define themselves as not being members of group Y may become more likely to fight with members of group Y. The backward-looking focus of certain negative identities may be a piece of this, but there are other factors, too. Prejudice and bias are not uncommon features of such negative self-definition,¹⁶ as are psychological mechanisms such as denial and projection (e.g., ascribing to others qualities that one does not wish to face in oneself),¹⁷ often in the context of shame.¹⁸ Ascribing evil motives or even nefarious practices to one’s anti-self can even occur. If they are more successful than we are, then they must be tricksters and liars. On occasion, sentiments of purity and righteousness become linked to negative identities: we are the pure and clean while those that we label as the taboo are dirt/filth/contamination.¹⁹ For example, judges or jurors who either

¹⁵ *Id.*

¹⁶ For example, in many historical eras, movements both religious and non-religious have defined themselves in part against a Jewish foil, a practice that has contributed to anti-Semitism. See DAVID NIRENBERG, *ANTI-JUDAISM: THE WESTERN TRADITION* (2014).

¹⁷ On such projection in the context of colonization, see Albert Memmi, *Mythical Portrait of the Colonized*, in ALBERT MEMMI ET AL., *THE COLONIZER AND THE COLONIZED*, 79, 79–89 (Beacon Press 1991) (1965).

¹⁸ E-mail from Jennifer Reynolds, Assoc. Professor & Faculty Dir., Univ. of Oregon School of Law ADR Center to Jonathan Cohen (Jan. 31, 2020, 18:43 EST) (on file with author) (Jennifer Reynolds suggests that in some cases negative identities are produced by “shame turned outward,” making such conflicts especially difficult. “If negative identity is shame turned outward, then this is another reason why conflicts involving negative identity are difficult to resolve—they may ask people to look at themselves more honestly, which could be very painful.”).

¹⁹ See generally MARY DOUGLAS, *PURITY AND DANGER* (2002).

consciously or subconsciously hold the positive identity of being a law-abiding citizen may treat criminal defendants differently from those who, usually subconsciously, hold a negative identity of not being a criminal, an identity that may lead them to want to rid society of criminal filth.²⁰ Again, these are not all-or-nothing propositions. Many of us hold both such identities; the question is in what measure.

When conflicts occur, negative identities may make them harder to resolve, for, in addition to all of the “usual” problems that arise when parties are in conflict,²¹ sometimes the other party will present ideas and information that challenge our sense of self. Rather than listening to such dissonant ideas and information, we may consciously or subconsciously choose to ignore it, protecting our sense of self at the price of possible resolutions. Anyone, of course, can present ideas and information that challenge a person’s sense of self, but when a person has a negative identity, the words of the anti-self are likely to be especially threatening to one’s identity. Empathy—often a key to conflict resolution—is also likely to be particularly difficult in the context of negative identity. If I have defined myself as “not you,” then trying to understand how the world looks from your perspective is likely to be difficult, if not destabilizing to my very sense of self. Put differently, negative identities can act as a psychological blind spot, with the anti-self-standing at the center of that blind spot.

IV. CONFLICT RESOLUTION IN THE CONTEXT OF NEGATIVE IDENTITY

What can be done when conflicts arise in the context of negative identities? Sometimes conflicts can be handled in a limited way, where problems are defined narrowly, and the parties pursue an immediate solution to the instant problem rather than attempting a deeper dialogue. Such narrow solutions are often quite useful. The parties don’t need to try to see the world through the other’s eyes—through the eyes of their anti-self—but can simply reach an agreement that would serve them better than would no agreement.

But is there not more that can be done beyond finding limited, narrow solutions at times? Might not deeper levels of conflict resolution and even human growth occur in the context of negative identity? And, if so, how is that to come about? Let me begin by addressing those questions from the perspective of the holder of the negative identity, i.e., how a good-willed

²⁰ On the judges’ tendency to describe criminality in the language of filth, see Martha Grace Duncan, *In Slime and Darkness: The Metaphor of Filth in Criminal Justice*, 68 TUL. L. REV. 725 (1993-1994); MARTHA GRACE DUNCAN, ROMANTIC OUTLAWS, BELOVED PRISONS: THE UNCONSCIOUS MEANINGS OF CRIME AND PUNISHMENT (1996).

²¹ See ARROW, ET AL., *supra* note 4.

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holder of a negative identity might choose to act. Admittedly, many holders of negative identities may not choose to take such steps, but considering this idealistic perspective is a valuable intellectual exercise. First, some such negative-identity holders may choose to engage in this work of their own initiative. Second, this perspective provides food-for-thought about how others—most notably third-party neutrals and the anti-self—might engage with holders of negative identities, a subject I will then consider.

For holders of negative identities, a first option is to listen to the other party with an open heart and mind, with a willingness to do the hard work of thinking deeply about what they say and perhaps be changed by that.²² Listening does not, of course, automatically imply agreement, but if one has no willingness to let one's thoughts and feelings be changed through dialogue, why hold the dialogue? In the context of negative identities, empathetically listening to one's anti-self is especially important. What has their experience been? What does the world look like through their eyes? What would it feel like to stand in their shoes? Likely one's anti-self will see the situation, both current and historical, through a different set of lenses. Hearing their take on things, challenging though that may be, may broaden one's understanding at a deep level.

A second option is for a party to examine or even interrogate their own identity. Why do I define myself this way? Must I define myself this way? It is often asserted that we should study the past so that we do not repeat mistakes that were made in the past. That is certainly an important reason to examine our previous experiences. However, when thinking about negative identity, there is another very important reason to study the past: to better understand who one is.²³ Why do I hold the identities that I do? And if one of those is a

²² See Jonathan R. Cohen, *Open-Minded Listening*, 5 CHARLOTTE L. REV. 139, 146 (2014). See also Carrie Menkel-Meadow, *Why We Can't Just All Get Along: Dysfunction in the Polity and Conflict Resolution and What We Might Do About It*, 2018 J. DISP. RESOL. 5, 7–11 (2018) (arguing that much conflict cannot be “reasoned away” by our brains but that our hearts must be involved for meaningful change to occur).

²³ In this regard, the approach suggested here differs from much conflict resolution analysis that is derived from economic game theory. Neoclassical economic theory generally takes parties' preferences, including their intertemporal preferences, as essentially given. See SEN, *supra* note 2 (As with Sen's analysis of identity and violence, the approach suggested here recognizes that preferences and identities may evolve over time, in part from experience, [e.g., bitter, ongoing conflict may produce negative identities and preferences associated with them] but also in part through deliberate choice). See generally George J. Stigler & Gary S. Becker, *De Gustibus Non Est Disputandum*, 67 AMER. ECON. REV. 2, 76 (1977); Gary S. Becker & Kevin M. Murphy, *A Theory of Rational Addiction*, 9 J. POL. ECON. 4 (1988); Jonathan R. Cohen, *On Reasoned Choice* 36–84 (1993) (unpublished Ph.D. dissertation, Harvard University) (on file with the Harvard University Library). Put differently, conflict is not simply a matter of strategic,

negative identity, where did it come from? Is it something I like? Is it something that I want to hold on to? As mentioned above, one of the great human freedoms is choosing who we want to be. Examining one's own identities is critical to such choice. Further, such self-examination can be essential for conflict resolution. If I can understand how I came to define myself as "not you," I may then be able to define myself in a new, positive way. If I can do that, resolving our conflicts may become much easier.

A third option for the holder of the negative identity may be to accept that, yes, I do hold a negative identity vis-à-vis my anti-self, but also recognize that both of us hold multiple identities. Might it be possible for us to focus on what we have in common rather than what drives us apart? "I'm a member of group X and you're a member of group Y, and as members of these groups we disagree deeply about certain things. But I am not only a member of group X and you are not only a member of group Y. Perhaps if we can look at what we have in common we can work out some of our differences."

Are there steps that others, most notably third-party neutrals and the anti-self, can take to promote conflict resolution in the context of negative identity? The brief answer (for exploring this topic at length is beyond my scope here) is "yes." Many already do so to some degree. Most mediations begin by allowing each party to share its version of the dispute with the other party. Where parties hold negative identities, this can be especially valuable, for hearing the other party's experiences and perspective can lead one to rethink many things. Indeed, one school of mediation takes as its central goal promoting the parties' *understanding* of their dispute,²⁴ an inquiry that conceivably may reach into probing the parties' identities.²⁵ What identity(ies) do you hold and where did they come from? Consider Carrie Menkel-

intertemporal interaction, it is also a process through which the parties themselves are constructed—and may choose aspects of their own construction. Critical to this process of identity construction are the stories we tell ourselves. See SARA COBB, *SPEAKING OF VIOLENCE: THE POLITICS AND POETICS OF NARRATIVE IN CONFLICT RESOLUTION* 15 (2013) ("Although the interest-based discourse has certainly contributed to conflict resolution, it has fit, hand-in-glove, to the discourse of rational choice theory, which disattends to the presence and creations of meaning systems and their relation to violence.").

²⁴ See, e.g., GARY FRIEDMAN & JACK HIMMELSTEIN, *CHALLENGING CONFLICT: MEDIATION THROUGH UNDERSTANDING* (2009).

²⁵ I think of the increasing role of Internal Family Systems psychological theory (viz., exploring different parts of a person's psyche and engaging in dialogue with such parts) in mediation. See David A. Hoffman, *Mediation, Multiple Minds, and Managing the Negotiation Within*, 16 HARV. NEGOT. L. REV. 297 (2011); Leonard L. Riskin, *Managing Inner and Outer Conflict: Selves, Subpersonalities, and Internal Family Systems*, 18 HARV. NEGOT. L. REV. 1 (2013).

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Meadow's description of many successful dialogue processes designed to foster intergroup conflict resolution:

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.²⁶

When third-party neutrals foster conversations that help parties see one another as full people (e.g., people who also have fears, stresses, and vulnerabilities), dialogue can become much easier.²⁷ In areas of group conflict, good historical education, too, can play an extremely valuable part, helping each side understand not only its own history but its counterpart's history. I emphasize "good" for, especially in the context of group conflict, all too often history is taught in a limited way (e.g., teaching only the history that valorizes our side) rather than in a rich and critical way.

When one party holds a negative identity, are there things the anti-self can do to help promote conflict resolution between them? Briefly, the answer here is "yes" as well, though the task is not simple. In some conflicts, a direct approach of asking questions such as "How did you come to feel this way?" "Why do you see me the way that you do?" or even "How do you understand the past and how it has brought us here?" may be possible. In other conflicts, an indirect approach may yield better results. For example, one may try to act in ways that create cognitive dissonance in the mind of the party who holds a negative identity. Recall the historic, non-violent civil rights protests led by Dr. Martin Luther King, Jr. Many Whites defined themselves (and unfortunately still define themselves) as not Black, including stereotyping Blacks, especially Black men, as criminal and violent.²⁸ A piece of the brilliance of the non-violent protests was that those protests called attention to

²⁶ Menkel-Meadow, *supra* note 23, at 16.

²⁷ *Id.* at 16–17.

²⁸ See, e.g., Katheryn K. Russell, *The Racial Hoax as Crime: The Law as Affirmation*, 71 IND. L.J. 593 (1996) (critiquing the prejudicial but influential myth of the "criminalblackman"); KATHERYN RUSSELL-BROWN, *THE COLOR OF CRIME* (2008).

the racism of segregation in a way that created a cognitive dissonance for Whites: it was the Black protesters who were peaceful and the White police and mobs who were violent. Such dissonance, in my view, was an aspect of why these protests gained wide media coverage.

V. A LITERARY EXAMPLE – JACOB AND ESAU

Sometimes a story can bring abstract ideas to life. When it comes to interplay between negative identity and conflict, I know of no literary example illustrating this interplay better than the biblical saga of Jacob and Esau.²⁹ According to the Bible, Jacob and Esau were twins born of their parents Isaac and Rebekah. Even in utero, the brothers struggled against each other, apparently causing Rebekah significant discomfort:

[T]he children struggled in her womb, and she [Rebekah] said, “If so, why do I exist?” She went to inquire of the Lord, and the Lord answered her, “Two nations are in your womb, two separate peoples shall issue from your body; one people shall be mightier than the other, and the older shall serve the younger.”³⁰

Jacob’s name itself reflects this strife. The Hebrew word for Jacob, *Ya’akov*, is a variant of the word *ekev*, meaning heel. Why is Jacob called *Ya’akov*? The Bible explains that Jacob is so named because he emerged from Rebekah’s womb grasping his older brother Esau’s heel.³¹ Names and identity go hand in

²⁹ I write “literary example” for the historicity of these early Biblical narratives is a subject of much dispute, due in part to the absence of archeological evidence confirming such narratives. See ISRAEL FINKELSTEIN & NEAL SILBERMAN, *THE BIBLE UNEARTHED* 35 (2001); THOMAS L. THOMPSON, *THE HISTORICITY OF THE PATRIARCHAL NARRATIVES: THE QUEST FOR THE HISTORICAL ABRAHAM* 2–3 (1974); THOMAS L. THOMPSON, *BIBLICAL NARRATIVE AND PALESTINE’S HISTORY: CHANGING PERSPECTIVES* 2, 55 (2013) (“The current standard interpretation of the conflict themes in the Jacob narratives understands the stories as more or less *historiographic* traditions that reflect real historical or sociological conflicts between ancient Israel and neighboring or related groups of people[.]”).

³⁰ *Genesis* 25:22–23. All biblical verses come from the Jewish Publication Society’s 1985 translation.

³¹ *Genesis* at 25:26.

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hand, especially in the Bible,³² and from his very birth Jacob is defined in contrast to his brother.

This contrast between the twins continues to be a theme as they grow, each serving as a foil to the other. Esau is defined as a “skillful hunter, a man of the outdoors; but Jacob was a mild man who stayed in camp.”³³ Their father Isaac prefers Esau while their mother Rebekah favors Jacob.³⁴ As one might expect, conflict becomes a defining theme of the brothers’ lives. First, there is the stew story in which Jacob extracts from a famished Esau his firstborn birthright in exchange for a bowl of red pottage.³⁵ Next comes the story from the deathbed of their blind, elderly father Isaac,³⁶ where at Rebekah’s behest Jacob masquerades as Esau, donning Esau’s clothes and covering his hands and neck in goat skins to feel like the hairy Esau.³⁷ Further, when Isaac asks Jacob which of his sons he is, Jacob answers, “I am Esau, your first-born,”³⁸ so as to receive from Isaac Esau’s firstborn blessing.³⁹ Isaac bestows upon Jacob that firstborn blessing and immediately thereafter, Esau arrives, Jacob now departed.⁴⁰ Upon discovering that Isaac has bestowed the firstborn blessing upon Jacob, Esau bursts into wild and bitter sobbing and pleads with their father to bless him as well (“Have you but one blessing, Father? Bless me too, Father!”).⁴¹ The response he receives is as much a curse as a blessing.⁴² Esau becomes enraged and vows to kill Jacob once the days of mourning for

³² Names signifying certain meanings or identities are common in the Bible, and this is especially clear in the Hebrew. See, e.g., *Genesis* 2:7 (the first person, *Adam*, is created out of the dust of the Earth [*Adamah*]); *Genesis* 2:10 (Moses [*Moshe*] is so named because Pharaoh’s daughter drew him out of the water, *M’shiteihu*). This is like calling the first-person Adam “Earthling” and Moses “From Water Drawn.” By rough analogy, one might think of the names of modern-day superheroes like “Spiderman” (who is part spider and part person), “Superman” (who possesses superpowers), or “Flash” (who moves in a flash); their names deeply signify their characters. Additionally, as with Jacob’s being renamed “Israel,” name changes in the Bible carry much meaning. See, e.g., *Genesis* 17:4–5 (on Abram’s renaming to “Abraham”); *Genesis* 17:15–16 (on Sarai’s renaming to “Sarah”).

³³ *Genesis* 25:27.

³⁴ *Genesis* 25:28.

³⁵ *Genesis* 25:29–35.

³⁶ *Genesis* 26:34 (Jacob and Esau are now at least forty).

³⁷ *Genesis* 27:16.

³⁸ *Genesis* 27:19.

³⁹ *Genesis* 27:18–19.

⁴⁰ *Genesis* 27:28–29.

⁴¹ *Genesis* 27:34–38.

⁴² *Genesis* 27:39–40 (“See, your abode shall enjoy the fat of the earth and the dew of heaven above. Yet by your sword you shall live, and you shall serve your brother; but when you grow restive, you shall break his yoke from your neck.”).

their father Isaac have ended.⁴³ Fearing imminent fratricide, Rebekah advises Jacob to flee, which he does.⁴⁴

The two brothers will not meet again until some twenty years later, years during which Jacob, once the deceiver, now becomes the deceived.⁴⁵ What will happen when they meet? As biblical readers may recall, the brothers reconcile,⁴⁶ but it is what takes place on the eve of their reconciliation that is most suggestive concerning the value of moving beyond negative identity for conflict resolution.

The setting for their re-encounter is the land of Seir where Esau dwells. As Jacob and his large entourage approach that land, he first sends messengers to announce his peaceful intentions.⁴⁷ The messengers return, announcing that Esau is approaching with four hundred men.⁴⁸ Fearing a violent encounter, Jacob divides his followers into two camps—if Esau attacks one camp, at least the other may escape.⁴⁹ That evening—the evening before Jacob will meet Esau again—we are told of a strange incident:

[That night] Jacob was left alone. And a man wrestled with him until the break of dawn. When he saw that he had not prevailed against him, he wrenched Jacob's hip at its socket, so that the socket of his hip was strained as he wrestled with him. Then he said, "Let me go, for dawn is breaking." But

⁴³ *Genesis* 27:41.

⁴⁴ *Genesis* 27:42–44.

⁴⁵ *Genesis* 29:14–28. I refer to Jacob's marriages to sisters Rachel and Leah. *Id.* Jacob loved Rachel and worked for her father Laban for seven years believing his reward would be marrying Rachel. *Id.* Yet Laban tricks Jacob into marrying the older sister Leah. *Id.* Jacob is then permitted to marry Rachel one week later, but only if he toils in Laban's service for another seven years, which he does. *Id.* Perhaps in this what-goes-around-comes-around story (Jacob, who once deceived his father Isaac, now becomes deceived by his father-in-law Laban), there is a hint concerning the maturation of Jacob's identity. Might experiencing the pain of having been deceived taught Jacob empathy for his brother Esau, causing Jacob to rethink his own past actions? As with much of the Bible, the text is sparse and the reader can only speculate, but this story too is suggestive of Jacob reexamining his own life, including his own identity.

⁴⁶ *Genesis* 33:4 ("And Esau ran to meet him [Jacob], and embraced him, and fell on his neck, and kissed him; and they wept."). I note, however, that the Bible describes later hostility between the Amalekites (descendants of Esau) and the Israelites (descendants of Jacob). *See, e.g., Exodus* 17:8–16.

⁴⁷ *Genesis* 32:4–6.

⁴⁸ *Genesis* 32:7.

⁴⁹ *Genesis* 32:8.

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he answered, "I will not let you go, unless you bless me." Said the other, "What is your name?" He replied, "Jacob." Said he, "Your name shall no longer be Jacob, but Israel, for you have striven with beings divine and human, and have prevailed."⁵⁰

For generations, biblical commentators have wrestled with the question of exactly who or what this mysterious figure was who wrestled with Jacob, in part due to the ambiguity of the final sentence above: "Your name shall no longer be Jacob, but Israel, for you have striven with beings divine and human, and have prevailed."⁵¹ Was this mysterious being a person? Might he have been an angel or perhaps even God? The great 11th century French commentator Rashi saw this mysterious being as Esau's guardian angel.⁵² In a similar vein, contemporary Jungian psychologist Esther Spitzer views him as Jacob's own psychological shadow, the parts of his own personality that he would rather not face.⁵³ Whatever the exact nature of this mysterious wrestler, most noteworthy is the act and timing of the renaming. It is on the eve of Jacob's reconciliation with his lifelong rival, his anti-self Esau, that Jacob receives the new name, and hence new identity, of "Israel."

The Jacob and Esau narrative is suggestive of several ideas concerning the interaction between negative identity and conflict. First and most basically, negative identity may help to produce conflict. The characters Jacob and Esau are essentially anti-selves to one another, and so long as they hold these negative identities, conflict is the dominant theme of their relationship.

Second, the internal work of moving beyond a negative identity may be essential to conflict resolution. Once a party can see itself as more than "not them," working out differences with "them" may become easier. Jacob's reconciliation with his lifelong rival Esau occurs the day after he goes from being Jacob-the-heel-grabber to Israel-the-God-wrestler. Conflict resolution professionals frequently strive to create safe spaces for dialogue between the parties, such as mediation. Where a party holds a negative identity, finding a safe space for that party's *internal* exploration of their negative identity may also be essential. As Jennifer Reynolds writes, "[When people hold strong

⁵⁰ *Genesis* 32:25–30.

⁵¹ *Genesis* 32:25–30.

⁵² See ABRAHAM BEN ISAAH & BENJAMIN SHARFMAN, *THE PENTATEUCH AND RASHI'S COMMENTARY: A LINEAR TRANSLATION INTO ENGLISH: GENESIS 330* (1976).

⁵³ Esther Spitzer, *A Jungian Midrash on Jacob's Dream*, in *THE RECONSTRUCTIONIST* 22–23 (1976), as quoted in *THE TORAH: A MODERN COMMENTARY* 223 (W. Gunther Plaut ed., 1981).

negative identities, it] may be that creating spaces in which people with different views can talk is less important than creating spaces [for] someone to explore what his/her/their negative identity is all about.”⁵⁴

Third, seeking to resolve conflict with one’s anti-self can serve as a catalyst for reworking one’s identity when that identity is, in part, a negative one. Why is it difficult to meet with people with whom we are in conflict? Part of the reason is that such encounters often “stir up stuff” within ourselves. At times, such encounters may force us to face aspects of our negative identity that we usually do not face.⁵⁵ Put differently, the interaction between negative identity and conflict resolution may be bi-directional: facing one’s negative identity may aid in resolving conflict with one’s anti-self, and engaging in constructive dialogue with one’s anti-self may lead one to rethink one’s negative identity.

VI. CONCLUSION

Identity is a core piece of the human experience. All too often, conflict is a piece of the human experience, too. Here, I have suggested that a particular form of identity—negative identity—may make conflicts more likely to arise and also make them more difficult to resolve when they do. Fortunately, all is not lost. For example, through open-minded listening, self-examination, and embracing different aspects of our identities we may be better able to resolve conflicts. Third party neutrals and the other party to the conflict (i.e., the anti-self) can also take steps to promote conflict resolution in the context of negative identity, steps that may lead parties to rethink their very sense of self. Such steps may not be easy, but they are possible. When they succeed, conflict resolution becomes not only a process for resolving disputes, but also a means of human growth.

⁵⁴ Reynolds, *supra* note 19.

⁵⁵ Note that Jacob’s reencounter with Esau appears not to be a matter of choice, but necessity, for tension between Jacob and his father-in-law Laban has led Jacob to depart Laban’s home. *Genesis* 25:22–23.

The Spaces We Make: Dialogic Classrooms and Social Transformation

JILL DeTEMPLE*

- I. INTRODUCTION: SPACE AND POSSIBILITIES
- II. HOLDING SPACE: REFLECTIVE STRUCTURED DIALOGUE AND DIALOGIC CLASSROOMS
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- V. SHIFTING THE SPACE: POSSIBILITIES FOR OUT THERE

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ABSTRACT

Recent research examining the use of Reflective Structured Dialogue in undergraduate classrooms shows that classes that are intentionally designed to invite reflection, curiosity, and connection across difference increase student engagement, comprehension of course content, and willingness to entertain ideas at variance with native worldviews. This paper outlines the principles of dialogic classrooms, including their basis in Reflective Structured Dialogue, an approach to conflict transformation. Moving to a Ph.D. core seminar as a case study, the paper then considers the ways in which conflict management principles—especially the intentional crafting of spaces to hold relationships in curiosity, openness, and vulnerability—can shape what is possible in human relationships. Students who are graduates of dialogic classrooms can shape spaces in professional and other social settings, inviting productive discourse that works against the flattening effects of polarization.

I. INTRODUCTION: SPACE AND POSSIBILITIES

Early in my teaching career, I was assigned a new classroom in which to conduct a standard course in our general education curriculum for undergraduates, now titled “Religious Literacy.” I had taught the class several times before and was not particularly daunted by its relocation to classrooms on the ground floor of my university’s freshly completed Residential Commons, undergraduate facilities designed to foster a sense of community, when we began requiring sophomores as well as first-year students to live on campus. Though I knew the classrooms had been hastily finished, with furnishings arriving just a few days before the start of term, I imagined a light, flexible space considerably more adept than the boxy classrooms—still sporting blackboards and their accompanying clouds of chalk dust—to which I had become accustomed in my home building, which enjoys a note on the National Historic Register.

When I walked in that first morning, however, I came to understand very quickly that “new” did not equate with “better.” The room was shaped like an L, so that it was almost impossible to have all 35 students looking either in one direction or at each other. A pillar in the middle of the room impeded any clear vision of a screen meant for the projection of technology, and the white board was mounted on a different wall than the screen, making it exceedingly awkward to use both in the same session. While this was disorienting enough, I quickly came to learn that the handful of students who arrived a few minutes late were locked out of the room, imprisoned in a foyer I could not see from my corner of the L. The moveable furniture I had coveted for years was too big for the space, making it impossible to actually use in any meaningful way. It was, as I reported to a colleague fated to teach in the same place later in the day, a classroom from hell.

It is standard knowledge among mediators that space matters. I have watched my partner in Reflective Structured Dialogue work, John Sarrouf, agonize over the symmetry of a circle of chairs, and I have listened as mediation experts emphasize the importance of holding one’s hands and body just so in order to elicit possibilities in the responses of their clients. This is knowledge of which the religious people I study are also aware. Cathedrals, temples, and mosques are designed to inspire awe and contemplation; adherents know what to do with their bodies and voices in places and times of reverence. As demonstrated by that poorly planned classroom, however, the academy often neglects spatial considerations when it comes to pedagogy, a lacuna that goes well beyond the physical.

This paper argues for the careful crafting of pedagogical spaces through processes of thoughtful reorientation that an emphasis on dialogic

practices can provide. The lessons learned from research on dialogic classrooms and a case study taken from a graduate core seminar, reoriented using dialogic principles, suggest that crafting pedagogical spaces using dialogic approaches positively shapes what is possible in human relationships—between students in a class, between students and course materials, and to future iterations of relationships in professional and social settings as students learn the skills and intention required to deliberately create spaces that hold and encourage productive vulnerabilities and connections across differences.

