



SCHOOL OF LAW
TEXAS A&M UNIVERSITY

Texas A&M Law Review

Volume 10 | Issue 1

10-14-2022

Choices: The Many Routes to Justice and Peace with Dispute Resolution, Ethics, and Feminism

Carrie Menkel-Meadow

University of California Irvine School of Law, cmeadow@law.uci.edu

Follow this and additional works at: <https://scholarship.law.tamu.edu/lawreview>



Part of the [Dispute Resolution and Arbitration Commons](#), and the [Legal Ethics and Professional Responsibility Commons](#)

Recommended Citation

Carrie Menkel-Meadow, *Choices: The Many Routes to Justice and Peace with Dispute Resolution, Ethics, and Feminism*, 10 Tex. A&M L. Rev. 1 (2022).

Available at: <https://doi.org/10.37419/LR.V10.I1.1>

This Article is brought to you for free and open access by Texas A&M Law Scholarship. It has been accepted for inclusion in Texas A&M Law Review by an authorized editor of Texas A&M Law Scholarship. For more information, please contact aretteen@law.tamu.edu.

CHOICES: THE MANY ROUTES TO JUSTICE AND PEACE WITH DISPUTE RESOLUTION, ETHICS, AND* FEMINISM

*by: Carrie Menkel-Meadow***

DOI: <https://doi.org/10.37419/LR.V10.I1.1>

* I have often said that my whole career could be summed up in this simple word: AND (rather than OR or BUT). There are almost always more than one way to do something and many ways to frame a problem. IT DEPENDS would be another one of my mantras (as a social scientist and as a lawyer), where context and conditions make single frames, solutions, or answers unlikely or ill-advised.

** Distinguished and Chancellor's Professor of Law (and Political Science), University of California Irvine, and A.B. Chettle Jr. Professor of Law, Dispute Resolution and Civil Procedure Emerita, Georgetown University Law Center. Thank you first and foremost to Nancy Welsh, Peter Reilly, and Sarah Abdel-Motaleb for the conception of and planning for this wonderful event, even as we face so many challenges in the world to the fields in which I have worked for so long. Special thanks to the wonderful students of the *Texas A&M Law Review* for their intelligence, care, and professionalism in executing this event and publication, and special thank you to Emily Earnshaw, for thorough, thoughtful, and caring editing. Special thanks to Kirsten Evans and the Texas A&M staff for administrative acumen and skill for what was a first in-person (and hybrid) major event for many of us; and thanks to Dean Robert Ahdieh for his gracious hosting of this event.

With appreciation for those who have inspired me in my work in dispute resolution, negotiation, mediation, feminism, legal ethics, legal problem solving, legal education, socio-legal studies, international and comparative law, and law and culture, including those now gone: Margaret Mead, Mirra Komarovsky, Mary Parker Follett, John Forbes Nash Jr., Gary Bellow, Roger Fisher, Howard Raiffa, Frank Sander, Howard Lesnick, Wallace ("Wally") Warfield, Margaret Shaw, Murray Schwartz; my parents, Gary and Margot Menkel, who guided me through history, an education and religion in Ethical Culture, and models of moral and humane behavior; those still with us with whom I have worked and who still inspire and educate me: my co-authors, Lela Love, Andrea Kupfer Schneider, Jean Sternlight, Michael Wheeler, and Victor V. Ramraj; and my partners, mentors, and co-teachers in legal education, Mark Spiegel, David B. Filvaroff, Paul Brest, Vicki C. Jackson, Robin West, and Bryant Garth; those who believed in and encouraged my work institutionally, especially: Carol O'Neil, Carole Goldberg-Ambrose, Susan Gillig, Judith C. ("Judy") Areen, T. Alexander ("Alex") Aleinikoff, and James Henry; those who helped me chart our various fields: Jack Himmelstein, Gary J. Friedman, James K. ("Jim") Sebenius, Robert Mnookin, Lawrence E. ("Larry") Susskind, Deborah M. Kolb, and Melanie Greenberg; those with whom I still work in the fields of dispute resolution, feminism, and socio-legal studies, and who are trying to make a more peaceful and just world: Howard Gadlin, Carol B. Liebman, Stephanie Smith, Janet ("Jan") Martinez, Ulrike Schultz, Naomi Creutzfeldt, Amy J. Cohen, Kondi J. Kleinman, Christopher Honeyman, the Program on Negotiation ("PON") at Harvard Law School, and the Senior Mediators Group; and those who have shared my work in teaching and learning in over 25 countries, many former students, now teachers and professional dispute resolvers themselves: Silvia Faerman, Carlos Ruffinelli, Ana Silva, Ana Carolina Viana Riella, Carlos Silva, Hugo Rojas, Alain Verbeke, Maria Moscati, Orna Rabinovich-Einy, Michael Freeman, Michael Palmer, Lukasz Rozdeicz, Amira Dotan, Robi Damelin, Letizia Coppo, and so many others.

For more recent assistance in all research and teaching activities, thanks to Dianna Sahhar, librarian extraordinaire, Maria Del Carmen Gonzalez, faculty assistant, and

Be yourself. Everybody else is taken.—Oscar Wilde

*Some work of noble note, may yet be done . . .
'Tis not too late to seek a newer world.*—Alfred, Lord Tennyson¹

TABLE OF CONTENTS

- I. INTRODUCTION: DIFFERENT WAYS TO FRAME AND SOLVE PROBLEMS 2
- II. THE MANY WAYS TO DO MANY THINGS 9
 - A. *Psychology—Heal thyself* 9
 - B. *Feminism—The many!* 11
 - C. *Civil Rights—Will there ever be racial or class justice?* 14
 - D. *Politics and Diplomacy—The dangers of entrenched two-sided adversarialism* 17
 - E. *Writing and Cooking—Some advice from the creative arts* 20
- III. WHAT LESSONS FOR DISPUTE RESOLUTION, ETHICS, AND FEMINISM? 21

I. INTRODUCTION: DIFFERENT WAYS TO FRAME AND SOLVE PROBLEMS

As Yogi Berra once said, “When you come to a fork in the road. . . . take it[!]”² Our lives present us all with choices—personal and professional. My professional life has been filled with efforts to create more choices of process and ethical and political commitments to seek a more just world. I began as a poverty and civil rights lawyer and sought effective and creative ways to solve problems, notably when court-based solutions were too “brittle” and binary and did not solve the underlying problem.³ I have looked at legal problem solving through the lens of interdisciplinary approaches to negotiation, diplo-

Alexandra Cadena, research assistant. Special thanks to Jean Sternlight and Kondi Kleinman for advice and counsel on this version of my Essay.

And to all who listened to my keynote or are reading this Essay: by now you should realize it does not take just a village, but many cities and locations around the world, to make a teacher, scholar, and mediator. Finally, I thank my partner of over 50 years, Robert Meadow, with whom every idea, thought, and feeling I have ever had has been vetted, criticized, often agreed with, and most certainly improved before the rest of you even had a chance to hear or read them.

1. ALFRED TENNYSON, *Ulysses*, in POEMS, VOL. II (1842), reprinted in THE WORKS OF ALFRED LORD TENNYSON 147, 148 (Wordsworth Editions Ltd. 1994).

2. 20 *Great Yogi Berra Quotes*, AUTHENTIC MANHOOD (Sept. 24, 2015), <https://www.authenticmanhood.com/blog/20-great-yogi-berra-quotes> [https://perma.cc/FVL9-859B].

3. See generally Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754 (1984) (proposing a problem-solving negotiation model to overcome the limitations of the traditionally adversarial model in litigation) [hereinafter Menkel-Meadow, *Toward Another View*].

macy, mediation, and litigation,⁴ and more hybridized forms of dispute resolution and legal problem solving.⁵ I have often and proudly challenged conventional notions of adversarial and assumed competitive processes of negotiation and litigation, and I have often asked how other perspectives (feminist, other excluded voices,⁶ socio-legal realist⁷) and other disciplines (e.g., political science, sociology, decision sciences, psychology, anthropology, planning, and community and organizational development) might broaden or even alter the way we first frame and then attempt to solve a problem. I have also always applied an ethical (moral, legal, and practical) filter to those choices we make and how we evaluate them.

I am deeply honored by and appreciative of this retrospective and prospective look at my work and how others relate to it as they apply their own thinking to the issues of justice and peace, especially in these troubled times. In this published version of my keynote talk, I hope to continue this inquiry: What are some of the different methods, approaches, frames, and issues to be used to try to create a better world? We have choices and different processes, substantive and ethical pluralism, and we should be mindful of the many ways we can pursue a variety of goals.

Consider this problem (I have been and always will be an experiential teacher):

A pizzeria tells Alice and Bob that they can have an entire pizza for free if they can agree on how to split it, but if they can't agree they'll only get half a pizza—six slices. The twist is that if they can't agree Alice will be given four of the slices and Bob just two. The question: How should they split the 12 pieces?⁸

4. See Carrie Menkel-Meadow, *Ethics and the Settlement of Mass Torts: When the Rules Meet the Road*, 80 CORNELL L. REV. 1159 (1995); Carrie Menkel-Meadow, *What Is an Appropriate Measure of Litigation? Quantification, Qualification and Differentiation of Dispute Resolution*, 11 ONATI SOCIO-LEGAL SERIES 320 (2021) (Spain), <https://doi.org/10.35295/OSLS.IISL/0000-0000-0000-1146>.

