

When Litigation is Not the Only Way: Consensus Building and Mediation As Public Interest Lawyering

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

—*Stuart Hampshire*¹

I. INTRODUCTION: PROCESS IS JUSTICE

British social philosopher Stuart Hampshire recently articulated the fundamental and foundational principles of the modern conflict resolution movement (and I do call it a movement).² He asserted that, “there will always be a plurality of different and incompatible conceptions of the good and there cannot be a single comprehensive and consistent theory of human virtue.”³ Correspondingly, “our political enmities in the city or state will never come to an end while we have diverse life stories and diverse imaginations.”⁴ Hampshire, a socially progressive, socialist philosopher hoped to articulate

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1. STUART HAMPSHIRE, *JUSTICE IS CONFLICT* 35 (2000).

2. *Id.* Hampshire first articulated these ideas at Harvard University’s Tanner Lectures on Human Values in two lectures during the 1996-1997 academic year. Hampshire expanded the Lectures in *Justice is Conflict. Id.* at xiii. Harvard University, 1996-1997, published as *Justice is Conflict* (2000).

3. *Id.* at 34.

4. *Id.* at 5.

universal conceptions of the good.⁵ In his lifetime of reflection on this important subject, Hampshire concluded that at best we know the bad things—the evils we want to eliminate—when we see them, but we cannot agree on either the means to eliminate those evils or the content of the good we seek to promote.⁶ One person’s equitable redistribution of wealth is another’s person confiscation of justly held and earned property. In the evening of his productive years of contemplation, Hampshire adopted a procedural or process-driven social philosophy that I want to discuss today. Hampshire has named and described the moral articulation of the approach I have been arguing for, teaching and practicing with for much of my career in seeking social justice through law. Today we will explore how processes other than litigation can serve the public interest, at least as well, if not better than, the more commonly used methods of lawsuits, litigation and commanded rule-changes.

While Hampshire concludes that agreement on the substantive good is not possible in our modern, diverse, and pluralistic world,⁷ he is optimistic that there might be one human universal: “fairness in procedure is an invariable value, a constant in human nature [T]here is everywhere a well-recognized need for procedures for conflict resolution, which can replace brute force and domination and tyranny.”⁸ Hampshire refers to several forms of conflict resolution, including both well-known forms such as adjudication, arbitration, and “judging,”⁹ as well as broader political processes such as deliberating, examining, discussing policy choices, diplomatic negotiations, and “hearing.”¹⁰

Seeking to define a universal human propensity for procedural fairness, Hampshire reduces conflict resolution to the single principle, *audi alteram partem* (“hear the other side”),¹¹ a universal principle of “the adversary argument” in which thinking is identified

5. Hampshire lists absence of violence, oppression, illness, and poverty, among other things in his universal conceptions of the good. See HAMPSHIRE, *supra* note 1.

6. *See id.*

7. *Id.*

8. *Id.* at 4-5.

9. *Id.* at 7.

10. *Id.* at 9-10.

11. *Id.* at 8.

with the use of reason to weigh alternatives.¹² When properly expanded from “hear the other side” to “hear all sides,” Hampshire provides a foundational principle from which to measure whether justice and the public interest are served in all political and legal decision making. Where Hampshire sees justice in the recognition that all conflict is inevitable and must be humanely tended to, those in the conflict resolution movement see the conflict resolution processes employed as at least one important measure of justice. Furthermore, despite what law professors teach in civil procedure or constitutional law, “due” or “just” process does not necessarily require litigation, a “day in court,” or a lawsuit.

Today, using a variety of illustrations from real issues, real cases, scholarship, literature, films, and other cultural artifacts, I want to explore how processes that enable the expression and “handling” of conflict may serve the public interest as well as, if not better than, the simplistic Anglo-American conception of adversary justice or public interest litigation.

II. PROBLEMS WITH “TWO-SIDED” ADVERSARIALISM

It is common in human thinking to divide the world into dichotomous categories. In my view, there is truth in the old joke, “There are two kinds of people in the world—those who divide things into two—and those who don’t.” Hampshire thinks of human conflicts as having two sides, perhaps because he is a product of Anglo-philosophical thinking, the same system that produced the adversary legal system. Hampshire is not alone in conceiving of human dilemmas as the confrontation of good and evil, the just and unjust, competition and cooperation, the rich and the poor, plaintiffs and defendants, as if there were null sets in all those places in between those categories. In a binary view of process, we need to listen to, take in, and fully understand the “other side” and then either we will be persuaded through negotiation or a third party will decide by adjudication how those opposite views should be reconciled, accommodated, or judged.

12. *Id.* at 8-9.

I am one of those people who does not divide the world into two categories,¹³ so I want to expand on Hampshire's significant observations about the importance of conflict resolution as a process to demonstrate that his principle of "hearing all sides" supplies the philosophical justification for a variety of new forms of legal and political dispute resolution, even about hotly contested, "adversarial" issues affecting the public interest.

Few modern legal problems have only two sides. Civil rights issues implicate employees, employers, customers, private entities, many layers of governmental enforcement agencies, and grievance processes. Environmental issues involve developers, local communities, who themselves may be split between pro-development employment seekers and environmental conservationists, a wide variety of disagreeing public interest groups¹⁴ and federal, state, and local agencies. Mass torts involve literally hundreds and thousands of parties, not only the plaintiffs injured by mass accidents, products defects, or slow environmental harms, but also multiple layers of manufacturers, distributors, and insurers. Consider how often in litigation the "real parties in interest" include others besides those formally named as plaintiff or defendant in any given case.¹⁵ To the extent that multiple parties have claims, needs, interests and "rights" in a legal action, the concept of "hearing both sides" may be falsely reductionist in assuming that all parties can align themselves on one or the other side of the "v." and that any resolution favoring one side over the other will solve the problem, conclude the litigation, or end the conflict. Consider how many years the legal issues in *Brown v. Board of Education*,¹⁶ have been relitigated, not to mention the larger

13. See, e.g., Carrie Menkel-Meadow, *The Trouble with the Adversary System in a Post-Modern, Multi-cultural World*, 38 WM. & MARY L. REV. 5 (1996).

14. Consider the different goals of various public interest environmental groups, such as, the Sierra Club, the Humane Society, the Nature Conservancy, the Audubon Society, and the World Wildlife Federation. Some of the groups agree to land trades for development, others resist all development, and still others "take sides" when one type of animal preservation threatens another.

15. For examples of ways to read a case from a broader conflict resolution perspective, see Carrie Menkel-Meadow, *Taking Problem-Solving Pedagogy Seriously*, 49 J. LEG. ED. 14 (1999).

16. 347 U.S. 483 (1954).

social dilemmas that continue to plague education in our nation.¹⁷ These dilemmas include economics, quality, privatization, and “white flight.”

Inspired by both practical achievement¹⁸ and modern political theory,¹⁹ new forms of legal processes have developed out of the failures of conventional litigation and are now used in both private settings and public settings such as courts, administrative regulatory processes, and even in legislative contexts. Utilizing the Hampshire and Habermasian²⁰ principles of “hearing the other side”²¹ and engaging in “democratic discourse,”²² lawyers are increasingly involved in negotiation, mediation, and consensus building situations that depend on conflict resolution processes that are different from argumentation, competitive advocacy, and law or rule-based decision making. These different forms of conflict resolution employ different techniques, require different skills, and are based on different “moralities” or internally justified structures and outcomes.