II. HOLDING SPACE: REFLECTIVE STRUCTURED DIALOGUE AND DIALOGIC CLASSROOMS

The genesis of these observations is work which begun in 2016 that tested Reflective Structured Dialogue as a pedagogical approach to connection across difference in postsecondary classrooms. Pioneered by a group of family therapists in Cambridge, MA in the wake of abortion clinic violence in the late 1980s, Reflective Structured Dialogue (RSD) is an approach to speaking and listening across differences employed by non-profit Essential Partners, Inc. (formerly Public Conversations Project). Drawing on lessons learned from dysfunctional family dynamics, RSD was designed by members of the Family Institute of Cambridge to disrupt stuck and reactive patterns of discourse that often manifest around polarizing issues. As several founders described it:

[RSD is] an approach to creating contexts in which opponents in long-standing conflicts over public issues can move beyond stereotyping, polarizing rhetoric and defensive reactivity, contexts where they can relate in ways that enable them to understand more fully the beliefs, meanings, values, and fears held not only by their opponents, but also by themselves.²

Core practices of RSD include giving participants time to reflect before speaking and listening, giving attention to the ways in which personal experiences and deeply held beliefs and values influence people's positions on

² Richard Chasin et al., *From Diatribe to Dialogue on Divisive Public Issues: Approaches Drawn from Family Therapy*, 13 *MEDIATION Q.* 323, 324 (1996); see generally, Carol Becker et al., *From Stuck Debate to New Conversation on Controversial Issues*, 7 *J. OF FEMINIST FAM. THERAPY* 143 (1995).

polarizing issues, a structured format that equalizes time to speak and listen amongst participants, an emphasis on speaking to be understood and listening to understand rather than one of persuasion, and a focus on curiosity as a positive value. All of these practices create a space in which people are encouraged to be reflective rather than reactive, a stance that breaks the stuck loops of discourse described above. Essential Partners has used RSD since 1989 to encourage deep listening and constructive speaking such that people can build trust and understanding across differences. The organization regularly works with faith communities around issues such as sexuality and science; civic organizations around issues of policing, space allocation, or other community concerns; and educational institutions around issues of expression, diversity, and community engagement. In 2018, Essential Partners mediated a national conversation about guns that brought 21 Americans to Washington D.C. to talk about their views on gun ownership and regulation.³

Classroom applications are more recent and are the result of an ongoing collaboration between John Sarrouf, Co-Executive Director and Director of Strategic Partnerships at Essential Partners, and a growing team of researchers and practitioners. In 2016, following a two-year sustained conversation about free expression issues on college campuses, Mr. Sarrouf and I developed and led a two-day workshop on the use of RSD in Religious Studies classrooms for the Graduate Program in Religious Studies at Southern Methodist University.⁴ In 2017, we began a major research project investigating the use of RSD in undergraduate classrooms to promote intellectual humility and conviction with faculty from five institutions in the diverse fields of sociology, philosophy, social work, and biological science focused on stem cell research.⁵

After several months of collaborative work aimed at defining intellectual humility and conviction, ways to measure those traits using quantitative and qualitative instruments, class observations designed to assess

³ Diane Tsai et al., *What Happens When You Reimagine the Difficult Conversation about Guns*, TIME (Apr. 4, 2018), <https://time.com/5226590/guns-conversation-america/>.

⁴ The workshop was titled, "Conflict and Conversation in Religious Studies Settings." The workshop was funded by the Wabash Center for Teaching and Learning in Theology and Religion in 2016.

⁵ The research referenced in this article was supported by a subaward agreement from the University of Connecticut with funds provided by Grant No. 58942 from the John Templeton Foundation. Its contents are solely the responsibility of the authors and do not necessarily represent the official views of UCONN or the John Templeton Foundation. *See generally*, UNIVERSITY OF CONNECTICUT, <https://humilityandconviction.uconn.edu/globalresearchprojects/> (last visited Apr. 6, 2020). This study was approved by the Southern Methodist University Institutional Review Board.

the ways faculty generally use discussion and positioning in classrooms, and some fine tuning of the established workshop model, the grant leadership team enrolled faculty in short one- to two-day workshops to teach skills in RSD as a classroom practice. Faculty graduates of those workshops who opted into the larger study and who employed at least three instances of dialogic techniques in their classrooms then administered an exit survey to students in their classes via a link to the Qualtrics survey the team had designed. The leadership team trained more than 130 faculty at thirteen institutions and received a total of 428 surveys over three semesters: Fall 2017, Spring 2018, and Fall 2018.

Students were sorted by class standing (first-year through graduate) and gender, though we did not code for race/ethnicity, socioeconomic background, or major. The survey was mixed method, including Likert scale questions (disagree to agree, none to significant, etc.), short explanatory sections, and longer, open-ended written sections (e.g., “Think of a dialogue that occurred in your classroom this semester. What was the topic? Tell a story about what went well and/or did not go well during the conversation”). After analyzing the results of the 2017 survey, we developed tiered questions to better understand potentially ambiguous initial responses⁶ and eliminated some questions that we came to view as not open-ended enough.

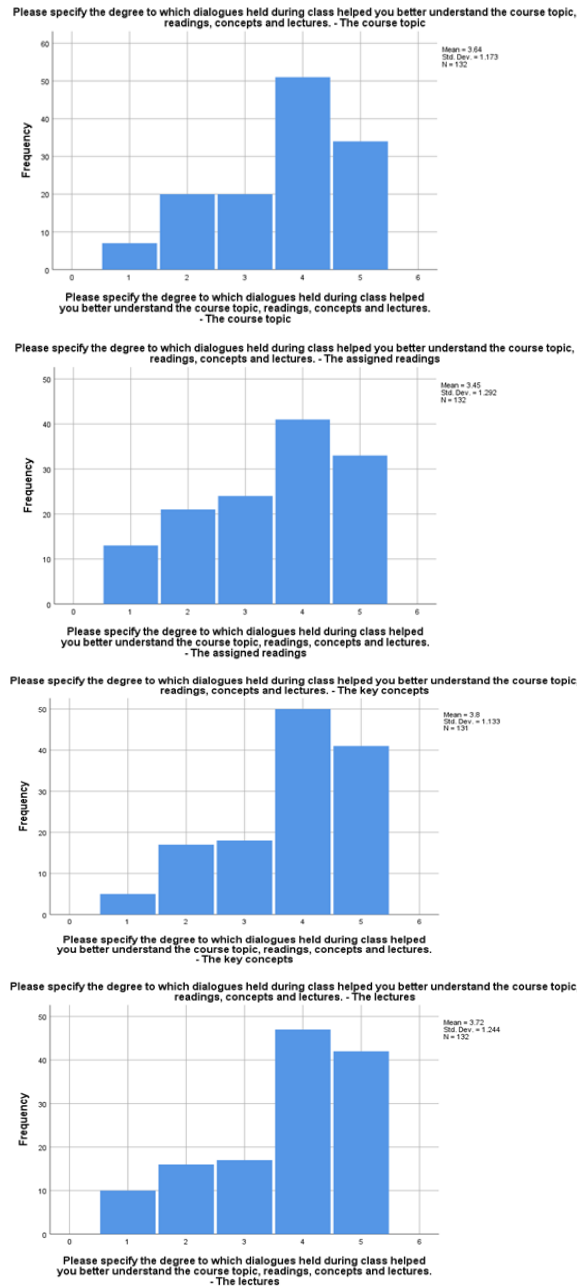
The results of the survey, combined with interviews of participating faculty members and observations of their teaching, show that the use of RSD and accompanying dialogic practices, a cluster of strategies and attitudes we have come to call a “Dialogic Classroom,” resulted in 1) a remarkably robust student engagement with faculty, peers, and course content; 2) a strong sense of belonging in class settings; 3) an increased willingness to speak in class; and 4) a marked willingness and ability to speak and listen across differences, even about contentious subjects.

For example, 99% of students surveyed in 2017 reported that they either somewhat agreed (35%) or agreed (64%) that “dialogues in this classroom helped me understand the course topic, readings, and concepts better.” When broken into categories of course topic, assignments, key concepts, and lectures in the 2018 Spring and Fall surveys for purposes of better understanding which parts of a class students felt dialogue supported, respondents emphasized that dialogue helped them thrive conceptually, and they also felt strongly that it aided them in understanding assignments, lectures, and course topics more broadly (Figure 1).

⁶ For example, did a student report being less likely to be willing to speak because they felt the dialogues shut them down, or because they were actively trying to listen to others?

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Figure 1 – Data from Spring 2018 study survey (n=132). 1 = never, 2 = sometimes, 3 = about half the time, 4 = most of the time, 5 = always



In a similar manner, students almost universally reported a strong sense of belonging in class, something they talked about in the written section of the survey as being related to getting to know classmates better, class experiences that invited listening, and environments that encouraged a sense of comfort and trust between peers. “As we had more dialogues the class became more open and willing to talk to each other rather than the professor,” wrote one student in 2017, answering the question, “In this course, have you seen changes or transformations in how others engage in your class? If YES, please describe.” Another commented: “Before, NO ONE wanted to talk. Over the semester, we had the quietest people join the discussion.” In the Spring 2018 survey, when asked to comment regarding if and why they were more willing to speak in class, one student responded: “We became comfortable with one another and I knew they would be understanding and interested in answering honestly.” Another student elaborated: “Having an open, respectful and friendly environment helped ensure that both me and my classmates understood that a question wasn’t an attack on their ideas or opinions, but an attempt to answer their stance more thoroughly or to point out a new perspective.” Others wrote about making friends in the class or feeling that the classroom environment was welcoming.

Quantitative data from the surveys also support dialogic classrooms as spaces that invite student belonging. When asked if “The opportunity to dialogue in this classroom helped me feel a sense of belonging in this class,” 91% of respondents from the combined pool from Fall 2017, Spring 2018, and Fall 2018 (n=411) either somewhat agreed (43%) or agreed (48%).

Perhaps because of that sense of belonging or the feeling of comfort that comes with it, students reported high levels of willingness to speak in class. When asked if their willingness to speak had increased or decreased over the course of the semester, 63% of students responding to the Fall 2018 survey reported that their willingness to speak in class “increased a little” (38%) or “increased a lot” (25%). When asked why they were more willing to speak, 43% of students named being given time to reflect before contributing, 44% cited an atmosphere of openness, 34% noted that they knew they wouldn’t be interrupted, 48% acknowledged that “hearing different experiences made it easier to add my own,” and 38% noted that “going around the circle made it easier to know it was my turn.” Additionally, 16% of students felt that they needed to fill a silence.

There was no significant correlation between a willingness to speak and a sense that students within a class were likely to agree (.159, R squared variable resulting from regressions analysis). There was, however, a significant statistical correlation between self-reported willingness to speak and a self-reported sense of belonging in class (.449), a self-reported time in

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which the student shared personal identity to give perspective (.454), a self-reported willingness to ask direct questions (.413), and an expressed interest in wanting dialogue in other classes (.473).

Figure 2 - Correlations: Change in Willingness to Speak to Ability to Speak and Listen Across Difference Index, R squared variable from regression analysis.

Fall 2018

	Willing speak
Everyone contributes with disagreements	.137
Want dialogue in other classes	.473**
Dialogues helped understand feelings and beliefs	.406**
Helped feel understood	.395**
Willing to use dialogue beyond classroom	.347**
Different backgrounds committed to thriving	.224*
Sense of belonging	.449**
Felt positively about differing opinions	.278**
Willing to ask direct questions	.413**
Openly disagree	.408**
Shared personal experience understand point of view	.415**
Shared personal identity to give perspective	.454**
Listened respectfully	.249**
Group holding similar opinions?	.159

** indicates statistically significant correlation

When surveyed about their experiences speaking and listening across differences, students reported frequent use of curious questions designed to elicit deep understanding of other people, the ability to express personal experiences, values, and beliefs that led to their positioning, and resilience in hearing points of view that differed from their own. Of students taking the survey in Fall and Spring 2018, for example, 30% reported that the sentence “On more than one occasion, I shared personal experiences, values, or beliefs

that allowed others to understand my point of view” described them moderately well. 34.8% reported that the sentence described them very well, and 20% reported that it described them extremely well. Just 3.8% said that sentence did not describe them. Responding to the sentence, “On more than one occasion, I reconsidered my viewpoints based on others’ perspectives,” 9.7% of students from the combined Fall and Spring 2018 surveys responded that the sentence did not describe them, 20% reported that the sentence described them slightly well, 35.3% responded that the sentence described them moderately well, 26% responded that the sentence described them very well, and 9% responded that the sentence described them extremely well.

Faculty experiences using RSD to create dialogic classrooms were also positive, and in interviews conducted during semesters in which they were engaged in using dialogic techniques, including RSD, faculty spoke about the use of dialogue to increase and enhance student engagement, to support curiosity as an intellectual virtue, and to create classrooms that are student centered. One professor, for example, noted that:

What I think I learned from [the dialogues] has been a slow progression of appreciation for curiosity and what motivates students, and students being empowered and motivated. It’s so much more of a factor in the overall goal of educating someone. It’s been a slow progression of me realizing that, and this has been a capstone kind of—What do they call it when a wave comes crashing over? It’s been the tip of the wave of what I feel like has been a movement towards and appreciation for curiosity and openness.⁷

Another noted that the structure of the dialogues allowed students to overcome a fear of vulnerability, something she tied to intellectual resilience. As she commented in an interview:

Part of curiosity is saying, ‘No, I want to open myself up to the possibility that I’m wrong, I’m completely wrong about this, and I would like to learn [about it], and I would be fascinated to hear another perspective, to

⁷ Interview by Margie DeWeese-Boyd with G1*, Professor, Gordon College (May 16, 2018) [*indicates a pseudonym].

hear something that leads me to reconsider things I've always taken for granted.' But that takes a lot of courage to be engaged with it that way.⁸

Another faculty member commented that the use of dialogues “takes the fear out of the equation” for students who may feel vulnerable in less structured settings. “I think it frees up energy to be a good listener, to be a better listener, to integrate what people tell you and to think, ‘Wow! I never quite thought about it from this perspective.’”⁹

When asked about engagement in their classrooms, many faculty linked student engagement to classrooms structured with students at the center, something dialogues helped them to do. One professor noted that in dialogic classrooms, “Students are engaged enough that they can carry the conversation, that the class is established *as a class*, [there’s a] norm and practice, that that’s what’s happening. And I’m surprised! I find myself thinking new thoughts as a result of the conversation we’re having.”¹⁰ Another commented, as she reflected on learning to implement dialogue, “That was really the biggest thing I took away, was how to write really powerful questions where I could then take myself out of it and let the students really dig in.”¹¹

When well crafted, dialogic classrooms create spaces where students feel supported in being curious, speaking and listening across difference, and engaging with each other and course materials in meaningful ways that may create lasting social and intellectual change. We now turn to the architecture of those spaces before considering a case study that examines how such architecture was employed to reorient a graduate core seminar such that it opened space for broader social and intellectual possibilities.

III. NUTS AND BOLTS: BLUEPRINTS FOR BUILDING A DIALOGIC CLASSROOM

While Reflective Structured Dialogue is a central practice, dialogic classrooms do not employ structured dialogues every day (faculty report an

⁸ Interview by Margie DeWeese-Boyd. with G3*, Professor, Gordon College (May 18, 2018).

⁹ Interview by Margie DeWeese-Boyd with G2*, Professor, Gordon College (May 18, 2018).

¹⁰ Interview by Margie DeWeese-Boyd with G3*, Professor, Gordon College (May 18, 2018).

¹¹ Interview by Betsy Hayes with HR*, Professor, Bridgewater College (Dec. 6, 2018).

average of 3–4 per semester.)¹² Rather, structured dialogues are part of a larger ethos and orientation that dissolves dialogic values—curiosity, open-mindedness, reflection, speaking to be understood, listening to understand, interpersonal connection—into the heart of classroom structures and experiences.¹³ As one professor in our study put it, “There are a lot of values that weren’t necessarily only in the structured dialogues as such, but they seep into a lot of other things one might do.”¹⁴

A. Structure for Purpose

Like the spaces in which we live, play, work, and worship, classrooms function best when designed to meet the purpose for which they are intended. While we can’t always control the physical spaces we teach in (remember that classroom from hell), dialogic classrooms are designed with a conscious pedagogical structure aimed at fulfilling the goals of the course.¹⁵ This means that structured dialogues are often tiered, moving from relatively tame topics to more controversial ones as students build trust with each other and the process, and that there is a clear purpose for the dialogues as part of curricular goals. One teacher in our study, for example, had students dialogue about what it is to be an American before reading and discussing Amy Tan’s *Joy Luck Club*,¹⁶ an exercise that routinizes peer-to-peer discussion and opens avenues into the plurality of American experiences. Dialogic classrooms may also utilize a host of other processes and exercises designed to build trust, comfort, and accountability between students, and to practice the skills necessary for meaningful dialogic work. These may include short “dialogic moments” where professors ask students to reflect for a minute about something in their lives that relates to a topic relevant to the day’s lesson, improvisational exercises aimed at team-building and cooperation, or even short theater pieces

¹² Based on collected faculty interviews and observations conducted as part of the research study. “The Dialogic Classroom: Teaching for Humility and Civic Engagement.” <https://humilityandconviction.uconn.edu/globalresearchprojects/>.

¹³ For more on how dialogic classrooms integrate these values into daily structures, especially in times of disruption, see generally Jill DeTemple & John Sarrouf, *Disruption, Dialogue, and Swerve: Reflective Structured Dialogue in Religious Studies Classrooms*, 20 TEACHING THEOLOGY AND RELIGION 283 (2017).

¹⁴ Interview with Cullum Clark, Professor, Southern Methodist University (Apr. 20, 2018).

¹⁵ DeTemple & Sarrouf, *supra* note 12, at 287–88. See Grant Wiggins & Jay McTighe, UNDERSTANDING BY DESIGN (2nd ed. 2005), for an explanation of structuring courses to meet pedagogical goals, often referred to as “Backward Design.”

¹⁶ Faculty observation by John Sarrouf at Gordon College (Feb. 2018).

that may ask students to publicly, and cooperatively, relate some piece of their identity to class issues.¹⁷

B. *Say it Out Loud*

A key practice to creating a classroom with enough structure to hold encounters across difference is a voiced emphasis on open-mindedness and curiosity as intellectual virtues.¹⁸ Faculty do this in a variety of ways. Some ask students to recount a time when they felt either rejected or accepted simply because of an assumption someone made about them or a position they hold¹⁹; others ask students to complete Open Mind,²⁰ an app produced by Heterodox Academy that teaches students about why open-mindedness is sometimes difficult, but why it can be useful in various social settings. Other faculty introduce the concept as a subset of listening as a valued practice. “How do you know you are really being listened to?” one faculty member asks her class, “How can you do that for others?” Another professor asks students to tap into the values they have learned in the academy, asking them “How do you want to be in this class?” as an early class exercise meant to focus on academic and interpersonal values.²¹

This kind of public focus on values that are often assumed to exist in academic settings makes structures visible, and therefore, more accessible to students. This is key for the third element of dialogic classrooms: communication agreements.

C. *Map it: Rules of the Road*

Crafted early in the semester, communication agreements form the container that holds class discourse and relationships. While many classrooms operate with implicit rules for engagement, collectively crafting overt rules to which class members agree allows a facilitator, usually the professor, to

¹⁷ For example, Ping Chong’s work can be adapted for classroom use. See LPAContheMAP, *Beyond Sacred Documentary*, YOUTUBE (Dec. 11, 2015), <https://www.youtube.com/watch?v=XktjcpGnacM>.

¹⁸ Jason Baehr, *Educating for Intellectual Virtues: From Theory to Practice*, 47 J. OF PHIL. OF EDUC. 248, 254 (2013).

¹⁹ Faculty observation by John Sarrouf at Southern Methodist University, March 1, 2018.

²⁰ See OPENMIND, <https://openmindplatform.org/> (last visited Apr. 8, 2020).

²¹ Faculty observations by Jill DeTemple at Gordon College (Aug. 1, 2018) and Southern Methodist University (Dec. 4, 2019 and Sept. 3, 2019).

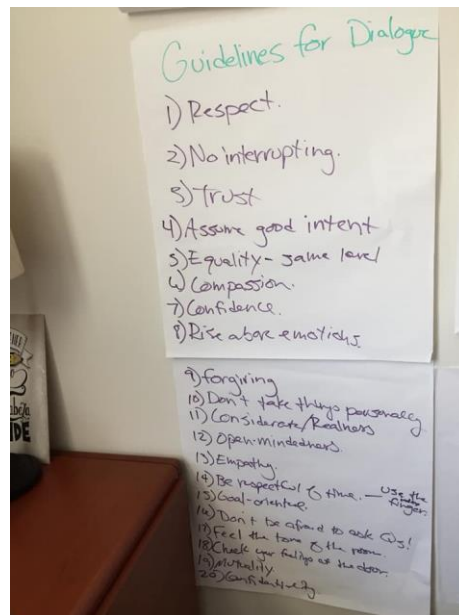
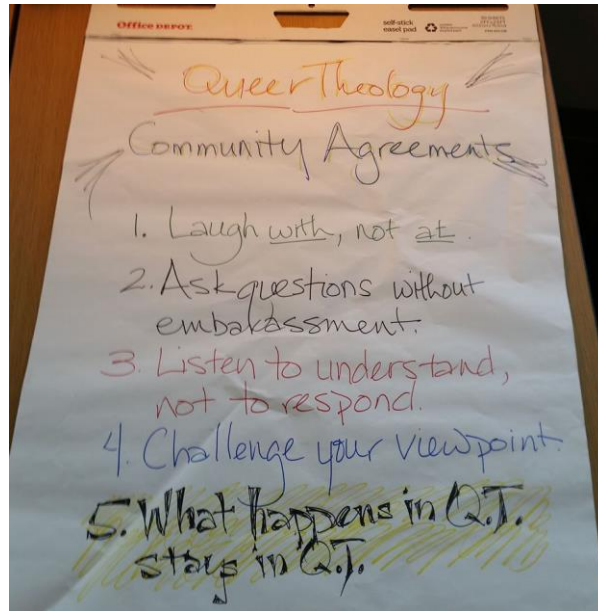
intervene when there is a violation.²² Crafting agreements is also another way to draw attention to dialogic values. If one value of the class is curiosity, then perhaps the class will agree that they want to ask curious questions as opposed to rhetorical ones. If listening is a virtue, then not interrupting may be an agreement that is important as people hold the intention to listen to one another. Agreements are also structures that hold space for agency. Confidentiality and the ability to pass, or pass for now, allow those who may be reticent or not be ready to share a story a way to take charge of their own level of participation. Crafting agreements allow students to discern what is important to them as they co-create a space designed for their learning together (figure three).²³

²² For more on intervention see *Guide to Conversations across the Blue-Red Divide*, ESSENTIAL PARTNERS, <https://whatisessential.org/red-blue> (last visited Apr. 8, 2020).

²³ Common agreements include “don’t interrupt,” “listen with resilience,” “speak to be understood,” “listen to understand,” “confidentiality,” “pass” and “pass for now.” The way these are articulated depends on local contexts.

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Figure Three – Agreements Generated by Students in a Queer Theology class (photo, Peter Carlson); and Prison Exchange class (photo, Meredith Minister)



D. Make Space for Time: Reflection

A key component of Reflective Structured Dialogue is timed reflection, designed to allow people to break cycles of reaction and more deeply engage with and articulate the histories, values, and experiences that led themselves and others to positions and beliefs.²⁴ Dialogic classrooms invite regular reflection through reflective exercises such as journals or discussion posts, entrance or exit tickets that ask students to write a question at the beginning or end of class, or “dialogic moments” that ask students to reflect for a minute or two on a topic related to course content.²⁵ Asking students to take a minute and think about a time when they did or did not understand the purpose of something, for example, may lead to a more productive class on teleological theories of existence; asking students to reflect on a personification of death may lead to greater curiosity about a subject from which many students feel distanced.²⁶ Reflection thus not only breaks reactive cycles, but also allows students to connect often new or unfamiliar course content to something they already know, creating new and effective cognitive connections.²⁷

E. Shift the Focus: Re-center Engagement

Traditional classrooms are centered on teachers physically and socially. Lecture halls with fixed seating are designed so that every student in the room can see the teacher (and the teacher can see every student in the room), but not so that students can see one another or easily become the focus of attention themselves. The presumption behind these designs is what Paulo Freire described as a “banking knowledge” of education where an expert is able to “deposit” information in students with who will receive it with no regard to context, shared or divergent histories, or multiple interpretive

²⁴ Sallyann Roth, *Speaking the Unspoken: A Work-Group Consultation to Reopen Dialogue*, in *SECRETS IN FAMILIES AND FAMILY THERAPY* 268 (Evan Imber-Black ed.) (1993).

²⁵ Essential Partners, Inc., *Ways to Teach When the World is on Fire: The Dialogic Classroom: Teaching for Humility and Engagement* (2017) (unpublished manuscript).

²⁶ Both of these examples come from student survey accounts of dialogic moments they described positively.

²⁷ JANE FRIED, *OF EDUCATION, FISHBOWLS, AND RABBIT HOLES: RETHINKING TEACHING AND LIBERAL EDUCATION FOR AN INTERCONNECTED WORLD*, 43 (2016); JOSHUA R. EYLER, *HOW HUMANS LEARN: THE SCIENCE AND STORIES BEHIND EFFECTIVE COLLEGE TEACHING*, 158–60 (2018).

possibilities.²⁸ Dialogic classrooms disrupt this model by inviting, supporting, and encouraging multifocal engagement between professors, students, and course material.

Students in dialogic classrooms report that they feel freer to ask questions of peers, and professors note that they are more easily able to “get out of the way” as students become accustomed to engaging each other directly. Such multifocal engagement requires more of students, and more of faculty as they must create the structures to support a model where they themselves are not always at the center, and where listening is held up as a form of engagement on par with speaking. Students cannot be the passive learners described in Freire’s model, but must rather continually contribute to the educational spaces they occupy. Professors need to become comfortable trusting that students can carry the weight of that intellectual work. The result is classrooms that are the kinds of dynamic spaces faculty generally describe as their ideal classrooms where students freely engage with the material and each other, and where the faculty role shifts to one of facilitation as much as that of the knowledge bearer.

F. *Hold the Space: Actively Facilitate*

While re-centering a classroom may appear to be a dereliction of duty to an outsider who walks in to a classroom to discover students in circles and passing timers around so that they have equal time to listen and speak while their professor is watching quietly from a corner, this is far from the case. Facilitation is not a traditional way of understanding teaching, but dialogic classrooms require the kind of structuring and careful attention that facilitation as a practice describes. Effective facilitators do the bulk of their work on the front end: understanding the needs of those they support, including the purpose of the event they will facilitate; crafting a space of encounter that supports those needs; and then making sure the encounter happens in such a way that the purpose is met.²⁹ This may mean reminding people of the purpose of the encounter, or stopping or redirecting an interaction that will be detrimental to that purpose.

Teaching as facilitation shares these characteristics. In dialogic classrooms, faculty craft entire classes, from the syllabus to final exercises, with an eye toward creating a space that will allow their students to fully

²⁸ PAULO FREIRE, *PEDAGOGY OF THE OPPRESSED: 50TH ANNIVERSARY EDITION* 72 (Myra Bergman Ramos trans.) (2017); *See also* BELL HOOKS, *TEACHING TO TRANSGRESS: EDUCATION AS THE PRACTICE OF FREEDOM* 14 (1994).

²⁹ For a helpful and detailed description of effective facilitation, see generally PRIYA PARKER, *THE ART OF GATHERING: HOW WE MEET AND WHY IT MATTERS* (2018).

engage with course content, with their own knowledge and convictions, and with each other.³⁰ They ensure that this engagement continues by providing structured spaces of encounter and including structured dialogues that students understand as invitations to gain greater knowledge about something important. Like any good facilitator, professors in effective dialogic classrooms know how to intervene and redirect in order to get back to the purpose, be that by enforcing communication agreements or reminding students of that purpose in reflective moments, assignments of various kinds, or in-class exercises designed to strengthen academic or interpersonal skills. While the focus is not on themselves, they do keep the focus, allowing and maintaining the kind of reorientation that dialogic classrooms provide.³¹

When dialogic classrooms fail in their goals it is usually because one of the structures above was not built or maintained. Students asked to recall a dialogue they participated in during a class sometimes reported experiences that remained centered on the professor, as in the case of one who wrote that, “A dialogue situation that occurred in the classroom this semester happened on a few occasions where a student asked the professor [their] opinion and the professor did not answer the student’s question directly, instead the professor changed the subject.” The student in this instance does not appear to be able to distinguish dialogic interactions as outside other classroom structures, nor does it appear that the student was able to establish the relationship they wanted with the professor in terms of trust or engagement.