5. See Carrie Menkel-Meadow, *Hybrid and Mixed Dispute Resolution Processes: Integrities of Process Pluralism*, in COMPARATIVE DISPUTE RESOLUTION 405 (Maria Federica Moscatti et al. eds., 2020).

6. See Carrie Menkel-Meadow, *Excluded Voices: New Voices in the Legal Profession Making New Voices in the Law*, 42 U. MIA. L. REV. 29 (1987).

7. See Carrie Menkel-Meadow, *Uses and Abuses of Socio-Legal Studies*, in ROUTLEDGE HANDBOOK OF SOCIO-LEGAL THEORY AND METHODS 35 (Naomi Creutzfeldt et al. eds., 2020).

8. Peter Coy, Opinion, *This Novel Theory of Negotiation Also Works in the Real World*, N.Y. TIMES (Feb. 25, 2022) <https://www.nytimes.com/2022/02/25/opinion/coca-cola-negotiation.html>; see also BARRY NALEBUFF, SPLIT THE PIE: A RADICAL NEW WAY TO NEGOTIATE 7–8 (2022) [hereinafter SPLIT THE PIE]. This is not really a “new way.” Barry Nalebuff has been writing about these ideas for many years. See, e.g., ADAM M. BRANDENBURGER & BARRY J. NALEBUFF, CO-OPETITION 4–5 (1st Currency paperback ed. 1998); AVINASH K. DIXIT & BARRY J. NALEBUFF, THINKING STRATEGICALLY: THE COMPETITIVE EDGE IN BUSINESS, POLITICS, AND EVERYDAY LIFE 44–48 (Norton paperback ed. 1993); see also STEVEN J. BRAMS & ALAN D. TAYLOR, FAIR DIVISION: FROM CAKE-CUTTING TO DISPUTE RESOLUTION (1996).

What's your answer? (Hint: I and every one of my students, including several of my former students in this audience, said, "Six each!") Barry Nalebuff, business professor at Yale's School of Management, says this is wrong, as is the answer given by most of his students: Alice should get 8 of the 12 (to reflect her greater negotiating "power" from being in a more powerful place with 4 already).⁹ Nalebuff says that those, like me and my students, who choose six each for "fairness" are wrong because the way to properly structure this negotiation is to focus on the "extra value" that is created by reaching an agreement and divide that value equally (since they contributed an assumedly equal effort to reach an agreement, which actually might not be true). Here, that extra value is six slices, so Alice and Bob each get three more (from what was originally offered); Alice gets seven and Bob gets five. Nalebuff says this solution is so "simple," but no major journal would ever publish it, so now he puts it in books for the lay and business reader.¹⁰

Some of you will recognize my method—using a story or parable of values, methods, and choices to consider decision-making, negotiation strategy, and ethical problem solving, as in my use of Carol Gilligan's (and before her, Lawrence Kohlberg's¹¹) Heinz's dilemma:

Heinz has a wife who is dying and in pain. The druggist has a medicine that will ease her pain or even save her life, but Heinz cannot afford it. Is it morally forgivable or appropriate for Heinz to steal the drug?¹²

"Answers" have been given to these hypotheticals that I have questioned all of my academic career,¹³ and which I will critique again here. There is seldom only one "solution" to a problem of this kind—and certainly not to real problem solving in life, which is situated in contexts, usually with more than one variable or criterion for decision and evaluation. Yes, some solutions are better than others, like some interpretations of poems are better than others, but there is often more than one solution, choice, or interpretation.

9. Coy, *supra* note 8; SPLIT THE PIE, *supra* note 8, at 8–11.

10. Coy, *supra* note 8; SPLIT THE PIE, *supra* note 8, at 1–2.

11. See, e.g., Lawrence Kohlberg, *Moral Stages and Moralization: The Cognitive-Developmental Approach*, in MORAL DEVELOPMENT AND BEHAVIOR: THEORY, RESEARCH, AND SOCIAL ISSUES 41–45 (Thomas Lickona ed., 1976).

12. See CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT 25–27 (1982); see also Carrie Menkel-Meadow, *Portia in a Different Voice: Speculations on a Women's Lawyering Process*, 1 BERKELEY WOMEN'S L.J. 39, 45–47 (1985) [hereinafter Menkel-Meadow, *Portia in a Different Voice*]; Carrie Menkel-Meadow, *Portia Redux: Another Look at Gender, Feminism, and Legal Ethics*, 2 VA. J. SOC. POL'Y. & L. 75, 78–79 (1994) [hereinafter Menkel-Meadow, *Portia Redux*]. *Portia Redux* was also printed in LEGAL ETHICS AND LEGAL PRACTICE: CONTEMPORARY ISSUES 25 (Stephen Parker & Charles Sampford eds., 1995).

13. See Carrie Menkel-Meadow, *What Trina Taught Me: Reflections on Mediation, Inequality, Teaching and Life*, 81 MINN. L. REV. 1413 (1997).

This is my theme today: What are the different ways, routes, methods, and processes that can, in fact, give us different “solutions” (contingent or otherwise) to human problems? I suggest that your answers to these questions will depend on your goals; your ethics or morality; maybe your gender; maybe also your class, race, religion, professional training or discipline, or other life circumstances; and certainly your context and the constraints of the situation. A full consideration of what other methods, goals, or processes might be available is necessary for good solutions to these sorts of problems. Unlike Nalebuff’s suggested solution, based on his conception of a “fair” solution based on assumptions of equal needs, efforts, and endowments, I see a greater range of possible solutions. And as I am wont to do, I will “fight the hypo!” As I talk about some examples, we will unpack some of the issues addressed today—varied, multiple, appropriate, accessible, and yes, aspirational dispute resolution (“a” DR); feminist theory and practice (and what it says for other theories of “difference,” exclusion, or subordination); and ethics (both legal and human), in the political as well as moral senses.

To discuss the hypotheticals in reverse order, Kohlberg’s answer to his Heinz’s dilemma, which was the basis of some of his work on political socialization and development,¹⁴ was that when Jake (an 11-year-old boy) said it was permissible to steal the drug (this is “like a math problem with humans,” he says), Jake was putting a “higher morality” above profit—“[L]ife is worth more than money.”¹⁵ Amy (also 11, but a girl) on the other hand, prevaricates and suggests that maybe there is another way—Could Heinz borrow the money or would the druggist make a loan (in part to avoid the guilt he might feel if Heinz’ wife died)? Four decades ago (just as my work on negotiation and Alternative Dispute Resolution (“ADR”) was beginning to be heard)¹⁶ I suggested that perhaps if Heinz and the druggist sat down and talked about the situation, the druggist might develop some empathy, and the two of them (perhaps even with a mediator) might come up with some other solution (loan, installment payments, find a benefactor, ask the pharma company for a donation or a free or subsidized medical trial?).¹⁷ I suggested then (and still do now) that Amy “fights the

14. And on which my husband wrote his political science dissertation close to 50 years ago. Robert Meadow, *Information and Maturation in the Political Socialization Process* (1976) (Ph.D. dissertation, University of Pennsylvania) (on file with author). See LAWRENCE KOHLBERG, *THE PHILOSOPHY OF MORAL DEVELOPMENT: MORAL STAGES AND THE IDEA OF JUSTICE* (1981) (book version of earlier published research on the development of political judgment in children and adolescents); see also Kohlberg, *supra* note 11.

15. GILLIGAN, *supra* note 12, at 25–28 (internal quotation marks omitted from first quotation).

16. See generally Ellen C. DuBois et al., Transcription, *Feminist Discourse, Moral Values, and the Law—A Conversation*, 34 *BUFF. L. REV.* 11, 49–63 (1985).

17. See *id.* at 50–51; Menkel-Meadow, *Portia in a Different Voice*, *supra* note 12, at 46–47.

hypo” of having to answer about draconian “wrong or right” or “more morally or politically developed” answers, as Kohlberg labeled them.¹⁸ Both Carol Gilligan and I saw that Amy’s principles were based on an “ethic of care,” not just “logic” or “right” or “wrong” or even law.¹⁹ Different conceptualizations, different questions, and different processes (more conversational) may produce different, less brittle, outcomes. Note that “Amy” and now “Alice” here in our second example are “A’s” (alternatives, appropriate (to the situation), and more accessible) in their other approaches to these dictates of abstract problem solving.

So how should the pizza be divided? If you teach in a business school, like Nalebuff does, or you teach in a law school, as I do, where you think you are an enlightened, modern, profit-maximizing, and efficient negotiator (and as Nalebuff says, a “fan” of Roger Fisher’s²⁰) you should, in Nalebuff’s analysis, consider not the total amount to be divided,²¹ but the “gain” achieved by doing the work of agreeing to split the pizza (from the endowments you have if the pizza is not split agreeably—four for Alice and two for Bob²²). By agreeing and getting all 12 slices, the gain is another 6 pieces and should be divided “equally” between those who agreed—Alice and Bob, so Alice has 7 and Bob has 5. Alice, after all, even in Fisher and Ury’s terms, has a better BATNA²³ if the deal falls apart (four versus two), and so she has greater bargaining power.