In law, Lon Fuller is the legal philosopher who has most eloquently written about the differentiation of legal processes for different purposes.²³ Indeed, as part of the “legal process” school of jurisprudence, Fuller wrote a series of articles suggesting that adjudication, mediation, and arbitration each had their own structures, procedures, and independent “moralities.”²⁴ Fuller

17. Privatization and “white flight,” as well as economic and quality issues continue to plague education.

18. See, e.g., THE CONSENSUS BUILDING HANDBOOK pt. 3 (Lawrence Susskind et al. eds., 1999) (review the case studies reported).

19. See, e.g., JOHN S. DRYZEK, DELIBERATIVE DEMOCRACY AND BEYOND (2000); DELIBERATIVE DEMOCRACY (1997); JAMES BOHMAN, PUBLIC DELIBERATION (1996); MARK KINGWELL, A CIVIL TONGUE (1995); DELIBERATIVE POLITICS (Stephen Macedo ed., 1999); AMY GUTTMANN & DENIS THOMPSON, DEMOCRACY AND DISAGREEMENT (1996); DELIBERATIVE DEMOCRACY (Jon Elster ed., 1998); MICHAEL C. DORF & CHARLES F. SABEL, *A Constitution of Democratic Experimentalism*, 98 COL. L. REV. 267 (1998).

20. JURGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY (William Rehg trans., 1996).

21. HAMPSHIRE, *supra* note 1, at 8.

22. See sources cited *supra* note 19.

23. Carrie Menkel-Meadow, *Mothers and Fathers of Invention: The Intellectual Founders of ADR*, 16 OHIO ST. J. DISP. RES. 1 (2000).

24. See LON L. FULLER, THE PRINCIPLES OF SOCIAL ORDER (Kenneth I. Winston, ed. 1981); Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978); Lon Fuller, *Mediation—Its Form and Functions*, 44 S. CAL. L. REV. 305 (1971); Lon L. Fuller,

believed that each process was uniquely suited to resolving or dealing with particular kinds of legal problems and that different processes should be used for fact, law, norm, or relationship issues. For Fuller, as for me, one “size” of dispute resolution process—adjudication—does not fit all. Indeed, modern theorists and practitioners of dispute resolution have increasingly permitted, and even encouraged, some hybridization of these various processes to permit a greater variety of “hearing and listening,”²⁵ as well as decisional processes depending on such factors as the kinds of issues implicated and the number of parties involved.²⁶

III. THE STRUCTURE OF PROCESS PLURALISM: DIFFERENT MODES FOR DIFFERENT CLAIMS

Conflict resolution processes as tools for achieving social justice have several separate elements. First, different processes by definition develop their own process norms, justified by different conceptions of what that process is supposed to do. Adjudication, with which those in the public interest law movement are most familiar, involves adversary advocacy of competing parties and principles, often beginning with a contested trial and then proceeding to appellate resolution and decision.²⁷ In contrast, mediation and negotiation use less formal means of party engagement, where it is contemplated that unfettered dialogue, followed by consent and agreement will produce an outcome that both, or all, parties have participated in crafting.

Second, different processes produce different kinds of outcomes. Proponents, like myself, of problem-solving through negotiation, mediation, or the newer forms of consensus building, believe that the outcomes produced by such participatory processes are qualitatively

Collective Bargaining and the Arbitrator, 15 NAT'L. ACAD. ARB. PROC. 8 (1962); Lon L. Fuller, *An Afterword: Science and the Judicial Process*, 79 HARV. L. REV. 1604 (1966).

25. See *supra* note 10 and accompanying text.

26. See, e.g., Frank E.A. Sander & Stephen B. Goldberg, *Fitting the Forum to the Fuss: A User Friendly Guide to Selecting an ADR Procedure*, 10 NEG. J. 49 (1994).

27. Trials are often contested when there are competing views of the “facts.” Litigation often advances to the appellate level when one of the parties seeks a definitive legal rule change. Consider the prototypical public interest law campaigns for *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) and *Roe v. Wade*, 410 U.S. 113 (1973).

better than those produced by third party decision-makers. Consensus outcomes are more likely to focus on the future, as well as the past. They are supposed to be based on underlying interests and needs, rather than arguments and positions. As the popular parlance goes, they are intended to “expand the pie,” or look for additional resources or new ideas, rather than to divide a presumed limited sum of resources available to the parties. In more technical terms, different processes are more likely to produce “pareto optimal” solutions²⁸ than the assumed compromises of negotiation or “split the baby” compromise verdicts or arbitration awards. In processes where all the “real parties in interest”²⁹ participate, there will be more than two sides to each issue and very likely there will be more than one issue to be resolved. Expanding, rather than narrowing, issues will increase the likelihood of reaching good agreements, because as game theory and other quantitative theories propose, more solutions are possible when more “trades” are possible.³⁰ Although it may seem counter-intuitive to conventional legal reasoners, the more disagreement about what is important, the better. Oppositional or complementary “trades” allow each side to satisfy their most important needs by meeting the most important needs of other parties. With more complementary, rather than conflicting, desires, we can find more ways to share things, an elaboration of the Homans theory of complementary needs.³¹

For all of the above reasons, the current theoretical and practical technology of ADR approaches to legal problems would be better described as “appropriate” dispute resolution, rather than “alternative” dispute resolution, as we refer to it now. Matching different techniques with different goals can help to assess what process is most appropriate for accomplishing the outcome that is best suited to the particular kind of problem.³²

28. “Pareto optimal” solutions are those that make each party as well off as it can be without unnecessary harm to the other parties. *See* HOWARD RAIFFA, *THE ART AND SCIENCE OF NEGOTIATION* 139 (1982).

29. *See supra* note 15 and accompanying text.

30. *See, e.g.*, HOWARD RAIFFA, *THE ART AND SCIENCE OF NEGOTIATION* (1982).

31. *See generally* GEORGE C. HOMANS, *SOCIAL BEHAVIOR: ITS ELEMENTARY FORMS* (Robert K. Merton ed., 1974).

32. As examples, consider, joint custody, rather than exclusive physical custody in

In addition to the selection of different procedural rules³³ and different rules of decision³⁴ entirely different and morally differentiated modes of appeal, argument, and justification may be utilized to deal with different kinds of conflicts. Lawyers and rational analysts clearly prefer arguments, principles, rights, and rules. Economists, political scientists, some lawyers, and realists recognize that preference trading or bargaining is the actual way in which political and legal decisions are made and utilities are maximized. More recently, a newer group of theorists, drawn from a wide variety of disciplines³⁵ have argued that emotions, feelings, passions, and belief systems are an integral part of the way people process information, argue for justice, and decide whether to agree to something or resolve a conflict.³⁶ Most scholars focus on the tensions between the first two of these “modes”—the tension between rational principle and “crude bargaining.”³⁷ More recently, focus in conflict resolution has turned to the role of feelings, beliefs, the need for cathartic narrative, and human “imagination” or “soul”³⁸ to determine whether conflicts are deemed, by the parties, to be “resolved.”