In other instances, students complained about a lack of viewpoint diversity in their dialogue circles, something intentional structuring for variety could remedy, or professors saying that they were going to do a dialogue and then continuing to lecture. In other instances, faculty reported being frustrated that students did not seem to embrace the dialogues, actively resisting them as “outside” the purpose of the course. In these instances, something about the course structure, combined perhaps with expectations generated in broader educational environments, impeded the effectiveness of dialogic experiences. While the method was there, the reorientation and structure required to support it was not.

³⁰ Jill DeTemple et. al., *Reflective Structured Dialogue: A Conversation with 2018 American Academy of Religion Excellence in Teaching Award Winner Jill DeTemple* 2 TEACHING THEOLOGY AND RELIGION 223, 228 (2019).

³¹ ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, THE PROMISE OF MEDIATION: THE TRANSFORMATIVE APPROACH 209–214 (2005).

IV. COMING IN SIDEWAYS: A CASE STUDY IN REORIENTING A GRADUATE CORE SEMINAR

Core seminars in Ph.D. programs—classes designed to orient students, usually in cohorts, to their chosen field of study—are unique spaces within the academy. They are often tied to comprehensive exams, which students must complete with a passing grade in order to pass to candidacy for the Ph.D., and they are often one of the few places where entire cohorts are together in any systematic way during their program of study. While generally conceived as a space of knowledge acquisition, core seminars are a pillar of identity formation in programmatic contexts.³² What happens there helps distinguish a Ph.D. from Brown from one awarded by the University of Chicago. They carry enormous weight.

This burden can make core seminars fraught spaces. Students may feel the need to compete with one another, or may enter the class with hostility or resentment that they are required to master material in which they believe they have no interest, that will not help them in their professional lives, or that they fear they cannot master. Faculty generally receive no training in how to craft or facilitate graduate seminars³³ and may themselves feel vulnerable as the seminars can easily become spaces where their knowledge and authority may be challenged. Core seminars can easily become places where people are vigilant, waiting for an assault on scholarly or personal commitments, a state that leads to stuck conversations and reactive rather than reflective interactions, leaving little room for the values of cooperation, curiosity, or open-mindedness that many of us are hoping to instill in the next generation of researchers and scholars.

To make matters worse, graduate core seminars often work on the same dysfunctional dynamic as political polarization. Polarization works on an axis of reduction that ignores complexity in favor of singularity³⁴. A neighbor who loves birds, volunteers for the PTA, and is well respected in his professional setting simply becomes “Joe the Republican.” Another who plays in a local band, keeps an immaculate yard, and is known for rescuing strays becomes “Shira the Democrat.” This flattening of complex identities and commitments continues the cycles of vigilance that may not allow us to engage with anyone perceived to be “on the other side.”

In a similar way, graduate students are regularly reduced in their identities. What matters in seminars and other academic settings is their

³² Vicki Sweitzner, *Towards a Theory of Doctoral Student Professional Identity Development: A Developmental Networks Approach*, 80 THE J. OF HIGHER EDUC. 3 (2009).

³³ Sara Steen et. al., *Rethinking the Graduate Seminar*, 27 TEACHING SOC. 167 (1999).

³⁴ Roth, *supra* note 23, at 271.

advisor, their dissertation topics, their theoretical commitments, and their CV-worthy accomplishments. Students become attuned to perceived slights or intellectual threat, often to the detriment of basic functioning, much less cooperative inquiry.³⁵ A core seminar I taught several years ago very much operated on this model. Split between graduate students who considered themselves theologians and those who considered themselves historians, members of the class were on constant alert for perceived attack on their commitments. Though we muddled through, I was aware of side conversations in the small room after seemingly innocuous exchanges, and several students came to see me to express their frustration with a classroom dynamic that no one could precisely name until the second-to-last class. We finished the semester with a cookie cake that proclaimed, “No Weasels!” an homage to a comment the week before when a student had asked, in essence, to be heard. It was a brutal semester, another version of the classroom from hell.

When facing a different core seminar in the Fall of 2019, I had some trepidation. The roster revealed a potentially greater rift in intellectual commitments, and the subject matter was difficult: early religious studies theory and method, most of which is rooted in colonial and racist histories that make it difficult to imagine using in any relevant way in 21st century scholarship. I found myself preparing for resistance and broken dynamics before the semester began, but crafted a syllabus that looked remarkably like the one I had used in that difficult seminar from several years before, though with some dialogic elements thrown in as I thought it would be useful to acquaint graduate students with dialogic pedagogies.

It was not until about ten days before the beginning of the semester, and after a conversation with some colleagues that led me to the realization that political polarization and bad graduate dynamics are related, that I considered reorienting the entire course so that it more thoroughly reflected the dialogic principles and practices I had been working to develop in undergraduate settings. It felt extraordinarily risky. What if graduate students, more formed academically than their undergraduate peers, would not follow such an unusual lead? Could I structure things enough to make them feel comfortable in letting down carefully cultivated personas so that they could

³⁵ Sweitzner, *supra* note 31, at 6–8, 12–16). Of note is the way Sweitzer catalogues the effect of relationships exogenous to the academy in addition to peer and mentor networks in professional identity formation, something long unrecognized in educational literature and practice. The negative effects of professional identity development around narrow educational and intellectual commitments I mention above are widely recognized, but as Sweitzer explains, relatively unstudied. *See also* Davin J. Carr-Chellman & Carol Rogers Shaw, “*Do the Hard Work*”: *Identity Development and First Year Doctoral Students*, ADULT EDUCATION RESEARCH CONFERENCE (2017), <https://newprairiepress.org/aerc/2017/papers/3>.

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connect across intellectual and personal differences? How would exercises that worked to form connection and community in undergraduate settings translate when professional identities were on the line? I decided to take the risk.

The result was a class that, while not perfect, did overcome many of the problems in those earlier seminars. There was no need for a cookie cake at the end of the semester. Students connected across disciplinary boundaries and approaches. They exhibited openness towards course content throughout the term and were able to use that content deftly in final papers and projects. They were unusually engaged in the three-hour class meetings, which often ran a bit over time as conversations were lively and ongoing. I did not dread facing the seminar each week, or the fallout from class confrontations gone wrong. It was a pleasure to teach.

So, what changed? What does such a reorientation entail? First, I changed the syllabus. Not the course content—the readings remained the same and encompassed the same core intellectual material the seminar was designed to deliver. Instead, I changed the way the syllabus presented that material. Rather than present the history of the field as a body of knowledge to be mastered as part of curricular requirements for the program, the standard language from the catalogue, I invited students to consider that body of knowledge as a history to which they must orient. Presenting an image of a glacier on the front page of the syllabus, I invoked a metaphor: like the glacier, the history of religious studies has carved deep channels in which you must position yourselves. Once you understand those channels, what will you choose to reify, what will you choose to reform, and what will you choose to reject? Will you choose to stand squarely in the middle of those channels, off to one side, or will you try to change their directions? Such a presentation shifted the intellectual structure of the class from one of content mastery to one of exploration with a goal of conscious engagement. One cannot be removed when asked to make such a decision.

To support this goal, I added regular reflection exercises, including structured dialogues, that asked students to consider their positioning in response to readings, theories, and concepts we considered as part of course content. Students were asked to think about issues of rationality, representation, and identity in the classroom settings by telling a personal story that would help others understand how they came to think about such topics, and then digging deeper into the values and beliefs underneath those experiences, as well as complexities that pulled students in different directions. Dialogic moments asked them to think about times when class assignments they experienced had either supported or undermined educational goals, where they thought authors were strong in their writing and where they

left questions unanswered, and reflections on what they were leaving behind or taking away from a reading or class session. Three short papers codified these reflections into formal written work, marking the value of such thinking in academically measurable ways.

All of these exercises were supported by a dialogic class structure that included communication agreements students co-created early in the semester. The agreements included:

- Careful use of Tone
- Confidentiality
- Need Everyone's Opinions -- they might be helpful
- Look for Commonalities
- Speak to be Understood/Listen to Understand
- It's not a Competition
- Conversations Should be Linked to a Purpose
- You can Pass or Pass for Now
- Freedom of Disagreement is a Value.

The agreements to look for commonality and that it's not a competition, especially, set a markedly different tone for discourse than previous versions of the seminar.

In addition to the reoriented syllabus and communication agreements, I used several exercises to reorient and strengthen relationships in the room between students, students and course materials, and students and me as instructor. Many of these came from improv theater and were designed to make students aware of and able to shift focus in a room both directly and laterally, or to generate new and intuitive ideas individually and as a group. As the seminar settled into a rhythm after the first several weeks, we would open most classes with an exercise called "five things." Designed to elicit quick responses on stage, five things is a useful exercise to encourage students in making declarative sentences and generating ideas without too much hesitation. To do five things, everyone stands in a circle. One person starts by asking the person to their left to name five things. For example, I might begin by saying, "John, name five things in your refrigerator." John would then do so, with the class counting together after each individual item. Hesitation sounds, the "ums" and "ahs" we use when we're not sure of what to say, can be penalized by adding another item. Once a person has answered, they turn to the person next to them and ask for a different five things.

My intention in introducing five things was to teach students a skill for writing (it is often better to simply put things on paper than to wait for a perfect sentence or paragraph to form), and to practice speaking declaratively

and without qualification, something that can be difficult to do when one is aware of every potential theoretical problem with a statement or when one is vigilant and waiting for reprisal. The exercise did that work. Students became adept at speaking clearly, and they reported that the exercise helped them in early writing projects as they had naturalized the process. The real magic, however, became clear as the things people were asked to list became more personal over the course of the semester, working to recognize people's complex identities in the room. One student from out of state was asked for five reasons her local football team lost in a game the weekend before; another student was asked for the five best things about being a father the week after his first child was born; another was asked about five classes he wished he had taken as an undergraduate, a query that allowed us to understand a complex intellectual biography.

As I was part of the circle, students were able to interact with me as well, asking me to name cities, foods, and other things that allowed me to be a person as well as instructor. Often, the tensions that I had noticed in the previous seminar were expressed with humor and curiosity as theologians were asked to talk about authors in their field or historians were asked to name time periods that most or least interested them. The structure of the game, and the classroom in which it took place, allowed students to invite wholistic versions of themselves into the room. No one was vigilant for attack. No side conversations were required. No one ended up crying in my office. Students were unusually good at listening to one another and asking curious questions for elaboration or clarification.

Perhaps most strikingly, the students in this version of the core seminar were willing to take social and intellectual risks. Because of the vigilance present in previous versions of the course, students were reticent to try anything outside of an ordinary discussion format in class. When I asked them to render a classical religious studies theory as a drawing, haiku, or limerick, for example, they performed at a much lower level than a typical undergraduate class tasked with the same assignment. For fear of not getting it perfectly right, they could not do it at all. The structure of a dialogic classroom, however, made space for the kind of creativity and play that often lead to effective learning.³⁶ This was most evident in final papers and projects that reflected a willingness to stretch intellectually, even when it felt uncertain. Such a stretch resulted in truly innovative scholarship, some of which was of publishable quality, an unusual outcome for core seminar research projects.

Student feedback in course evaluations and personal communication after the end of the class was overwhelmingly positive, though one student was clearly alienated by the model, unable to understand how it might be

³⁶ EYLER, *supra* note 26, at 99–100.

useful as a “serious academic.” A few others, while appreciating the social space of the seminar, were concerned that taking time to connect and think about issues of identity, representation, and pedagogy meant that we did not have as much time for what they considered the “real” content of the class. This is a balance that I will have to contend with going forward, and I will make some adjustments to better accommodate more traditional discussions in some instances, though, again, their work in discussions and in papers and projects indicates that students did master the core material of the course. Indeed, for one student, the experience was transformative. After a theater exercise on the last day, designed to elicit a summative declaration of identity and purpose in relation to the body of knowledge we had spent a semester exploring, the student sent a brief note of thanks, explaining that the way the course was structured, and that particular exercise, showed the student a space in academia that the student could not have imagined previously, and which they described as “a beautiful space of scholarship and creativity.”³⁷

Reorienting the seminar so that we went in sideways—placing students’ orientation to core course material instead of the material itself at the center, and taking overt steps to craft a learning community with commitments to open inquiry, cooperation, and listening—resulted in a vastly improved space of learning. Based on this experience and the data presented in the first part of this paper, it is reasonable to hope that such reorientation holds promise in other pedagogical and civic spaces, including those of law and alternative dispute resolution and the spaces into which they feed.

V. SHIFTING THE SPACE: POSSIBILITIES FOR OUT THERE

Here, I need to make a disclaimer: I am not a lawyer, did not go to law school, and am not involved in alternative dispute resolution as a practice. I thus base my remarks not on authority in those fields, but on a sense of purpose I imagine I share with those invested in legal processes and their alternatives outside of the court system. In short, those of us who spend our days training lawyers or other future professionals and citizens, working in law, or in the ADR system, are invested in relationships that form communities. Bettering people’s abilities to form and perform relationships in professional and social settings is in our best interest as a society. Creating spaces where this can best happen is a task we share.

How, then, might we implement dialogic structures in these spaces? The trick, I think, is not to begin with the structures themselves, but rather with

³⁷ Letter from Anonymous, Student, Southern Methodist University, to Jill DeTemple, Professor, Southern Methodist University (Dec. 4, 2019) (on file with author).

the values they are intended to support and the realities they are intended to address; a process that will relate the impact of a dialogic structure with the intentions of its framers. The values upheld in dialogic classrooms—intellectual humility, open-mindedness, curiosity, cooperation, reflexivity, and resilience—encourage learned behaviors that are vital to broader civic spaces and which can flourish within them. A student demonstrated this succinctly when she tapped me on the shoulder one day during my office hours in our campus coffee shop. “I just wanted to thank you,” she said, “Thanksgiving was SO much better this year!”

Indeed, the values named above are vital for the maintenance of relationships across differences, a key ingredient for a healthy society. Following conflict transformation specialist and dialogic classroom architect John Sarrouf, communities (or indeed relationships of all kinds) are only as strong as their ability to connect across difference, and that connection takes courage.³⁸ Structuring client meetings, mediation sessions, or even law school classrooms in ways that allow people to acknowledge and hold difference inverts usual norms that place processes and procedures before people, and content before connection. Going the other way and centering relationships—be it by creating ways to “check in” before a meeting, careful attention to times given to listen and speak, or in time set aside for reflection—can shift professional, civic, and even familial spaces in favor of dialogic values, and thus dialogic relationships that allow connection across differences in worldview and/or experiences. These are skills students and practitioners can take with them as they move “out there,” to PTA meetings, neighborhood gatherings, family dinners, or discussions in houses of worship. Especially in a polarized society, putting relationships first has the effect of giving people deep contours and context that polarization steals away.

Taking steps to hold up listening as a valued skill is another lesson dialogic classrooms have to give. In most educational and professional environments, speaking is supported. We teach students how to give presentations, make arguments, debate, and persuade in written form, and reward speaking behaviors with grades, curricular credit, and accolades when done especially well. While speaking is an essential skill for professional life, we often skip over listening, presuming that students know how to do it appropriately and well. Taking the time to reflect on how to listen, and then practicing and rewarding listening, establishes listening as a valued way of interacting in educational and social spaces that extend well beyond the classroom. Polarizing discourse often discourages deep listening; doing so

³⁸ Q Boston, *The Courage to Cross the Street: and What to Do Next*, YOUTUBE (Jan. 28, 2018), http://www.youtube.com/watch?v=set30hYH_DU.

may be considered an act of treachery by one's tribe or faction.³⁹ The practice of listening, then, and the skills to do it well, can become an act of healing when deployed across lines of difference in grocery stores, beauty parlors, or at the local bar.⁴⁰

Dialogic classrooms also demonstrate that naming and practicing open-mindedness and curiosity as virtues can shift social spaces in productive ways. Certainly, these are values already in place in law and mediation environments. What dialogic classrooms teach, however, is that structuring processes so that such values are raised up, creates an operational environment that allows greater and more focused practice. Lawyers may be more thorough when they are curious about evidence; ADR practitioners may be more effective when they are creating an environment that invites genuine questions amongst clients. And again, acts of curiosity and open-mindedness can work in broader social contexts to disrupt the patterns that reinforce polarizing discourses. Asking someone about an experience that led them to a belief is a radically different act than asking how they could possibly hold such a belief, and a more productive one.

But how do we craft the spaces in which we can champion the values of relationship, deep listening, curiosity, and open-mindedness, especially in a polarized climate? This is trickier business, especially as most social spaces are not as centralized as classrooms. There is no syllabus for most cocktail parties, no reading assigned for shared flights or train rides, no physical space of gathering that allows people to sit in a circle online. The demise of communication agreements, broadly defined, is often bemoaned in widely shared laments over the death of civil discourse, especially in political contexts.⁴¹

What the dialogic classroom work teaches is that well-crafted questions produced in the context of articulated values have the effect of

³⁹ Amy Chua & Jed Rubenfeld, *The Threat of Tribalism*, THE ATLANTIC (Oct. 2018), <https://www.theatlantic.com/magazine/archive/2018/10/the-threat-of-tribalism/568342/>. For two studies that examine polarization in the United States, see also PEW RESEARCH CENTER, *Political Polarization in the American Public* (June 12, 2014), <https://www.people-press.org/2014/06/12/political-polarization-in-the-american-public/>; STEPHEN HAWKINS ET AL., HIDDEN TRIBES: A STUDY OF AMERICA'S POLARIZED LANDSCAPE (2018).

⁴⁰ Stephanie Kimball & Jim Garrison, *Hermeneutic Listening: An Approach to Understanding in Multicultural Conversations*, 15 STUDIES IN PHIL. AND EDUC. 51–52.

⁴¹ Gerald F. Seib, *Civil Discourse is in Decline, Where Does it End?*, WALL ST. J. (May 29, 2017), <https://www.wsj.com/articles/civil-discourse-in-decline-where-does-it-end-1496071276>; Michael A. Cohen, *Who's to Blame for America's Civility Crisis?*, BOSTON GLOBE (June 26, 2018), <https://www.bostonglobe.com/opinion/2018/06/26/who-blame-for-american-civility-crisis/RQ4Pwip3kmUzuWeHRcNeIL/story.html>.

THE SPACES WE MAKE

creating space for engagement in novel and meaningful ways.⁴² To put it another way, the questions we ask, and the way we listen, powerfully shape the spaces we make for engagement. They shape the possibilities for relationships and communities, even in divisive times. Asking a genuine question: “Tell me a story that would help me understand . . .” is a small opening that can grow and strengthen as people enter a space of productive vulnerability together. It takes courage to cross a divide with curiosity; it takes courage to tell a story that someone else may not want to hear. Leaning into that discomfort, however, is a powerful act, one that we can teach, support, and in which we can engage in spaces near and far.

This, in and of itself, is not new for ADR practitioners, or even for those in law, though the methods and case studies I have described may be. What the classroom work reveals, however, is the possibility that such questions hold when they are not used in the service of deliberation. Dialogic classrooms are not designed to reach consensus, or even compromise. They are rigorously bounded, and driven, by the cause of exploration. This is what sets them apart from other places where many of the same techniques—open enquiry, reflective listening, facilitation done with an emphasis on multi-partiality—are employed.

While powerful, the spaces shaped in dialogic classrooms are limited. They are prolegomena, the beginning frame. Where we need more than beginning—where we need deliberation toward consensus, where we need final decisions that will shape policies and the formal contours of a shared civic life—we will need structures that go beyond what I have outlined here. Students who speak of “making Thanksgiving SO much better” and of being reoriented to the possibilities of creativity in academic spaces lead me to believe that this is possible, perhaps even probable, when we give them the proper tools to construct a foundation upon which such structures can be built. The spaces we make are the spaces students will adapt, reorient, replicate, and rebuild in places that go well beyond the classroom. Wisdom demands we attend carefully to those spaces, to their consequences, and to their possibilities.

⁴² This conclusion is drawn from student research surveys, noted earlier, that indicate that dialogic classrooms resulted in greater student abilities in listening, speaking, and engagement across difference. Questions designed to invoke curiosity and connection are a central part of the dialogic classroom training offered to faculty as part of the research study. For more on effective questions in dialogic contexts see *Designing Questions*, <https://whatisessential.org/higher-ed/designing-questions>.

Sharing Dispute Resolution Practices with Leaders of a Divided Community or Campus: Strategies for Two Crucial Conversations

WILLIAM FROEHLICH, NANCY H. ROGERS, AND JOSEPH B. STULBERG

I. INTRODUCTION

II. HOW NATIONAL POLARIZATION IS PLAYING OUT LOCALLY

III. THE FIRST CONVERSATION: HOW DISPUTE RESOLUTION CONCEPTS RELATED TO TRUST, ROOT CAUSES, AND PREPARATION MIGHT HELP LOCAL LEADERS HELP THEIR COMMUNITIES

- A. *“Become engaged right away, asking other leaders to do the same, and augment resources as necessary to respond effectively.”*
- B. *“Identify and engage stakeholders, those persons who have a stake in the conflict or can be a resource for developing and implementing a durable resolution.”*
- C. *“Issue a statement that ‘frames the matter’ by summarizing what has occurred, recognizing the impact, describing issues, announcing decisions, acknowledging who has been consulted, identifying the processes and values that will be applied to address the issues—all with an authentic voice and delivered by a person whose message will be trusted.”*
- D. *“When a conflict or concern is raised, in addition to the clearly articulated dispute, identify the roots of the problem.”*
- E. *“Keep in mind the brittleness of some residents’ trust in their local leaders in the midst of volatile conflict and follow approaches likely to develop or enhance that trust Help your staff understand that some conflicts are precipitated or arise because of a lack of trust, and they must work to earn public trust in this context Show a sense of urgency regarding the concerns of all parts of the community.”*
- F. *“Acknowledge the pain that may fall unevenly on residents but that it is the shared hope of all to deal with the hurt of any.”*
- G. *“Offer students safe and effective options to meet their needs and goals.”*
- H. *Conclusion*

IV. CHALLENGES IN PREPARING LOCAL LEADERS

V. THE SECOND CONVERSATION: STRATEGIES TO REACH CURRENT LOCAL LEADERS AND TEACH FUTURE LEADERS (CURRENT STUDENTS)

- A. *Guides that Summarize What Other Leaders Were Glad That They Did or Wish that They Would Have Done When a Divisive Incident or Conflict Occurred*
- B. *Guides and Tools to Help Communities Prepare in Advance of a Divisive Incident or Conflict*
- C. *Simulations and De-briefing Materials: Midland, New Lake Springton University*
- D. *Academies for Community “Core Leadership” Groups*
- E. *Individual Counsel: The Bridge Initiative @ Moritz*
- F. *Teaching Students: Preparing Future Leaders and Their Advisors*

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ABSTRACT

Dispute resolution experts have much to offer local leaders during a time of national division. They can provide ways for these leaders to: preserve and build trust, take advantage of the energy underlying protest to help the community deal over the long term with root causes of the concerns that residents raise, and prepare the community by making it more resilient and ready to deal with a divisive incident or conflict. In creating and using a “virtual toolkit” of resources for assisting local officials, several strategies emerged that will help dispute resolution experts reach these leaders. The strategies include: ask other local leaders to transform the dispute resolution practices into leader-to-leader counsel, omit alternative dispute resolution (ADR) jargon, fit leaders’ schedules, offer an engaging format that might be a change of pace for leaders, educate for discovery so that local leaders can tailor the concepts to local situations, and conduct the conversations quietly.

I. INTRODUCTION

All politics may be local,¹ and certainly local leaders are among the most trusted public officials.² Still, the rancor of national politics and cries for racial equity seem to have intruded on local politics and rendered more brittle the public's trust both for their local leaders and one another.³ Surveys indicate heightened levels of violent hate incidents,⁴ perceptions of

¹ U.S. House of Representatives Speaker Tip O'Neill is often credited with the statement, "All politics is local." See, e.g., E.J. Dionne, Jr., *All Politics Used to Be Local, Then Along Came Trump*, WASH. POST, Nov. 3, 2019, https://www.washingtonpost.com/opinions/all-politics-used-to-be-local-then-along-came-trump/2019/11/03/19c3cc2a-fcdf-11e9-ac8c-8eced29ca6ef_story.html.

² *Why Americans Don't Fully Trust Many Who Hold Positions of Power and Responsibility*, PEW RESEARCH CENTER, Sept. 19, 2019, <https://www.people-press.org/2019/09/19/where-public-confidence-stands-about-eight-groups-that-have-positions-of-power-and-responsibility/> ("Roughly six-in-ten (63%) say local elected officials do a good job promoting laws and policies that serve the public at least some of the time, compared with a smaller share (47%) who say members of Congress do this."); Lee Rainie and Andrew Perrin, *Key Findings About Americans' Declining Trust in Government and Each Other*, PEW RESEARCH, July 22, 2019, <https://www.pewresearch.org/fact-tank/2019/07/22/key-findings-about-americans-declining-trust-in-government-and-each-other/> ("Three-quarters of Americans say that their fellow citizens' trust in the federal government has been shrinking.").

³ Bruce Drake & Jacelyn Kiley, *Americans Say the Nation's Political Debate Has Grown More Toxic and 'Heated' Rhetoric Could Lead to Violence*, PEW RESEARCH CENTER, July 18, 2019, <https://www.pewresearch.org/fact-tank/2019/07/18/americans-say-the-nations-political-debate-has-grown-more-toxic-and-heated-rhetoric-could-lead-to-violence/> ("More than eight-in-ten U.S. adults (85%) say that political debate in the country has become more negative and less respectful . . . About three-quarters (76%) say it has become less fact-based and 60% say it has become less focused on issues."); Frank Newport, *The Impact of Increased Political Polarization*, GALLUP, Dec. 5, 2019, <https://news.gallup.com/opinion/polling-matters/268982/impact-increased-political-polarization.aspx>; Mark Jurkowitz et al., *U.S. Media Polarization and the 2020 Election: A Nation Divided*, Pew Research Center, Jan. 24, 2020, <https://www.journalism.org/2020/01/24/u-s-media-polarization-and-the-2020-election-a-nation-divided/>; Nick Laughlin, *How 2020 Is Impacting Gen Z's Worldview*, MORNING CONSULT, undated, approximately August, 2020, <https://morningconsult.com/form/gen-z-worldview-tracker/> ("In just two months, the average trust rating for 15 major institutions Morning Consult is tracking has dropped from 56 percent to 46 percent. The largest declines are with the police (24-point drop in trust), the U.S. government (-17), the criminal justice system (-14) and the news media (-13).").

⁴ Adeel Hassan, *Hate-Crime Violence Hits 16-Year High, F.B.I. Reports*, N.Y. TIMES, Nov. 12, 2019, <https://www.nytimes.com/2019/11/12/us/hate-crimes-fbi-report.html>.

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discrimination,⁵ distrust of government and institutions,⁶ hard feelings across political and identity groups,⁷ and a resort to media sources that reinforce the user's views.⁸ Local public officials and other community and university leaders—"local leaders" for simplicity—who are working to protect the rights and the safety of residents or students in the midst of divisive incidents or conflicts therefore must deal with these heightened trust and communication challenges. And they must do so often, as residents and students are frequently raising local versions of national issues.⁹ These are crucial and difficult conversations.

Dispute resolution experts have a great deal to offer local leaders. We explain, as a start to the conversation about doing this work, three suggested strategies for the first crucial conversation—between leaders and their residents or students—and six strategies for the second crucial conversation between dispute resolution experts and local leaders.