But who are Alice and Bob to each other, and what will happen after they divide the pizza? If they are co-workers, romantic or business partners, or even just repeat play friends, a quick (and efficient, I might add) agreement to share the whole pizza (what they “win” if they agree to cooperate with each other), six slices apiece, might make

18. See Menkel-Meadow, *Portia in a Different Voice*, *supra* note 12, at 45–47.

19. GILLIGAN, *supra* note 12, at 26–27, 30.

20. See ROGER FISHER ET AL., *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* (Penguin Books, 3d ed. 2011) (1981); *SPLIT THE PIE*, *supra* note 8, at 2, 30, 68.

21. *SPLIT THE PIE*, *supra* note 8, at 2; Coy, *supra* note 8.

22. By the way, who produced these endowments? Notice that abstract hypotheticals often make assumptions! This time Alice (a woman or girl?) has more to start with than Bob (a man or boy?)—not so common empirically in the real world—Who came to give them these endowments? I don’t have time or space here, but I have feminist critiques of endowment (or prospect) theory too. See, e.g., Gregory Klass & Kathryn Zeiler, *Against Endowment Theory: Experimental Economics and Legal Scholarship*, 61 UCLA L. REV. 2 (2013). Not everyone values more what they already have than some buyers, or negotiators! It depends (on the item and the situations of the negotiators)! See LEE ROSS & RICHARD E. NISBETT, *THE PERSON AND THE SITUATION: PERSPECTIVES OF SOCIAL PSYCHOLOGY* 3 (2011).

23. BATNA is the best alternative to a negotiated agreement, what one could obtain away from the current negotiation, as a measure of whether to stay in a negotiation or seek another solution. For some it is a measure of how much bargaining power a party has in a negotiation. Nalebuff claims Alice has more with her “endowment” of four. *SPLIT THE PIE*, *supra* note 8, at 8.

their relationship seem “fairer”²⁴ at this point and could create some goodwill for the future. If Alice “captures” her equal share of the “surplus”²⁵ (the 6 pieces the parties gain by agreeing) and gets three, giving her seven, “more” than Bob has (five), will Bob want to gain more the next time around (revenge, equalization, revanchement)? Like Robert Axelrod’s iterated Prisoner’s Dilemma computer tournament (won by the “TIT FOR TAT” program written by mathematician Anatol Rapaport),²⁶ there are possibly more “rounds” to this interaction. Pizza-sharing deals among friends are likely to be repeated. Maybe Alice gets more now, but could a deal be made with Bob to give him more pizza (or something else he likes) later? Even if Alice and Bob don’t ever interact again, if Bob feels he did not get a “fair” deal, what will Bob say to others who might negotiate with Alice (“Watch out, she is a greedy pizza-maximizer!”)? In negotiation, reputation might be the strongest ethical and market disciplinarian.²⁷

What are the toppings on the pizza—Can it be shared in other ways? Alice gets the sausage, Bob the vegetables? (This is disaggregation: sharing and trading in dispute resolution language.)

In my own example of allocations and distributions of scarce items, I long ago posited an example from my own life: one piece of chocolate cake left, and my brother and I to divide it. When we were old enough to talk to each other, we learned that I liked the icing and he the cake (like the famous orange division of fruit and zest for eating or cooking).²⁸ We divided the cake horizontally, not vertically. Ironically, when it comes to carrot cake (which I split with my husband), I like the cake and he the icing—signaling that different issues and different items can produce different preferences. Needs, interests, and preferences are variable by item, situation, and people.²⁹ Some things are

24. See WHAT’S FAIR: ETHICS FOR NEGOTIATORS at xxvi (Carrie Menkel-Meadow & Michael Wheeler eds., 2004).

25. The “surplus” is the additional six pieces offered by the offeror of the whole pizza.

26. ROBERT AXELROD, THE EVOLUTION OF COOPERATION at viii (rev. ed. 2006).

27. Eleanor Holmes Norton, *Bargaining and the Ethic of Process*, 64 N.Y.U. L. REV. 493, 545 (1989).

28. See FISHER, URY & PATTON, *supra* note 20, at 58–59; SPLIT THE PIE, *supra* note 8, at 273 n.24. For the most recent discussion of the origins of the divided orange story, see Deborah M. Kolb, *The Love for Three Oranges Or: What Did We Miss About Ms. Follett in the Library?*, 11 NEGOT. J. 339, 339 (1995), and MARY PARKER FOLLETT, *Constructive Conflict*, in MARY PARKER FOLLETT—PROPHET OF MANAGEMENT: A CELEBRATION OF WRITINGS FROM THE 1920s 67, 73 (Pauline Graham ed., 1995) (“[I]ntegration is more profitable than conquering or compromising, the first step toward this consummation is to bring the differences into the open. We cannot hope to integrate our differences unless we know what they are.”). See also DONALD D. BOWEN ET AL., *EXPERIENCES IN MANAGEMENT AND ORGANIZATIONAL BEHAVIOR* 134–36 (4th ed. 1997).

29. As my colleague and fellow negotiation teacher, Kondi Kleinman, nicely illustrates: each year he asks his class to recommend good restaurants, films, or books, and they proceed to send out *their* favorites, without asking if he has any food allergies or preferences (he doesn’t like seafood). I ask my students to bargain about one of the

tradable—others are not. Things will not always work out this nicely, as Robert Mnookin points out when he suggests that in trading items, if I know what you like (preferring apples to oranges or icing to cake), I can take advantage of you in some settings.³⁰ But we would never know unless we asked about preferences and thought about other alternatives. Really, I like the crust of the pizza more than the meat or cheese—Is a deal in the offing? Could we at least ask some questions, talk to each other, and consider some other solutions before we quickly answer Nalebuff’s mostly quantitative question, based on assumptions of value and maximization in particular contexts?

More to the point of my concerns today—Where are the parties situated in relation to each other? Are they really “equal” in their needs, desires, and interests in pizza? Might less be more to one of them (me, always on a diet?), or more to one who is feeding children or hasn’t eaten in a long time?³¹ The “justice” or “ethics” of how the pizza should be divided is not a simple mathematical or even business proposition. Who the parties are and what their relative circumstances are should, in my view, matter in these “abstract” hypotheticals. Who is offering the pizza? Would anyone really want seven pieces of pizza at one time? The whole hypothetical wouldn’t work at all for people who don’t even like or want pizza.

Back to one of Carol Gilligan’s later examples.³² It is winter, and the hardworking moles have created for themselves an underground home, built with dirt, mud, leaves, and other materials, all while the joy-seeking porcupines have ignored the future cold, failing to build an appropriate shelter. Now those porcupines tap on the side of the mole home and beg for shelter during the first storm. How should the moles react? Moralists—or those who believe in property, labor, deserts, and “reap what you sow” biblical injunctions—think the porcupines should be taught a lesson to think more about the future and plan ahead (good advice for any living creature, within limits!). Those who are more social welfarist look for solutions to share space with the freezing tenants—Can they get a blanket to wrap around the

course requirements in my Negotiation course. They always frame their arguments in terms of *their* needs—less work, fewer papers, etc. They almost never consider an argument about what I (the teacher) might want (e.g., fewer papers to grade? Or different kinds of evidence of their own learning?) Getting people to really ask about interests, preferences, and needs is often much harder than we think.

30. Robert H. Mnookin, *Why Negotiations Fail: An Exploration of Barriers to the Resolution of Conflict*, 8 OHIO ST. J. ON DISP. RESOL. 235, 240–41 (1993).

31. When I posed this hypothetical at the Symposium event and asked students in the audience what questions they would ask of Alice and Bob, the first student to respond asked, “Who is hungrier?” Put differently: Who has the greater need for the pizza? So social welfare concerns might be of significance beyond efficiency or “simple” solutions to abstract problems.

32. See Menkel-Meadow, *Portia Redux*, *supra* note 12, at 79–80.

sharp quills,³³ take turns inside the den while foraging for food in the snow, or see if it's not too late to widen the mole den? Should the moles defect, collaborate, or cooperate? This highly anthropomorphized fable (modified from Aesop³⁴) is used by Carol Gilligan (and myself) to suggest that there are often more solutions to these “fables,” “hypotheticals,” or stories that we can learn from them.³⁵ There may be more than one “moral” (I prefer “lesson”) to a story or abstract hypothetical. “What if . . .” is our mantra in the field of dispute resolution and problem solving.³⁶

In the rest of this Essay, I want to explore how having many different approaches to problem solving, dispute resolution, and the amelioration of human injustice might provide more than just one way to try to resolve a dispute, seek peace, create justice, or engage in the problem-solving tasks of our lives. I will start with some examples outside of our own field directly and then return to implications for dispute resolution, law, and justice (and some peace would be nice too!). We have bigger problems to solve than dividing pizzas.

II. THE MANY WAYS TO DO MANY THINGS

A. *Psychology—Heal thyself*

How many people in this audience have struggled with anxiety, stress, depression, existential confusion, grief, illness, parenting issues, or other mental distress? I imagine most of us if we are honest. Psychological impacts on our behaviors and feelings are complicated,³⁷ more so as experienced in this time of pandemic-related enforced

33. *Id.* at 80. Some readers of this version of the fable see the quills of the porcupines as “differences” (from the moles), which could be seen in racial or ethnic (or species) terms, which adds to the issues (welcome in, evict, share, adapt, innovate for exclusion or inclusion). *See id.* at 79–80; *see also supra* text accompanying note 22.