Thus, conflict over legal, moral, social, and political principles and “goods”³⁹ can be handled and “manipulated” in a number of different ways. The “essentialist” public interest lawyer tends to think

parenting. See *I Am Sam* (New Line Productions, 2001); Carrie Menkel-Meadow, *I Am Sam as an ADR Movie*, Picturing Justice, at http://www.picturingjustice.com/iamsam_meadow.htm (last visited Apr. 23, 2002). Also consider environmental trades of land for animal and habitat preservation and waste siting, contingent agreements for science disputes and medical monitoring for some product defects cases and mass torts and even simple annuities for traditional tort cases.

33. Compare HENRY M. ROBERT, ROBERT’S RULES OF ORDER (Darwin Patnode ed., 1989), and the FED. R. CIV. P. with THE CONSENSUS BUILDING HANDBOOK, *supra* note 18, at pt. 1.

34. Different rules of decision include one or more judges, majority, plurality, or “super majority” vote, and unanimous consent.

35. Proponents span the range from philosophy and political science, to sociology, anthropology, critical legal approaches based on race and gender and post-modernism.

36. JON ELSTER, SOLOMONIC JUDGMENTS (1989); JON ELSTER, ALCHEMIES OF THE MIND (1999).

37. See, e.g., Jon Elster, *Strategic Uses of Argument*, in BARRIERS TO CONFLICT RESOLUTION (Kenneth Arrow et. al. eds., 1995); Cass R. Sunstein, *Agreement without Theory*, in DELIBERATIVE POLITICS, *supra* note 19.

38. These are Hampshire’s phrases. See HAMPSHIRE, *supra* note 1.

39. “Goods” is used here in both the material and ideal senses of the word.

of litigation and adjudication as the normative ways of accomplishing public good, perhaps because the model set by *Brown v. Board of Education* appeared so successful.⁴⁰ At least some sophisticated lawyers, who care about public interest and seek social justice, recognize that litigation, although it has its uses, may not be optimal for all forms of legal change. Many public interest groups use, and have recently intensified their use of, legislative and lobbying efforts. Many groups in the civil rights, civil liberties and environmental movements use, or had to defend against, the referendum process. In the administrative context, some public interest groups participate in negotiated rule-making,⁴¹ one of the hybrid forms of dispute resolution I want to highlight here. Poverty lawyers and community development activists always explore other models of social and legal change, from organizing, to street or court theater, to community education, to collaborative joint venture strategies.⁴² More recently, even the most avid of traditional poverty law advocates recognize the importance of “facilitating coalitions” and encouraging “collaborative relationships across professions.”⁴³

40. Of course, in recent years many question and debate the “success” of that landmark piece of litigation and strategy. The debate occurs not only among legal scholars, *see* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959), but among political scientists and economists who are attempting to assess the actual empirical impact of legal efforts to desegregate the schools, *see, e.g.,* GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991); JAMES HECKMAN & PETRA TODD, *SOURCES OF AFRICAN-AMERICAN ECONOMIC PROGRESS IN THE LABOR MARKET IN THE 20TH CENTURY*.

41. *See, e.g.,* Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1 (1997).

42. *See, e.g.,* SAUL ALINSKY, *REVELLE FOR RADICALS* (1969); Stephen Wexler, *Practicing Law for Poor People*, 79 YALE L.J. 1049 (1970); Peter Gabel & Paul Harris, *Building Power and Breaking Images: Critical Legal Theory and the Practice of Law*, 11 NYU REV. L. & SOC. CHANGE 369 (1982-1983); Lucie E. White, *Collaborative Lawyering in the Field? On Mapping the Paths from Rhetoric to Practice*, 1 CLINICAL L. REV. 157 (1994); Michael Diamond, *Community Lawyering: Revisiting the Old Neighborhood*, 32 COLUM. HUM. RTS. L. REV. 67 (2000); Ingrid V. Eagly, *Community Education: Creating a New Vision of Legal Services Practice*, 4 CLINICAL L. REV. 433 (1998); Symposium, *Lawyering for Poor Communities in the Twenty-First Century*, 25 FORDHAM URB. L.J. 673 (1998).

43. *See, e.g.,* Louise G. Trubek, *REINVIGORATING POVERTY LAW PRACTICE*, 25 FORDHAM URB. L.J. 801 (1998); Jennifer Gordon, *We Make the Road by Walking: Immigrant Workers, The Workplace Project and the Struggle for Social Change*, 30 HARV. C.R.-C.L. L. REV. 407 (1995).

IV. MUST WE COMPETE TO “WIN” SOCIAL JUSTICE OR CAN WE “COOPERATE”?

The underlying tension of how best to achieve legal and social change on behalf of “the public interest”⁴⁴ replicates basic philosophical, epistemological, political, and behavioral issues about whether it is humans’ lot to have to compete over social goods⁴⁵ or whether collaboration, community, cooperation, and shared fates motivates people to work together to achieve a better world. Let me illustrate how this basic human dilemma runs through all human activity, from the basic instinct for survival to more complex efforts to use law to effectuate social change.

In a brilliant novel, entitled *Enduring Love*, Ian McEwan eloquently demonstrates this tension. In the opening sequence of the novel, the protagonist, a science writer, is about to share a much wanted picnic with his wife, only to discover that a large air balloon carrying a child and an older man are hovering above in the sky, in obvious distress. Not knowing what propels him except a child’s cry, Joe rushes to grab a dangling rope and steady the balloon, joined by four other men, from different points around a field, “racing into this story and its labyrinths.”⁴⁶ All five men have different ideas about how to save the boy and his adult companion, as the wind gusts build and the dangling rope, man and child are pushed above a steep escarpment. Four of the men eventually let go and the balloon, the man and boy, and one man still dangling from the rope, sail over the cliff. The protagonist suggests that some calculations of the speed of wind gusts, weights of the five men, distance and height might have saved the boy and man had anyone been able to do the calculations in enough time, the failure of “rational” thinking in emergencies. In the aftermath of what turns into a catastrophe, the loss of life, Joe Rose

44. I am avoiding definitions here. For my efforts to define what constitutes a social justice lawyer engaged in “cause lawyering”, see Carrie Menkel-Meadow, *The Causes of Cause Lawyering: Toward An Understanding of the Motivation and Commitment of Social Justice Lawyers*, in CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES (Austin Sarat et al. eds., 1998).

45. Competition recharacterized by the “zero-sum”/scarcity view of human nature, requiring litigation, and command and control for social justice and re-distribution.

46. IAN MCEWAN, *ENDURING LOVE* 1 (1997).

sees the problem as akin to the Prisoner's Dilemma. Each of the five men had to decide whether to hold on to the rope and steady the balloon as a strong gust takes it up over the falling escarpment. In that split second moment, all the teachings of human nature as competitive and self-preserving or cooperative and group protective are brought to bear in the situation. As with the classic Prisoner's Dilemma, the parties cannot communicate with each other because the wind is so strong they cannot hear each other shouting contradictory advice and intentions. Joe recounts, from his memory of the event, the simultaneous desire to "stay on the rope and save the boy, [when] barely a neuronal pulse later, came other thoughts, in which fear and instant calculations of logarithmic complexity were fused."⁴⁷ None of the five men admits to being the first to let go, though all but one of the men do let go, as the balloon sails off the cliff. Joe attributes their failure to coordinate their actions and do the greatest good—the saving of all, to the lack of a leader, team, and plan, rather than just themselves. In that instant he recognizes that "cooperation—the basis of our earliest hunting successes, the force behind our evolving capacities for language, the glue of our social cohesion" failed them because:

letting go was in our nature too. Selfishness is also written on our hearts. This is our mammalian conflict; what to give to others and what to keep for yourself. Treading that line, keeping the others in check and being kept in check by them, is what we call morality . . . our crew enacted morality's ancient, irresolvable dilemma: us, or me.⁴⁸

As each man accedes to the salience of "me," the "us" is lost and death ensues. For Joe Rose, a "society" that began as a good society becomes a bad society as it disintegrates as each man looks out for himself alone and one dies, dangling from the rope, as his single weight is insufficient to bring the balloon to safe ground.