Our experience engaging in this work leads us to believe that at least three strategies permeate the counsel that dispute resolution experts might offer:

1. Build trust: Collaborative practices can help to maintain and build trust during strained times.

⁵ Lydia Saad, *Fewer See Equal Opportunity for Blacks in Jobs, Housing*, GALLUP, Jan. 21, 2019, <https://news.gallup.com/opinion/gallup/246137/fewer-equal-opportunity-blacks-jobs-housing.aspx>

⁶ Frank Newport, *The Impact of Increased Political Polarization*, GALLUP, Dec. 5, 2019, <https://news.gallup.com/opinion/polling-matters/268982/impact-increased-political-polarization.aspxpew>.

⁷ Susan Page, *Divided We Fall? Americans See Our Angry Political Debate as a Big Problem*, USA TODAY, Dec. 9, 2019, <https://www.usatoday.com/story/news/politics/elections/hiddencommonground/2019/12/05/hidden-common-ground-americans-divided-politics-seek-civility/4282301002/> ("an overwhelming 74% said that situation had gotten worse over the past decade.").

⁸ Jurkowitz, *supra* note 4.

⁹ See, e.g., events arising the last week in February: Lauren Bates et al., *A Call to Strike on March 31: A Letter to Faculty from Students*, Feb. 27, 2020, <https://middleburycampus.com/48635/opinion/a-call-to-strike-on-march-31-a-letter-to-faculty-from-students/> (White supremacy); Dawn Onley, *Syracuse University Suspends Students Who Were Protesting White Supremacy Hate Crimes*, THE GRIO, Feb. 19, 2020, <https://thegrio.com/2020/02/19/syracuse-university-suspends-students-who-were-protesting-white-supremacy-hate-crimes/> (racial issues); Carla Hill, *White Supremacist Propaganda Produced by U.S. Hate Groups Is Spreading—and Working*, NBC NEWS, Feb. 24, 2020, <https://www.nbcnews.com/think/opinion/white-supremacist-propaganda-produced-u-s-hate-groups-spreading-working-ncna1140726> (white supremacy canvassing neighborhoods and college campuses at high point in recent memory).

2. Focus on root causes: While leaders must focus on preserving the safety of those presenting their grievances, they can, at the same time, channel some of the energy and attention stimulated as the result of broad scale protest into long-term problem-solving processes. These processes can address underlying concerns.
3. Prepare ahead: The chances of succeeding increase when a community or campus prepares ahead of a divisive incident or conflict. That focus on preparing also helps to make the community more resilient and a better place to live.

Dispute resolution professors can teach their students about the use of selected dispute resolution practices for community division, thereby reaching future leaders or their lawyers.¹⁰ But they face broader and more immediate hurdles when they seek to reach current leaders. Their challenge is to engage leaders with relevant and practical insights. To accomplish that, they need to develop strategies that incorporate other realities facing local leadership. In addition to dispute resolution concepts, these leaders consider the role of safety agencies, the need to reach users of social media, political and electoral ramifications, the resistance to “outsiders,” the need to build a team of leaders and other stakeholders, to list a few examples. For this second level crucial conversation, we suggest six additional strategies:

1. Communicate leader to leader: Ask local leaders who understand dispute resolution practices to offer counsel to other local leaders.
2. Use no ADR jargon: Explain concepts and techniques without dispute resolution vernacular (no “BATNA” or “caucusing,” for example).
3. Adapt the outreach to fit times that are more free: Offer counsel as part of the typical breaks in a local leader’s frantic calendar (e.g., during an annual conference, at a staff retreat, during normal, steady-state times before a crisis develops or, if during a crisis, through a quick phone call with a counterpart from elsewhere).
4. Make it engaging: Format advice in a manner that alters the pace of a typical day (e.g., a game-like table-top simulation, a discussion-based academy) or takes little time (e.g., a short video or desk card).
5. Facilitate tailoring to local needs: Offer a deep enough understanding of the concepts so that local leaders can adapt them to their own communities and situations.

¹⁰ See *infra* Part V(E).

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6. Don't brag: Allow for quiet conversations with leaders so that they can decide whether to announce that they have consulted dispute resolution experts.

To explain these nine strategies, we offer more detail on current community division and how leaders are responding to it (Part II). We then elaborate on how dispute resolution concepts might help achieve the first three strategies (Part III); what dispute resolution experts need to understand about leading locally, including tackling the "root causes"¹¹ so as not to dissipate the energy that might be diverted to achieve change (Part IV); what resources dispute resolution professors might use to teach students how to apply dispute resolution concepts if they become leaders or, applying the six strategies identified immediately above, how dispute resolution experts might advise and use other forms of pedagogy to reach local leaders (Part V).

Would it be better to focus dispute resolution expertise elsewhere? As we focus on local leaders, we do not suggest that this is the only or even the most important use of dispute resolution expertise during this period of national polarization. Others may want to teach advocates for change strategies to negotiate more effectively. Still others may want to teach collaborative approaches to Congressional or state lawmakers or leaders at the grass roots level. The possibilities to add value are many.

II. HOW NATIONAL POLARIZATION IS PLAYING OUT LOCALLY

Expressions of concerns, mass protests, and other forms of dissent are a normal, and often positive, part of democratic life. But the tools that local leaders have previously used to sustain citizen trust in their efforts and keep their residents safe during these events may no longer be as effective in the current environment. To exaggerate a little and use dispute resolution jargon, one might say that local leaders are increasingly having a difficult conversation with community residents.

Local leaders are more often confronted with violent hate crime, which had reached a 16-year high, according to FBI statistics, even before a reported 2020 surge in hate incidents toward Asian Americans in response to the coronavirus pandemic.¹² Moreover, colleges and universities report a

¹¹ Wallace Warfield, *Building Consensus for Racial Harmony in American Cities: Case Model Approach*, 1996 J. DISP. RESOL. 151; Mara Schoeny and Wallace Warfield, *Reconnecting Systems Maintenance with Social Justice: A Critical Role for Conflict Resolution*, 16 NEGOT. J. 253 (2000).

¹² Adeel Hassan, *Hate-Crime Violence Hits 16-Year High, F.B.I. Reports*, NEW YORK TIMES, Nov. 12, 2019, <https://www.nytimes.com/2019/11/12/us/hate-crimes-fbi->

recent upswing in hate speech incidents.¹³ These incidents, in addition to animating needs for protection and counsel, often spawn conflict as people focus on the underlying issues that made the insults painful, such as their sense that the community or campus does not make them feel welcome or that decision-making is not equitable. For example, a movement, discussed below, begun with an initiative “I, Too, Am Harvard,” for students of color to express their desire to feel as valued as other students, became an “I, Too, Am” movement that resonated broadly enough to spread to campuses across the United States.¹⁴

Survey results also suggest that community cohesion and trust have become more brittle. For example, people who live in politically diverse areas are less likely to feel a community bond or sense of trust with their neighbors.¹⁵ Trust in traditional institutions is also shakier, making it complicated for leaders to reach residents with accurate information and gain their confidence in it.¹⁶ Further, people are creating their own echo chambers by choosing news and social media sources that reinforce their views, and “evidence suggests that partisan polarization in the use and trust of media sources has widened in the past five years.”¹⁷ Interpreting polling data, Frank Newport of Gallup explained:

report.html; Matthew Ormseth, *Rise in Hate Incidents Toward Asian Americans During Coronavirus Crisis, Officials Say*, LOS ANGELES TIMES, May 13, 2020, <https://www.latimes.com/california/story/2020-05-13/hate-crimes-and-incidents-directed-at-asian-americans-rise-during-pandemic-county-commission-says>.

¹³ See Jeremy Bauer-Wolf, *Hate Incidents on Campus Still Rising*, INSIDE HIGHER ED, Feb. 25, 2019, <https://www.insidehighered.com/news/2019/02/25/hate-incidents-still-rise-college-campuses>; Carla Hill, *White Supremacist Propaganda Produced by U.S. Hate Groups Is Spreading—and Working*, NBC NEWS, Feb. 24, 2020, <https://www.nbcnews.com/think/opinion/white-supremacist-propaganda-produced-u-s-hate-groups-spreading-working-ncna1140726> (white supremacy canvassing neighborhoods and college campuses at high point in recent memory).

¹⁴ See, e.g., Chrystal A. George Mwangi, Genia M. Bettencourt, & Victoria K. Malaney, *Collegians Creating (Counter) Space Online A Critical Analysis of the I, Too, Am Social Media Movement*, 11(2) JOURNAL OF DIVERSITY IN HIGHER EDUCATION 146 (2018).

¹⁵ Zacc Ritter, *Polarization May Undermine Community Bonds, Trust in Others*, Gallup, Feb. 19, 2020, <https://news.gallup.com/opinion/gallup/284357/polarization-may-undermine-community-bonds-trust-others.aspx>.

¹⁶ Frank Newport, *The Impact of Increased Political Polarization*, GALLUP, Dec. 5, 2019, <https://news.gallup.com/opinion/polling-matters/268982/impact-increased-political-polarization.aspx>; Laughlin, *supra* note 4.

¹⁷ Jurkowitz, *supra* note 4.

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Partisans on both sides increasingly see institutions in the U.S. not as beneficial and necessary, but as part of an effort by the other side to gain advantage and to perpetuate its power and philosophical positions. Liberals and Democrats today, for example, have lower trust in traditional family institutions, traditional religious institutions and the economic system. Republicans have lower trust in the scientific process, higher education, the mass media, and the role of the state (government).¹⁸

With national political division falling along societal fault lines,¹⁹ trust in equitable treatment has fallen as well. Trust hit a low after the police killing of George Floyd in 2020, with the vast majority of Americans saying that racism is “a big problem,” and most perceiving discriminatory police treatment of African-Americans.²⁰ Beliefs that African-Americans have equal job opportunity have dropped in the last few years, reaching the lowest point since before the Civil Rights Act of 1964.²¹ As a further illustration of

¹⁸ Frank Newport, *The Impact of Increased Political Polarization*, GALLUP, Dec. 5, 2019, <https://news.gallup.com/opinion/polling-matters/268982/impact-increased-political-polarization.aspx>.

¹⁹ Alec Tyson, *The 2018 Midterm Vote: Divisions by Race, Gender, Education*, PEW RESEARCH CENTER, November 8, 2018, <https://www.pewresearch.org/fact-tank/2018/11/08/the-2018-midterm-vote-divisions-by-race-gender-education/> (“The stark demographic and educational divisions that have come to define American politics were clearly evident in voting preferences in the 2018 congressional elections. There were wide differences in voting preferences between men and women, Whites and non-Whites, as well as people with more and less educational attainment.”).

²⁰ Giovanni Russonello, *Why Most Americans Support the Protests*, NEW YORK TIMES, June 5, 2020, <https://www.nytimes.com/2020/06/05/us/politics/polling-george-floyd-protests-racism.html>; Bradley Jones, *Democrats Far More Likely Than Republicans to See Discrimination Against Blacks, Not Whites*, PEW RESEARCH CENTER, Nov. 1, 2019, <https://www.pewresearch.org/fact-tank/2019/11/01/democrats-far-more-likely-than-republicans-to-see-discrimination-against-blacks-not-whites/> (“A new survey by Pew Research Center . . . finds that Americans continue to see widespread discrimination against a number of groups in the U.S., including Muslims, gays and lesbians, Hispanics, women, and Jews, as well as Blacks.”).

²¹ Lydia Saad, *Fewer See Equal Opportunity for Blacks in Jobs, Housing*, GALLUP, Jan. 21, 2019, <https://news.gallup.com/opinion/gallup/246137/fewer-equal-opportunity-blacks-jobs-housing.aspx> (“Sixty-one percent of U.S. adults now say that Blacks in their

the division, White respondents are twice as likely as African-American respondents to believe that there is equal job opportunity.²² Gallup reports that in 2019 for the first time since the Gallup staff began asking the question in 2001, most African-Americans described race relations as bad; most Whites still report those relations as good.²³ Polling regarding religious groups indicates that over 80 percent of Americans believe that Muslims encounter discrimination in the United States.²⁴ Results for other identity groups solidify the picture of increasingly fractured and fractious communities.²⁵

While leadership responsibilities have always involved addressing challenges, the multiple social dynamics that have increased polarization put at risk the public confidence in both their local leaders' ability to deal with such matters and their community members' resiliency when addressing them.²⁶ For example, a university administrator may work quietly with students in one dorm where hate speech occurred so as not to provide a megaphone for the hateful persons. But students may instead interpret that limited response as either an administrator's effort to cover up an incident that might be considered a public relations problem for the university or as the administration's failure to care about the pain caused by such hateful incidents.²⁷ A mayor's decision to delay the release of police videos at the request of prosecutors may quickly be deemed a cover-up, such that when the video is released a few days later, that decision may be considered a bow

community have the same chance as whites to get any job for which they are qualified, the lowest since before Dr. Martin Luther King Jr.'s August 1963 'I Have a Dream' speech when fewer than half perceived this.”).

²² *Id.* (“In the 2018 poll, 67% of Whites and 30% of Blacks expressed the view that Blacks have the same chance as whites in their community to get any kind of job for which they are qualified.”).

²³ Mohamed Younis, *Most Blacks Rate Race Relations with Whites as Bad*, GALLUP, Feb. 21, 2019, <https://news.gallup.com/poll/246899/blacks-rate-race-relations-whites-bad.aspx> (In late 2018, 54% of white respondents considered Black-White relations to be good; 45% considered them bad, whereas 40% of African-American respondents considered Black-White relations to be good; 59% considered them to be bad.).

²⁴ David Masci, *Many Americans See Religious Discrimination in U.S.—Especially Against Muslims*, PEW RESEARCH CENTER, May 17, 2019, <https://www.pewresearch.org/fact-tank/2019/05/17/many-americans-see-religious-discrimination-in-u-s-especially-against-muslims/> (“Most American adults (82%) say Muslims are subject to at least some discrimination in the U.S. today. . . .”).

²⁵ *Id.*; Jones, *supra* note 21.

²⁶ Page, *supra* note 8; Raine & Perrin, *supra* note 3.

²⁷ See, e.g., Lauren Aratani, *'It Could Be Someone in My Class': US University Rocked by Hate Incidents*, THE GUARDIAN, Nov. 27, 2019, <https://www.theguardian.com/us-news/2019/nov/27/syracuse-university-racism-campus>.

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to increasing pressure.²⁸ As dispute resolution folks might portray it, local leaders, when tackling such matters, are conducting difficult and crucial conversations²⁹ with their residents or students.

More and more, local leaders are thus having difficult and crucial conversations with groups of residents who experience their community in different ways. Some residents may feel they are members of groups that are targeted and discriminated against and other residents may think that all is fine. Local leaders deal with a public that might not trust the information that they or many other traditional sources are releasing. These community members resemble in some way disputants at a mediation table. Leaders may benefit from mediation, negotiation, and dispute system design concepts that help to maintain and enhance trust, focus on underlying interests and root causes, and prepare in advance for divisive incidents and conflicts. We turn now to more detail about these concepts.

III. THE FIRST CONVERSATION: HOW DISPUTE RESOLUTION CONCEPTS RELATED TO TRUST, ROOT CAUSES, AND PREPARATION MIGHT HELP LOCAL LEADERS HELP THEIR COMMUNITIES

To identify which dispute resolution concepts might help local leaders, we worked with our students and colleagues at the Divided Community Project to offer a small group of local leaders, community-wide mediators, law enforcement leaders, and civil rights advocates a document that listed potentially applicable dispute resolution concepts. We asked them to tell us which of these concepts seemed helpful, how they would explain them, and what other key considerations should be mentioned to local leaders. Their conclusions help to illustrate how dispute resolution concepts might assist local leaders and, the subject of Part IV below, what else dispute resolution experts might consider regarding a leader's constraints and interests in order to effectively apply dispute resolution concepts. We were

²⁸ See, e.g., Eric Ross, *Mayor Suthers Supports Release of Body Camera Video in Fatal Weekend Shooting*, KOAA NEWS5, Aug. 7, 2019, <https://www.koaa.com/news/covering-colorado/mayor-suthers-supports-release-of-body-camera-video-in-fatal-weekend-shooting>.

²⁹ Materials on difficult conversations apply concepts from negotiation, mediation, and facilitation to challenging and important conversations. See, e.g., DOUGLAS STONE, BRUCE PATTON, & SHEILA HEEN, *DIFFICULT CONVERSATIONS: HOW TO DISCUSS WHAT MATTERS MOST* (2010); KERRY PATTERSON ET AL., *CRUCIAL CONVERSATIONS: TOOLS FOR HOLD FOR TALKING WHEN STAKES ARE HIGH* (2d ed. 2011).

able to further sharpen their advice with insights from experts who study race, ethnicity, and implicit bias.³⁰

We set out below a few examples of these key considerations for local and university leaders when conflicts or divisive incidents arise.³¹ These relate to three dispute resolution-grounded strategies for local leaders:

1. Retain and build trust.
2. Create processes to deal with the root causes for residents' concerns or demands.
3. Prepare ahead of a divisive incident or conflict.

Of course, the considerations in the subtitles are not meant to help leaders mediate; rather, they offer leadership suggested action steps to take. These actions are informed by dispute resolution concepts but without its jargon. For each action step, we mention the dispute resolution concepts that support it; those will be familiar to dispute resolution faculty and experts.³²

³⁰ The Kirwan Institute staff helped to include principles from their work, including those reflected in Ohio State University Kirwan Institute for the Study of Race and Ethnicity, *THE PRINCIPLES OF EQUITABLE CIVIC ENGAGEMENT* (2019). *See generally* THE OHIO ST. U. KIRWAN INST. FOR THE STUDY OF RACE AND ETHNICITY, <http://kirwaninstitute.osu.edu/> (last visited Aug. 6, 2020).

³¹ These are excerpted from four of the guides published by the Divided Community Project at The Ohio State University Moritz College of Law. DIVIDED COMMUNITY PROJECT, *PLANNING IN ADVANCE OF COMMUNITY UNREST* (2d ed. 2020) [hereinafter *PLANNING IN ADVANCE OF COMMUNITY UNREST*]; DIVIDED COMMUNITY PROJECT, *KEY CONSIDERATIONS FOR LEADERS FACING COMMUNITY UNREST: EFFECTIVE PROBLEM-SOLVING STRATEGIES THAT HAVE BEEN USED IN OTHER COMMUNITIES* (2d ed. 2020) [hereinafter *KEY CONSIDERATIONS FOR LEADERS FACING COMMUNITY UNREST*]; DIVIDED COMMUNITY PROJECT, *KEY CONSIDERATIONS FOR COLLEGE AND UNIVERSITY LEADERS: WHEN CONFLICTS AND DIVISIVE INCIDENTS ARISE* (2020) [hereinafter *KEY CONSIDERATIONS FOR COLLEGE AND UNIVERSITY LEADERS: WHEN CONFLICTS AND DIVISIVE INCIDENTS ARISE*]; DIVIDED COMMUNITY PROJECT, *KEY CONSIDERATIONS FOR COLLEGE AND UNIVERSITY LEADERS: PREPARING THE CAMPUS AT A TIME OF NATIONAL POLARIZATION* (2020) [hereinafter *PREPARING THE CAMPUS AT A TIME OF NATIONAL POLARIZATION*].

³² For books used for teaching these concepts, see generally ROBERT BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION* (2d ed. 2005); EDWARD BRUNET, CHARLES B. CRAVER, AND ELLEN E. DEASON, *ALTERNATIVE DISPUTE RESOLUTION: THE ADVOCATE'S PERSPECTIVE* (5th ed. 2016); JAY FOLBERG, DWIGHT GOLANN, LISA KLOPPENBERG, & THOMAS STIPANOWICH, *RESOLVING DISPUTES: THEORY, PRACTICE, AND LAW* (3d ed. 2016); STEPHEN B. GOLDBERG, FRANK E. A. SANDER, NANCY H. ROGERS, & SARAH RUDOLPH COLE, *DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, ARBITRATION, AND OTHER PROCESSES* (7th ed. 2020); CARRIE J. MENKEL-MEADOW, LELA P. LOVE, & ANDREA K. SCHNEIDER, *MEDIATION: PRACTICE, POLICY, AND ETHICS* (3d ed. 2020);

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We then provide an example that highlights the difference that this advice and these concepts can make for local leaders dealing with new challenges. These are illustrations—just the beginning of how dispute resolution concepts might help local leaders assist their communities.³³ These considerations aim at trust, root causes, and preparation. The last consideration relates more often to the strategies involved in preparing for divisive incidents and conflicts.

- A. *“Become engaged right away, asking other leaders to do the same, and augment resources as necessary to respond effectively.”*³⁴

This advice about early engagement resembles a similar concept in public policy mediation:

Many conflicts start with a resolvable problem and grow beyond hope of resolution because they are not dealt with early . . . One or more parties choose not to acknowledge that a problem exists. Other groups are forced to escalate their activities to gain recognition for their concerns. Eventually everyone engages in an adversarial battle, throwing more time and money into ‘winning’ than into solving the problem.³⁵

MICHAEL L. MOFFITT & ANDREA K. SCHNEIDER, *EXAMPLES AND EXPLANATIONS: DISPUTE RESOLUTION* (3d ed. 2014); NANCY H. ROGERS, ROBERT BORDONE, FRANK E. A. SANDER & CRAIG A. McEWEN, *DESIGNING SYSTEMS AND PROCESSES FOR MANAGING DISPUTES* (2d ed. 2019); JOSEPH B. STULBERG & LELA P. LOVE, *THE MIDDLE VOICE* 75 (3d ed. 2019); KIMBERLEE K. KOVACH, *MEDIATION: PRINCIPLES AND PRACTICE* (3d ed. 2008); LISA BLOMGREN AMSLER, JANET K. MARTINEZ, & STEPHANIE E. SMITH, *DISPUTE SYSTEMS DESIGN: PREVENTING, MANAGING AND RESOLVING CONFLICT* (2020).

³³ For additional applications of dispute resolution concepts for local leaders, see the guides for community and campus leaders posted at Divided Community Project, *Toolkit Navigation*, THE OHIO ST. U. MORITZ COLLEGE OF L., <https://go.osu.edu/dcptoolkit> (last visited Aug. 6, 2020).

³⁴ KEY CONSIDERATIONS FOR COLLEGE AND UNIVERSITY LEADERS: WHEN CONFLICTS AND DIVISIVE INCIDENTS ARISE, *supra* note 32, Point I.

³⁵ SUSAN CARPENTER & W.J.D. KENNEDY, *MANAGING PUBLIC DISPUTES: A PRACTICAL GUIDE FOR GOVERNMENT, BUSINESS, AND CITIZENS’ GROUPS* 3–4 (1988).

The impact of early involvement is considered so central that one of the mediators from the Community Relations Service of the U.S. Department of Justice reported that immediately after the 9-11 attacks in New York City, the mediators established new operational areas. They became engaged early in order to remind governmental and civic leaders to include a message of tolerance:

As soon as we had direct information—that's within the first days [after the 9-11 attacks]—we were working out of command posts because Lower Manhattan was completely sealed off. [We worked] with high level state officials and the police departments and state troopers to issue messages of moderation, restraint, tolerance, and vigorous law enforcement of any hate crime activity. As quickly as [the attack] was linked to Middle Eastern terrorists, we wanted to avoid creating a tremendous backlash against other people who were Middle Eastern or appeared to be Middle Eastern, which included South-Asian and Sikh populations. We also encouraged that messaging to go into part of what Governor Pataki and Mayor Giuliani were saying in New York; that is, while the primary emphasis was on the rescue and the recovery, we encouraged messages around maintaining this moderation, restraint, tolerance, and vigorous law enforcement of hate crimes. . . . There was no resistance to the request by the state and local officials. They saw the clear need.³⁶

In addition to perhaps forestalling hate crimes, early involvement may help people find safe and constructive avenues to achieve goals. A university staff member reported this occurring on a personal level:

³⁶ Civil Rights Mediation Organization, *Interview with Renaldo Rivera*, Oct. 29, 2001, http://www.civilrightsmediation.org/interviews/Renaldo_Rivera.shtml.

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Students confided in me that they were marching to the university administration building with demands. I said, “[c]ool, that is fine. You can do that. Or you can tell me what your concerns are and we can get them resolved that way.” As they explained what they sought, I recognized that they might well succeed if they explained their goals in writing and made an appointment with the appropriate university official. Although they were set on marching, they gave me permission to arrange for that official to be available when they arrived, and they followed her counsel about bringing a written explanation of their concerns and ideas to resolve them. They achieved their goals.³⁷

CRS’s quick engagement after 9-11 enhanced trust between the agency and marginalized communities.³⁸ The campus administrator’s preparation (by arranging a meeting with a key administrator) enabled the students to address their underlying concerns. Advice to engage early in a dispute, as encouraged by public policy mediators, could make a critical difference for leaders encountering divisive incidents or conflict.

B. *“Identify and engage stakeholders, those persons who have a stake in the conflict or can be a resource for developing and implementing a durable resolution.”*³⁹

This consideration about engaging stakeholders operationalizes for leaders similar advice offered to those designing dispute resolution processes or systems, suggesting questions such as:

³⁷ Based on oral descriptions by an equity and inclusion university staff member at the Divided Community Project’s campus unrest gathering on Jan. 10, 2020.

³⁸ Discussing how to build credibility and trust, Rivera noted “In a series of activities from day two right through the present, what occurred is that they consistently heard about CRS and when there was a big problem they had seen us at work.” Rivera, *supra* note 37.

³⁹ KEY CONSIDERATIONS FOR LEADERS FACING COMMUNITY UNREST, *supra* note 32, at 11.

- “Who cares about the problem?
- Who is affected either by the problem/conflict or by a potential solution to it?
- Who must be part of any resolution?
- Who has expertise that will help to create or assess proposals?
- Who will ultimately provide the resources?
- Who will approve the new process?
- Who will implement the new process or system?
- Who will be persuasive with the decision-makers?
- Who might effectively oppose implementation?”⁴⁰

Meaningfully engaging multiple stakeholders during a divisive incident or conflict can be important as those persons might help leaders better understand or address the situation. For example, in December 2019, a man violently stabbed five persons of the Jewish faith who were celebrating the festival of Hanukkah in a Rabbi’s home.⁴¹ The next day, New York Governor Andrew Cuomo conducted a news conference to address the matter, joined by local elected officials, the chief of police, and multiple community members.⁴² Having representatives of those affected stand with the Governor at the news conference gave residents a visual confirmation that their leaders were taking account of people who shared their viewpoints or religious views.⁴³ It helped to maintain residents’ trust that their leaders were taking their viewpoints into account.

Engaging additional stakeholders, as designers understand, may also provide important expertise or insights to leaders about underlying or root causes. In one situation, engaging an expert as a key stakeholder allowed city leaders to address some of the bitterness lingering from past discrimination:

In Sanford, Florida residents recently sought an apology for the closing of a city pool fifty years earlier. Some of the city leaders at first found the demand irritating; it

⁴⁰ NANCY ROGERS, ROBERT BORDONE, FRANK SANDER & CRAIG MCEWEN, *DESIGNING SYSTEMS AND PROCESSES FOR MANAGING DISPUTES* 71–72 (2d. ed. 2019); *see also* LISA BLOMGREN AMSLER, JANET K. MARTINEZ AND STEPHANIE E. SMITH, *DISPUTE SYSTEMS DESIGN: PREVENTING, MANAGING AND RESOLVING CONFLICT* 29–30 (2020).

⁴¹ Ryan Tarinelli & Michael R. Sisak, *Five Stabbed at Hanukkah Celebration in Latest Attack on Jews*, CONCORD MONITOR, Dec. 19, 2019, <https://www.concordmonitor.com/5-stabbed-at-Hanukkah-celebration-in-latest-attack-on-Jews-31627048#lg=1&slide=0>.

⁴² *Id.*

⁴³ *Id.*

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occurred so long in the past.