34. *See* AESOP, *The Ant and the Grasshopper*, in THREE HUNDRED AESOP'S FABLES 6 (George Fyler Townsend trans., 1871) (in which the ants store grain for the winter but the grasshopper, who sings through the summer, is left begging for food in the winter: “If you were foolish enough to sing all the summer, you must dance supperless to bed in the winter.”).

35. Carrie Menkel-Meadow, *The Power of Narrative in Empathetic Learning: Post-Modernism and the Stories of Law*, 2 UCLA WOMEN'S L.J. 287, 298 (1992) (reviewing PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS: DIARY OF A LAW PROFESSOR* (1991)); Carrie Menkel-Meadow, *Telling Stories in School: Using Case Studies and Stories to Teach Legal Ethics*, 69 FORDHAM L. REV. 787 (2000).

36. *See, e.g.*, PAUL BREST & LINDA HAMILTON KRIEGER, *PROBLEM SOLVING, DECISION MAKING, AND PROFESSIONAL JUDGMENT: A GUIDE FOR LAWYERS AND POLICY MAKERS* 8–9 (2010) (“Problems also include situations where nothing has gone wrong yet, but where there is reason to believe that if some action is not taken, something *may* go wrong in the future. Problem solving in these cases calls for the deployment of strategies calculated to head off foreseeable future problems. Much of lawyers' work . . . involves anticipating and avoiding problems that might arise.”)

37. *See, e.g.*, JENNIFER K. ROBBENOLT & JEAN R. STERNLIGHT, *PSYCHOLOGY FOR LAWYERS: UNDERSTANDING THE HUMAN FACTORS IN NEGOTIATION, LITIGATION, AND DECISION MAKING* (2d ed. 2021).

quarantines, illness, death, fear, uncertainty, and disruptions to our life routines. How do we cope with such stresses? Let us count the ways. In her recent memoir, sociologist of the tech age and chronicler of human feelings in that environment, Sherry Turkle suggests that in the modern age we use a variety of forms of assistance to seek psychological well-being—the old fashioned “talking cure” (whether Freudian or not) of psychoanalysis or therapy, pharmacological medication, physical activity, “shopping therapy,”³⁸ and personal meditation.³⁹ Recently, well-known psychiatrist Mark Epstein has linked his two lives as a psychiatrist and a practicing, meditating Zen Buddhist. Epstein seeks to find the ground between a focus on healing *past* wounds and finding the common “kindness” in both approaches (therapy and meditation) to release, in the present, the “holding on” to pain and the past, and to find some peace and resolution in the calm, peacefulness, and different kinds of insight that come from meditation and “being in the moment.”⁴⁰ So the past is important, if painful, but we need to function in the present.

None of these paths are easy, nor are they mutually exclusive. Some methods are used simultaneously, some consecutively, and some at different times for different purposes. I sought therapeutic help through my stressful tenure period⁴¹ and grief counseling when my parents died (Holocaust refugees who survived to a ripe old age); I meditate sometimes⁴² and do yoga often (for those who consider this “ADR”—the mind and body connection is another set of multiple practices). Various forms of psychological healing can be helpful to people at different stages of personal development. There is also a need for couples therapy; family systems therapy; and, from my days in using Esalen and Tavistock “group encounter” theory and practice, uses of psychological group dynamics for classrooms, organizations, and yes, the development and encouragement of “human potential,” even in law and legal education.⁴³ In my ideal world, every human

38. I mean here to include not only stereotypes of women shopping, but also consider the “mid-life crisis” red sports car of the stereotyped middle-aged man.

39. SHERRY TURKLE, *THE EMPATHY DIARIES: A MEMOIR* 340 (2021).

40. MARK EPSTEIN, *THE ZEN OF THERAPY: UNCOVERING A HIDDEN KINDNESS IN LIFE* 267–68 (2022).

41. I was the first clinical professor to obtain tenure at UCLA for both academic and clinical work. I felt the competing schools of my colleagues with different views of legal education and judgment breathing down my neck. In the end it was a unanimous vote, but who knew that at the time?

42. Unlike some of our colleagues who are serious proponents of “mindfulness” work in dispute resolution (see Leonard L. Riskin, *The Contemplative Lawyer: On the Potential Contributions of Mindfulness Meditation to Law Students, Lawyers, and Their Clients*, 7 HARV. NEGOT. L. REV. 1 (2002), and Clark Freshman, *After Basic Mindfulness Meditation: External Mindfulness, Emotional Truthfulness, and Lie Detection in Dispute Resolution*, 2006 J. DISP. RESOL. 511), I am not a regular meditator but a sporadic one. Even meditation comes in many forms.

43. See WALTER TRUETT ANDERSON, *THE UPSTART SPRING: ESALEN AND THE HUMAN POTENTIAL MOVEMENT: THE FIRST TWENTY YEARS* (2004); ELIZABETH

being would have one hour a week to thoughtfully reflect on their life—behaviors, thoughts, and feelings—with some qualified expert life coach of their own choosing, to revisit and examine choices made, to give and get feedback, and to consider what else might have been—What did I do well; what might I have done differently, for me and also for those I interact with? But since we cannot heal the whole world by looking entirely inward, what else do we need to solve the world’s problems and create more justice by looking outward too?

B. *Feminism—The many!*

From its beginnings in the 19th century,⁴⁴ the American feminist or women’s movement, like so many social movements, had common goals (obtaining the vote⁴⁵ in the “first wave”) but also more conflictual goals in both the first and the second waves, often sadly personified by frontline leaders who differed on strategies (think Susan B. Anthony and Elizabeth Cady Stanton, and the not-so-pretty history around abolition (“Will Black men get votes before white women?”), and the media-produced competitions of Betty Friedan⁴⁶ and Gloria Steinem⁴⁷), and the issues of inclusion of lesbians (“redstockings”) and now LGBTQ+ and transgender people.⁴⁸ Goals differed too (as they have in the gay liberation movements as well): Should we equalize marriage or abolish it as a location of gendered (roles) oppression? Do we use the Equal Protection Clause for gradual legal change (as Ruth Bader Ginsburg did) or push for the more controversial Equal Rights Amendment⁴⁹ with more “automatic” equality in all

DVORKIN, JACK HIMMELSTEIN & HOWARD LESNICK, *BECOMING A LAWYER: A HUMANISTIC PERSPECTIVE ON LEGAL EDUCATION AND PROFESSIONALISM* (1981).

44. I taught Women’s Studies at UCLA for many years after writing my first legal feminist articles. See, e.g., Carrie Menkel-Meadow, *Women’s Ways of “Knowing” Law: Feminist Legal Epistemology, Pedagogy, and Jurisprudence*, in *KNOWLEDGE, DIFFERENCE, AND POWER: ESSAYS INSPIRED BY WOMEN’S WAYS OF KNOWING* (Nancy Rule Goldberger et al. eds., 1996); Carrie Menkel-Meadow, *Mainstreaming Feminist Legal Theory*, 23 *PAC. L.J.* 1493 (1992); Carrie Menkel-Meadow, *Feminist Legal Theory, Critical Legal Studies, and Legal Education or “The Fem-Crits Go to Law School,”* 38 *J. LEGAL EDUC.* 61 (1988); Menkel-Meadow, *Portia in a Different Voice*, *supra* note 12.

45. See ELLEN CAROL DUBOIS, *SUFFRAGE: WOMEN’S LONG BATTLE FOR THE VOTE* (2020).

46. See BETTY FRIEDAN, *THE FEMININE MYSTIQUE* (1963).

47. See GLORIA STEINEM, *OUTRAGEOUS ACTS AND EVERYDAY REBELLIONS* (3d ed. 2019).

48. My own women’s college spent years developing a policy of whether to admit transgender women. See John Leland, *Barnard Considers Policy for Transgender Students*, *N.Y. TIMES* (Dec. 12, 2014), <https://www.nytimes.com/2014/12/13/nyregion/barnard-weighs-policy-for-transgender-students.html>; Elizabeth A. Harris, *Barnard College, After Much Discussion, Decides to Accept Transgender Women*, *N.Y. TIMES* (June 4, 2015), <https://www.nytimes.com/2015/06/05/nyregion/barnard-college-to-accept-transgender-women.html>.

49. Barbara A. Brown et al., *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 *YALE L.J.* 871 (1971).

spheres?⁵⁰ As an early legal feminist, I was involved in the dividing of our world—both theoretical and practical—into different schools of legal feminism: equality feminism, “difference” or cultural feminism, post-modern feminism, and the critique of “white” and “middle class” feminism.⁵¹ Whatever our debates in the law journals, these differences also mattered for litigation strategies in pregnancy leave,⁵² pornography,⁵³ and employment discrimination⁵⁴ cases in which many of us found ourselves on opposite sides of these issues. Should pregnancy be treated as a “natural” condition, requiring accommodation at work, or a “disability,” requiring the same benefits received by all “injured or sick” employees? Was all pornographic depiction of women harmful to women and suable over (the civil tort harm theory enacted by statute in Indianapolis, thanks to efforts by feminist law professor Catharine MacKinnon⁵⁵), or did some women fear censorship of important works with explicit pictures⁵⁶ or explicitly sexualized material that some women enjoyed? Did some women’s achievement (professional women) occur on the backs of other women (working class women of color doing home or childrearing labor for others)?⁵⁷ These days, even the category of gender binary⁵⁸ and what gender(s) find desirable or objectional in sex is contested and explored in many different (often unsettled) ways.⁵⁹ These and other controversies and chosen methods of theoretical and practical contestation suggest there is no one “feminism,” as there is no one way to achieve equality, eq-

50. Those old enough here to remember will know of the debates on same-sex bathrooms; the draft, military services, and access to military academies, see, for example, *United States v. Virginia*, 518 U.S. 515 (1996); and reproductive rights and abortion under the ERA rubric. Where are we now on those issues?