In that literarily realized moment, McEwen describes the plight of us all as humans and certainly of the public interest-seeking lawyer—how should I act to save or better human life? Do I hold on to my

47. *Id.* at 14.

48. *Id.* at 14-17.

self-interest and self-preservation and compete with others, or stay and attempt to coordinate action with others to achieve the greatest good for the greatest number? This dilemma of cooperate or defect is played out daily in both the macro and micro decisions of our lives. McEwen's story dramatizes the need for human coordination of action, the failure of rational calculations and incomplete information, and the conflicting impulses and emotions of those who would seek to do good.

The recent movie, *A Beautiful Mind*,⁴⁹ is a clever Hollywood depiction of the more complicated ideas of John Nash's bargaining theories, within the context of non-cooperative and cooperative "games"⁵⁰ within game theory. In game theory, to cooperate is to be able to share information, non-cooperative games are those in which, like the Prisoner's Dilemma, the parties cannot communicate preferences, interests, threats, or other forms of information.⁵¹ In the movie, John Nash's more complicated explanations of equilibrium points in multi-party non-cooperative games is demonstrated as a problem of maximizing joint gain when all the men in a bar compete for the single beautiful blond. With all attempting to maximize individual gain with a scarce resource, a single blond, there will be one victor and a lot of lonely men and female brunettes. Nash sees, in a moment of creative insight,⁵² that all the men would be better off if they paired up with their "second choices" and all got dates. This demonstrates, Hollywood style, that an equilibrium point of

49. *A BEAUTIFUL MIND* (Universal Pictures 2001).

50. See, e.g., John Nash, *The Bargaining Problem*, 18 *ECONOMETRICA* 155 (1950); John Nash, *Two-Person Cooperative Games*, 21 *ECONOMETRICA* 129 (1953).

51. For technical descriptions of the Prisoner's Dilemma, see, e.g., WILLIAM POUNDSTONE, *PRISONER'S DILEMMA* (1992); DOUGLAS G. BAIRD ET AL., *GAME THEORY AND THE LAW* (1994); AVINASH DIXIT & BARRY NALEBUFF, *THINKING STRATEGICALLY: THE COMPETITIVE EDGE IN BUSINESS, POLITICS AND EVERYDAY LIFE* (1991). For less technical depictions, just watch *NYPD Blue* (NBC television broadcast) on television every week where Prisoner's Dilemma is literally shown as two compatriots in crime are locked up in different cells and forced or cajoled into "defecting" against each other, with promises of "better deals" for cooperating with the police.

52. The real story of mathematical genius is a bit more complex, as proofs have to be elaborated to the satisfaction of peers. See, e.g., MIHALY CSIKSZENTMIHALYI, *CREATIVITY: FLOW AND THE PSYCHOLOGY OF DISCOVERY AND INVENTION* (1996); SYLVIA NASAR, *A BEAUTIFUL MIND: A BIOGRAPHY OF JOHN FORBES NASH, JR., WINNER OF THE NOBEL PRIZE IN ECONOMICS*, 1994 (1998).

maximizing joint gain can be established for multi-party games or dilemmas, just as a “minimax” strategy, developed by original game theorists Von Neumann and Morgenstern,⁵³ can establish a point of strategic agreement based on a combination of mistrust and self-interest in zero-sum games.⁵⁴ Game theory elucidates that combination of rational strategic thinking, the ability to share information, the formation of preferences, interests and utilities and most importantly, the “rules” or assumptions that determine whether outcomes will be “rational” or “maximizing,” either for particular individual players or for all of them “in the game.”

This narrative which spawned decades of mathematical, political science,⁵⁵ and psychological research into human motivation and decision-making comes from our own domain of law enforcement (the “prisoner’s dilemma”). The truth, however, is that its application to real legal disputes is actually much more complex. Information rules and the number of parties, as well as initial resource endowments,⁵⁶ make the assumptions of game theory evocative for us, but not finally determinative or fully satisfying. Therefore, game theory asks the somewhat dichotomous question of whether to cooperate or defect, whether to hold on to the rope to save the other or let go and save our self. Unfortunately, legal, social, and political disputes are not so simple and often pose more multi-faceted questions. If the parties always defect, or hide information, they will not know about the possibilities of mutually agreeable solutions to their problems. If they seek to “win” a dramatic court suit, they may leave the other side with a strong desire for revenge that will inhibit compliance with even the most definitive court ruling. Further, if the conditions change, a ruling based on the past set of events or conditions may quickly be avoided or rendered moot.⁵⁷

53. JOHN VON NEUMANN & OSKAR MORGENSTERN, THEORY OF GAMES AND ECONOMIC BEHAVIOR (1944).

54. POUNDSTONE, *supra* note 51, at 97.

55. ROBERT AXELROD, THE EVOLUTION OF COOPERATION (1984).

56. Classic game theory assumes “players” of equal bargaining power, see Nash, *supra* note 50.

57. Consider how a school district-based set of geographical rulings in the remedial sequella of *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954), made broader remedial options across districts much harder to justify, as more and more whites fled to the suburbs or private schools following *Brown*. See *Milliken v. Bradley*, 418 U.S. 717 (1974) (Detroit school desegregation

Therefore, the question of whether to compete or cooperate is too complicated and important to leave to the dry assumptions of game theory, especially when people's lives and social justice hang in the balance. For this reason, I suggest that conventional lawsuits and important, but limited, "competitive" and polarized public interest campaigns are not the best ways to achieve social justice in the current multi-partied and multi-issue world, especially with the unequal resource allocations of the parties. Social justice is not a "game." If the goal is to maximize joint gain, or at least improve the social conditions for those worst off, then we will need all the tools and all the strategies that are likely to help. As McEwen's balloon is buffeted by sudden winds beyond the parties' control, team work, coordination, communication, and cooperation may be necessary to bring the people back to ground for a safe landing. Public interest lawyers, indeed, all lawyers, need to learn and then use a wider variety of techniques and processes to achieve their aims of social justice.

V. LEGAL PRACTICE, PROBLEM SOLVING, AND SOCIAL JUSTICE: SOME EXAMPLES

Though many do think of American legal and governmental processes in binary terms—fact and law, plaintiffs and defendants, Republicans and Democrats, federalism and states' rights, developers and conservationists, conservatives and liberals—the truth is far more complex as modern legal and governmental developments have well illustrated. Even our two party system is contingent historically and might have turned out differently if Thomas Jefferson had acceded to the request of John Adams⁵⁸ that they create a coalition government when the outcome of the 1796 election seemed in doubt and too close to call.⁵⁹ Adams hoped that the parties could put aside their

case).