But involving a city historian helped the city officials to understand that people still living had been excluded from swimming in a city pool because of “Whites only” policies and that these people recalled vividly that the city had closed the pool because federal law otherwise required them to integrate. The historian helped officials realize that, though they had not perpetrated this harm, they could be a part of resolving this still-current bitterness by acknowledging what had occurred and the effects of the insult on many of its residents and suggesting an official city apology. Though the apology did not occur, the conversation was cathartic for participants.⁴⁴

Leaders in Sanford and New York used collaborative practices to build trust and deal with root causes during strained times.

- C. *“Issue a statement that ‘frames the matter’ by summarizing what has occurred, recognizing the impact, describing issues, announcing decisions, acknowledging who has been consulted, identifying the processes and values that will be applied to address the issues—all with an authentic voice and delivered by a person whose message will be trusted.”*⁴⁵

Those teaching mediation focus on a number of the concepts reflected in this “framing” consideration for local leaders, including: after parties have shared their perspectives, “it is generally beneficial for the neutral to restate those positions and demonstrate a basic comprehension of the relevant information and to reflect the apparent feelings of the parties [T]his lets the participants know that they have been heard and their

⁴⁴ KEY CONSIDERATIONS FOR LEADERS FACING COMMUNITY UNREST, *supra* note 32, at 13.

⁴⁵ KEY CONSIDERATIONS FOR COLLEGE AND UNIVERSITY LEADERS: WHEN CONFLICTS AND DIVISIVE INCIDENTS ARISE, *supra* note 32, at 10.

feelings have been validated.”⁴⁶ Emotionally charged statements may be “adroitly reframed to make them more palatable to the other side.”⁴⁷ “It seems sensible to identify negotiating issues . . . [P]arties often neglect to do it. They are understandably wrapped up in the matter. Frequently they see only their own concerns and have no patience to listen to the concerns of others . . . [T]he mediator sorts out the parties’ negotiating issues and uses them to build the bargaining agenda.”⁴⁸ “The mediator listens carefully to learn the parties’ central tenets. The principles each party holds dear will need to be reflected in the resolution.”⁴⁹

A summarization and framing by Indiana University Provost Lauren Robel in 2019 illustrates a leadership application of these techniques, familiar to all mediators. After learning that a professor from the business school had maligned members of a number of groups on social media, she sent the following memorandum to the business school community and released it to the broader campus community:

[This professor] has, for many years, used his private social media accounts to disseminate his racist, sexist, and homophobic views. When I label his views in this way, let me note that the labels are not a close call, nor do his posts require careful parsing to reach these conclusions. He has posted, among many other things, the following pernicious and false stereotypes:

- That he believes that women do not belong in the workplace, particularly not in academia, and that he believes most women would prefer to have a boss than be one; he has used slurs in his posts about women;

⁴⁶ EDWARD BRUNET, CHARLES B. CRAVER & ELLEN E. DEASON, *ALTERNATIVE DISPUTE RESOLUTION: THE ADVOCATE’S PERSPECTIVE: CASES AND MATERIALS* 251 (5th ed. 2016) (citing Alison Taylor & Folberg, *Mediation* 112–15 (1984)).

⁴⁷ *Id.* (citing KARL A. SLAIKEU, *WHEN PUSH COMES TO SHOVE: A PRACTICAL GUIDE TO MEDIATING DISPUTES* 231–33 (1996)).

⁴⁸ JOSEPH B. STULBERG & LELA P. LOVE, *THE MIDDLE VOICE* 80–81 (3d ed. 2019).

⁴⁹ *Id.* at 75.

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- That gay men should not be permitted in academia either, because he believes they are promiscuous and unable to avoid abusing students;
- That he believes that Black students are generally unqualified for attendance at elite institutions, and are generally inferior academically to White students.

Ordinarily, I would not dignify these bigoted statements with repetition, but we need to confront exactly what we are dealing with in [his] posts. His expressed views are stunningly ignorant, more consistent with someone who lived in the 18th century than the 21st . . .

His latest posts slurring women were picked up by a person with a heavily followed Twitter account, and various officials at Indiana University have been inundated in the last few days with demands that he be fired. We cannot, nor would we, fire [him] for his posts as a private citizen, as vile and stupid as they are, because the First Amendment of the United States Constitution forbids us to do so. That is not a close call.

Indiana University has a strong nondiscrimination policy, and as an institution adheres to values that are the opposite of [his] expressed values. We demand tolerance and respect in the workplace and in the classroom, and if [he] acted upon his expressed views in the workplace to judge his students or colleagues on the basis of their gender, sexual orientation, or race to their detriment,

such as in promotion and tenure decisions or in grading, he would be acting both illegally and in violation of our policies and we would investigate and address those allegations according to our processes. Moreover, in my view, students who are women, gay, or of color could reasonably be concerned that someone with [his] expressed prejudices and biases would not give them a fair shake in his classes, and that his expressed biases would infect his perceptions of their work. Given the strength and longstanding nature of his views, these concerns are reasonable.

Therefore, the Kelley School [of Business] is taking a number of steps to ensure that students not add the baggage of bigotry to their learning experience:

- No student will be forced to take a class from [him]. The Kelley School will provide alternatives to [his] classes;
- [He] will use double-blind grading on assignments; if there are components of grading that cannot be subject to a double-blind procedure, the Kelley School will have another faculty member ensure that the grades are not subject to [his] prejudices.

If other steps are needed to protect our students or colleagues from bigoted actions, Indiana University will take them.

The First Amendment is strong medicine, and works both ways. All of us are free to condemn views that we find reprehensible, and to do so as vehemently and publicly as

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[he] expresses his views. We are free to avoid his classes, and demand that the university ensure that he does not, or has not, acted on those views in ways that violate either the federal and state civil rights laws or IU's nondiscrimination policies. I condemn, in the strongest terms, [his] views on race, gender, and sexuality, and I think others should condemn them. But my strong disagreement with his views—indeed, the fact that I find them loathsome—is not a reason for Indiana University to violate the Constitution of the United States.

This is a lesson, unfortunately, that all of us need to take seriously, even as we support our colleagues and classmates in their perfectly reasonable anger and disgust that someone who is a professor at an elite institution would hold, and publicly proclaim, views that our country, and our university, have long rejected as wrong and immoral.⁵⁰

One can imagine the likely positive reactions of students to Provost Robel's candid and authentic summary of what occurred, her attention to the harm, including students who might be fearful, and her effort to protect them, her openness to more ideas for protecting students, her explanations of the Constitutional issues of why some likely proposals may not be feasible, and her commitment moving forward to the values that nearly all likely share. Moreover, as Executive Vice President for Academic Affairs and Provost, she is the university's chief academic officer; by making this statement and then making it public, she announced to the university's multiple stakeholders, including students, faculty, staff, alumni, and financial supporters, the university's authoritative stance on this particular matter and the values that support it. As this example illustrates, the framing wisdom that mediators know well can work for leaders to maintain and build trust between campus leaders and students and among the students. It can

⁵⁰ Lauren Robel, *On the First Amendment*, INDIANA UNIVERSITY (Nov. 20, 2019), <https://provost.indiana.edu/statements/archive/first-amendment.html>.

emphasize the root causes of the reaction, including the sense of insult by those already having dealt with past discrimination based on race, gender, and sexual orientation.

D. “When a conflict or concern is raised, in addition to the clearly articulated dispute, identify the roots of the problem.”⁵¹

In dispute resolution literature, commentators focus on delving to discover the underlying issues or “root causes” in community-wide civil rights disputes as a means of dealing with the heart of the concerns.⁵² These commentators advocate a focus on underlying issues not only to reach resolution, but also to meet a valid concern that Professor Bernard S. Mayer explained as a fear that “dispute resolution might be used as a means of preventing serious organizing, dissipating dissent through a show of dialogue, and focusing people on the potential for minor concessions rather than on the essence of exploitation.”⁵³

This dispute resolution skill, when employed by leaders, can help avoid treating only the presenting protests while disregarding underlying issues. For example, in Bloomington, Indiana during the summer of 2019, protestors confronted a vendor who was participating in the city’s long-standing, popular weekly Farmers’ Market; the vendor, in her social media posts, aligned herself with White supremacists.⁵⁴ The protestors’ actions, met by the vendor’s supporters, created a public safety concern, a situation that led Bloomington’s Mayor John Hamilton to suspend the market’s operations.⁵⁵ But Mayor Hamilton importantly characterized the matters involved in the Farmers’ Market situation as raising deeper issues that

⁵¹ KEY CONSIDERATIONS FOR COLLEGE AND UNIVERSITY LEADERS: WHEN CONFLICTS AND DIVISIVE INCIDENTS ARISE, *supra* note 32, at 10.

⁵² See Wallace Warfield, *Building Consensus for Racial Harmony in American Cities: A Case Model Approach*, 1996 J. DISP. RESOL. 151 (1996) (discussing the importance of understanding the role of consensus in the resolution of interracial conflict); Mara Schoeny & Wallace Warfield, *Reconnecting Systems Maintenance with Social Justice: A Critical Role for Conflict Resolution*, 16 NEGOT. J. 253, 257 (2000).

⁵³ BERNARD S. MAYER, BEYOND NEUTRALITY: CONFRONTING THE CRISIS IN CONFLICT RESOLUTION 44 (2004).

⁵⁴ Jack Healy, *Amid the Kale and Corn, Fears of White Supremacy at the Farmers’ Market*, N.Y. TIMES (Aug. 18, 2019), <https://www.nytimes.com/2019/08/18/us/indiana-farmers-market-white-supremacy.html>.

⁵⁵ *Id.*

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required “ongoing efforts to address race, inclusion, and equity.”⁵⁶ He asked the Divided Community Project to “meet with community leaders, City employees, and many other local leaders who play critical roles in the life of the city to gain insight into longstanding issues related to race and diversity in Bloomington.”⁵⁷

Processes implemented in Sanford, Florida, after Trayvon Martin’s tragic death further illustrate how collaborative processes can highlight the root causes of conflict. Depicted as a “deeply divided community” with layers of “distrust between the police department and the Black community, which erupted following the Trayvon Martin shooting,” the City of Sanford—working with community residents and stakeholders—developed a Nine Point Plan to “to reunite the City and move forward.”⁵⁸ After more than two years of community engagement to develop and implement the Plan, a report identified collective “feelings of frustration and anger” and “feelings of ongoing institutionalized prejudice and racism.” Community engagement “reinforced the history of injustices” and the African-American community’s “resolve to hold the City accountable for change.”⁵⁹

⁵⁶ Press Release, Mayor’s Office of Bloomington, Ind., City Invites Continued Engagement on Issues of Race and Inclusion in Bloomington, (Nov. 19, 2019) (on file at <https://bloomington.in.gov/news/2019/11/19/4269>).

⁵⁷ *Id.*

⁵⁸ Andrew Thomas, *Nine Point Plan: Action Plan for Reuniting the Community, One City—Many Communities, Two Year Progress Report April 2012 - April 2014*, at 2 (Jan. 2015), <https://www.sanfordfl.gov/home/showdocument?id=11455>.

⁵⁹ *Id.* As stated in the report:

The following is a summary list of some of the long standing issues that was a driving force underlying the frustration and anger.

- The State of Florida dissolving the incorporation of the City of Goldsboro and merging it with the City of Sanford in 1911
- The renaming of streets in Goldsboro following the merger in 1911
- The Jackie Robinson experience in Sanford in the 1940’s and the making of the movie “42” in 2012
- Seminole County Public School non-compliance with Consent Decree of 1970
- Poor housing inventory in the African American communities
- High unemployment rate in the African American communities
- Inadequate infrastructure in the African American communities[.]

Id.

Advice from dispute resolution experts for leaders to search for and deal with underlying issues and roots of conflict thus can help leaders restore equity and resilience within their communities.

- E. *“Keep in mind the brittleness of some residents’ trust in their local leaders in the midst of volatile conflict and follow approaches likely to develop or enhance that trust . . . Help your staff understand that some conflicts are precipitated or arise because of a lack of trust, and they must work to earn public trust in this context . . . Show a sense of urgency regarding the concerns of all parts of the community.”*⁶⁰

Maintaining and enhancing trust takes a central role in mediation literature. As one mediation text notes:

[The process of securing trust] begins with the mediator’s first interaction with the disputants and continues until mediation is concluded. Trust is attained and maintained when the mediator is perceived by the disputants as an individual who understands and cares about the parties and their dispute, has the skills to guide them to a negotiated settlement, treats them impartially, is honest, will protect each party from being hurt during mediation by the other’s aggressiveness or their own perceived inadequacies, and has no interests that conflict with helping to bring about a resolution which is in [their] best interest.⁶¹

Some community leaders have recognized the importance of taking an aggressive approach toward maintaining and enhancing trust, in light of the threats to trust discussed in Part II. In one example, the leaders not only kept their communications timely and ongoing but also enlisted the collaboration

⁶⁰ KEY CONSIDERATIONS FOR LEADERS FACING COMMUNITY UNREST, *supra* note 32, at 13–16.

⁶¹ NANCY H. ROGERS & RICHARD A. SALEM, A STUDENT’S GUIDE TO MEDIATION AND THE LAW 11–12 (1987).

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of community leaders who might be trusted by those citizens who had lost confidence in city leaders. Following the Trayvon Martin shooting in Sanford, Florida, in 2013, leaders—advised by local and the U.S. Justice Department’s Community Relations Service mediators—arranged for multiple sources of information about the trial of George Zimmerman, the neighborhood volunteer who had been charged in connection with the shooting:

[Sanford, Florida] needed a means to control rumors. By the time Zimmerman’s trial occurred in 2013, the local clergy had formed an association, Sanford Pastors Connecting, that met regularly, and the Sanford Police Department, CRS, and the County Sheriff’s Office reserved seats in the courtroom that could be rotated among members of that association. The pastors could provide information to members that would be trusted Sanford [also] hired a public relations firm so that the city could respond to media requests in a timely way.⁶²

F. *“Acknowledge the pain that may fall unevenly on residents but that it is the shared hope of all to deal with the hurt of any.”*⁶³

Mediators understand the role of expressing empathy; that “acknowledgment of hurts and frustrations helps to humanize the conflict,” and that it helps to note the “positive aspects of the relationship and the goals the disputants have in common”⁶⁴

In the Farmers’ Market conflict noted previously, Bridge Initiative @ Moritz mediators recognized racial tensions surfaced by protests at the Farmers’ Market. Importantly, they acknowledged the deeper pain experienced by some residents when they noted in their report that “people

⁶² Andrew Thomas in Nancy H. Rogers, *When Conflicts Polarize Communities*, 30 OHIO ST. J. ON DISP. RESOL. 173, 183–84 (2015).

⁶³ KEY CONSIDERATIONS FOR LEADERS FACING COMMUNITY UNREST, *supra* note 32, at 3.

⁶⁴ NANCY H. ROGERS & RICHARD A. SALEM, A STUDENT’S GUIDE TO MEDIATION AND THE LAW (1987), *reprinted in* GOLDBERG ET AL., DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, ARBITRATION, AND OTHER PROCESSES 108 (7th ed. 2020).

of color, religious minorities, and other marginalized communities in Bloomington have been confronting these realities for generations.”⁶⁵

For the reasons above, it is important to provide counsel to leaders about showing empathy and commonality in the midst of divisive incidents. One can imagine, for example, the reaffirming impact of the statement by the Indiana University Provost quoted above: “[W]e support our colleagues and classmates in their perfectly reasonable anger and disgust that someone who is a professor at an elite institution would hold, and publicly proclaim, views that our country, and our university, have long rejected as wrong and immoral.”⁶⁶ Surely it must have helped students rebuild trust among students and with their leadership to have the top academic officer acknowledge their pain and further affirm that the whole community will support them.

G. *“Offer students safe and effective options to meet their needs and goals.”*⁶⁷

Mediation professors suggest generating multiple options that meet the parties’ interests.⁶⁸ Creating these options is more difficult in the midst of a divisive incident or conflict but can be a useful part of increasing the resiliency of the community or campus—the preparation part.

The “I, Too, Am” Movement referenced above illustrates the usefulness of this suggestion for leaders as well and the power of finding these options in a university context:

[A student’s desire to do something arose in 2012—her first year as an undergraduate at Harvard—] in response to debates about Harvard’s affirmative action policy that were generated by an article in the student newspaper written by a White student

⁶⁵ DIVIDED COMMUNITY PROJECT, BRIDGE INITIATIVE @ MORITZ, REPORT: BLOOMINGTON, INDIANA 3 (2019) [https://bloomington.in.gov/sites/default/files/2019-12/Bridge Initiative Bloomington Report 123019.pdf](https://bloomington.in.gov/sites/default/files/2019-12/Bridge%20Initiative%20Bloomington%20Report%20123019.pdf). [hereinafter BRIDGE INITIATIVE REPORT: BLOOMINGTON, INDIANA].

⁶⁶ Letter from Lauren Robel, Exec. Vice President & Provost, Indiana Univ., to Kelly Sch. Of Bus., Indiana Univ., Provost Statement: On the First Amendment (Nov. 20, 2019), <https://provost.indiana.edu/statements/archive/first-amendment.html>.

⁶⁷ KEY CONSIDERATIONS FOR COLLEGE AND UNIVERSITY LEADERS: WHEN CONFLICTS AND DIVISIVE INCIDENTS ARISE, *supra* note 32, at 3, 15.

⁶⁸ See, e.g., SUSAN L. CARPENTER & W.J.D. KENNEDY, MANAGING PUBLIC DISPUTES: A PRACTICAL GUIDE FOR GOVERNMENT, BUSINESS, AND CITIZENS’ GROUPS 132–36 (1988); ROGERS & SALEM, *supra* note 61, at 111.

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opposed to the university's affirmative action policies. The student who started the "I, Too, Am" Movement recalled:

'I felt, and other students felt, that our presence and identity as Black students was being de-valued. At the time I was a freshman. We'd just shown up on campus, and we felt like people were saying I wasn't smart enough to be here. . . . Everybody was talking about it on campus and it created a lot of racial tension.'⁶⁹

She worked on several projects for academic credit or with university support . . . Concerned about the climate for minority students at Harvard and inspired by Langston Hughes's poem, "I, Too," she created an online montage of photos and interviews of other minority students at Harvard. In the photos, interviewees held a dry erase board with a belittling comment they heard or a response they might have wanted to make to an off-putting comment or action by another student. She posted the montage on Tumblr under the name "I, too, am Harvard." She did that work for credit as part of an independent study at Harvard. The University hosted a play by students based on this work. The student's work was viewed over a million times and stimulated similar online montages at other universities. What became known as the ITA ("I, Too, Am") Movement received

⁶⁹ Ali Vingiano, *63 Black Harvard Students Share their Experiences in a Powerful Photo Project*, BUZZFEED NEWS, (Mar. 3, 2014), <https://www.buzzfeednews.com/article/alisonvingiano/21-black-harvard-students-share-their-experiences-through-a>, *quoted in* PREPARING THE CAMPUS AT A TIME OF NATIONAL POLARIZATION, *supra* note 32, at 11.

support from student affairs professionals at a number of campuses.⁷⁰

H. Conclusion

The action steps suggested above are a few of the potential examples illustrating what dispute resolution expertise has to offer for local and university leaders given the challenges discussed in Part II.⁷¹ This is so particularly as leaders aim to take advantage of three dispute resolution-based strategies—maintain and enhance trust, deal with root causes, and prepare in advance for a more resilient community and effective decision-making when a divisive incident or conflict occurs.⁷² But, to be effective, dispute resolution experts need to appreciate some other aspects of leading locally (Part IV) and translate what they know into a language and a format that will help them reach these leaders (Part V).

IV. CHALLENGES IN REACHING LOCAL LEADERS

Context matters—a crucial first lesson in dispute system design.⁷³ Thus, designers are advised to conduct an assessment of each new milieu.⁷⁴ Leaders weigh a number of factors that may not typically concern mediators. To the extent that mediators choose not to recognize these or lack the experience to discern them, their counsel may be dismissed as impractical.

⁷⁰ PREPARING THE CAMPUS AT A TIME OF NATIONAL POLARIZATION, *supra* note 32, at 11.

⁷¹ For additional examples of counsel for local leaders based on dispute resolution concepts, see the guides for community and campus leaders at <https://go.osu.edu/dcptoolkit>.

⁷² Other instances of considerations for leaders, taken from Divided Community Project guides, that coincide with dispute resolution concepts (listed in parentheses might include: “Expand teaching of effective negotiation, advocacy, and facilitation for faculty, staff, and students.” (“[N]egotiator training by a professional third party is often used as a precursor to formal negotiation.” CARPENTER & KENNEDY, *supra* note 36, at 235); “Identify and apply college or university values and aspirations.” (Identify common interests and goals. STULBERG & LOVE, *supra* note 33, at 75; Nancy H. Rogers, *One Idea for Ameliorating Polarization: Reviving Conversations About an American Spirit*, 2018 J. OF DISP. RESOL. 28, 29–35; CARPENTER & KENNEDY, *supra* note 36, at 204; “Work to improve relationships that were strained during the conflict.” (Reconcile the parties. BUSH & FOLGER, *supra* note 33 (transformative mediation); Annalise Buth & Lynn Cohn, *Looking at Justice Through a Lens of Healing and Reconnection*, 13 NW J.L. & SOC. POL’Y 1 (2017) (restorative justice practices)).

⁷³ ROGERS ET AL., *supra* note 33, at 69–97.

⁷⁴ *Id.* at 83–89.

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We argue in Part V, below, that there are also other strategies to deal with any deficits in experience on the part of the dispute resolution experts, but we first offer a few examples of what these experts may not appreciate about the contexts in which local leaders operate.

First, law enforcement plays a role in local leaders' decisions. In hate crime situations, for example, prosecutors may urge leaders not to release evidence to the public until they can apprehend and question those who are suspected to have committed the offenses. Dispute resolution experts can recognize these matters as leaders' important interests in the effective administration of justice and public safety. However, these experts may fail to appreciate how strongly leaders may be committed to particular options on both philosophical and practical grounds. Thus, the commitment that leaders have to certain options may be a feature of the local context in which leaders operate.

Second, elected leaders may be worried about how their actions and speech affect coming elections. In an analogous context, public university leaders may be attentive to the views of legislators who vote on appropriations. In addition, university leaders may be mindful to how their actions and speech are perceived by the board of trustees. These considerations can influence how leaders approach their decisionmaking and their choices.

Third, leaders often emphasize the unique nature of their community or university. Some leaders may therefore resist "outside" experts who base their advice on what occurs elsewhere. This resistance can create a tendency for local leaders to reinvent what to do when facing divisive incidents or conflicts. After reviewing decades of studies of communities under stress, sociologist James Coleman concluded, "Each community [deals with these conflicts] as if similar problems had never arisen elsewhere. Each community carries out for itself a trial and error process without benefit of the cumulative experience of other communities."⁷⁵ Local leaders may also believe that the unique nature of their community precludes the sort of divisive incidents or conflicts that occur elsewhere. The Presidential Commission that examined university leaders' lack of preparation for unrest in the 1960s concluded:

Convinced that their own campuses were immune to disruptive or violent protests, administrators were unprepared to cope with them when they occurred. In the midst of a crisis, some administrators believed that

⁷⁵ JAMES COLEMAN, *COMMUNITY CONFLICT* 4-5 (1957).

their only options were to do nothing or call in the police.⁷⁶

Fourth, unlike most mediators, local leaders operate in what might be described as a “goldfish bowl.” National publicity is always a possibility. The involvement of national advocacy groups is a game-changing contingency. Public information requests affect the candor of discussions among the leadership team. Social media use increases the pace at which conflicts develop.

Fifth, leaders may be sensitive to the charge, mentioned above,⁷⁷ that they are using collaborative methods to squelch expression. Several leaders responded positively at Divided Community Project meetings to the conclusion of civil rights mediator Wallace Warfield that mediators in these contexts should search for the tap roots of conflict, including historical issues.⁷⁸ They also embraced his view that leaders should set in place long-term processes to deal with them, including committing to public accountability in dealing with these concerns.⁷⁹

Some may argue that these and other influences on leaders’ actions make those leaders believe that the counsel of dispute resolution experts is, or will be, unhelpful. We do not. We suggest in the next part that a number of strategies can be employed to reach leaders in ways that they will accept and find useful and will make a difference in communities across the nation.

V. THE SECOND CONVERSATION: STRATEGIES TO REACH CURRENT LOCAL LEADERS AND TEACH FUTURE LEADERS (CURRENT STUDENTS)

The first three parts of this article discuss the crucial and difficult conversations that local leaders are having with residents or students during

⁷⁶ PRESIDENT’S COMMISSION ON CAMPUS UNREST, THE REPORT OF THE PRESIDENT’S COMMISSION ON CAMPUS UNREST 37–38 (1970).

⁷⁷ See text accompanying *supra* notes 53–60.

⁷⁸ Wallace Warfield, *Building Consensus for Racial Harmony in American Cities: A Case Model Approach*, 1996 J. DISP. RESOL. 151, 153; Mara Schoeny & Wallace Warfield, *Reconnecting Systems Maintenance with Social Justice: A Critical Role for Conflict Resolution*, 16 NEGOT. J. 253, 257 (2000). But see Laura Nader, *Controlling Processes in the Practice of Law: Hierarchy and Pacification in the Movement to Reform Dispute Ideology*, 9 OHIO ST. J. ON DISP. RESOL. 1, 13 (1993); JEROME AUERBACH, *JUSTICE WITHOUT LAW?* 144 (1983) (both arguing that informal dispute resolution processes are used to pacify dissidents).

⁷⁹ Schoeny & Warfield, *supra* note 79, at 266.

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this time of national polarization. We turn now to the occasions when dispute resolution experts reach out to assist local leaders. This might also be described as a crucial and difficult conversation, though the focus here is on the conversation between dispute resolution experts and leaders rather than between leaders and residents or students.

We mentioned in the last part of this article that it is not easy for those who are not local leaders to transmit dispute resolution counsel that takes into account the other challenges that these leaders face. At least six strategies will help: 1) offer the advice through other local leaders or at least as they would word them; 2) omit the ADR jargon; 3) fit the patterns and breaks in leaders' frantic schedules; 4) select a game-like or other engaging format; 5) give enough explanation so that a local leader can tailor the counsel to the community's need and situation; and 6) do all of this quietly, unless the leader prefers otherwise.

The Divided Community Project's approach provides an illustration of approaches that implement both the themes and strategies discussed above. The Project will share all of its tools for implementing these six strategies, what we call a "virtual toolkit," with other dispute resolvers who will employ them in nonprofit ventures. The Project will also advise dispute resolution experts on how they might create their own or additional tools.

A. Guides that Summarize What Other Leaders Were Glad That They Did or Wish that They Would Have Done When a Divisive Incident or Conflict Occurred

The Divided Community Project prepared written guides that contain prescriptive dispute resolution suggestions for addressing or planning for divisive events and conflicts. But they are distinctive in several ways. In preparing for the conversation between dispute resolution experts and leaders, Project personnel first shared dispute resolution ideas with a group of current and former local and university leaders and then solicited these leaders' help in identifying ideas they were glad to have used and ideas they wished they had used. It importantly invited these leaders to give feedback regarding the tone and language of the written suggestions. The result is that the guides are styled as practical advice from leader to leader, written in the language of leaders speaking to colleagues. They include both summary advice and deeper discussions and illustrations that allow leaders to decide how they might apply the concepts in their own situations. Others could

replicate this process for translating dispute resolution concepts into practical advice for leaders, described in each guide.⁸⁰

The guides themselves do not meet all of the strategic factors listed above. Reading a guide does not fit easily into a leader's frantic schedule, for example. The Project discovered that it had to combine the guides with other strategies discussed below to reach leaders.