51. See Carrie Menkel-Meadow, *Feminist Legal Academics: Changing the Epistemology of American Law Through Conflicts, Controversies and Comparisons*, in *GENDER AND CAREERS IN THE LEGAL ACADEMY* 475 (Ulrike Schultz et al. eds., 2021), for a review of this legal history.

52. See *Cal. Fed. Sav. & Loan Ass’n v. Guerra*, 479 U.S. 272 (1987).

53. See *Am. Booksellers Ass’n v. Hudnut*, 771 F.2d 323 (7th Cir. 1985), *aff’d*, 475 U.S. 1001 (1986); Paul Brest & Ann Vandenberg, *Politics, Feminism, and the Constitution: The Anti-Pornography Movement in Minneapolis*, 39 *STAN. L. REV.* 607 (1987); Nan D. Hunter & Sylvia A. Law, *Brief Amici Curiae of Feminist Anti-Censorship Taskforce*, et al., in *American Booksellers Association v. Hudnut*, 21 *U. MICH. J.L. REFORM* 69 (1987).

54. See, e.g., *EEOC v. Sears, Roebuck & Co.*, 628 F. Supp. 1264 (N.D. Ill. 1986), *aff’d*, 839 F.2d 302 (7th Cir. 1988).

55. See *Am. Booksellers Ass’n*, 771 F.2d at 324–25.

56. *BOS. WOMEN’S HEALTH BOOK COLLECTIVE, OUR BODIES, OURSELVES* (Touchstone ed. 2011).

57. *THIS BRIDGE CALLED MY BACK: WRITINGS BY RADICAL WOMEN OF COLOR* (Cherríe Moraga & Gloria Anzaldúa eds., 1981).

58. See, e.g., SUZANNE J. KESSLER & WENDY MCKENNA, *GENDER: AN ETHNOMETHODOLOGICAL APPROACH* (U. Chi. Press ed. 1985).

59. AMIA SRINIVASAN, *THE RIGHT TO SEX: FEMINISM IN THE TWENTY-FIRST CENTURY* (2021). As I write this, Texas officials seek to criminalize gender-transforming transitions through medication or surgery.

uity, and “fairness” for all genders. We must struggle on many different fronts simultaneously.

I remember one of my first attempted “mediative” interventions in such feminist contestations, as feminists met to discuss legal strategies for the case of *EEOC v. Sears, Roebuck & Co.*⁶⁰ A distinguished historian (from my own college, Barnard), Rosalind Rosenberg,⁶¹ was to testify that women “self-selected” for lower paying jobs at Sears, which was, therefore, not liable for discriminatory policies that found women outside of higher paid (big-ticket item) commission jobs. Others of us, led by Alice Kessler-Harris,⁶² another historian (feminist and labor), were preparing testimony and statistical evidence that women were actively and more subtly directed away from these jobs and thus discriminated against by gender, making Sears liable under Title VII for its employment practices.⁶³ Eventually, the plaintiffs lost this one, with hardly a mention of the contested feminist historian testimony in the reported opinion.⁶⁴ I felt, as I had before in my civil rights work,⁶⁵ that there was no one simple legal answer to this problem. Both arguments were valid: some women were actively discouraged, through discrimination, not to apply for these jobs; other women had internalized a gendered assumption of what jobs were appropriate for them. This is still discrimination in my view, but with a more difficult proof problem—Who is legally responsible, Sears in particular, or social norms and society in general?

The legal evidence requirements and legal interpretations of vague or rigid statutes⁶⁶ did not allow for “either or both” claims and arguments⁶⁷ (shifting burdens from clear statistical disparities⁶⁸ formed only one part of Title VII doctrine). Legal cases were and are important strategies for some legal victories, but ultimately, desegregation of workplaces takes lawsuits, human resources training, mediation, and most importantly, economic necessity and culture change. As a

60. See, e.g., *EEOC v. Sears, Roebuck & Co.*, 628 F. Supp. 1264 (N.D. Ill. 1987); see also Ruth Milkman, *Women’s History and the Sears Case*, 12 FEMINIST STUD. 375 (1986); Alice Kessler-Harris, *Equal Employment Opportunity Commission v. Sears, Roebuck and Company: A Personal Account*, 35 RADICAL HIST. REV. 57 (1986).

61. ROSALIND ROSENBERG, *BEYOND SEPARATE SPHERES: INTELLECTUAL ROOTS OF MODERN FEMINISM* (1982).

62. ALICE KESSLER-HARRIS, *OUT TO WORK: A HISTORY OF WAGE-EARNING WOMEN IN THE UNITED STATES* (1982).

63. 42 U.S.C. § 2000e.

64. See RICHARD CHUSED & WENDY WILLIAMS, *GENDERED LAW IN AMERICAN HISTORY 1081–1205* (2016).

65. See discussion *infra* Section II.C.

66. Of course, interpreted by different judges creating doctrine under Title VII.

67. A point creatively made by Kim Crenshaw in her coining of the term “intersectionality” (discrimination on the basis of race *and* gender, e.g., against black women, “different” from either race or gender discrimination separately). See Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991).

68. *Griggs v. Duke Power Co.*, 401 U.S. 424, 428–37 (1971).

former discrimination litigator, I saw that teeing up these feminist theory disputes in courts was not always a good idea, where rigid legal categories and harsh proof requirements did not comport with reality on the ground. I spent years with Eleanor Holmes Norton, then of the EEOC, on panels defending the use of ADR methods (mediation, class action settlements) as ways to achieve some civil rights and employment discrimination amelioration and justice with other, more subtle, consensual, and tailored-to-particular-workplaces-or-employees settlements, rather than relying solely on litigated court decisions. Mediative processes offered some recognition of both past practices and promises for future remediation, even including affirmative action, quotas, transfers, and new criteria and evaluation procedures (yes, incentivized by law and threats of lawsuits but settled out of court to permit tailored flexible solutions for particular individuals and employers). This remains a contentious issue among scholars and activists—What should be litigated publicly in court, with the risk of brittle (and adverse) decisions, and what change is possible with mediated and privatized settlements?⁶⁹

C. *Civil Rights—Will there ever be racial or class justice?*

As anyone who has seen Spike Lee's *Do the Right Thing* knows, struggles for liberation and equality, in this country and others, have long been characterized by conflict about the means to be used to best achieve freedom and equality. To wit, the closing quotes at the end of the film, which juxtapose Martin Luther King Jr.'s hope for non-violent justice and Malcom X's call to arms:

Violence as a way of achieving racial justice is both impractical and immoral. It is impractical because it is a descending spiral ending in destruction for all. The old law of an eye-for-an-eye leaves everybody blind. It is immoral because it seeks to humiliate the opponent rather than win his understanding; it seeks to annihilate rather than to convert. Violence is immoral because it thrives on hatred rather than love. It destroys community and makes brotherhood impossible. It leaves society in monologue rather than dialogue. Violence ends by destroying itself. It creates bitterness in the survivors and brutality in the destroyers.—*Martin Luther King, Jr.*⁷⁰

I think there are plenty of good people in America, but there are also plenty of bad people in America and the bad ones are the ones who seem to have all the power and be in these positions to block things that you and I need. Because this is the situation, you and I have to preserve the right to do what is necessary to bring an end to that situation, and it doesn't mean that I advocate violence, but at the same time I am not against using violence in self-defense. I don't

69. See Carrie Menkel-Meadow, *Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (In Some Cases)*, 83 GEO. L.J. 2663 (1995).

70. *DO THE RIGHT THING* (40 Acres and a Mule Filmworks 1989).

even call it violence when it's self-defense, I call it intelligence.—
*Malcolm X*⁷¹

These ideas have resonated among and between reformers and revolutionaries for as long as human history. Yet the means to achieve justice are themselves varied. Saul Alinsky, credited with writing the “rules” for community organizing (and inspiring to President Obama, and me),⁷² notes that what we see as the brilliance of Mahatma Gandhi’s non-violence strategy was actually dictated by circumstances and the means available to him—an appeal, finally, to British civility and post-World War II bankruptcy, and cultivating some citizen passivity to an “active passivity” of sitting still and refusing to move in the Salt March of 1930, a now infamous act of civil disobedience.⁷³ That Gandhi’s brilliant strategy then came to be used by both King and, in different ways, Nelson Mandela (who also advocated violence as a younger justice fighter⁷⁴) suggests that we need to use what we have and learn and adapt to different situations. Mandela was able to let go of “holding” his anger and outrage against his jailors, and, as an amazing act of courage, strategy, and personal fortitude, harness the energy from his anger to the creative acts of forging a new nation, in the hope of minimizing death and setting a model for transition to democracy, and someday true equality.⁷⁵

Martin Luther King Jr. (and Mandela and Desmond Tutu in South Africa) used religious appeals to Christian hope, charity, and faith as inspiration to use sit-ins, marches and other, more “peaceful” actions to move forward on civil rights (and to avoid, as much as possible, what they knew to be the brutal power of the White State in mowing down their people⁷⁶). There were also appeals to the “shame” of being unchristian, unloving, and violating “God’s as well as Man’s (person’s) order of things,” including love, forgiveness, and of course, “the arc of

71. *Id.*

72. SAUL D. ALINSKY, *RULES FOR RADICALS: A PRAGMATIC PRIMER FOR REALISTIC RADICALS* 36–45 (Vintage Books ed. 1985).

73. As part of the Salt March, Indian citizens non-violently marched for nearly a month in protest of harsh salt laws and taxes.