58. Perhaps the compromise was suggested by Abigail Adams. If women were among the founding "mothers" would our governmental structure have looked different? MARY BETH NORTON, *FOUNDING MOTHERS AND FATHERS: GENDERED POWER AND THE FORMING OF AMERICAN SOCIETY* (1996); LYNNE WITHEY, *DEAREST FRIEND: A LIFE OF ABIGAIL ADAMS* (1981).

59. See JOSEPH J. ELLIS, *FOUNDING BROTHERS: THE REVOLUTIONARY GENERATION* 179-

antagonism for the good of the new Republic, despite differences over foreign policy and the national debt, among other issues, including slavery. Jefferson, however, retreated to Monticello and our two party system arose in lurid⁶⁰ and contested adversarialism.

As modern inheritors of Adams' desire to do what was best for the polity as a whole, but perhaps ironically using Jeffersonian-inspired principles of regionalism and local control, a number of "experiments" in governance and political decision-making focus on transcending binary oppositions as ways of achieving resolutions to legal and political conflicts.⁶¹

At the level of political theory these experiments draw their life and justification from participatory democracy and democratic discourse.⁶² At the level of process, many of these processes draw their practice from mediation theory and practice.⁶³ Mediation theories strive to reach a consensual agreement that maximizes joint, not individual gain, and depends, in part, on the facilitation of a third party neutral to manage information sharing, rules of process, and rules of decision and creative brainstorming processes to enrich the range of possibilities for resolution.

Mediation and its cousin, consensus building for multi-party, multi-issue public policy decision-making, are undertaken for several different reasons including: functional problem-solving⁶⁴; law

88 (2000) [hereinafter ELLIS, FOUNDING BROTHERS] (suggesting that Adams sought to develop a bi-partisan government with Jefferson, which was opposed by James Madison, Jefferson's political and partisan strategist). See also JOSEPH J. ELLIS, PASSIONATE SAGE: THE LEGACY OF JOHN ADAMS 29-32 (1993).

60. Both sides (Federalists and Republicans) engaged in personal slander as well as political diatribes, the famous James Callendar writing scurrilous stories about anyone when paid by the other side. See ELLIS, FOUNDING BROTHERS, *supra* note 59.

61. See, e.g., THE CONSENSUS BUILDING HANDBOOK, *supra* note 18, at pt. 3.

62. See *supra* note 15; LAWRENCE SUSSKIND & LIORA ZION, STRENGTHENING THE DEMOCRATIC PROCESS IN THE UNITED STATES (2001) (manuscript on file with the author).

63. See, e.g., CARRIE MENKEL-MEADOW, MEDIATION: THEORY POLICY AND PRACTICE (2001) [hereinafter MENKEL-MEADOW, MEDIATION]; Howard Raiffa, *Post-Settlement Settlements*, 1 NEG. J. 9 (1985); see also Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754 (1984).

64. This includes resolving a dispute, environmental siting, clean-up allocations, block grant allocation and internal organizational dispute resolution. See, e.g., Lauren Edelman et al., *Internal Dispute Resolution: The Transformation of Civil Rights in the Workplace*, 27 LAW & SOC'Y REV. 497 (1993); *The Many, Different, and Complex Roles Played by Ombudsmen in Dispute Resolution*, 16 NEG. J. 35 (Howard Gadlin ed., 2000).

making⁶⁵; litigation settlement⁶⁶; legal decision-making in new legal institutions⁶⁷; policy development⁶⁸; strategic planning and organizational change⁶⁹; multi-jurisdictional disputes, treaties and law-making opportunities⁷⁰; dialogues⁷¹; and healing, transformative, and expressive encounters.⁷²

The use of mediation or consensus building processes involve

65. This includes negotiated rule-making, local rules, development of state-wide commissions, international treaties and negotiated orders, such as the Kyoto Global Warming treaty, etc.). See, e.g., Philip Harter, *Negotiating Regulations: A Cure for the Malaise*, 71 GEO. L.J. 1 (1982).

66. Mediation is used to settle mass torts and class action lawsuits.

67. Problem-solving courts, such as family, drug courts, "vice," and domestic violence courts often utilize mediation. See, e.g., Judith Kaye, *Changing Courts in Changing Times*, 48 HASTINGS L.J. 851 (1997); Michael Dorf & Charles Sabel, *Drug Treatment Courts and Emergent Experimentalist Government*, 53 VAND. L. REV. 831 (2000); Greg Berman & John Feinblatt, *Problem Solving Courts: A Brief Primer*, 23 LAW & POL'Y 125 (2001); Deborah Epstein, *Effective Intervention in Domestic Violence Cases*, 11 YALE J. L. & FEMINISM 3 (1999).

68. This includes multi-agency policy setting such as in transportation, urban sprawl, and sustainable growth.

69. Mediation is used in government agencies priority setting, corporate strategic planning, university mission statements, and budget planning. Even the American Association of Law Schools now sponsors facilitated planning retreats for law schools. Former Dean of Washington University School of Law, Dorsey "Dan" Ellis, and I are members of the AALS Resource Corps, trained to facilitate consensus-building law school planning retreats. Indeed, I facilitated such a retreat at Washington University several years ago with Curtis Berger, former professor at Columbia University Law School (now deceased).

70. International environmental treaties, state, local, and regional coordinating efforts on such issues as crime, growth, and AIDS policy utilize mediation. See LAWRENCE SUSSKIND, *NEGOTIATING INTERNATIONAL ENVIRONMENTAL TREATIES* (2001); Michael Hughes et al., *Facilitating Statewide HIV/AIDS Policies in Colorado*, in *THE CONSENSUS BUILDING HANDBOOK*, *supra* note 18.

71. Non-decisional opportunities to debate, discuss, and inform communities that have widely different views about important political or moral issues such as abortion, see, e.g., Michelle LeBaron & Nike Cartarphen, *Finding Common Ground on Abortion*, in *THE CONSENSUS BUILDING HANDBOOK*, *supra* note 18; Margaret Herzig, *Public Conversations*, 4 DISP. RESOL. MAG., Summer 1998, at 10; affirmative action, see discussion of facilitated dialogues on California's Proposition 209 (anti-affirmative action referendum) in Menkel-Meadow, *supra* note 13, at 34-35, animal rights, see, e.g., LAWRENCE SUSSKIND & J. CRUIKSHANK, *BREAKING THE IMPASSE* (1987), without any expectation of decision, but in hopes of furthering human understanding also use mediation.

72. Mediation has been used in South Africa's Truth and Reconciliation Commission, the Human Values Project in Macedonia, and even bookstore/coffee house readings and discussions of controversial matters). See, e.g., MARTHA MINOW, *BETWEEN VENGEANCE AND FORGIVENESS* (1998); SUSAN COLLIN MARKS, *WATCHING THE WIND: CONFLICT RESOLUTION DURING SOUTH AFRICA'S TRANSITION TO DEMOCRACY* (2000).

procedures that differ from conventional litigation.⁷³ First, all the stakeholders or interested parties are identified and invited to the process, either in direct participation or by constituent representation. Second, the parties identify a broad agenda, rather than a limited set of triable issues. Third, in complex cases, a professional team of convenors studies the conflict or dispute or policy agenda and creates a conflict assessment or map of the proceeding to be commented on in advance by all the parties. Fourth, the parties select neutral facilitators to guide both process and rules of decision. During the process, the parties engage in joint fact-finding while the facilitators and parties develop groundrules for structured, but open, discourse.⁷⁴ Further, parties engage in creative brainstorming, rather than argumentative debate or structured witness examination. Neutral process experts facilitate collaboration, and often task-specified team assignments work simultaneously and decisions are “taken” by party-agreed standards of consensus in policy settings or consent in mediated agreements. The outcomes, reached by facilitated negotiation and consent, rather than externally imposed decisions, are widely thought to lead to greater satisfaction, legitimacy, implementability, and voluntary compliance.

