DISPUTE RESOLUTION

Aspen Casebook Series

DISPUTE RESOLUTION

Beyond the Adversarial Model

Third Edition

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For Robert Meadow,
Peter Popov and Nicole Love Popov,
Rodd, Joshua, Noah, and Zachary Schneider,
Jamie, Spencer, and Sander Moffitt,

Our partners and children whose support, love and dispute resolution talents we appreciate and cherish, and

For our many students, past, present, and future, whom we learn from and hope will use these materials to make the world a better place, with both peace and justice.

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Preface to the Third Edition

The fact that we are writing a preface to a third edition of our Dispute Resolution text is evidence that the field is both now a consolidated field, and also that it is continually changing, requiring new materials, updates and reconceptualizations of some aspects of the field.

As we write this, both domestic and international dispute resolution issues remain at the foreground of legal, governmental, private and diplomatic activity. Negotiation (both in public diplomatic, legal, and private business settings) continues to be one of the most important human processes of conflict resolution and transaction planning (see *The Negotiator's Desk Reference,* Chris Honeyman and Andrea Kupfer Schneider, eds. 2017 DRI Press). Mediation is now often required by courts before litigation may proceed, and is chosen by many parties as the process with the most party control over both process and outcome. Increasingly international tribunals (including private commercial, trade and investment and public human rights) are also promoting mediation and more universities around the world are teaching mediation as an essential part of both a legal and a general education. The authors of this text now teach with these materials across the globe. Arbitration continues to be "required" as mandatory in a wide variety of contractual settings, including consumer and employment contracts, which makes the United States an outlier in the world. This text adds brand new chapters on arbitration, as our Supreme Court continues to favor arbitral processes over a wide variety of claims against it, and we add a new arbitration expert to our collaboration—thank you Michael Moffitt!

As the foundational processes covered in this book—negotiation, mediation and arbitration—continue to be combined and altered to produce new hybrid forms of dispute resolution, some hybrids have fallen off in use (e.g., summary jury trials and mini-trials) while new ones emerge (e.g., final offer mediation) and some hybrids (e.g., ombuds) are attracting more usage in private companies and government agencies. This text continues to reflect the new uses of various dispute processes in more settings and to ask questions about the "scaling up" of dispute resolution processes in our larger legal and democratic systems. This new edition focuses on perhaps the

newest and most challenging form of dispute resolution "online dispute resolution" or ODR, which offers the potential for more access to justice (now called "ATJ"), as well as introducing concerns about "digital inequality." If Dispute Resolution (or ADR) is to continue to be "appropriate dispute resolution," we must always be mindful of its promises to deliver justice, fairness and good quality outcomes to those who participate in the processes.

The modern lawyer (and law student studying to be a modern lawyer) needs to understand and practice the many different ways of resolving clients' legal problems, using an ability to diagnose types of issues and problems and assessing the suitability of different processes for different kinds of legal problems and issues. The theme of "process pluralism" continues in this new version of the text, and we continue to focus on lawyers learning to counsel clients about appropriate process choices, from a perspective of knowing what each process offers, in terms of procedures used, party participation, choice, self-empowerment, creative solutions and achieving desired outcomes.

Assessment of what processes are appropriate for particular disputants, as well as for larger system choices, continue to be issues of both policy and ethics. As with our prior editions, each process is presented with a focus on skills, as well as the policy and ethical issues implicated in its use.

Any dispute resolution course works best with active participation by students in role-plays and simulations. These are available, both in the Teacher's Manuals to the texts we have written (*Dispute Resolution, Negotiation and Mediation)* and available online through WoltersKluwer for those who adopt this text. Each chapter contains "problem boxes" which ask students to actively engage in the materials. These problem boxes can be used for class discussion, as well as written assignments. Dispute resolution must be "practiced" to be learned and understood.

As in prior editions, we have tried to present a variety of materials, including general jurisprudential readings, skills prescriptions and exercises, cases, empirical studies, policy questions, and professional responsibility rules and questions to think about and discuss. We have heard the pleas of users (both students and professors) and have once again, trimmed our book, to make chapters shorter and more adapted to one chapter per class and or one chapter per week of a 14-week semester. We welcome your input and are all available to discuss pedagogic choices. Our revisions of the paperback "splits" for Negotiation and Mediation will follow shortly.

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Carrie, Lela and Andrea thank Michael Moffitt for joining us on this edition as he concludes his service as Dean of the University of Oregon Law School and Jean Sternlight, our esteemed colleague, leaves us to pursue her interests in arbitration in other venues. Thanks to both of them for continuing to collaborate with us on all the issues in the field. We have all shared ideas and inputs on these revised materials—adding new materials, particularly the most recent case law in arbitration, new materials in negotiation and mediation and hybrids, and removing material that is now dated, as the uses of various forms of dispute resolution become more institutionalized. We still hope for more innovation and the development of new processes, as well as evaluative work on what is or is not working now. We welcome your input.