74. See, e.g., NELSON MANDELA, *LONG WALK TO FREEDOM: THE AUTOBIOGRAPHY OF NELSON MANDELA* 263–307 (1st paperback ed. 1995) (1994); Jean R. Sternlight, Andrea Schneider, Carrie Menkel-Meadow, Robert Mnookin, Richard Goldstone & Penelope Andrews, Transcription, *Making Peace with Your Enemy: Nelson Mandela and His Contributions to Conflict Resolution*, 16 *NEV. L.J.* 281, 285 (2015).

75. In my view, complete “justice” for some situations, like apartheid and slavery, are virtually impossible to achieve, no matter what the “reparations.” With millions of lives lost, harmed and “wasted”—how do we get justice out of that? Ever? We need to aim for something else—a new term? Even “equity” can’t hold all that should fit this pain caused, wrongful acts and human shame.

76. As demonstrated so many times in the American South, as well as South Africa. See, e.g., DAVID J. GARROW, *BEARING THE CROSS: MARTIN LUTHER KING, JR., AND THE SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE* (1st Perennial Classics ed. 2004) (1986).

justice.”⁷⁷ Yet, by the early 1960s, Malcom X had had enough—change was coming too slowly, and though he led a well-disciplined and mostly non-violent group of Black Muslims, he saw in the Watts Riots of 1965, in Newark, in Detroit, and in other cities,⁷⁸ the brutality of modern urban police forces, not only in the south, but in the north (and out west, too).

In 1969 (at Woodstock and in Harlem), Sly and the Family Stone sang *Everyday People*⁷⁹: with lyrics such as “different strokes for different folks” and “we gotta live together,” this song could just as easily be an anthem of choices for strategies for social justice movements, as it is a song (from a mixed-race band) encouraging tolerance through song. In 2020, George Floyd’s murder exemplified how the “beat goes on”⁸⁰—What has changed? Do we peacefully march or take more violent action?⁸¹ Either you believe we are making (slow, too slow) evolutionary progress, or you think we need to hurry things on a bit.

To dip into the “ethics” part of my personal and scholarly background—when it comes to revolutions and my Ethical Culture upbringing,⁸² I am of the Emma Goldman school of revolution: “If I can’t dance at the revolution, I don’t want to be a part of your revolution.”⁸³ (This means, Be careful how you get to major social change—today’s revolutionaries are tomorrow’s dictators!). The way we make

77. MARTIN LUTHER KING, JR., *A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS AND SPEECHES OF MARTIN LUTHER KING, JR.* (James Melvin Washington ed., 1986) [hereinafter *A TESTAMENT OF HOPE*].

78. I was alive for all of these and watched them in horror in my early participation in civil rights activities as a young girl in Ethical Culture Sunday School in the 1960s.

79. SLY AND THE FAMILY STONE, *Everyday People*, *on STAND!* (Epic Records 1969).

80. SONNY & CHER, *The Beat Goes On*, *on IN CASE YOU’RE IN LOVE* (ATCO Records 1967).

81. I am not sure this will make it to print or recording, but when I finished Colson Whitehead’s *The Underground Railroad* (2016), I wondered why every Black American descended from slavery didn’t just kill every white person they saw. My personal desire for vicarious revenge was enormous. That too is a form of “dispute resolution” we don’t talk about enough in our “landscape of disputing.” Some civil rights activists tell us that “the struggle will never be over—it will always be with us,” but the process is the struggle, and it leads to “Black Love!” (to root out the white supremacy in all of us, including internalized white supremacy among Black people). See Intersectionality Matters with Kimberlé Crenshaw, *Was This the Last Black History Month?* (Apr. 7, 2022), <https://www.aapf.org/imkc-podcast-episodes>.

82. Carrie Menkel-Meadow, *And Now a Word About Secular Humanism, Spirituality, and the Practice of Justice and Conflict Resolution*, 28 *FORDHAM URB. L.J.* 1073 (2001).

83. While this quote (and other similar ones) is attributed to Emma Goldman, based on a passage from her autobiography *LIVING MY LIFE* (1931), she likely never said these exact words. See Alix Kates Shulman, *Dances with Feminists*, *WOMEN’S REV. BOOKS*, Dec. 1991, at 13, <https://doi.org/10.2307/4021093>. Martin Luther King Jr. also warned that “the end is preexistent in the means.” MARTIN LUTHER KING, JR., *The American Dream*, in *A TESTAMENT OF HOPE*, *supra* note 77, at 208, 214.

the revolution should plant the seeds for what we reap afterward and the processes we create. Mandela understood this too and tried to get the African National Congress to see it that way. I still prefer the non-violent approach.⁸⁴ So we take to the streets when we have to, we bring lawsuits when we can (diversifying judiciaries is also part of the struggle⁸⁵), and in the meantime, we also use other means for social justice—integrating social, educational, work, and worship spaces.⁸⁶

D. *Politics and Diplomacy—The dangers of entrenched two-sided adversarialism*

My early work in negotiation⁸⁷ derived from my legal services practice and training in sociology and political science. As many of you have heard before, my question in my earlier years of practice was, Why did we win cases and not solve the underlying problems? A court victory on statutory or even constitutional grounds was a “win,” which only temporarily halted some bad practices in prisons, schools, welfare systems, evictions, and private corporations, as skillful managers figured out new ways to do things or had to adapt without sufficient funding to really follow court injunctive demands (e.g., prisons, hospitals, welfare systems, schools). I asked, Why was the world divided into plaintiffs and defendants, winners and losers who created brittle, often binary, outcomes, when social scientists, using categories of their own, had more of them—four-fold tables, continua, multi-variate analysis? I have always seen multi-variate causes in most social and political problems. I look for “ands” when both (or all) parties can gain something—e.g., sharing the pizza, the chocolate cake, or the orange or, even better, making more pizzas, cakes, and oranges. From that “more” place of seeing more variables and factors and preferences we can seek more resources and other possible outcomes, or at least more contingent solutions that can be revisited as conditions change (environmental disputes, economic change).

In more recent years, as my interests have turned more international and multicultural, I have focused on similar problems in international diplomacy—assumptions of scarce resources, “dualities” of

84. This is not an easy thing for the child of Holocaust survivors to say. My parents were adamantly against the death penalty, except for the torture they would willingly have seen leveled at Hitler. We all have relative values. As Alinsky puts it so well, Rule One of the ethics of Means and Ends: “[O]ne’s concern with the ethics of means and ends varies inversely with one’s personal interest in the issue,” and Rule Two: “[T]he judgment of the ethics of means is dependent upon the political position of those sitting in judgment.” ALINSKY, *supra* note 72, at 26 (emphasis omitted).

85. This is being written as Ketanji Brown Jackson is confirmed as the first African American woman on the United States Supreme Court.

86. Yes, I am still an integrationist. “Some of my best friends are . . . different than me,” and I was born of a mixed (religion) set of parents, raised to not just “tolerate,” but celebrate differences.

87. See Menkel-Meadow, *Toward Another View*, *supra* note 3.

alliances, and Cold War (and sadly, seemingly back again now in the Ukraine war) oppositional thinking and behaviors (mirroring or “causing” domestic litigation stances).⁸⁸ The world of diplomatic negotiation (remember game theory was derived to assist in this work in the middle of World War II and then the Cold War⁸⁹) is filled with similar “false” dichotomies of choices—appease (Chamberlain) or attack (Iraq).⁹⁰ Often, we are mind prisoners of what I like to call “false analogies”—Is this like “Munich” (let’s not give in too easily) or more like Iraq (shock and awe!)? Are we all so psychologically traumatized by the past to be unable to see other alternatives? In diplomacy, perhaps more than other spheres, there must be a deeper and richer set of process choices, given multiple motives, culturally and politically different systems and goals, communication difficulties, and the extremely high stakes—whether motivated by a “world view” of maintaining the balance of power like Henry Kissinger⁹¹ or by a more pragmatic, transactional, event-focused approach like George Schultz and James Baker.⁹² Perhaps more recently, the behavioral and attitudinal repertoires have broadened with some women diplomats looking at other factors.⁹³

As we meet today, President Biden has chosen a slightly different path so far in negotiation with the Russians in the invasion of Ukraine—using public “shaming” (another ADR technique⁹⁴) to expose Vladimir Putin’s plans to the world, and thereby encouraging unity in sanctions and economic strangulation, and establishing cooperation once again with NATO, Europe, and the United States (a mas-

88. Such as Munich-like “concessions” of weakness versus challenging aggression (Viet Nam, Iraq, and Afghanistan).

89. KEN BINMORE, *GAME THEORY: A VERY SHORT INTRODUCTION* 1–2, 5–6 (2007); R. DUNCAN LUCE & HOWARD RAIFFA, *GAMES AND DECISIONS: INTRODUCTION AND CRITICAL SURVEY*, at viii (1957) (“[Game theory is] the problem of individuals reaching decisions when they are in conflict with other individuals and when there is risk involved in the outcomes of their choices.”). Game theory modeled what can happen without (and then later with) communication between and among the parties.