B. Guides and Tools to Help Communities Prepare in Advance of a Divisive Incident or Conflict

One strategy to avoid local leaders' hectic schedules during a crisis is to help community leaders plan in advance, when they have more time. This strategy strengthens a community even if it never faces a divisive crisis by building trust among residents and with leaders. The Divided Community Project has developed guides for both community and higher education leaders highlighting principles and action steps to take to plan for addressing divisive events.⁸¹ In addition, its virtual toolkit has a guide for identifying a community spirit.⁸² The Project also offers leaders guides and a website that they can provide for community organization leaders and classroom teachers who want to build bridges across community divides at a grassroots level.⁸³ These guides, though, work best when there is an incentive to read them. We turn now to two means to encourage leaders to read or listen to counsel (Parts C and D).

⁸⁰ For the introductory materials in key Divided Community Project publications, see DIVIDED COMMUNITY PROJECT, *DIVIDED COMMUNITIES AND SOCIAL MEDIA: STRATEGIES FOR COMMUNITY LEADERS* 3 (2d ed. 2020) [hereinafter *DIVIDED COMMUNITIES AND SOCIAL MEDIA*]; DIVIDED COMMUNITY PROJECT, *IDENTIFYING A COMMUNITY SPIRIT* 3–6 (2019); *KEY CONSIDERATIONS FOR LEADERS FACING COMMUNITY UNREST*, *supra* note 32, at 5–8; *KEY CONSIDERATIONS FOR COLLEGE AND UNIVERSITY LEADERS: WHEN CONFLICTS AND DIVISIVE INCIDENTS ARISE*, *supra* note 32, at 5–8; *PLANNING IN ADVANCE OF COMMUNITY UNREST*, *supra* note 32, at 5–6; *PREPARING THE CAMPUS AT A TIME OF NATIONAL POLARIZATION*, *supra* note 32, at 6–7.

⁸¹ *PLANNING IN ADVANCE OF COMMUNITY UNREST*, *supra* note 32; *PREPARING THE CAMPUS AT A TIME OF NATIONAL POLARIZATION*, *supra* note 32.

⁸² *IDENTIFYING A COMMUNITY SPIRIT*, *supra* note 81.

⁸³ KASSANDRA STEWART & DIVIDED COMMUNITY PROJECT, *HOSTING AMERICAN SPIRIT STORYTELLING CONVERSATIONS: A BRIEF GUIDE WITH 18 IDEAS* (2019); DIVIDED COMMUNITY PROJECT, *AN AMERICAN SPIRIT* (2019); *American Spirit*, MORITZ COLLEGE OF LAW, <https://moritzlaw.osu.edu/american-spirit/>.

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C. Simulations and De-Briefing Materials: Midland, New Lake & Springton University

Each simulation asks participants to play—in person or virtually—the roles of community or university leaders during a series of crises that arise in a fictional community or university.⁸⁴ Participants are asked to develop talking points for an emergent press conference. While participants work, the simulation becomes increasingly more complicated through a series of “injects” which participants must react to, such as calls from the media, emergent protests, questions about public records, and outside influences.

One goal for using “table-top” simulations is to encourage leaders to read the guides so that they can perform well within the leadership team during a simulation. A second function is to ask them to imagine that the events occurred in their own community and then help them create an agenda to implement what they would like to have in place that is tailored to their communities and situations—thus a plan to prepare ahead of a divisive incident or conflict. A third aspect is the game-like nature of a simulation. In addition, a simulation can be completed and discussed within a half day, a time period that might be set aside for leadership team retreats.

While dispute resolution scholars and community leaders could easily pull out lessons on facilitation and participatory process from the simulations, the simulation’s core learning goals for leaders tie back to the Project’s virtual toolkit:

1. The value of counsel from an experienced community mediator.⁸⁵
2. What other community leaders can contribute.⁸⁶
3. How to build trust in government.⁸⁷
4. Effective communication strategies during crisis.⁸⁸

⁸⁴ Crises are adapted from relevant news headlines.

⁸⁵ KEY CONSIDERATIONS FOR LEADERS FACING COMMUNITY UNREST, *supra* note 32, at 9–10; KEY CONSIDERATIONS FOR COLLEGE AND UNIVERSITY LEADERS: WHEN CONFLICTS AND DIVISIVE INCIDENTS ARISE, *supra* note 32, at 19.

⁸⁶ KEY CONSIDERATIONS FOR LEADERS FACING COMMUNITY UNREST, *supra* note 32, at 11–12; KEY CONSIDERATIONS FOR COLLEGE AND UNIVERSITY LEADERS: WHEN CONFLICTS AND DIVISIVE INCIDENTS ARISE, *supra* note 32, at 8.

⁸⁷ KEY CONSIDERATIONS FOR LEADERS FACING COMMUNITY UNREST, *supra* note 32, at 13–16.

⁸⁸ KEY CONSIDERATIONS FOR COLLEGE AND UNIVERSITY LEADERS: WHEN CONFLICTS AND DIVISIVE INCIDENTS ARISE, *supra* note 32, at 17; KEY CONSIDERATIONS FOR LEADERS FACING COMMUNITY UNREST, *supra* note 32, at 19–22; DIVIDED

5. Framing what is taking place.⁸⁹
6. How to immediately begin long-term collaborative processes that will deal with root causes over time.⁹⁰
7. The value of planning in advance of conflict.⁹¹

The simulations engage participants, and the core learning points emerge during the simulation debrief. Facilitators often begin with open-ended questions about the simulation and ask participants to complete an online poll to assess their community's preparedness for community unrest.⁹² Facilitators prompt discussion asking, "How do you wish Midland had prepared for situations such as this one?" and "If Midland leaders knew that all of these events would take place in three months, what would they do to prepare for community unrest?"

In conjunction with debriefing conversations, the simulation may be used to help public officials assess whether a community has strong, existing relationships with the natural, influential leaders of various stakeholder and bridge-building groups; whether a community has made it apparent to the public, both visually and audibly, that leaders are taking into account the views of the groups most directly affected by the crisis at hand; whether the community's communications team is prepared to expand quickly during a time of crisis; whether bringing in an outside mediator or consultant would be helpful or disruptive; whether the community has local leaders they can call on to help facilitate tough conversations; and whether the community is communicating effectively during crisis.

The simulation stimulates self-discovery, thus avoiding the potential resentment of "outsiders" giving advice. In Columbus, Ohio, one of more than a dozen communities and campuses that have used a Project

COMMUNITIES AND SOCIAL MEDIA, *supra* note 81, at 4–8, 12–30; PREPARING THE CAMPUS AT A TIME OF NATIONAL POLARIZATION, *supra* note 32, at 18.

⁸⁹ KEY CONSIDERATIONS FOR COLLEGE AND UNIVERSITY LEADERS: WHEN CONFLICTS AND DIVISIVE INCIDENTS ARISE, *supra* note 32, at 10–14; KEY CONSIDERATIONS FOR LEADERS FACING COMMUNITY UNREST, *supra* note 32, at 23–24.

⁹⁰ KEY CONSIDERATIONS FOR COLLEGE AND UNIVERSITY LEADERS: WHEN CONFLICTS AND DIVISIVE INCIDENTS ARISE, *supra* note 32, at 8–10.

⁹¹ KEY CONSIDERATIONS FOR COLLEGE AND UNIVERSITY LEADERS: WHEN CONFLICTS AND DIVISIVE INCIDENTS ARISE, *supra* note 32, at 24; KEY CONSIDERATIONS FOR LEADERS FACING COMMUNITY UNREST, *supra* note 32, at 29; PLANNING IN ADVANCE OF COMMUNITY UNREST, *supra* note 32; PREPARING THE CAMPUS AT A TIME OF NATIONAL POLARIZATION, *supra* note 32, at 21–23.

⁹² The Divided Community Project created an online quiz called "Community Assessment and Preparedness Test," available to access from Bill Froehlich at Froehlich.38@osu.edu.

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simulation,⁹³ Mayor Andrew Ginther described his experience with the *Midland* Simulation this way:

The simulation provided a realistic gauge of the mounting tensions that occur during civil unrest between city officials, residents, community advocates and civic leaders. [During the debriefing conversation, Project staff] elicit[ed] ideas to enhance city's community engagement efforts, to leverage the work of community partners, and to begin planning in advance of civil unrest and social crisis. The *Midland* Simulation was an opportunity for my staff to identify how they will support the community during a social crisis and encouraged participants to think creatively—outside of our traditional silos. Ben Franklin tells us, "If you fail to plan, you are planning to fail." *Midland* has helped Columbus plan.⁹⁴

In other words, the combined approaches described in Parts A through C—creating the lay language guides that reflect the context in which leaders operate and then incentivizing their use in a half day, game-like setting when leaders are in a retreat and not in the midst of a crisis, followed by applying the lessons learned to a plan for their community—resulted in reaching local

⁹³ The Project has used the *Midland* Simulation with hundreds of students at OSU's Moritz College of Law and students at Stanford Law, as well as with community leaders from the following communities: Bloomington (IN), Charlotte (NC), Charlottesville (NC), Columbus (OH), Dallas (TX), Indianapolis (IN), Kenyon College (OH), Memphis (TN), Midwest City (OK), Norman (OK), Portland (OR), San Leandro (CA), Sanford (FL), Sugarland (TX), and at a number of conferences. The *Midland* simulation is also effective with large groups (ranging between 12 and 150) as a 45-minute mini exercise. The Project has used the *New Lake* Simulation with dozens of students at OSU's Moritz College of Law.

The Project has used the *Springton University* Simulation with more than a hundred participants including students at OSU's Moritz College of Law and campus leaders from the following campuses: The Ohio State University, The University of Oklahoma, The University of Hawaii at Manoa, The University of Massachusetts at Amherst, Case Western Reserve University, and Menlo College. The *Springton University* Simulation.

⁹⁴ Mayor Standup-Midland Simulation, VIMEO, <https://vimeo.com/ctvcolumbus/review/320046219/c7181fcb8d> (last visited Aug. 1, 2020).

and campus leaders from dozens of communities and campuses in ways that led to planning ahead.

D. Academies for Community “Core Leadership” Groups

A second Divided Community Project strategy for overcoming challenges of reaching leaders is to invite them, in teams, to participate in a three-day seminar. The Academy Initiative,⁹⁵ conducted in collaboration with the American Bar Association Section of Dispute Resolution, brings diverse leaders together from several communities at a time to engage in a conflict resolution strategy and skill-building program. The goal is to strengthen community leaders’ skills to effectively intervene in divisive conflicts. It can also help assemble, support, and train a core cadre team from each community in principles and practices in planning for and addressing immediate incidents or underlying causes of community unrest. These team members will be a vital part of that community’s leadership team in the event of a divisive incident or conflict; the credibility and effectiveness of their counsel and insights stems from their being viewed by leaders as collaborators, not “outsiders,” that their counsel stems from their understanding and taking into account the practical issues faced by leaders, and their being able to communicate their counsel to leaders in a jargon-free language with a tone that will make their counsel most effective.

Divided Community Project facilitators⁹⁶ commit to keep Academy conversations confidential so that participants can openly discuss and analyze specific problems, challenges, or both in their city, advance a game

⁹⁵ Initiated in March 2019, the inaugural Academy Initiative hosted core leadership groups from Charlottesville (VA), Kenyon College, Memphis (TN), and the State of Oregon. Based on feedback from the 2019 Academy, the Divided Community Project hosted a second Academy in March 2020 with core leadership groups from Bloomington (IN), Charlotte (NC), Indianapolis (IN), and Midwest City (NC). This initiative is developed in partnership with the American Bar Association Section of Dispute Resolution (specifically, Section Director Linda Seely and Public Policy, Consensus Building, and Democracy Committee co-chairs Jessie Lawrence and Terry Amsler).

In August 2020, the Project hosted an online three day “Campus Academy” for University leaders including leaders from the following campuses: The Ohio State University, The University of Oklahoma, The University of Hawaii at Manoa, The University of Massachusetts at Amherst, Case Western Reserve University, and Menlo College.

⁹⁶ Facilitators have included experienced mediators who reflect the diversity of the communities represented: Terry Amsler, Susan Carpenter, William Froehlich, Jessie Lawrence, Michael Lewis, Becky Monroe Nancy Rogers, Linda Seely, and Josh Stulberg.

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plan for addressing them, and share their conclusions with other teams in attendance and welcome their feedback and assessment. Program assurances of confidentiality facilitate this. The Academy curriculum includes five key components: academy preparation, introductions and orientation, simulation, planning, and follow-up.

To prepare, participant communities must identify diverse core leadership groups from their communities. To develop a process that can be implemented broadly in a community, a core leadership group ideally includes two representatives from municipal infrastructure (that number insures public leadership commitment to initiative and ideally includes a high-ranking police official and a city manager or the equivalent) and representatives from the local non-profit community, community advocates, faith community, and an educational institution.⁹⁷ Once identified, participants in the Academy engage in pre-session conference calls so that Academy facilitators learn how the group came together, participant expectations for the Academy, sources of community tension, the desired outcomes, and next steps envisioned for the team. As in the simulations, participants should read some of the Divided Community Project guides in advance of the Academy.

Over the three days, each community group explains that group's goals for participating in the academy and the follow-up discussions. Facilitators then describe how the academy will respond to those goals. Participants discuss with similarly situated leaders from other communities (e.g., separate meetings of police leaders, religious leaders, non-profit advocates) the challenges to engaging broad stakeholder groups and processes that have worked in their communities. They engage in an abbreviated simulation,⁹⁸ complete an assessment test that asks participants to consider whether their community is prepared for community unrest,⁹⁹ and debrief on key insights for handling and preparing for community unrest. With the aid of Divided Community Project facilitators, participants develop a process for broadly engaging community stakeholders.¹⁰⁰ To get an idea of what has worked in other communities, participants hear from a panel of

⁹⁷ See *Academy Initiative: Strengthening Democratic Engagement to Address Local Civil Unrest*, DIVIDED COMMUNITY PROJECT, <https://moritzlaw.osu.edu/dividedcommunityproject/strengthening-democratic-engagement-to-address-local-civil-unrest/> (last visited Apr. 2, 2020).

⁹⁸ See *supra* Part V(C).

⁹⁹ The Divided Community Project created an online quiz called "Community Assessment and Preparedness Test," available to access from Bill Froehlich at Froehlich.38@osu.edu.

¹⁰⁰ Planning materials and prompting questions are available at <https://go.osu.edu/dcptoolkit>.

individuals who have been in the heat of community unrest or are engaging in similar planning processes. Participants engage in conversations about topics including advanced negotiations, addressing power imbalances, and bringing additional people to the table.

Following the Academy, the Divided Community Project hosts individual and group follow-up conversations to provide continued support for communities seeking to implement their respective plans. Following the 2019 Academy, for example, initial conversations focused on obstacles to implementation; later conversations addressed specific issues like how to bring those who don't want to engage to the table.

Kenyon College's team developed the "Kenyon Concerns Coalition" following the 2019 Academy. The college website describes this initiative:

Kenyon Concerns Coalition is an advisory group of Kenyon staff, faculty[,] and students whose purpose is to support a connected community by identifying and positively intervening on issues of broad campus concern to avert community division. If you know of a potential campus-wide issue within the Kenyon community, you can let the coalition know by contacting a coalition member listed below, or by completing this form.¹⁰¹

Dispute resolution experts can develop their own approaches, of course, to preparing leadership teams in a concentrated format. The Academy seems to work in part because it encourages locally-generated insights and planning in

¹⁰¹ *Kenyon Concerns Coalition*, KENYON COLLEGE, <https://www.kenyon.edu/directories/offices-services/ombuds-office/kenyon-concerns-coalition/> (last visited Apr. 2, 2020). In March of 2019, a group of eight Kenyon College community representatives attended The Ohio State University Moritz College of Law, Divided Communities Project's inaugural Academy Initiative, titled "Strengthening Democratic Engagement to Address Local Civil Unrest." This academy was the result of lessons learned from community leaders and mediators that had experience dealing with community unrest within their communities. The academy sought to teach the tangible principles, guidelines, and suggestions born from the strife endured. The Kenyon representatives returned to campus and formed the Kenyon Concerns Coalition as a way to identify and address issues of broad campus concern by applying the principles learned during the academy. Since formation, the coalition expanded to include additional campus leaders to best serve the group's purpose and meets monthly to discuss any areas of possible campus-wide concern.

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a confidential atmosphere. It also takes advantage of the time when leaders are not involved in a crisis and therefore have more time to plan and can use their flight time on the way to the Academy to read the guides. By including other leaders in the presentations and using a discussion and breakout format, the Academy takes into account the reality of their situations and engages participants. The Divided Community Project makes its academy curriculum available for nonprofit use as part of its “virtual toolkit.”¹⁰²

E. Individual Counsel: The Bridge Initiative @ Moritz

One way to reach local leaders during a crisis is to offer the help in a condensed format and free of charge. Often the approach to these leaders can be through a member of the leadership team who understands the constructive role that dispute resolution expertise can play. Alternatively, the offer may be a simple one—simply to connect leaders with their counterparts (mayor to mayor, police chief to police chief, etc.) in another city or university that has encountered similar issues. Sometimes, a leader will contact the Divided Community Project’s Bridge Initiative and ask for quiet counsel.

The Project’s Bridge Initiative @ Moritz models itself on the U.S. Justice Department’s Community Relations Service, a group of civil rights and hate incident mediators.¹⁰³ The Project often touches base with or recommends that leaders contact that agency, taking care to supplement rather than replace the work of these experienced community mediators. Serving as a hub, the Divided Community Project tries to leverage the reach of current Divided Community Project products and tools, create a network of skilled dispute resolution practitioners and leaders who have led communities successfully through polarized circumstances to provide initial screening and consultation, and help implement locally-based sustainable planning and service efforts.

The following example from the Project suggests what might be feasible for other dispute resolution experts interested in doing this work. In

¹⁰² See Divided Community Project, *Toolkit Navigation*, THE OHIO ST. U. MORITZ C. OF L., <https://go.osu.edu/dcptoolkit>. (last visited Aug. 1, 2020).

¹⁰³ CRS serves as “America’s Peacemaker” for communities facing conflict based on actual or perceived race, color, national origin, gender, gender identity, sexual orientation, religion, or disability. CRS works toward its mission by providing facilitated dialogue, mediation, training, and consultation to assist these communities to come together, develop solutions to the conflict, and enhance their capacity to independently prevent and resolve future conflict. Community Relations Service, <https://www.justice.gov/crs/about>.

August 2019, Bloomington, Indiana Mayor John Hamilton contacted representatives of the Bridge Initiative @ Moritz to identify services the Project could provide after the Mayor shut down the community Farmers' Market following protests concerning a farm with ties to White supremacist groups.¹⁰⁴ Though most Bridge Initiative contacts are conducted quietly, Mayor Hamilton chose to make this consultation public. He announced that he had asked the Bridge Initiative to help identify the underlying concerns.¹⁰⁵ Former Divided Community Project Director Becky Monroe¹⁰⁶ and Bridge Initiative Mediator William A. Johnson¹⁰⁷ traveled to Bloomington on five occasions between August 2019 and February 2020. Johnson met with dozens of community leaders and city employees, "including non-traditional local leaders who may not hold positions in local organizations but play critical roles in the life of the city."¹⁰⁸ After three trips to Bloomington, the Project developed a report to identify longstanding community divisions and their underlying caucus "in a way that enables local leaders to work together to identify actions they can take independently as well as collaboratively with city government officials to address them."¹⁰⁹ As the report explains:

Mayor Hamilton described the pain and fear that the recent events at the Farmers' Market brought to the fore, and his commitment to address longer standing and underlying concerns around White supremacy, racism,

¹⁰⁴ Divided Community Project Shares Report, Recommends Collaborative Community Process to Address Long-standing Social Issues in Bloomington, City of Bloomington News Release, December 30, 2019, <https://bloomington.in.gov/news/2019/12/30/4302> ("Mayor John Hamilton sought out the services of the Bridge Initiative in August 2019 when escalating tensions spurred the temporary suspension of the City-run Bloomington Community Farmers' Market.").

¹⁰⁵ *Frequently Asked Questions—2019: Farmers' Market*, CITY OF BLOOMINGTON, INDIANA: MAYOR JOHN HAMILTON, <https://bloomington.in.gov/market-FAQ> (last visited Apr. 2, 2020).

¹⁰⁶ Former interim Director of the U.S. Justice Department Community Relations Service. For Becky Monroe's more detailed biography, see Divided Community Project, *Becky Monroe*, THE OHIO ST. U. MORITZ C. OF L., <https://moritzlaw.osu.edu/dividedcommunityproject/project-designers/who-we-are/becky-monroe/>. (last visited Aug. 2, 2020).

¹⁰⁷ Experienced mediator who previously served three terms as the Mayor of Rochester, New York and served for over two decades as the President and CEO of the Urban League of Rochester. BRIDGE INITIATIVE REPORT: BLOOMINGTON, INDIANA, *supra* note 66, at 3.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

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and other forms of discrimination. The Mayor also shared his perspective that Bloomington was a stronger and more resilient community because of its engaged and active citizenry who spoke up and out when they felt that the government and others were not living up to Bloomington's ideals. [The Project was asked to support the community as it grappled with] some of the longer-standing and underlying issues and to provide a structure upon which local leaders could begin to address these issues through action planning.¹¹⁰

In February 2020, Monroe and Johnson returned to Bloomington to give community members the opportunity “to provide feedback to the report, confirm its representation of community concerns, and discuss ways to expand public involvement as the report’s recommended action steps proceed.”¹¹¹ At the time of the development of this article, Monroe and Johnson continue to work in Bloomington on behalf of the Project.

Other dispute resolution experts could replicate the Community Relations Service or Bridge Initiative models that seek to listen to what local leaders find useful, can be provided quickly and easily because there are no charges for the assistance, and leave the decision-making to the local leaders.

F. Teaching Students: Preparing Future Leaders and Their Advisors

A few professors have begun to create,¹¹² and we anticipate that others will create, teaching materials on leading in the midst of division. All of the Divided Community Project tools are available now to teach law or other students in higher education how to lead effectively in the future and advise leaders. The Divided Community Project “virtual toolkit” has

¹¹⁰ *Id.*

¹¹¹ *Bridge Initiative Reconvenes Community Members, Awards Training Toward Implementation of Next Steps*, WBIW, Feb. 14, 2020, <http://www.wbiw.com/2020/02/14/bridge-initiative-reconvenes-community-members-awards-training-toward-implementation-of-next-steps/>.

¹¹² *See, e.g.*, exercises on Congressional negotiations and divided communities in the latest editions of GOLDBERG ET AL., *supra* note 33, at 59–66, 457–58; ROGERS ET AL., *supra* note 33, at 235–36.

teaching notes on how to use these guides and tools in the classroom. In addition to the tools listed above, these include videos, case studies, and other materials for classroom preparation and use.

We have also used a Dispute System Design Workshop to involve students in preparing current and future leaders, co-facilitating the leaders meeting and soliciting the advice that the Project includes in the guides described in Subparts A and B above.¹¹³ Students developed and tested each of the simulations: *Midland*, *New Lake*, and *Springton*. Following graduation, some students have continued to work with the Project as contractors; others have volunteered to facilitate the simulation in various communities across the country.¹¹⁴

In the long-term, teaching students how to apply dispute resolution concepts to leadership may have the deepest effect of all of the approaches discussed in this article, as these students move into leadership positions. In the short-term, we have found that students are drawn to the topic, appreciate getting the individual feedback involved in teaching through simulation, and seem (based on anecdotes only) to gain in appreciation for those who sincerely hold different viewpoints during these polarized times.

VI. CONCLUSION

A two-level difficult and crucial conversation may seem daunting at first. As discussed above, regarding the first level conversation, leaders in Bloomington, Kenyon College, Rochester, Columbus, Sanford, and elsewhere applied dispute resolution concepts constructively to help retain and build trust, deal with the root concerns in their communities, and make their communities more resilient and prepared to handle divisive incidents

¹¹³ For Divided Community Project materials that were developed in this manner, see generally PLANNING IN ADVANCE OF COMMUNITY UNREST, *supra* note 32; KEY CONSIDERATIONS FOR LEADERS FACING COMMUNITY UNREST, *supra* note 32; DIVIDED COMMUNITIES AND SOCIAL MEDIA, *supra* note 81; IDENTIFYING A COMMUNITY SPIRIT, *supra* note 81. Materials on dealing with hate also permeate a number of the guides.

¹¹⁴ Graduates have facilitated the simulation in Dallas (TX); Sugarland (TX); Columbus (OH), and as part of an International Association of City/County Management training event in Charlottesville (VA). We have used the simulations (with the guides as preparatory material) for hundreds of law students. Student participants may gain or strengthen a sense of appreciation for public officials involved in crisis; gain valuable feedback from experienced facilitators on how each individual interacts during a crisis; and prepare for matters that may arise if they hold public office, lead in other ways in a community or university, or advise leaders. We find that offering the simulation as an extra-curricular workshop attracts about twenty law students each year.

SHARING DISPUTE RESOLUTION PRACTICES

and conflicts. We have offered illustrations of the second-level conversation—how dispute resolution faculty and other dispute resolution experts can find strategies to overcome the challenges that we describe in providing help to local officials, community leaders, and university leaders. Themes regarding these strategies include quiet leader-to-leader and jargon-free counsel, taking advantage of the times that leaders typically devote to learning or preparation, offering an engaging change of pace, and preparing leaders to apply the concepts themselves. We make the Divided Community Project virtual toolkit available to our colleagues to use for both levels of conversations, but we also explain ways for colleagues to add other resources. Our toolkit is but a start. Dedicated and creative colleagues in the field will devise additional and we hope even better strategies.

It is a moment when most Americans think that the nation is becoming increasingly polarized—in fact, too polarized to solve the problems facing it.¹¹⁵ In addition, it is a time when Americans broadly want to end racial discrimination and need local leaders' help to translate their determination into social change. Dispute resolution faculty and experts have the background and workable strategies to help communities and campuses express and even resolve basic concerns while treating each other well on a human level.

¹¹⁵ Newport, *supra* note 4; Lee Rainie, Scott Keeter & Andrew Perrin, *Trust and Distrust in America*, PEW RESEARCH CENTER, July 22, 2019, <https://www.people-press.org/2019/07/22/trust-and-distrust-in-america/> (70% think that low trust in each other makes it harder to solve problems; 64% think low trust in the federal government makes it harder to solve problems); Zaid Jilani and Jeremy Adam Smith, *What Is the True Cost of Polarization in America?*, GREATER GOOD MAGAZINE, Mar. 4, 2019, https://greatergood.berkeley.edu/article/item/what_is_the_true_cost_of_polarization_in_america (“If Americans don’t learn to build bridges with each other, we may see more government shutdowns, lying, segregation—and even violence.”); Stephen M. Walt, *America’s Polarization Is a Foreign Policy Problem, Too*, FOREIGN POLICY, Mar. 11, 2019, <https://foreignpolicy.com/2019/03/11/americas-polarization-is-a-foreign-policy-problem-too/>.

Teaching the World: Educational Pivots for the Second Half of the ADR Century

NOAM EBNER*

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VII. CAN WE NOT SAY WIN/WIN? BENEFITS TO LAW SCHOOLS,
BENEFITS TO ADR

VIII. CONCLUSION

I. INTRODUCTION

We are currently approaching the midpoint of the first century of ADR development in the U.S and around the world. It is a remarkable point in time to be involved in the ADR field,¹ marked as it is by reflection² upon the first half of The ADR Century and planning ahead for the second.

In this article, I will not discuss the past in detail, providing only the broadest of all possible snapshots as the minimal context necessary to continue the conversations of recent field-wide gatherings,³ and to engage listeners and

¹ Given the context of the symposium, I focus this article on the legally-focused ADR field and ADR education in law schools. ADR is, at once, a category of legal practice and education and a subset of the larger conflict resolution field. The latter field's temporal arc is longer; we currently approach the end of the Conflict Resolution Century.