Conventional public interest advocacy often assumes that there are good guys and bad guys. For justice to prevail, a third party, the courts, must hear the facts and rule the bad guys out of order establishing good legal precedent in the process.⁷⁵ Problems arise when there are many actors and good guys and bad guys meld together, when there are not enough resources to share between the bad guys and the good guys, or when the processes⁷⁶ are simply

73. See generally MENKEL-MEADOW, *MEDIATION*, *supra* note 63.

74. Ground rules are particularized for each situation from a common core of principles. In mediation, confidentiality is likely to be one of the key ground rules. Confidentiality is complex, as evidenced by the many layers of rules and laws pertaining to mediation confidentiality. See, e.g., Symposium, *Uniform Mediation Act*, 85 MARQUETTE L. REV. 1 (2001). In consensus building, openness or transparency is more likely to be the ground rule, especially in jurisdictions with Open Meeting or Sunshine laws. See ROGERS ET AL., *MEDIATION, LAW, PRACTICE AND POLICY* (2001).

75. Legislative advocacy seeks to create statutory law by using testimony, also usually quite adversarial or agonistic, to regulate the bad guys and protect the good guys. See DEBORAH TANNEN, *THE ARGUMENT CULTURE* (1998).

76. Traditional processes include courts, legislatures, and administrative agencies.

gridlocked with competing sides or overworked with too-big-to-handle-dockets. When the losers in the electoral process or the defeated in the litigation process, seek to upset their losses with constant battles, new elections, appeals, and attempts to dethrone or reverse “settled” outcomes, the paradigm again fails. Occasionally, the interested parties are so turned off by the complexities, expense, and wastefulness of these traditional processes they simply refuse to participate. Because of these concerns, and others, creative lawyers,⁷⁷ attempting to find social justice for the many, rather than for the few, use the structured processes of mediation and consensus building to arrive at negotiated solutions to very complex legal and social problems.

The environmental arena is an especially productive domain for these processes. Former Secretary of the Interior, Bruce Babbitt, frustrated by the legislative grid-lock on some forms of environmental regulation and wildlife protection, championed a process he denominated “quasi-legislative dispute resolution.”⁷⁸ Habitat Conservation Planning empowers the stakeholders in a particular region to engage in trades and negotiations and to set standards for preservation of species not protected by the binary approach of current legislation.⁷⁹ Environmental problems over

77. Lawyers are joined by other professionals, including mediators, urban planners, diplomats, social workers, and psychologists in utilizing mediation.

78. Bruce Babbitt, *ADR Concepts: Reshaping the Way Natural Resource Decisions Are Made*, in INTO THE 21ST CENTURY: THOUGHT PIECES ON LAWYERING, PROBLEM SOLVING AND ADR 14 (CPR Institute for Dispute Resolution ed., 2001).

79. As an example, he recounted his experience on Cape Cod when the proliferation of seagulls, due to increased human presence, threatened several endangered bird species. The Interior Department’s solution of lacing croutons with cyanide to kill the gulls brought more parties and issues to the dispute. The croutons made the gulls sick, but not sick enough—they didn’t die right away but circled into the streets of Cape towns like Chatham. The animal rights groups decried the killing of the gulls calling it “speciesism,” but the biologists were concerned about preserving some bird groups that faced extinction.

A consensus building-forum was quickly organized and a solution reached. “Hazers” were stationed to flash and wave flags at the gulls, with an occasional rocket being set off, to scare them away, rather than kill them. Even with this creative solution, eventually “deus ex machina” and time helped. A sudden increase in coyotes on the island (another product of increased human habitation) also scared the gulls and unfortunately ate the youngest gulls. But, the animal rights people couldn’t blame people, it was the “delicate balance of nature” and the “natural” laws of the animals that eventually solved the problem.

natural resource use⁸⁰ cannot be solved in dichotomous terms and not with the time-consuming processes of litigation or legislation. “New governmental processes”⁸¹ involve all the stakeholders and to manage a variety of targeted, and in some cases, unique, creative solutions to problems. Such solutions may themselves be contingent and revisited with an agreed-upon process as scientific conditions or facts change.

The state of Oregon convened such a process to manage its highway access dispute.⁸² The dispute involved commuters and developers who wanted more roads and residents and business people who wanted fewer, larger roads, which threaten more intimate communities and businesses running through existing towns and villages. The Policy Consensus Institute helped facilitate a process. All identified stakeholders participated, and a long-term plan was first recommended to, and then adopted by, the appropriate governmental decision-makers. The Governor of Oregon is so committed to the process that he sits on the Board of the Policy Consensus Institute.⁸³

The EPA, OSHA, and a variety of federal agencies are using a similar process. The agencies use negotiated rule-making⁸⁴ to involve all stakeholders in rule drafting before the fact. Early involvement avoids conflicts after the notice and comment period.⁸⁵ While the evaluative jury is still out on the success and efficiency of these proceedings,⁸⁶ “reg-neg” is being used by federal, state, and local

80. These include water, forests, air, deserts, and competing animal groups and land itself.

81. Babbitt, *supra* note 78, at 13-15.

82. Videotape: Building Consensus: Transportation Rulemaking in Oregon (Policy Consensus Initiative 2000) (on file with author).

83. *PCI Board of Directors Names New Chair*, POLICY CONSENSUS INITIATIVE NEWSLETTER, Feb. 2002, at 7.

84. This is referred to as “reg-neg.”

85. Without “reg-neg” post notice and comment conflicts typically end in court with an often decade-long appeals processes.

86. Compare Cary Coglianese, *Is Consensus an Appropriate Basis for Regulatory Policy?*, in ENVIRONMENTAL CONTRACTS 93 (Eric Orts & Kurt Deketelaere eds., 2001), and Cary Coglianese, *Assessing the Advocacy of Negotiated Rule-Making*, 9 N.Y.U. ENV. L.J. 386 (2001), with Philip Harter, *Assessing the Assessors*, 9 N.Y.U. ENV. L.J. 32 (2000), and JODY FREEMAN & LAURA LANGBEIN, REGULATORY NEGOTIATION AND THE LEGITIMACY BENEFIT (2002). See also Laura Langbein & Cornelius Kerwin, *Negotiation versus Conventional Rulemaking*, 10 J. PUB. ADMIN. RES. & THEORY 599 (2000).

governments.⁸⁷

Beyond formal governmental uses, consensus building techniques facilitate hotly contested value disputes. I facilitated “public conversations” on affirmative action in California when Proposition 209 was pending. The aim was to educate voters that the issue was far more complex than the polarized election debate suggested. Different parties argued for different levels of affirmative action in education, employment, and government contracting. The main goal of the public conversations was to inform the public by exposing multiple views from different sources, rather than the stylized debate presented by the media⁸⁸ and election materials. Public conversations, facilitated by neutral professionals, have also been effective in the bitterly contested realm of pro-choice and pro-life communities. The conversations work to enhance understanding across seemingly unbridgeable divides, as well as to encourage agreement on some life-preserving solutions.⁸⁹

At the level of formal litigation, mediative settlement processes and consensus building fora facilitate resolutions to a variety of mass torts⁹⁰ and class actions.⁹¹ This includes both the process dimensions of “streams” of cases using ADR methods⁹² (like mediation and arbitration to decide individual claims⁹³) and more creative outcomes than courts normally would be permitted.⁹⁴ Increasingly, federal⁹⁵ and

87. Mayor Anthony Williams, for example, has initiated a series of community fora, facilitated by consensus building neutrals, on a number of specific issues in Washington D.C. See *DC Agenda*, available at <http://www.dcagenda.org> (last visited Aug. 27, 2002) (an organization—non-profit—created to sponsor and coordinate such multi-party collaborations in Washington D.C.).