90. This is part of where Roger Fisher’s work came from: not only law, but diplomatic work. See Carrie Menkel-Meadow, *Why Hasn’t the World Gotten to Yes? An Appreciation and Some Reflections*, 22 *NEGOT. J.* 485, 487, 489 (2006).

91. See HENRY KISSINGER, *WORLD ORDER* 9 (2014).

92. See, e.g., Carrie Menkel-Meadow, *Deconstructing Henry: Negotiation Lessons from Kissinger’s Career*, 35 *NEGOT. J.* 337, 339 (2019) (reviewing JAMES K. SEBENIUS ET AL., *KISSINGER THE NEGOTIATOR: LESSONS FROM DEALMAKING AT THE HIGHEST LEVEL* (2018)); PETER BAKER & SUSAN GLASSER, *THE MAN WHO RAN WASHINGTON: THE LIFE AND TIMES OF JAMES A. BAKER III*, at xvi–ii (2020).

93. See, e.g., WENDY R. SHERMAN, *NOT FOR THE FAINT OF HEART: LESSONS IN COURAGE, POWER & PERSISTENCE*, at xvi–ii, xx (2018); SUSAN RICE, *TOUGH LOVE: MY STORY OF THE THINGS WORTH FIGHTING FOR* 14 (2019); SAMANTHA POWER, *THE EDUCATION OF AN IDEALIST: A MEMOIR*, at xii (2019).

94. JOHN BRAITHWAITE, *CRIME, SHAME AND REINTEGRATION*, at vii (1989).

sive exercise in coalition building).⁹⁵ Has Putin succeeded in bringing together what President Trump tried to put asunder? Clearly some different strategies are being employed here, demonstrating that if we are in unprecedented times, we may need unprecedented choices of action—Is this Munich or the Anschluss (1938), the “invasions” of Hungary and Czechoslovakia (1956, 1968), the Cuban Missile Crisis of 1962,⁹⁶ or something else altogether? How do we learn from past events,⁹⁷ but not learn too much? What are the many (not just two—appease or attack) ways to conduct multi-party, multi-issue negotiations?⁹⁸

Perhaps as intractable as modern international diplomacy currently seems is the hyperpolarized society in which we (and many other countries) now find ourselves.⁹⁹ Elsewhere I have opined on how we might try to cross some of those adversarial walls in the interests of (and some hope for) finding ways to get some things done and reach across lines of polarized division, but I am somewhat skeptical in our present moment that these strategies will work: reduce debates and two-sided adversarial claims,¹⁰⁰ look for cross-interests and coalitions with whom to build alternatives,¹⁰¹ and work on non-political tasks

95. See, e.g., 2 *COMPLEX DISPUTE RESOLUTION: MULTI-PARTY DISPUTE RESOLUTION, DEMOCRACY AND DECISION MAKING*, at xv–xix (Carrie Menkel-Meadow ed., 2d ed. 2012) (discussing sequencing and multi-party negotiations); James K. Sebenius, *Sequencing to Build Coalitions: With Whom Should I Talk First?*, in *WISE CHOICES: DECISIONS, GAMES, AND NEGOTIATIONS* 324 (Richard J. Zeckhauser, Ralph L. Keeney & James K. Sebenius eds., 1996).

96. See Robert S. McNamara, *Introduction* to ROBERT F. KENNEDY, *THIRTEEN DAYS: A MEMOIR OF THE CUBAN MISSILE CRISIS* 13–16 (1968). I lived through that one too—the master class of diplomatic negotiations—with the much-published note that John Kennedy (advised by precursors to Harvard’s PON) thought about how Khrushchev would have to “sell” his agreements to his own people—the importance of thinking about “face” and the interests of people on the other side of the table. Thus, the United States “withdrew” missiles from Turkey so Khrushchev could present an “equality” of concessions to his side of the table.

97. *LANDMARK NEGOTIATIONS FROM AROUND THE WORLD: LESSONS FOR MODERN DIPLOMACY*, at v (Emmanuel Vivet ed., 2019).

98. See generally *COMPLEX DISPUTE RESOLUTION* (Carrie Menkel-Meadow ed., 2d ed. 2012) (3-volume series, including *FOUNDATIONS; MULTI-PARTY DISPUTE RESOLUTION, DEMOCRACY AND DECISION MAKING*; and *INTERNATIONAL DISPUTE RESOLUTION*).

99. See, e.g., David Brooks, Opinion, *Globalization is Over. The Global Culture Wars Have Begun.*, N.Y. TIMES (Apr. 8, 2022), <https://www.nytimes.com/2022/04/08/opinion/globalization-global-culture-war.html>.

100. Recall (for those old enough) that the *MacNeil/Lehrer NewsHour* on PBS began by having more than two sides of issues presented in prime-time news reports, as contrasted with Ted Koppel’s *ABC News Nightline*, which tended to present two-sided debate formats on many issues.

101. Carrie Menkel-Meadow, Commentary, *Applying Conflict Resolution Insights to Hyper-polarization: “When Will (We) Ever Learn?”*, 39 *CONFLICT RESOL. Q.* 375, 376–77 (2022), <https://doi.org/10.1002/crq.21335>; 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, 6. Building cross coalitions works in many directions, see the alliances now of the health-yoga community with

together (as in natural disaster and pandemic relief and assistance) to build a sense of community and comradery.¹⁰²

E. *Writing and Cooking—Some advice from the creative arts*

In this paean to multiple methods, we should look at a recent essay by Ann Patchett, *There Are No Children Here*,¹⁰³ which describes an encounter with another writer who, in giving advice to writers, told them that writers should have an office, get dressed, and go to work (for six hours a day), like any other job. Quietly incredulous, Ann Patchett said she wrote in her pajamas, on a couch or at the dining room table, and was quick to get up and help a friend in need, just because writing offered the “flexibility” of not being a “regular job.” More incredible, the (male) writer told her she could not be a writer without children (Patchett had decided by age 30 never to have children) since it was not until “one” had children that one could “know love.” Patchett has known amazing love: of mother, sister, father, dogs, husband, editors, bookstore partners, artists, publishers, customers, fellow writers, readers, and many other people’s children in her life. If you think she can’t write about love, I have some books to recommend.¹⁰⁴ How could there ever be only one way to write a novel, short story, play, opera, poem, or even a law review article? Only one way to bring or settle a lawsuit? Only one way to solve a legal problem?

In a similar vein, I imagine some in this audience (not my amazing cook husband who works “by the book”) are creative and intuitive cooks. If there was only one way to cook a meal, why would *The New York Times* publish the *No-Recipe Recipes*,¹⁰⁵ and why would some of us be so fascinated with the many cooking shows that we ask would-be chefs to “whip up something” from random ingredients in their refrigerators? Multiple cooking methods, varieties of ingredients—these are the things that make cooking (and eating) so interesting, pleasurable and, these days, healthy. Improvisation, creativity, flexibility, resilience, and adaptation are all qualities essential to human (and legal) problem solving. That’s why I use brain teasers in all my courses—

anti-vaccine right wingers—a dangerous (to all our health) combination, but another form of coalition forming.

102. One of my greatest teachers was the gestalt therapist at Esalen Janet Lederman, who used to say, “Get the focus off the focus.” (She worked a lot with children!) JANET LEDERMAN, *ANGER AND THE ROCKING CHAIR: GESTALT AWARENESS WITH CHILDREN* (1969).

103. ANN PATCHETT, *There Are No Children Here*, in *THESE PRECIOUS DAYS: ESSAYS* 127–30 (2021).

104. See ANN PATCHETT, *BEL CANTO* (2001) (a great ADR book!); ANN PATCHETT, *TRUTH & BEAUTY: A FRIENDSHIP* (2004); ANN PATCHETT, *THIS IS THE STORY OF A HAPPY MARRIAGE* (2013).

105. SAM SIFTON, *THE NEW YORK TIMES COOKING: NO-RECIPE RECIPES* (2021).

stretch the minds of law students and teach them to not only “think out of the box” but consider other disciplines too.¹⁰⁶

These are the multiple methods and processes of flexibility, creativity, and humanity that cannot be cabined into single routes of legal or social processes.

III. WHAT LESSONS FOR DISPUTE RESOLUTION, ETHICS, AND FEMINISM?

After 45 years of law professing and dispute resolution work, what insights do I have to share to move all our fields along to the next stages of development—both theoretical and practical (as you all explore in the papers presented here)?