² Here I beg the reader's forgiveness for speaking of 'the field' as a monolithic whole, rather than many individuals doing their individual things; not to mention, for seemingly ascribing to it opinions, intents, and goals. When I do so, it is to convey my best sense of the general sentiments expressed at the field's—again, that term—gathering points, or themes repeatedly raised by those who many recognize to be amongst its leaders. I will not use it to mask my own opinions, which I will present clearly as such.

³ Particularly, two recent gatherings of the field; one in person and one in writing. The first is *Appreciating our Legacy and Engaging the Future: An International Conference for Dispute Resolution Teachers, Scholars, and Leaders* held at Pepperdine University in June 2019. See generally Straus Institute for Dispute Resolution, *Appreciating our Legacy and Engaging the Future: An International Conference for Dispute Resolution Teachers, Scholars, and Leaders*, PEPPERDINE CARUSO SCH. OF L. (2019), <https://law.pepperdine.edu/straus/training-and-conferences/connecting-in-classrooms.htm>; Pepperdine Caruso School of Law, *Appreciating our Legacy and Engaging in the Future: An International Conference for Dispute Resolution Teachers, Scholars, and Leaders*, YOUTUBE (July 2, 2019), https://www.youtube.com/playlist?list=PLtgqDmgt8BJYwe4hol0cW_jEjVnRFPj_x [hereinafter "Appreciating our Legacy" conference]. This conference, co-sponsored by Pepperdine, Texas A&M, and ABA-DR in cooperation with many law school-based dispute resolution programs, brought together approximately 150 members of the ADR community to look back and cast ahead. The second is the Theory-of- Change Symposium convened online by John Lande, in which dozens of people in the dispute resolution field weighed in with their ideas and suggestions for the future of ADR. Bridging these two projects, Prof. Lande edited and published *Theories of Change for the Dispute Resolution Movement*, an open-access book incorporating chapters on the "Appreciating our Legacy" conference as well as the contributions to the Theory of Change symposium. See generally THEORIES OF CHANGE FOR THE DISPUTE RESOLUTION MOVEMENT: ACTIONAL IDEAS TO REVITALIZE OUR MOVEMENT (John Lande ed., 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3533324 [hereinafter THEORIES OF CHANGE].

readers as participants in these ongoing conversations.⁴ Instead, my focus will be on the future, explaining how the field can build on its previous successes by refining its conceptual models in both theory and practice. My key suggestion is that ADR's educational model also needs paradigmatic revision, if we hope our field to maintain and expand its beneficial impact across systems, professions, and society at large. Essentially, I suggest, we need to broaden our vision of our educational scale and impact. Bringing large numbers of non-students—members of the public who are not enrolled in our schools or our courses—into the circle of those we affect through ADR education, will benefit our schools, expand ADR practice, and strengthen the overall impact of the ADR field.

II. TAKING A MID-CENTURY MOMENT

In the first half of the ADR Century, the field of ADR has enjoyed notable achievements. It has touched the lives of individuals, inspiring many to get involved in the field.⁵ It has permeated the workflows and cultures of institutions and organizations. In particular, it has gained footholds (and beachheads, and perhaps even established colonies) within the court system. It has become ubiquitous in legal education,⁶ and has affected the way that lawyers interact.⁷

It is those very successes that provide a springboard for achieving so much more in the second half of the ADR Century, maintaining and reinforcing ADR's success in those areas as well as expanding it to others.

⁴ See generally Pepperdine Caruso School of Law, *Appreciating our Legacy: Success, Failures, and Work in Progress*, YOUTUBE (July 2, 2019), <https://youtu.be/JDraunjWqPU> [hereinafter, "Opening Plenary"]. To do so without providing an hour-long introduction to this twenty minute symposium talk, or appending eight pages worth of footnotes to the first sentence of the written version, I recommend viewing, in particular, the "Appreciating our Legacy" conference's opening plenary. In this session, Carrie Menkel-Meadow, Jean Sternlight, Doug Yarn, Len Riskin, Sharon Press, Tom Stipanowich, and moderator Andrea Kupfer Schneider discuss, in a most illuminating fashion, areas of ADR success and others requiring further development, including those noted in the next two paragraphs.

⁵ See Albie M. Davis, *Mediation: The Field of Dreams? If We Build It, They Will Come!* 9 NEGOT. J. 5 (1993).

⁶ See Pepperdine Caruso School of Law, *supra* note 5 (these and other successes are enumerated); see also Thomas J. Stipanowich, *Living the Dream of ADR: Reflections on Four Decades of the Quiet Revolution in Dispute Resolution*, 18 CARDOZO J. OF RESOL. 513 (2017).

⁷ See John Lande, *Good Pretrial Lawyering: Planning to Get to Yes Sooner, Cheaper, and Better*, 16 CARDOZO J. OF CONFLICT RESOL. 63 (2014) (For example, influences of the integrative approach to negotiation were evident in lawyers' descriptions of their negotiation experiences in unstructured interviews).

Sober work lies ahead. Now a mature(-ish) field, ADR must cope with questions of identity emanating from its shift from an ideological movement to a field that has been institutionalized in a variety of contexts, affected by those it sought to affect.⁸ Moreover, it remains to be seen whether the second half of the ADR Century will witness ADR rising to the aspirations or dreams of some of its proponents. In the legal arena, these have included deep transformation of the legal system⁹ and enhancing access to justice.¹⁰ Still broader aspirations have included hopes for changing the way individuals interact in society, impacting the way broad social conflicts are engaged, and creating a more peaceable world.¹¹

In all these areas, the first half of the ADR century has moved the needle (to introduce a phrase I will use throughout this article), significantly, yet not all the way. Will the second half see movement in the needle's position, on all these fronts?

It is perhaps regarding these last, broad aspirations that one most strongly feels the challenge set up by the first half century for the second. It is

⁸ See generally Carrie Menkel-Meadow, *Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-Opted or "The Law of ADR"*, 19 FLA. ST. U. L. REV. 1 (1991); Nancy Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?*, 6 HARV. NEGOT. L. REV. 1 (2001); Pepperdine Caruso School of Law, *supra* note 5 ("The failure that we have had around institutionalization... There's no question - in the answer to the question Carrie asked 30 years ago—who is going to change, when dispute resolution is institutionalized in the court? And I think we know the answer, it's dispute resolution, its appropriate dispute resolution, it's mediation that has had the significant changes. I think we all had hoped that in coming into the courts... we would change the institution.")

⁹ See, e.g., Opening Plenary, *supra* note 5. As stated there:

In many respects, our glass is half empty. We have not achieved that vision, that is evoked in the Burger and Sander discussions at the Pound conference, the dynamic system that responds to the needs of people and the interests of people in a more holistic way, that is adaptable to different sorts of situations, that can be less formal that can be less adversarial, that puts people into the driver's seat in conflict . . . which is a very difficult proposition, quite frankly, and yet, a very important one. These were all things we were thinking about

Id.

¹⁰ For a summary of this area of ADR focus, see Jacqueline Nolan-Haley, *Does ADR's "Access to Justice" Come at the Expense of Meaningful Consent?*, 33 OHIO ST. J. DISP. RESOL. 373 (2018).

¹¹ See *infra*, note 13.

remarkable that such a young field, in its formative stages, could even have *envisioned*, let alone achieve, such far-reaching impact. Indeed, simply *creating* a needle in these areas is a remarkable achievement of early ADR, let alone the degree to which it has already moved. I suspect that such movement is greater than those involved give themselves credit for. Still, in reflecting on how far we've come and the horizons yet ahead, an oft-repeated theme is a yearning for the ADR field to have more impact on the big picture: day-to-day layperson interactions, society, diplomacy, and peace.¹²

¹² See, e.g., BERNARD MAYER, *BEYOND NEUTRALITY* 4 (1st ed. 2004). Mayer observes:

But the field's growth has obscured the fact that it is facing a major crisis in achieving broad acceptance, profound impact, or mainstream use. As a result, the conflict resolution field has not yet lived up to its potential for changing the way conflict is handled in out organizations, communities, or societies . . . Conflict resolution professionals are not significantly involved in the major conflicts of our times . . . we are not involved at the center of the conflict or decision making processes.

Id. See, e.g., Doug Yarn, *Re-Conceptualizing the Work as Something Bigger than Ourselves--Reconciliation*, MEDIUM.COM (Jan. 2015), <https://www.mediate.com/articles/YarnFuture.cfm>. As Yarn states:

With the exception of a once overburdened court system, society really didn't crave what we were selling . . . Society has not been transformed, and political leaders do not turn to Mary Mediator for help solving the domestic and international problems of the day. More crucial perhaps is the fact that normal everyday folk don't turn to Mary Mediator for help either—at least without prodding by a court.

Id. See, e.g., Opening Plenary, *supra* note 5. As the speakers at the plenary state:

Mediation's roots were in the Civil Rights movement, and yet we have done little to move that dial. When major issues happen, we aren't the one that people turn to. We are on the brink of war—why? Why, with all of the time and all of the energy and all of the people we've trained and all of the people that we've worked with, how are we not

Moving the needle upwards on these fronts seem far easier to accomplish in the future, given ADR's established position on the eve of the second half of the ADR Century. And yet, new, emerging challenges may stymie those needles' progress, even cause them to regress. In the legal arena, the litigation juggernaut continues ever onwards, ever on the rise.¹³ Conversely, investment in ADR in legal education may be on the decline.¹⁴ ADR's perception as access to justice may erode as societal attitudes change.¹⁵ ADR's impact on society at large may actually diminish, given the interpersonal and societal polarization around political issues, the double threat currently tearing at the fabric of American society (as well as other societies around the world), and putting the skids on any movement toward a more peaceable society.¹⁶

To sum up the mid-century state-of-conversation in ADR in the very broadest of senses: We've achieved so much. There is so much left to be done.

moving that dial, and how have we not made more progress?

Id.

¹³ See, e.g., Bob Jones, *Worldwide Survey of Litigation Trends Reveals Grim News for America*, TOWNHALL (May 24, 2015), <https://townhall.com/columnists/bobjones/2015/05/24/worldwide-survey-of-litigation-trends-reveals-grim-news-for-america-n2003038>.

¹⁴ David Yarn et al., *What Will Be the Future of ADR in US Legal Education?*, in THEORIES OF CHANGE, 138 (John Lande ed. 2020).

¹⁵ Jennifer W. Reynolds, *Does ADR Feel Like Justice?*, 88 FORDHAM L. REV. 2357 (2020). As Reynolds observes:

[M]odern conflict spectacles . . . foisted upon the polity through media and social media, are so far afield from traditional ADR principles and practices that they may keep ADR from "feeling" like justice to many people. How people feel about alternative practices and processes will have an impact on whether they avail themselves of those methods in their own disputes. In other words, even if we had widely available, high-quality, and free ADR services available to everyone, we might still have an access-to-justice problem because those services would not be seen as providing justice.

Id. at 2360.

¹⁶ I note that while the effects of polarization diminish the overall effects of ADR on society at large, ADR activities might still have positive impact on local issues or communities. For one such attempt to mitigate the effects of polarization, see Erik Clevén, Robert A. Baruch Bush & Judith Saul, *Living with No: Political Polarization and Transformative Dialogue*, 2018 J. DISP. RESOL. (2018).

The field currently seems to be at a plateau; hopefully, this is a point of regrouping and gathering resources and intellectual capital for what lies ahead. If we are able to overcome obstacles old and new, the next half-century will turn out to be more thrilling and rewarding than the first.

III. GETTING TO MORE

The ‘If’ in the previous sentence is an uncomfortably big ‘If.’ Even bigger, is the question of ‘How?’ How is the ADR field to continue moving the needles upwards on so many fronts, while facing so many challenges?

While not a particularly new question, it may be particularly ripe for addressing at the current moment. Given the field’s focused attention on this issue at this moment, there may be unprecedented opportunity for communal action. Additionally, there seems to be increased recognition that ‘Let’s do, incrementally, more of the same!’ is unlikely to be ADR’s best strategy for thriving in the future.¹⁷ While it is hard to predict what will trigger ADR’s next great leap forward, I suspect it will not be handing out more flyers in courthouses—as many of us have done, often and literally. Rather, I suggest, ADR’s next moves will more likely take the form of Big Changes—ranging from significant reframing to paradigmatic shifts—in practice, research, and teaching.

At the “Appreciating our Legacy” conference, Carrie Menkel-Meadow articulated how new substantive ideas and educational practices bridge between the successes of the past and those of the future:

We’ve contributed memes, we’ve contributed ideas... to try to teach the next generation to look at problem solving differently. Whether we getting to yes, or to maybe, or unfortunately to war, the challenge is, what have our memes actually accomplished. The good news: every law school in the country—*every* law school—now teaches some form of negotiation, mediation, ADR, problem solving... but the question for us is twofold:

What are the new ideas that this field has produced in the last few years? We have been

¹⁷ See *infra* “On Pivots and Paradigms.”

terrific at the beginning of founding our field with a whole series of memes that reoriented, hopefully, how lawyers and diplomats and decision makers in government and decision makers in business and industry, and in labor unions who do collective bargaining—we did change the way many people thought about things.

But I challenge you to think about what really new ideas have come out of our field in the last few years? I think we've been working off of our old memes. And the world is definitely in need of new ones... So I hope—for the younger ones of you, who are both scholars and practitioners—you will help us think through why the memes we've used for the last forty years are actually not in ascendance at the moment.

The rhetoric in government and international affairs are not peacemaking. They are warmongering, trade wars, they are the language of aggression and beating and bullying, and the question is what intellectual ideas can we offer to counter that at the intellectual level of idea creation; and then, secondly, what can we do so that we are not preaching to our own particular choirs... how can we push forward these ideas, so that they go beyond the people who are already peacemakers and the people who want to make love and peace and make the world better. I really think we are in desperate need of new ideas intellectually, and new practices, and new educational programs.¹⁸

New intellectual ideas are already on the table, and hopefully more are on the way; we must engage with them deeply. In the next section, I'll introduce several of these briefly, to uncover their mechanism of departure from what

¹⁸ The "Appreciating our Legacy" conference, *supra* note 4.

Prof. Menkel-Meadow calls the field's 'traditional memes'. Next, I'll suggest applying the same mechanism to reimagine ADR education.

IV. ON PIVOTS AND PARADIGMS

Over the years and particularly recently, there have been a number of Big Ideas for reconceptualizing ADR, spanning practice and education. Each suggestion takes the form of recommending a particular *pivot*. I borrow the term 'pivot' from the realm of career transition and business recalibration, to indicate a process of intentionally, methodically identifying and doubling down on the best parts of what we have learned and accomplished in our field, in order to make a purposeful shift in a new, related, direction.¹⁹ Under this term, we might bring together suggestions that have been made to move past traditional names and categorizations, reorganize the work that has been done so far in ADR, incorporate the work of other disciplines, and create new conceptual frameworks or practical approaches. As examples of this, I'll note pivots advocated by:

- Bernie Mayer, suggesting the field step away from focusing on *neutrals resolving conflicts*, and instead improve *conflict engagement* through encompassing a *broad range of conflict roles*, with system and ally roles complementing neutral roles.²⁰
- Doug Yarn, suggesting a pivot away from mediation as the central theme of the field towards *reconciliation and reconciliation facilitation*.²¹
- Deb Eisenberg, suggesting a pivot away from ADR's focus on *specific processes*, toward a more flexible and inclusive focus on *process strategy*.²²

¹⁹ JENNY BLAKE, PIVOT: THE ONLY MOVE THAT MATTERS IS YOUR NEXT ONE 4–8 (2016).

²⁰ BERNARD MAYER, BEYOND NEUTRALITY: CONFRONTING THE CRISIS IN CONFLICT RESOLUTION 15 (2004). While I'm not familiar with any law school ADR program adopting this approach, several conflict resolution graduate programs implemented have, to different extents, including Creighton University's Negotiation and Conflict Resolution program.

²¹ Doug Yarn, *Re-conceptualizing the Work as Something Bigger than Ourselves—Reconciliation*, MEIDATE.COM (Jan. 2015), <https://www.mediate.com/articles/YarnFuture.cfm>.

²² Deborah Thompson Eisenberg, *Beyond Settlement: Reconceptualizing ADR as "Process Strategy" in Theories of Change*, in THEORIES OF CHANGE FOR THE DISPUTE RESOLUTION MOVEMENT: ACTIONABLE IDEAS TO REVITALIZE OUR MOVEMENT 50, 50–53 (John Lande ed., 2019).

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- Nancy Welsh, suggesting that some in the field might choose to pivot away from *mediation*—as it is largely practiced as a means for technically or formally ending disputes—toward innovating new processes and practices aspiring to profound transformation of society that center around the *essential elements* contributing to mediation’s original “soul.”²³
- Alyson Carrell and myself, suggesting a pivot away from mediation’s *technology-bereft* practice toward practice incorporating the best of its ‘human touch’ elements *with technology*.²⁴

The topic of pivots in ADR deserves attention far beyond the focus of this paper. I’m introducing it here briefly in order to introduce it as a necessary part of the bridge between the successes of the past and those of the future, even as I focus on the other necessary part of that bridge—a pivot in our educational paradigms. The two elements complement each other. If the field pivots conceptually, its educational curriculum and practices will necessarily change as well.²⁵ If educational paradigms shift, some pivots might be more suitable or beneficial than others.

²³ Michael Z. Green et al., *New Horizons for the ADR Field: Where Are We Headed and Where Can We Go?*, in THEORIES OF CHANGE FOR THE DISPUTE RESOLUTION MOVEMENT: ACTIONABLE IDEAS TO REVITALIZE OUR MOVEMENT 44, 46–47 (John Lande ed., 2019).

²⁴ Alyson Carrel & Noam Ebner, *Mind the Gap: Bringing Technology to the Mediation Table*, 2019 J. DISP. RESOL. 1, 3 (2019).

²⁵ These are offered as examples, to clarify the notion of fieldwide pivot and stir the reader’s imagination. If you are wondering how you might begin to consider pivots to propose, a good starting point might be considering just what ADR is, essentially, at present. John Lande, *What is (A)DR About?*, in THEORIES OF CHANGE FOR THE DISPUTE RESOLUTION MOVEMENT: ACTIONABLE IDEAS TO REVITALIZE OUR MOVEMENT 54 (John Lande ed., 2019) (listing elements helpful to such reflection). I don’t include, under ‘pivot’, expansions of ADR into new or new-ish areas that lack significant reframing of what it is we do and offer. For example, consider an ADR professor teaching negotiation in a business school, with the syllabus essentially similar to the one they use teaching in their ADR program. In such a case, ADR doesn’t pivot—it travels. Applying pivot terminology to ADR is an untested proposition and I’ll go no further in delineating it than suggesting that the term’s appropriateness increases together with the degree of unpacking, renaming, and borrowing from other disciplines involved.

V. A THEORY OF CHANGE FOR ADR EDUCATION: THE WORLD IS OUR CLASSROOM

John Lande introduced the helpful notion of formulating ‘theories of change’ as a mechanism for proposing, supporting, and considering propositions for new pathways for the ADR field:

A full-fledged theory of change involves six steps. These steps include: (1) identifying long-term goals; (2) "backwards mapping" to connect the requirements for achieving the goals and explain the necessity and sufficiency of those requirements; (3) identifying assumptions about the relevant context; (4) identifying interventions that will create the desired change; (5) developing indicators to measure outcomes and assess the initiative's performance; and (6) writing a narrative explaining the logic behind the initiative.²⁶

My (highly abbreviated) theory of change for ADR is, in a nutshell:

- (1) By the end of The ADR Century, ADR should grow exponentially from its current state, in terms of its impact on systems and especially in terms of its broad effects on society,
- (2) To this end, as broad a public as possible should be educated as to ADR's values and tools, creating enough familiarity that they are predisposed to prefer ADR's methods to other alternatives.
- (3) In the past, we have largely sufficed with raising public ‘awareness,’ reserving ‘education’ for key players and systems. However, public ‘awareness’ is not enough for ADR growth, and dedicating such resources that exist to highly targeted ‘education’ might be counterproductive.²⁷

²⁶ John Lande, *The Dispute Resolution Movement Needs Good Theories of Change*, in THEORIES OF CHANGE FOR THE DISPUTE RESOLUTION MOVEMENT: ACTIONABLE IDEAS TO REVITALIZE OUR MOVEMENT 13, 13–14 (John Lande ed., 2019).

²⁷ As Jen Reynolds so eloquently put this:

What will not be helpful are more projects that tend to concentrate knowledge and expertise in the hands

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- (4) Owing to the past successes of our field, we have the capacity to engage in educational activities at scale. Paradigmatic shifts in our educational approach, regarding the identity and scale of our audience, will allow us to conduct widespread ADR education.
- (5) TBD, depending on specific projects
- (6) I offer two mutually supporting propositions: First, that the compilation of knowledge and tools underlying the activities of the ADR field are useful to *all* people, in all their personal and professional interactions. Second, that if people were educated to view interactions and conflict through prisms offered by ADR, they would naturally prefer ADR when they are unable to self-resolve their disputes. By ‘educated’ I don’t intend ‘made aware of ADR’s existence’; such efforts have been surprisingly unsuccessful, and equally surprisingly ineffective even when successful.²⁸ Rather than ‘awareness’ our goal should be ‘education,’ in the sense that ‘members of the public have been taught, through a variety of educational and societal means, about the values of the ADR field, some of its tools, and their combined utility for preventing, managing and resolving disputes.’

I believe that we are now poised to experiment with efforts to realize new gains from our longtime investment in legal education. We have deep roots, human capital, political savvy, and other advantages, in this well-respected institution. Law students become lawyers, who benefit from enhanced social standing. Law schools themselves enjoy a unique social standing and a norm-setting role, and they are often engaged with local and wider communities to advance social agendas in ways that some other academic frameworks are often not.

of a small number of professional gatekeepers and guides. To the extent that the field focuses on the development and advancement of these kinds of players, the field is missing important opportunities to engage with the special challenges of the present moment.

See Reynolds, *supra* note 16, at 2377.

²⁸ Consider the work of Donna Shestowsky, showing that parties to legal processes are largely oblivious to mediation services offered by their court. See generally Donna Shestowsky, *Inside the Mind of the Client: An Analysis of Litigants’ Decision Criteria for Choosing Procedures*, 36 CONFLICT RESOL. Q., 69 (2018); Donna Shestowsky, *When Ignorance Is Not Bliss: An Empirical Study of Litigants’ Awareness of Court-Sponsored Alternative Dispute Resolution Programs*, 22 HARV. NEGOT. L. REV. 189 (2017).

Therefore, to achieve ADR's goals over the second half of the ADR Century, I propose that ADR educators must expand our grasp of our audience and societal impact through paradigmatic evolution of our educational approaches and goals on three fronts:

- (1) Our aspirations regarding our impact on legal education
- (2) Our view of how our messages spread throughout society, over time
- (3) Our view of our target audience as educators

Each evolutionary area requires action that should be designed and assessed with the ultimate goal of moving ADR's overall needle in mind. Action in any of these areas, in the framework of legal academia, will be challenging.²⁹ However, the benefits to be gained by succeeding at doing this in legal academia are accordingly large.

VI. MOVING ADR'S NEEDLE BY EXPANDING OUR EDUCATIONAL AUDIENCE: THREE EVOLUTIONARY PATHWAYS

A. *Educational Evolution: Law School and Legal Education*

In his typology of law schools' relationship to ADR,³⁰ Michael Moffit introduced the notion of law schools that are ADR islands: they invest so much in ADR that they stand high above the sea of law schools offering little or no ADR education.³¹ The most radical way to achieve the goal for which ADR first entered legal education would be to adjust a law school's worldview to align with an ADR worldview. Such a law school might be considered an ADR super-island, even an ADR continent. I leave it to readers to fantasize such a school's foci, priorities and curriculum.

While not dismissing the possibility of enacting such change at a single institution or more widely—amongst the plethora of voices calling for

²⁹ To clarify, I am not currently on faculty at a law school. However, I have taught in and around various frameworks of legal education ever since completing my own twenty years ago; I often collaborate with law school faculty, and I am occasionally, as in this symposium, asked to weigh in on issues regarding legal education. I hope that my close-by-but-not-inside status adds a helpful perspective; if my comments on legal education seem in any way out-of-synch with readers' current lived experience, this comment provides an explanation.

³⁰ Michael Moffit, *Islands, Vitamins, Salt, Germs: Four Visions of the Future of ADR in Law Schools (and a Data-Driven Snapshot of the Field Today)*, 25 OHIO ST. J. DISP. RESOL. 25–86 (2010).

³¹ *Id.* at 54.

dramatic change in legal education, one hears many suggestions that are aligned with ADR values and priorities or embrace them overtly³²—I’d like to focus on pathways more readily available to individual faculty, or small clusters of them, regardless of their school’s investment in, or attitudes toward, ADR.

Rather than shifting the attitude, worldview, or culture of a law school from the top down, individual faculty can consider whether, working in their current environment, they can re-envision their role and their work with students, adopting more of a ‘moving the needle’ orientation than in the past. In the context of educating future lawyers (as opposed to the broader circles of influence addressed in the next two sections), this entails the challenge of expanding the influence of ADR on formulating the law student’s worldview.

Legal education is a formation process, teaching students to reason, analyze, differentiate, categorize, and more. Of course, as the brain is trained, cognitive maps and worldviews develop and reform, with new ideas achieving primacy and new perspectives becoming dominant. We are all familiar with one noticeable effect: by the beginning of their spring semester, first year law students see everything—*everything*—in terms of their potential legal ramifications. Rather than cracks in the sidewalk, they see municipal negligence; late to work because of a pile-up on the highway, they fantasize suing for interference with contract. The point is not that this is what law students do in their free time, if we’ve left them any, but rather that many of them *can’t help* but do so. This is an external expression of the worldview remapping process. While this condition, thankfully, is not permanent, readers with a legal education of their own will recognize its deep and lasting power. Besides giving law students topics for pointed arguments amongst themselves that no one else can understand,³³ this phenomenon indicates how quickly, and how early-on in their studies, law students are indoctrinated into a rights-based worldview with little consideration of interests, empathy, or other important issues.

At the very same time, law students are shepherded into a competitive mindset leaving very little word for a collaborative worldview, even if they were cooperative people before law school. “Law school,” Michelle LeBaron

³² Elayne Greenberg & Noam Ebner, *What Dinosaurs Can Teach Lawyers About How to Avoid Extinction in the ODR Evolution*, St. John’s Legal Studies Research Paper No. 19-0004. See also Amani Smathers, *T-Shaped Lawyer*, R. AMANI SMATHERS (Sept. 17, 2019), <http://www.amanismathers.com/technolawgic/2014/2/21/t-shaped-lawyer>; Alyson Carrel, *Legal Intelligence Through Artificial Intelligence Requires Emotional Intelligence: A New Competency Model for the 21st Century Legal Professional*, 35 GA. ST. U. L. REV. 1153 (2019).

³³ And, partially explaining the phenomenon explained *infra*, note 43.

recently remarked, after her law students played a prisoner's dilemma game particularly competitively, "is a particularly individualist induction."³⁴

Some ADR professors are doubtlessly happy to teach their students the skills they need to implement their competitive approach and to achieve their rights-based goals. Others, keeping their eye on the goal of moving the needle, will not. They might try to help their students to recognize that there is more than one way to achieve success, that interests and rights are not always aligned, and that they might do better to make contextual choices. At times—perhaps in the case of particularly promising students—they might find themselves in the position of feeling they are in a struggle for law students' very soul, seeking to help them recognize the benefits of cooperation, integrative outcomes, trust, mutual help, and perceiving the larger societal picture.