88. Even the so-called “enlightened” PBS Newshour continues to use pro/con formats for most important issues.

89. Opponents may agree to diminish abortion clinic violence and pro-adoption material distribution at clinics. See *supra* note 70.

90. *In re Dow Corning Corp.*, 187 B.R. 934 (E.D. Mich. Sept. 12, 1995); *In re Joint Eastern and Southern Dist. Asbestos Litig.*, 122 B.R. 6 (E.D. N.Y. Dec. 7, 1990).

91. *In re Airline Ticket Comm’n Antitrust Litig.*, 268 F.3d 619 (8th Cir. 2001).

92. *In re A.H. Robins Co., Inc.*, 880 F.2d 709 (4th Cir. 1989).

93. *Pigford v. Glickman*, 185 F.R.D. 82 (D.D.C. 1999).

94. Coupons, in-kind items, and other “non-monetary” outcomes are not without their own controversies. Some believe class members receive very little relief, especially compared to the large attorney fees awards that go to the plaintiffs’ lawyers in these cases. See, e.g., Susan Koniak, *Under Cloak of Settlement*, 82 VA. L. REV. 1051 (1996).

95. ROBERT J. NIEMIC ET AL., GUIDE TO JUDICIAL MANAGEMENT OF CASES IN ADR

state courts are requiring parties to participate in various forms of ADR as part of the formal litigation process. All of the federal circuit courts of appeal have mediation programs.⁹⁶ Some judges use mediation in early stages of litigation or in very long and contested cases with complex remedial issues.⁹⁷ At the federal level, recent Attorney General Janet Reno became a champion of ADR and other forms of “legal problem solving.” She established the Inter-agency Alternative Dispute Resolution Working Group to coordinate the use of ADR in many federal agencies on issues such as contract procurement and disputes, employment, administrative costs, environmental clean-up, and inter-agency jurisdictional disputes.⁹⁸

Mediation also reverts to its source: the “simple” two party dispute about almost anything. In the public interest environment, a very few argue that creative and “gentler” forms of dispute resolution can actually provide greater access to more individualized justice in a variety of case types that greatly affect the disempowered.⁹⁹ Clearly, there are issues of equality, access, and economic support for participation in these different forms of justice.¹⁰⁰ To the extent that creative and participatory aspects of new forms of dispute resolution are available to those who can pay for them, they should also be available for those who cannot pay for them.¹⁰¹

(2001).

96. ROBERT J. NIEMEC, *MEDIATION AND CONFERENCE PROGRAMS IN THE FEDERAL COURTS OF APPEAL* (1997); *see also* ROBERT J. NIEMEC, *MEDIATION IN BANKRUPTCY* (1998).

97. *See* Tennessee higher ed. case, Cleveland, and Ohio (appointment of Howard Bellman for state-wide mediation,) etc.

98. Daniel Marcus & Jeffrey Senger, *ADR and the Federal Government*, 66 MO. L. REV. 709 (2001).

99. Common issues include family law, housing issues, entitlement disputes, consumer disputes, wage and employment disputes, and a host of other problems that involve poor people and the state and disputes among the disempowered. *See, e.g.*, Russell Engler, *And Justice for All—Including the Unrepresented Poor*, 67 FORDHAM L. REV. 1987 (1999); Linda Singer et al., *Alternative Dispute Resolution and the Poor, Part I: What ADR Processes Exist and Why Advocates Should Become Involved*, 26 CLEARINGHOUSE R. 142 (1992); Linda Singer et al., *Alternative Dispute Resolution and the Poor, Part II: Dealing with Problems in Using ADR and Choosing a Process*, 26 CLEARINGHOUSE R. 288 (1992).

100. Proponents of social justice must be sensitive to the “siphoning off” of “smaller” claims to secondary institutions. Richard Abel, *The Contradictions of Informal Justice*, in *THE POLITICS OF INFORMAL JUSTICE* (Richard Abel ed., 1982); Richard Delgado et al., *Fairness and Formality*, 1985 WISC. L. REV. 1359; Trina Grillo, *Mediation: Process Dangers for Women*, 100 YALE L.J. 1545 (1991).

101. Tailored solutions, in some circumstance, bring better and faster “relief” and should

There are many other examples of concrete successes with mediation and consensus building processes to achieve creative outcomes to complex legal and policy problems with greater party participation.

Access and resources are as important in mediation and consensus building processes as in the formal justice system. Participation requires time, as well as financial resources that many people do not have. Both Iris Young¹⁰² and Oscar Wilde have eloquently stated this critique: “The trouble with socialism is that it takes too many evenings.”¹⁰³ Some suggest that consensus, consent, and quality results might be harder to achieve in group settings where positions, interests, and arguments might either become polarized¹⁰⁴ or “regress” to a compromised mean or to an inadequately tested “groupthink”¹⁰⁵ (or “path dependent”) solution.¹⁰⁶ Others suggest that there is a certain irony in suggesting that specialized experts, like mediators or consensus building facilitators, are needed to enhance democratic participation in decision-making and problem-solving. Why should democracy depend on experts and especially, legal experts?¹⁰⁷ These objections obviate the need for lawyers, particularly public interest minded lawyers, to learn new and different skills from the standard diet of case-based adversary argument and analysis.

VI. IMPLICATIONS FOR LEGAL EDUCATION: TRAINING THE MODERN PUBLIC INTEREST LAWYER

If there are other ways to deal with multi-party and multi-faceted legal and policy dilemmas, through the use of facilitated negotiated

be available regardless of ability to pay.

102. Iris Marion Young, *Activist Challenges to Deliberative Democracy*, 29 POL. THEORY 670 (2001).

103. BARRY DAY, OSCAR WILDE: A LIFE IN QUOTES 238 (2000). The same can be said of participatory democracy.

104. Cass Sunstein, *Deliberative Trouble? Why Groups Go To Extremes*, 110 YALE L.J. 71 (2000).

105. IRVING L. JANIS, *GROUPTHINK: PSYCHOLOGICAL STUDIES OF POLICY DECISIONS AND FIASCOS* (2d ed. 1982). “Groupthink” is also referred to as a “path dependent” solution.