First—we need both the *internal* and the *external*. *Identity* and *knowing ourselves* as *individuals* and *in groups* are important and necessary for health and agency to take actions and think thoughts, but internal development is not enough. (Sorry meditators, I cannot stay in my head for too long when I see what is going on all around me. I am an activist.) I imagine most of us became lawyers to *do* something—we just cultivated the part of the legal brain that also wanted to teach others and create new causes of action, new legal processes, and new concepts and analyses.

Second, I do my work from a place of political and moral commitments (and my own form of religion or spirituality). I often say my religion is feminism—a belief in the equality and dignity of all human beings. I am a feminist and a civil rights activist—all human beings deserve equal rights, respect, and dignity¹⁰⁷—all people, women, men, people of color, all ethnicities and sexual orientations. This means making political and ethical commitments clear to my students, to my clients, and to parties with whom I mediate. This has never prevented me from getting mediation work, though I have sometimes turned down work that offended my own moral or political sensibilities.¹⁰⁸ In the words of Oscar Wilde with which this Essay began—I disclose who I am when I mediate—I am not “neutral” to many issues in life and law, but I try to be fair and as “unbiased” as I can be, always open to

106. Carrie Menkel-Meadow, *Aha? Is Creativity Possible in Legal Problem Solving and Teachable in Legal Education?*, 6 HARV. NEGOT. L. REV. 97, 119 (2001); see also MICHAEL WHEELER, *THE ART OF NEGOTIATION: HOW TO IMPROVISE AGREEMENT IN A CHAOTIC WORLD* (2013); CARRIE MENKEL-MEADOW, *NEGOTIATION: A VERY SHORT INTRODUCTION* (2022).

107. See JEREMY WALDRON, *THE HARM IN HATE SPEECH* 1–6 (2012), for an eloquent argument, justifying the regulation of “hate” speech by suggesting that everyone is entitled to recognition of their dignity, which is sometimes violated by what we say (with and without specific intent to cause harm).

108. See Carrie Menkel-Meadow, *Are There Systemic Ethics Issues in Dispute System Design? And What We Should [Not] Do About It: Lessons from International and Domestic Fronts*, 14 HARV. NEGOT. L. REV. 195, 205 (2009).

hearing other perspectives and learning—curiosity is as important a value in dispute resolution as any other.

What are the basic principles, commitments, and ethics of our field: to “settle cases,” “to seek justice” or “peace”? In my view, it may be simply “to make the parties better off than they were before.” Also, to learn how to be a better problem solver in the future. These are commitments both for local and personal disputes among people and for bigger disputes among countries and groups of people within those countries.

Third, we have some new and exciting challenges to which we can put our collective energies from our field. What is the future of labor exploitation in the Amazon, high-tech, non-union, gig-work world?¹⁰⁹ What new ways to engage in employment-labor relations? What processes for both organizing and collective bargaining? Why don’t we teach more labor issues in negotiation classes? Are there third ways beyond the labor-management adversarialism to employment justice?

How much are we addressing criminal justice issues in dispute resolution?¹¹⁰ How do we negotiate “fairer” and safer policing in different communities? Many mediators have been called into communities in times of crisis to negotiate community relations¹¹¹—Why not more permanently, as the Ohio State University community relations program is doing?¹¹² What would real criminal “justice” look like—more restorative and reparative justice, where appropriate, and less retributive and punishing processes?¹¹³

109. In the last few years, I have taught a new course, *Uberlaw: The Regulation of Innovation*, which has explored the misfit between old laws and new practices—a variation on the “no vehicles in the park” jurisprudential project. See Frederick Schauer, *A Critical Guide to Vehicles in the Park*, 83 N.Y.U. L. REV. 1109 (2008); see also Frank H. Easterbrook, *Cyberspace and the Law of the Horse*, 1996 U. CHI. LEGAL F. 207 (1996) (arguing that the new technologies and “things” don’t need their own field of law but can be assimilated to existing legal categories). As I write this, at least one Amazon warehouse and several Starbucks stores have voted to unionize, perhaps signaling a new era of labor organizing in this country. We’ll see how the contract negotiations go.

110. CYNTHIA ALKON & ANDREA KUPFER SCHNEIDER, *NEGOTIATING CRIME: PLEA BARGAINING, PROBLEM SOLVING, AND DISPUTE RESOLUTION IN THE CRIMINAL CONTEXT* (2019).

111. FROM CONFLICT RESOLUTION TO SOCIAL JUSTICE: THE WORK AND LEGACY OF WALLACE WARFIELD (Alice Pfund ed., 2013); BERTRAM LEVINE & GRANDE LUM, *AMERICA’S PEACEMAKERS: THE COMMUNITY RELATIONS SERVICE AND CIVIL RIGHTS* (2020).

112. *Divided Community Project*, OHIO STATE U. MORITZ COLL. L., <https://moritzlaw.osu.edu/faculty-and-research/divided-community-project> [<https://perma.cc/KD6K-ZNZZ>].

113. Carrie Menkel-Meadow, *Toward a Jurisprudence of Law, Peace, Justice, and a Tilt Toward Non-Violent and Empathic Means of Human Problem Solving*, 8 UNBOUND: HARV. J. LEGAL LEFT 79 (2013); Carrie Menkel-Meadow, *Restorative Justice: What Is It and Does It Work?*, 3 ANN. REV. L. & SOC. SCI. 161 (2007), <https://doi.org/10.1146/annurev.lawsocsci.2.081805.110005>.

In the learning that has taken place during the COVID-19 pandemic, have we made some progress on access to justice through online, digital civil (and even some criminal) matters?¹¹⁴ While I applaud the adaptations made by courts, mediators, and arbitrators to continue to resolve disputes and develop some innovations through computer-assisted dispute resolution (encryption for confidential document production, breakout rooms for caucuses, less travel and cost, the possibility of more flexible and staged and time-saving meetings, access from more rural areas to dispute resolution services), the part of me that went into dispute resolution to foster in-person empathy, communication, human understanding, and joint creative problem solving (I am still a Person2Person dispute resolution professional) worries that online dispute resolution might be more efficient in many settings, but also comes with many downsides. There are still access issues for some (age, some disabilities, expense, computer illiteracy, and lack of physical technology or general knowledge¹¹⁵), and for others, the need for more human connection and education about dealing with more than the particular dispute at hand. Mediation is also about problem solving education.

Where is dispute resolution, feminism (care and nurturance—sorry, I am still a difference feminist), and ethics (for the next generations) more needed than in productive ways to improve our environment and preserve our planet for the future (and for others who might come visit)?¹¹⁶ What can we bring to the important issue of the health of our planet, mediating science, political discourse, and public policy development?¹¹⁷

Finally, from my perspective (based on the questions and methods with which I began my teaching career, using clinical, experiential, feminist, civil rights, problem-solving, and professional judgment approaches), how can we deliver a legal education that seeks to promote justice and solve human problems rather than only learning how to argue or win cases? Medical school teaches physicians to focus on accurate diagnoses, appropriate treatment, and, where possible, cures

114. ETHAN KATSH & ORNA RABINOVICH-EINY, *DIGITAL JUSTICE: TECHNOLOGY AND THE INTERNET OF DISPUTES* (2017); see also RICHARD SUSSKIND, *ONLINE COURTS AND THE FUTURE OF JUSTICE* (2019).

115. See I, DANIEL BLAKE (Sixteen Films et al., 2016); Carrie Menkel-Meadow, *Is ODR ADR? Reflections of an ADR Founder from 15th ODR Conference, The Hague, The Netherlands, 22-23 May 2016*, 3 INT'L ON ONLINE DISP. RESOL. 4 (2016).

116. See DEEPAK MALHOTRA, *THE PEACEMAKER'S CODE* (2021); Carrie Menkel-Meadow, "Every Problem Wants to Be Solved": A Review of The Peacemaker's Code, 38 NEGOT. J. 321 (2022) (book review), <https://doi.org/10.1111/nej.12391>.

117. Carrie Menkel-Meadow, *Dispute Resolution Mechanisms*, in *ESSENTIAL CONCEPTS OF GLOBAL ENVIRONMENTAL GOVERNANCE* 68 (Jean-Frédéric Morin & Amandine Orsini eds., 2d ed. 2020); Carrie Menkel-Meadow, *Getting to "Let's Talk": Comments on Collaborative Environmental Dispute Resolution Processes*, 8 NEV. L.J. 835 (2008).

(as well as research into dealing with both current and future diseases and illnesses). Why is our equivalent of “health” not “justice”?

My intellectual and pedagogical paradigms of knowledge have been counter cultural since I entered legal academe. Except for here—my dear friends and colleagues in dispute resolution, feminism, legal ethics, and the diversification of the legal profession, education, and globalization—thank you for being here and continuing this work with me and with each other.

We have a lot of work to do. I hope I have added to the sum of human knowledge that might push us toward new processes; many, rather than only one, way of doing things; and hopefully, many new ideas and creative solutions to human problems.

I am looking forward to the next generation of you picking up these issues and also finding your own...

In the meantime:

How dull it is to pause, to make an end,
To rust unburnish'd, not to shine in use!
As tho' to breathe were life.

• • •

And this grey spirit yearning in desire
To follow knowledge, like a sinking star,
Beyond the utmost bound of human thought.¹¹⁸

118. TENNYSON, *supra* note 1, at 147–48.