All of us remain grateful for the institutional support we receive from our institutions: Carrie thanks the University of California Irvine Law School (and the political science department), and Georgetown University Law Center for allowing her to teach a great variety of courses on the themes of this text (including Multi-Party and Advanced Dispute Resolution, Deliberative Democracy, as well as the basics, Negotiation, Mediation and ADR). She thanks Adelina Tomova for administrative assistance and generally helpful problem solving; and Caleb Nissley and Sarah Salvini for research assistance; Hagop Nazarian, Shunya Wade, Kevin Homrighausen and Tony Boswell for continued enthusiasm in studying dispute resolution and "youthifying" an old hand. In addition, she thanks students at the University of Torino, University of Hong Kong, the Center for Transnational Legal Studies (London), Queen Mary Law School, Haifa University, Leuven University (Belgium), and the University of Melbourne, as well as many other international venues where she has been able to use these materials and explore cultural variations in the uses of human dispute resolution systems. Lela Love thanks the Kukin Program for Conflict Resolution and the Benjamin Cardozo Law School for supporting her scholarship. Her wonderful colleagues at Cardozo have been so helpful—Donna Erez-Navot, the Assistant Director of the Kukin Program and Nicole Duke, the Program's RA. Also, Simeon Baum, Bob Collins, Brian Farkas, Tracey Frisch, Peter Halprin, Charlie Moxley, Glen Parker, Leslie Salzman, Robyn Weinstein, David Weisenfeld, Dan Weitz, and David White lend ongoing ideas and support—as well as Hal Abramson, Josh Stulberg, and Michael Tsur who come regularly to Cardozo and provide inspiration. Andrea Schneider (and the rest of us) continue to marvel at the ongoing contributions of Carrie Kratochvil who works to make all of this work come together. She is very appreciative of Marquette University Law School for its support of the Dispute Resolution Program and this book. She also thanks Ilena Telford, April Kutz, and Jad Itani for their research assistance on this edition. Michael Moffitt thanks the Appropriate Dispute Resolution Center at the University of Oregon School of Law, the Conflict and Dispute Resolution Master's Program at the University of Oregon, and Phil and Penny Knight for their continued support of his research and teaching. He thanks his research assistants from Oregon and Harvard: Haley Banks, Christopher Dotson, Deanna Goodrich, Christopher Groesbeck, Juhi Gupta, Ayoung Kim, Chantal Guzman-Schlager, Ben Pincus, Jordan Shapiro, Austin Smith and Elise Williard.

We continue to be grateful for our many mentors, noting with this edition the passing of Frank Sander, Howard Raiffa, Thomas Schelling, and Margaret Shaw, among the the founding fathers and mothers of our field. We continue to be inspired by them—to stretch their ideas into the 21st century, finding new uses of "varieties of dispute processing." Our students continue to inspire us and question us about when and how to use processes outside of courtrooms to resolve disputes. And, as we observe an increasingly polarized political world, both domestically and internationally, we are proud of our students, and yours, who are at the front line of using these materials to look for new ways to work together productively, across perceived differences in values and ideals.

We continue to be thankful for and indebted to John Devins at Wolters Kluwer who believes in us and this project and helps achieve "justice" in law school publishing.

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We also want to thank each other for the continuing collegial and enriching relationships we have as we negotiate the words on these pages and engage happily and productively with our wider and wonderful "ADR" community in legal education and now, the growing interest in our field around the world. Despite the difficulties in world and domestic politics, we still hope that reading and working with these materials will increase well being and peace and justice in the world.

Carrie Menkel-Meadow
Lela Porter Love
Andrea Kupfer Schneider
Michael Moffitt

August 2018

Preface to the Second Edition

Since the publication of our first edition in 2005 there has been continued growth and diversification in the "process pluralism" we have described in both the older edition and now this new edition. Increasing use is being made of negotiation, mediation, and arbitration, and creative system designers are combining these processes in new ways in varied contexts. At the international level, more and more transnational disputes, conflicts, and transactions are drawing on dispute resolution processes,[1] which we hope soon to cover in a separate book on Transnational Dispute Resolution.

Nevertheless, since our last edition, the United States has been participating in two new wars and litigation and its concomitant fees and costs have continued to climb, even while an economic recession has altered the legal landscape. With the recession we have seen more housing foreclosures, a rise in financial fraud and complex business litigation, and additional banking, housing, employment, and consumer disputes that have caused many people great personal and financial harm. There has also been a major realignment in the market for legal services.

Thus, we think the process pluralism of ADR has gained even more importance in our daily and professional lives, and remains at the core of what all law students (and lawyers) should learn as part of their basic legal education and experience. We see ADR in the courts, out of the courts in a myriad of forms, and increasingly, in areas of aggregated disputes and conflicts, within organizations and among peoples and nations, spawning the new separate field of dispute system design. We report here, in the last chapter, some of the newest empirical and other research, designed to test claims about ADR's usefulness in our (and other) societies.

As in the first edition, we continue to center dispute resolution processes in a context of problem solving for clients, including individuals, governmental agencies, groups, private entities, organizations, corporations and nations. In order to negotiate, arbitrate, or mediate, lawyers need to understand their clients' needs and interests

1. Carrie Menkel-Meadow, Why and How to Study Transnational Law, 1 UC Irvine L. Rev. 97 (2010).

and those of the other parties, so interviewing, counseling, listening, communicating, and understanding are important constituent activities of dispute resolution which are also covered in this book.