106. Perhaps groups will seek the “lowest common denominator” rather than the pareto optimal solution.

107. No process is perfect and I think these objections, and others, are well made and deserve more consideration than I give them here.

processes such as mediation and consensus building, then the modern law student and lawyer will need to learn a variety of other skills and “intelligences”¹⁰⁸ to engage in this work. First, traditional legal analysis has to be supplemented with substantive and synthetic forms of creative thinking.¹⁰⁹ Lawyers must learn to solve problems by looking beyond the precedents and boilerplates of prior cases and prior deals. The early days of the public interest movement are replete with examples of lawyers developing new causes of action and new legal theories.¹¹⁰ Here, I am suggesting that some creativity with respect to process may be as important as substantive legal ideas and will require learning how to think outside of conventional legal boxes. Argument, trials, and legal research are all still important aspects of a legal education. Nevertheless, a more modern legal education should include instruction on the sociology and psychology of group behavior.¹¹¹ This will enable students to understand how decisions are made, to understand meeting management and facilitation,¹¹² to be able to wisely conduct the meetings that produce legal solutions to problems, and the constituent skills of negotiation¹¹³ and mediation.¹¹⁴ Beyond learning the role of the neutral, now

108. See the work of Howard Gardner in specifying a variety of human intelligences in which logico-linguistic intelligences (the most common form of intelligences for lawyers) are only some of the intelligences humans possess to solve problem. HOWARD GARDNER, *FRAMES OF MIND: THE THEORY OF MULTIPLE INTELLIGENCES* (1983).

109. See Carrie Menkel-Meadow, *Aha? Is Creativity Possible in Legal Problem Solving and Teachable in Legal Education*, 6 HARV. NEG. J. 97 (2001).

110. See Joseph Sax, *The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970) (land as public trusts); CATHERINE A. MACKINNON, *ONLY WORDS* (1993); CATHERINE A. MACKINNON, *FEMINISM UNMODIFIED* (1987) (pornography as a civil wrong); Charles Reich, *The New Property*, 73 YALE L.J. 733 (1964) (government entitlements as property); Symposium, *The Legacy of Goldberg v. Kelly: A Twenty Year Perspective*, 5 BROOK. L. REV. 731 (1990) (procedural due process revolution).

111. Donald Langevoort, *Behavioral Theories of Judgment and Decision Making in Legal Scholarship*, 51 VAND. L. REV. 1499 (1998); Russell Korobkin & Thomas S. Ulen, *Law and Behavioral Science*, 88 CAL. L. REV. 1051 (2000); Russell Korobkin & Chris Guthrie, *Psychology, Economics and Settlement*, 76 TEX. L. REV. 77 (1997).

112. See, e.g., ROGER SCHWARTZ, *THE SKILLED FACILITATOR* (1994); TIM HINDLE, *MANAGING MEETINGS* (1998).

113. These skills include client interviewing and counseling, questioning, information development and fact-finding, brainstorming, as well as argumentation.

114. Mediation requires a kind of “neutrality” quite inimical to most conceptions of the lawyer. The American Bar Association has recognized this important function of lawyers, in its recently approved new version of the Model Rules of Professional Conduct. See Report of the Commission on Professional Responsibility, *Ethics 2000* (Feb. 5, 2002) (approved by the

common in law school courses in mediation, the modern lawyer needs to learn how to be “inside” these new processes, if not as a traditional advocate then as a representative of creative ideas, as well as client interests.¹¹⁵

In addition, law students and lawyers need to explicitly learn how to represent organizational and constituency interests,¹¹⁶ as business students learn explicitly about entity and organizational interests and conflicts in decision-making. Recognizing that modern legal problems do not often divide into sides, modern lawyers need to learn about coalitional¹¹⁷ behavior and multi-party processes¹¹⁸ and how they differ in both theory and practice from dyadic processes. Finally, if we take multi-culturalism seriously, both domestically and internationally, we must avoid legal ethnocentrism that is already threatening some international ADR processes,¹¹⁹ as well as public interest work in other nations.¹²⁰ Issues of managing inter-cultural and multi-jurisdictional disputes, transactions, treaties, and policy

A.B.A. House of Delegates). The Preamble and Rules 1.12 and 2.4 now recognize the role of the lawyer as “third party neutral” as a “non-representational role helping parties to resolve a dispute or plan a transactional matter.” See also Howard Gadlin & Elizabeth Pino, *Neutrality: A Guide for the Organizational Ombudsperson*, 13 NEG. J. 17 (1997).

115. A growing body of literature addresses this need for different teaching topics and modalities. See, e.g., Suzanne J. Schmitz, *What Should We Teach in ADR Courses?*, 6 HARV. NEG. J. 189 (2001); Jean Sternlight, *Lawyers’ Representation of Clients in Mediation*, 14 OHIO ST. J. DISP. RESOL. 269 (1999).

116. These include managing a group client process, which is different from individual clients.

117. For some important treatments of these topics for legal audiences, see Gary Goodpaster, *Coalitions and Representative Bargaining*, 9 OHIO ST. J. DISP. RES. 243 (1994); ROBERT MNOOKIN ET AL., *BEYOND WINNING* (2000). See also HOWARD RAIFFA, *LECTURES ON NEGOTIATION ANALYSIS* (1996); Carrie Menkel-Meadow, *Negotiating with Lawyers, Men and Things*, 17 NEG. J. 257 (2001).

118. A few scholars in the ADR field have begun teaching ‘advanced’ negotiation courses in multi-party dispute resolution—Melanie Greenberg and I at Georgetown, Robert Mnookin and Lawrence Susskind at Harvard, and Maude Prevere at Stanford—which draw on these subjects and others.

119. Many critics charge, for example, that international commercial arbitration is becoming ever more “americanized” as American forms of discovery and litigation tactics begin to swamp older European forms of practice and civil law understandings of the *lex mercatoria*. See, e.g., YVES DEZALAY & BRYANT GARTH, *DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER* (1996).

120. See, e.g., Stephen Ellmann, *Cause Lawyering in the Third World*, in *CAUSE LAWYERING* (Austin Sarat & Stuart Scheingold eds., 1998); *CAUSE LAWYERING AND THE STATE IN A GLOBAL ERA* (2001).

agendas will require development of rigorous and sensitive ways to explore legal problem solving beyond the assumptions of American constitutionalism, lawmaking, and litigation processes.

In the wake of September 11, I have been doing my most challenging, difficult, and exciting teaching and practice. How can we attempt to forge justice and peace in a world in which there are many conflicting world views?¹²¹ Since I have come to believe, with the painfulness of our recent tragedies and the domestic aftermaths, that agreement as to the substantive good is unlikely, we should turn a lot of our attention to the possibility of designing some processes that will work to cross those divides. If “the skillful management of conflicts is among the highest of human skills,”¹²² as Stuart Hampshire suggests it is, it is in the public interest to pursue more varied methods for resolving conflicts and seeking justice. It is clear that war and its legal equivalent of litigation are necessary in some circumstances. Hopefully, our legal institutions, like all human institutions, will evolve and change to meet the changing demands of an ever-diversifying world of different values, save perhaps one: a human universal to survive and flourish.

121. For a domestic exploration of the difficulty of negotiating across radically different world views, see JOYCE DOHERTY, *LESSONS FROM WACO* (2001). For another depressing international perspective, see MICHAEL IGNATIEFF, *BLOOD AND BELONGING* (1993).

122. HAMPSHIRE, *supra* note 1.