From a needle-moving perspective, then, the question becomes: how do we help students to prefer our teachings over what most others in law school are teaching them? How can we embed our approach so deeply in formative legal training that it displaces the rights-based vision from its primacy, even subsuming it under an ADR-infused worldview?

One way would be to overtly bring our ADR worldview into direct clash with doctrinal approaches. We teach you to reach agreement, we might say, while other profs teach you to fight. Our way, we might say, reflects the *real* world. However, the real world and the lawyer's work in it involves both rights as well as interests, power as well as trust, competition as well as cooperation. Perhaps we would not do our students a favor by creating this dichotomy; moreover, we might do them a fundamental *dis*favor by bringing them into misalignment with their chosen profession, their other professors, and their very identity.

Forgoing this approach might not come easily, given our collective experience with our law school colleagues indicates that many of them will not step up to the challenge of bringing everything into alignment, explaining to students how the frames they teach fit together holistically with our own. Indeed, many of them will continue to ignore us or teach their students, implicitly or explicitly, not to waste their time on our kumbaya.

To bring the law school experience into alignment, we are challenged by two sets of defensiveness: our own, and our colleagues'. Letting go of our own, however, opens up the opportunity of subsuming, rather than contesting, a rights-based approach. We can then attempt to form students through our frames such that these become a natural part of how they take in and process the remainder of their legal education. In this new balance, ADR is no longer

³⁴ Personal correspondence with author.

the salt sprinkled onto legal topics in some law schools³⁵; instead, it is part of the main course.

To frame the challenge somewhat flippantly: *Can we flip the law school paradigm, without flipping the law school?* What might such a task entail? I'll leave it to ADR professors reading this article, with far more law school experience than I have, to consider this question. If you had to explain to students (directly or indirectly) that their entire law school body of learning was actually *an expansion of your ADR class*, and that their law school education in its entirety would *only* make sense when processed through this frame - how would you do it?

As examples, one strategy for changing the worldview balance would be to increase the number and salience of real-world interactions involving ADR components a student experiences, through clinical education in areas such as labor and family law. Faculty might not be able to create a new clinic at their school, but they might be able to nudge suitable teachable students towards them in their role as advisors. Keep in mind the ripple effect that changing one student's worldview can have. Another strategy would be to discuss an issue that students have learned in constitutional or contract law, discussing the case with them through an ADR worldview including an interests-based perspective, opportunities for mutual gain, and empathy.³⁶

One way to play with this idea, is to bring it down to a particular planning task: Assume you have been tasked to teach one of those (increasingly common) one or two-week J-term courses, surveying ADR or perhaps a wider range of the softer skills. What would you teach students, in that one week, that would not be *alternative*, but rather would help them to proceed to bring all of their future law school learning into their toolbox properly positioned alongside, not in opposition to, the ADR tools? And—*how* would you teach it to them?

B. Educational Evolution: Ripple Effects Over Time

The previous section focused on our current law students themselves. Such focus has a direct effect on moving ADR's societal needle, in the form of affecting thousands of law students annually. It also has indirect effects over time on its institutional needles, in the sense of our students becoming

³⁵ MOFFIT, *supra* note 31, at 27 (explaining that some law schools currently treat ADR as salt, or "...vital seasoning for many different offerings, but never consumed on its own. Rather than treat ADR as a topic that students should learn independent of doctrinal areas of the law, these schools consciously incorporate small doses of ADR throughout the curriculum.").

³⁶ My thanks to Elayne Greenberg for these excellent suggestions.

practicing lawyers rippling ADR principles and practices, to one extent or another, onward into the court system.

Expanding beyond this traditional aspiration of legal ADR education, with our eye on shifting the needles more sharply, involves considering our students in a new light, and our educational impact in a longitudinal sense. Law school students ripple what we teach them out into society far beyond the court system; they are our educational partners-over-time. In addition to our outlook as teachers in service of their learning and success, we could, more deliberately than we do, relate to them as potential amplifiers, ambassadors, change-agents and force-multipliers.

Law students turn into lawyers, who tend to have disproportionate conflict-effect in society at large (when compared to an average member of society):

- Lawyers sit at the crossroads of disputes and conflicts;
- Lawyers rise to leadership roles in business, government, and communities;
- Lawyers often garner instant credibility, and their opinions carry a certain gravitas;
- Lawyers model conflict behavior, and the public passively learns from lawyers' actions in movies, from the actions of the lawyer representing them, and from the lawyer they spoke with at the gym.

In that sense, lawyers are natural riplers of conflict behavior patterns and norms out into society. We should hope to have them ripple what we teach them onward, even if they don't directly 'go into' ADR. There is nothing novel in that, of course. What might be novel is strategic thinking and intentional action to this end: what can we add to our curriculum and pedagogy to prepare future lawyers to fulfill that function effectively, even when they are not intentionally doing so. Adding the notion of future effects, of time itself, into our educational planning has significant potential to move ADR's needles. We teach a hundred students a year; *they* will come into conflict-related interaction with tens of thousands³⁷ of people over the course of the next half-century. If we are intentional about preparing our students to play needle-shifting roles, our actions today will be multiplied—compounded, even—over time.

³⁷ These numbers were invented for effect.

C. *Educational (R)Evolution: The World is our Audience*

1. *STRUCTURAL LIMITATIONS ON OUR REACH*

Sure, we need to teach our law school students. In fact, we *love* teaching them, at least up until the point where we receive their detailed appeals on our grading. Even then, the lawyer in us (dormant or active) can always enjoy a well-reasoned appeal.

If we perceive our law students to be our *sole* direct audience, though, then even when we take time and their future ambassadorship into account, we are limiting our ability to affect much of the public, and particularly those outside of the field of law or its immediate environs. Having lauded the potential for ripple effect over time in the previous section, I note that this potential is still somewhat limited. Astounding as it may seem, there are many people out there in the world who will never in their whole life come into contact with a lawyer.³⁸ More to the point, though, the ripple-effect-over-time, beneficial as it is, is admittedly indirect (and therefore, imprecise), and it may require a great deal of time. The slower an idea spreads, temporally, the more vulnerable it is to disruption or intentional dismissal—particularly if it bucks a powerful, dominant status quo. You can't fight Epidemiology 101, nor its analogies: If an idea, behavior, or worldview is introduced to a group in the hopes it will spread, the more the group is small, tightly-knit, co-located, and in limited contact with others, the slower the spread of the ideas outside the group will be.

To be candid: law school entails *all* of those constraints. Consider how insulated our classrooms are from students from other programs,³⁹ and how our faculty buildings are often located in a secluded, private, corner of the campus. We might consider other factors of constraint (which vary from law

³⁸ No, this is not a lawyer joke in disguise.

³⁹ Legal ADR education limits its engagement with other members of the wider conflict resolution community. Even its informal elements, such as many of our student essay and mediation competitions are limited to JD and LL.M students. *See, e.g.*, 2020 James Boskey Dispute Resolution Essay Competition Rules https://www.americanbar.org/groups/dispute_resolution/awards_competitions/james_b_boskey_law_student_essay_contest_on_dispute_resolution/ (“The competition is open to anyone who was a full-time or part-time J.D. law student at an ABA-accredited law school during the 2019-20 academic year.”)

school to law school) such as income, gender⁴⁰ or racial⁴¹ disparity in law school application and enrollment. Lawyers' interactions with non-lawyers after law school continue to be somewhat constrained. As examples, they are constrained professionally, given the law-firm career-track paradigm; personally and voluntarily, because no one else seems to speak their language,⁴² or normatively, given restrictions on partnership with non-lawyers. If we truly want to have widespread impact, we need broad, contagious engagement that will not only nudge but *jar* the needle in the right direction.

2. JARRING THE NEEDLE: DESIGNING BROAD-AUDIENCE EDUCATIONAL ACTIVITIES

Engaging education outside of law school class structures is something that many ADR educators already do, in a variety of ways. University settings offer opportunities to engage relatively large numbers of people across a range of activities. Faculty might be active in their university's local community, sharing ADR insights with the local bar, training for a local mediation center, and more. ADR clinic activity exposes clients to ADR approaches, providing indirect education. Some law school ADR institutes have non-clinical practice activities in their local communities or beyond; these might include a direct educational element, or educate indirectly through practice.⁴³ All of these activities contribute to the education of our non-students. I hope to add to these good intentions and actions six needle-moving elements to consider: intentionality, scale, diversity and creativity, mainstreaming, collaboration, and amplification.

⁴⁰ Scott Jaschik, *Law School Gender Gaps*, INSIDE HIGHER ED (Nov. 30, 2016), <https://www.insidehighered.com/quicktakes/2016/11/30/law-school-gender-gaps>, *Law School Rankings by Female Enrollment* (2018), ENJURIS (2018), <https://www.enjuris.com/students/law-school-female-enrollment-2018.html>.

⁴¹ Melissa Heelan Stanzione, *Law School Enrollment Up Overall, But Not for Minorities*, BLOOMBERG LAW (Dec. 12, 2019, 3:23 PM), <https://news.bloomberglaw.com/us-law-week/law-school-enrollment-up-overall-but-not-for-minorities>, *Law School Enrollment by Race & Ethnicity* (2018), ENJURIS (2018), <https://www.enjuris.com/students/law-school-race-2018.html>.

⁴² Adam Pearce & Dorothy Gambrell, *This Chart Shows Who Marries CEOs, Doctors, Chefs and Janitors*, BLOOMBERG (Feb. 11, 2016), <https://www.bloomberg.com/graphics/2016-who-marries-whom/> (noting that lawyers tend to marry other lawyers).

⁴³ See, e.g., *Divided Communities Project*, THE OHIO STATE UNIVERSITY MORITZ COLLEGE OF LAW, <https://moritzlaw.osu.edu/dividedcommunityproject/> (last visited Apr. 22, 2020).

a. *Intentionality*

Having an overt, clear, and specific move-the-needle focus, in addition to any other goals a teacher or their institution have in conducting an activity. For example, this might lead a clinic instructor to expand the reasoning behind their ADR-driven advice, adding weight to the educational element of the interaction.

b. *Scale*

Designing projects so that they will directly impact many people who do not participate in our traditional classes, aspiring to reach more than we could ever accommodate in a classroom; perhaps, even, in all our classrooms, throughout our careers. The internet is, by its nature, an environment conducive to host such projects in, but there are other, more traditional platforms providing scale.

c. *Diversity and Creativity*

Teaching-the-world educational work can be done in diverse ways: writing, teaching, creating, playing, art, music, and more. A project aiming to move the needle might consider including more than one component, to broaden its reach to diverse audiences. Some projects might involve using our traditional conflict or academic skills (e.g., writing a book or designing a system),⁴⁴ others might tap skills or passions faculty have never yet brought to their professional work, or bring them to learn new skills.

d. *Mainstreaming*

These initiatives should not rely solely on professors' 'spare' time while not 'counting' towards their academic success. Law school ADR centers and institutes might have the discretion to put 'moving the needle' on their objectives list and dedicate person-power and resources to this cause.

⁴⁴ Traditional skills might be put to use in new ways, such as by accomplished academic authors turning their hand to writing for children. *See, e.g.*, G.F RELYEA & J. WEISS, TROUBLE AT THE WATERING HOLE: THE ADVENTURES OF EMO AND CHICKIE (Resol. Press 2017). This is a children's book about a bear cub named Emo and his best friend, a bird named Chickie, who try different conflict resolution strategies to help their friends, the forest animals, resolve a conflict around drinking priority at the watering hole.

Individual ADR professors at law schools viewing ADR as ‘vitamins,’⁴⁵ or ‘supplements’⁴⁶ might have less discretion to do so. While we can’t always determine what our institutions will support or give credit for, we may be able to influence this by assigning these activities, as a field, the front-and-center status granted to our field’s most important activities. Mainstreaming such efforts through recognition and reward by the ADR field’s institutions and channels (e.g., awards, spotlighting in journals, etc.) might facilitate faculty’s obtaining of support from their institutions. Beyond that, teaching-the-world should be on the teaching community’s agenda; we could discuss, share, improve, experiment, and collaborate on needle-moving projects just as often, and as successfully, as we do regarding teaching our classroom students.

e. *Collaboration*

Partnership comes naturally to many in the ADR field, and this is even more important when taking on large scale projects. Moreover, the more diverse the target audience of a project is (up to and including ‘everyone’), the more helpful it can be to involve a number of perspectives in its design and conduct through collaboration.

f. *Amplification*

Moving the needle requires engaging very broad audiences. Universities and law schools have communication channels and social media platforms, and (occasionally) professionals who know how to use these platforms for amplification of our work better than we do; we need to utilize the former and work closely with the latter. Amplifying and spreading word of our colleagues’ efforts is another way we can help to move the needle.

⁴⁵ See Moffit, *supra* note 31. In Michael Moffit’s typology, some law schools currently treat ADR as vitamins: “Persuaded that an understanding of ADR is foundational to modern lawyering, these schools require every student to take at least the recommended dosage of ADR. ADR courses under the *Vitamin* model are standalone courses, consumed outside of the context of the traditional law school curriculum.” *Id.*

⁴⁶ See Moffit, *supra* note 31. In my addition to Moffit’s typology, schools treating ADR as a *Supplement* offer it as standalone courses, yet as opposed to Moffit’s *Vitamins*, these courses are wholly elective. In other words, these schools recognize that ADR has some importance for modern lawyering, yet the modern lawyer can survive without studying it.

3. CASE STUDIES

Below, I describe a number of educational projects I've been involved in that aimed to share negotiation and conflict knowledge with the public at large, educating our non-students. Each demonstrates one or more of the six elements listed above.

a. *The Deliberation Engine Blueprint*

The Deliberation Engine project⁴⁷ envisioned an online platform that would, at once, allow for public debate around hot-button social-conflict issues, and support learning and practice of negotiation and conflict skills. Besides allowing mass participation in structured debate, the platform encouraged discussion grounded in data rather than opinion. It did so by creating linked connections between participants' statements and their supporting evidence and allowing other participants to rate not only their statements, but also the veracity and salience of the data they provided as evidence. The platform could accommodate formal education (e.g., negotiation teachers were invited to use the platform for large-scale, multiparty negotiation simulations), but primarily aimed to nudge participants from the general public to focus on fact-based debate in dealing with real-life issues (away from the platform).⁴⁸

b. *Embedding Negotiation Education in Games, Movies, and Theater*

How might people learn about negotiation, whilst going about their day-to-day life? A very diverse group of co-authors, took on this question by considering informal or free-range learning, in which people choose what (and when, and how) they wish to learn without any guidance from a teacher—or, don't even consciously 'choose' to learn at all. We explored whether free-

⁴⁷ Christopher Honeyman et al., *A Game of Negotiation: The "Deliberation Engine"*, in Christopher Honeyman et al., *Educating Negotiators for a Connected World*, 4 THE RETHINKING NEGOTIATION TEACHING SERIES (2013).

⁴⁸ *Id.* While this idea never made it off the drawing board, its formulation drew together a large, interdisciplinary group of experts. The outcome of this project is the blueprint articulated in the book chapter for anyone to explore and implement. There are, by now, online platforms for debate of broad social issues. *See, e.g.*, KIALO, www.kialo.com (last visited June 22, 2020). I am unaware of any adopting the Deliberation Engine's focus on fact-based debate. Given the deterioration in this form of debate since the book chapter came out, the value of such a platform may have increased.

range learning might serve as a mechanism for widespread negotiation education, suggesting that through involvement in the creation of games, theater, and movies, negotiation experts could teach the public at-large helpful negotiation lessons as they enjoyed cultural or recreational activities.⁴⁹

c. *NegMOOC*

While allowing students (and teachers) to participate without geographical considerations, university-based online learning does not transcend other limitations such as cost, program acceptance, group size, etc. The internet's capacity to take traditional commodities and enable them to flourish for free and at scale truly hit the educational realm with the flourishing of MOOCs (Massive Online Open Courses) in the early teens of the 21st century. MOOCs enable knowledge dissemination at unprecedented scale; anyone with an internet connection can take these free courses, regardless of background, experience, prior knowledge, age, location, or anything else.

In 2013, Creighton University decided to create and offer its first MOOC, and my proposal for a MOOC teaching basic negotiation concepts and skills was selected; thus, *Negotiation: Navigating Professional and Personal Interactions* (or "NegMOOC") was born. My university and I had different yet complementary interests in offering a MOOC. The university wished to dip a toe in the MOOC-y waters of open education and explore how offering MOOCs might help to advance its mission. I wanted to teach the world negotiation skills. NegMOOC served this purpose both directly and indirectly. Directly, in that over 2,000 students from 87 countries around the world enrolled in the course.⁵⁰ Indirectly, by providing me a testing ground to explore whether MOOCs could provide good-quality education, convey the signature negotiation course participant experience that serves us so well in our academic courses, and accommodate the negotiation and conflict classroom's signature pedagogy of experiential learning. The NegMOOC experience showed that thoughtfully designed MOOC's could indeed deliver

⁴⁹ Eric Blanchot et al., *The Education of Non-Students*, in Christopher Honeyman et al., *Educating Negotiators for a Connected World*, 4 THE RETHINKING NEGOTIATION TEACHING SERIES (2013).

⁵⁰ This offers a good example of the 'amplification' and 'mainstreaming' elements noted above: Creighton actively invited Creighton alumni to participate, and spread word of the course throughout the campus. My institute spread word of the course through its channels, and I invited participation through my own networks in the conflict and online education communities. Many colleagues in the ADR and conflict resolution world helped by sharing announcements of the course with their students and networks.

the goods on all three issues⁵¹; I consider MOOCs to be a powerful tool for disseminating the knowledge⁵² of our field to the public, at scale.⁵³

4. STAR WARS AND CONFLICT RESOLUTION

Since 2017, Jen Reynolds and I have been developing a new approach utilizing pop culture phenomena to introduce conflict and negotiation to the general public. Our working theory is that pop culture phenomena have their own, ready-made, mass following; if we can tap into this following and introduce negotiation and conflict resolution skills, terms, and tools by relating them to the pop-culture phenomenon, we can reach far more people than we could ever pack into our classrooms.

We decided to begin (and along the way, seek proof of concept), with a project on Star Wars & Conflict Resolution. Why Star Wars? For one set of reasons, we were both born at a certain time, grew up connected to the saga, and continue to quote it disproportionately (albeit accurately, and in a contextually helpful way) in conversations, courses, and academic articles.⁵⁴

More importantly, though, in terms of teaching the world, is that Star Wars is one of the largest cultural phenomena of our times; of *all* times.⁵⁵

⁵¹ For a discussion of NegMOOC's design, pedagogy, preparation, teaching, and assessment, see Noam Ebner, *Negotiation and Conflict Resolution Education in the Age of the MOOC*, 32 NEGOT. J. 231 (2016).

⁵² See Rachel Viscomi, *Engaging Deep Differences Online*, in THEORIES OF CHANGE 96 (John Lande ed. 2020). A comparable initiative has the general public *experiencing*, rather than *studying*, what the field has to offer, is Rachel Viscomi's proposal to convene a large number of online facilitated dialog groups, cutting across polarized lines.

⁵³ Noam Ebner, YOUTUBE, <https://www.youtube.com/channel/UCgk5FU8Xr2JADtt8ZRNyKmg/videos>. (last visited June 23, 2020). An additional, ongoing contribution of NegMOOC for advancing widespread negotiation education is the continued availability of the videos created for the course—lectures and interviews involving myself and many other professors in the ADR and conflict resolution fields who generously contributed their time and ideas to the course—on YouTube. NegMOOC participants logged approximately 17,000 views of these videos. Between the course's culmination in November 2014 and the final draft of this paper in June 2020, these videos have been viewed over 65,000 additional times. In May 2020 alone, over 1,500 people have accessed these videos 2,000 times, viewing them for 175 hours, with zero effort on my side.

⁵⁴ Star Wars nerds, in other words. Minor nerds, it should be said. I myself own but one lightsaber. And, it's not as if speak like Yoda, we do.

⁵⁵ The Hollywood Reporter & Morning Consult, *National Tracking Poll #181115*, THE HOLLYWOOD REPORTER, 3 (Nov. 8–11, 2018), <https://www.hollywoodreporter.com/sites/default/files/custom2/The%20Hollywood%20Reporter%20Morning%20Consult%20Film%20Franchise%20Return%20Poll.pdf>. (reporting that 75% of participants have seen all or some of the Star Wars movies).

Other fields have capitalized on this, using Star Wars to introduce philosophy, history, and other topics to a wide audience of readers. Conflict and its resolution are central to the saga's narrative themes, providing the perfect artefacts for implementing our vision of utilizing pre-existing, time-tested cultural and social phenomena as vehicles for introducing the knowledge of the conflict and negotiation field to the public at large.

We decided that the initial product would take the form of an edited book, incorporating contributions from many in the ADR, conflict, and related fields. We envision the book being written in a light, humorous tone with minimal jargon, and animated by passion for conflict resolution and for *Star Wars*, to connect with its broad target audience. In late 2019, we put out a call for chapter proposals, and were thrilled to receive dozens of proposals from familiar and new colleagues alike. We are currently seeking the right publisher to support creation of such a non-conventional book and its dissemination in line with a teaching-the-world vision.

These are only examples. As noted above, many in our field have engaged in spreading conflict education far and wide beyond their traditional classrooms or training rooms.

VII. CAN WE NOT SAY WIN/WIN? BENEFITS TO LAW SCHOOLS, BENEFITS TO ADR

In suggesting this educational pivot, I do not intend to put ADR faculty in law schools at odds with their institutions. Quite the opposite; I think that the shifts in our educational outlook will greatly benefit law schools, particularly in areas where they themselves would do well to pivot. With variations from one institution to another, some major issues law schools face are well known and generalize to most law schools: Student enrollment and retention and their effect on finances; student physical and mental health while in law school and beyond; bar exam passage rates, student employment and career success; law school branding and individuation; and the actual impact of the school and its alumni on the world and the impact of this on school finances, to name some of the biggies.⁵⁶

⁵⁶ Of course, I am not suggesting that these educational shifts by ADR faculty will provide a panacea for all the challenges law schools face today. Rather, I hope this section provides ADR faculty some initial pathways for not only *justifying* these shifts to their institutions but for actually *using* them to benefit their schools. Colleagues teaching in law schools can doubtlessly compile more informed and nuanced lists of issues challenging law schools and their own in particular and consider how these educational shifts can meet acutely-felt needs of their school.

My in-a-nutshell theory-of-change for law schools is that to thrive in the 21st century, they must create new pools of potential students and attract their actual enrollment. The current situation seems to offer a common situation that not all law schools can thrive in. By supporting their ADR faculty's educational shifts suggested in this article, a law school can generate large new pools of potential students, prime them to appreciate ADR-positive approaches, connect that to the school's overall legal approach, empower these students to enroll, support their mental health and help them to thrive in law school, and prepare them for effective 21st century practice.

Consider how the first two shifts, of affecting students' core legal paradigm and of empowering students to model and promote ADR in society, combine to form a new kind of student. If supported, rather than resisted, these shifts can support a law school's transformation into an institution in which a healing profession is taught. Framed appropriately in the law school's outreach website and recruitment material, this could attract a new type of student, from a largely untapped pool. It could help to retain students who might previously have dropped out of law school or experienced at-odds-ness with it, once they awaken to the fact that they are *not* being taught law as the helping profession they thought it would be. It would build these students a pathway to professional success, rather than offer them three dismal years likely to include coping with mental health issues.⁵⁷ Finally, it will prepare students to offer the services the lawyers of the future are likely to need.⁵⁸

The third shift, conducting ADR educational activity for the public at large, has inherent value that mesh with the goals some law schools hold themselves out as promoting, such as creating a more peaceable world or promoting social justice. Beyond that, the third shift closes a circle with the benefits ascribed to the first two shifts. As noted, these *attract* a new type of student from an untapped pool. It is teaching-the-world activity that *creates* this pool of potential students in the first place. Perceiving the helpful material they've learned to be typical components of legal education, more people might be drawn to attend law school... particularly, the law school that reached out and empowered them in the first place, in which these topics are more robust components of a legal education. Of course, some educational

⁵⁷ Beyond these students, enhancing ADR's effect on students' approach to legal and personal situations might contribute to lower rates of mental health problems across a law school. See Deborah Malizia, & Jessica Katz Jameson, *Hidden in Plain View: The Impact of Mediation on the Mediator and Implications for Conflict Resolution Education*, 35 CONFLICT RESOL. Q. 301 (2018) (finding that students studying mediation experience reduced stress levels and enhanced emotional well-being; the authors recommend expansion of mediation teaching in legal education as a means of dealing with the alarming rates of mental health issues amongst law school students and legal professionals).

⁵⁸ Greenberg & Ebner, *supra* note 33.

activities could involve branding and overt advertisement connecting potential students with pathways into the law school.

VIII. CONCLUSION

The ADR field confronts its future with a history of achievement. To maintain its momentum and increase its impact, it must consider change, across all its aspirations, axioms, activities, and audiences. Such change, which I have introduced using the term ‘pivot,’ should capitalize on the best gains of the field while unfettering it from preserving the entirety of all of its previous conceptions and processes.

In this article, I’ve proposed one such pivot, with regard to the educational reach of ADR in legal education. We have educated many thousands of key actors, gatekeepers, and legitimacy-granters, building a cadre of practitioners for legal ADR and beyond even as we established the field’s essentiality to the justice system, its efficacy in other systems, and its legitimacy far beyond these. With the goals of maintaining and expanding ADR’s footprint in these systems, and strengthening the role and impact that ADR’s principles, values, processes, and professionals have in society, the pivot I’ve suggested includes three paradigmatic shifts in how we view our educational audience. We can strive to increase ADR’s overall effect on our law students’ cognitive frames, impacting the overall shape of their legal understanding and their grasp of their role as lawyers. We can view our students as our partners-in-change, rippling the values of ADR not only into the court and related systems but also into broader circles of society. Finally, by adjusting our own vision of the scope of our educational audience, we can spread ADR’s ideas to non-students at scale, generating a more peaceable world even as we increase people’s tendency to utilize ADR to resolve their disputes.

As activity in this area increases, we will be better equipped to explore and address questions it gives rise to. One area to explore is how much education is ‘enough’? If a wide population is taught a very thin slice of ADR material, will that suffice to achieve movement on the needles we hope to budge? What types of complementary educational activities work well together to fortify thin slices? What educational activities provide more robust information without requiring excessive resources? How much can we teach through a single activity, before it is ignored by the very audience we wish to reach, owing to limitations on their free time and attention? Another set of questions we will be able to explore is the value of these activities to our schools, who support them through supporting us or by providing us further resources to enact them. Are these activities improving the overall legal

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education that students receive in our schools? Does it support their academic success, their physical and mental well-being, and their professional capacities? Has it brought about positive change with regard to student enrollment, retention, satisfaction, and degree completion? Has it had positive impact on expanding the field of ADR practice, opening up employment opportunities for our graduates? If the answers to even some of these questions are positive, these paradigmatic shifts may ultimately contribute to stabilizing and even expanding the role of ADR and its faculty in law schools, and bring greater alignment between ADR faculty, their institutions, and their colleagues.

While I've used the term 'paradigmatic shifts,' I stress that I am not claiming to have invented any wheels. Many ADR educators, from the movement's very beginning and up to the present day, have engaged in teaching-the-world activities. I hope that this article will support this activity's expansion, though its more modest contributions of recognizing this activity for what it is; framing it as a pivot; naming and articulating some of the different pathways such activity could follow; providing theoretical support for its centrality to ADR's future success; and ending, if this hasn't been made clear enough already, with a call to action: Teach the world.