In this new edition we have listened to our readers and students and streamlined (and shortened!) the materials we present to you. Instead of *Notes and Questions*, we now provide you with clearly demarcated *Problems* found, (somewhat ironically, in a book that is about "thinking outside of the box") inside grey boxes, which are easy to read (if not always easy to solve). These problem boxes can be used as out-of-class thinking and homework assignments or serve as discussion points for classes, whether in large group or smaller task groups. The Teacher's Manual for both the earlier edition (and this one too) continue to supply the largest collection of shorter role-plays and longer simulations for any ADR text, demonstrating our belief that the subjects of negotiation, mediation, arbitration, and dispute resolution generally are learned best *in action* where *theories in use*[2] can be tested for their efficacy, appropriateness, and ability to solve clients' problems. Both this book and the companion shorter "splits" — *Mediation: Practice Policy and Ethics* and *Negotiation: Processes for Problem Solving* can be used in both classroom (survey or specialized) courses or clinical settings, both within and outside of the United States.

This new edition adds new materials, including a number of recently decided cases, primarily on arbitration issues, from the highest courts in the land, and the latest in commentary and scholarship on dispute resolution issues. We have also edited some of the classic materials from our first edition to a more manageable length.

This book is presented in several sections. We offer two introductory chapters on the history and jurisprudence of dispute processes, as well as the importance and underlying value of problem solving for clients and the skills necessary to problem-solve. Then in three separate chapters for each primary process of negotiation, mediation, and arbitration we cover concepts and models of that process, skills needed to be both representatives and third party neutrals in that process, and the ethical, legal, and policy issues that are implicated in the use of those processes. Next, we provide a section of the book examining more complex issues in dispute resolution: variations and combinations of dispute resolution processes in both private and public settings; uses of dispute resolution in multi-party and transactional settings; and insights from dispute system design and related planning for dispute resolution processes. Finally, we survey some of the issues in assessing the past uses and future possibilities of dispute resolution, both for clients and for the larger society.

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All of us remain grateful to our various institutions for support as teachers, scholars, and practitioners: Georgetown University Law Center, the Center for Transnational Legal Studies, and the University of California, Irvine Law School for Carrie Menkel-Meadow, Benjamin N. Cardozo Law School and its Kukin Program for Conflict Resolution at Yeshiva University for Lela Love, Marquette University Law School and its Dispute Resolution Program for Andrea Kupfer Schneider and

2. Donald Schön, The Reflective Practitioner (1983).

the University of Nevada, Las Vegas and its Saltman Center for Dispute Resolution for Jean Sternlight. We thank our deans, colleagues, and our many students who have worked with these materials and given us useful feedback.

We thank the many authors and publishers who have allowed us to reprint their materials (as formally acknowledged in the Acknowledgments). We are especially grateful to those who allowed us to use their materials without exorbitant permissions or royalty payments, in the interest of dissemination of learning and education. And we are grateful for the continued inspiration of both our intellectual mentors and seniors (a smaller group as we join the ranks of the "senior mentors" ourselves), and our enthusiastic students, many of whom want to make full-time careers in this field, which we all helped create and foster.

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Finally, all of us thank each other for continuing to work, learn, and collaborate with each other — often from scattered corners of the world as we continue to spread our hopes and dreams for a more peaceful and just world.

Carrie J. Menkel-Meadow
Lela Porter Love
Andrea Kupfer Schneider
Jean R. Sternlight

November 2010

Preface to the First Edition

This book is inspired by our conviction that study of a variety of different processes of dispute resolution, what we here call "process pluralism," will enable the lawyers of the future to be more creative and effective in their legal problem solving. We subtitle this book "Beyond the Adversarial Model" because we believe that while litigation, and the adversarial process that inspires it, has its place in the legal order, modern life requires additional processes that better meet the needs of parties in conflict, as well as of the larger societies within which legal and other disputes occur. We believe that these other processes will produce qualitatively better solutions, improve relationships between parties, and deliver both justice and peace, both effectively and meaningfully. We also care about efficiency, of course, but for us, that value must often bow to the others.

Two of us are of the founding generation of "alternative dispute resolution" (a field many now call "appropriate dispute resolution" or simply "dispute resolution"); the other two of us came fast behind with specialized knowledge of several of the processes we study in this book. We have all been teaching these processes for many years and thought it time to enter the field with a new textbook. (Note that we did not say "casebook," as "cases" are not all that our field is about.) This book is organized to provide a comprehensive treatment of the field of dispute resolution, whether taught with skills components (and use of the many simulations, role-plays, and problem sets found in the Teacher's Manual) or as a survey of the field's theoretical, practical, ethical, legal, or policy issues.

We begin with a theoretical and historical introduction to the field of dispute and conflict resolution, introducing readers to the basic concepts and their creative developers and pointing out innovations in social and legal problem solving. Important theorist and practitioner Professor Lon Fuller, whom we call "the jurisprude of ADR," introduces us to the idea of "process integrity" — the evaluation of each dispute resolution process for its own logic, function, purpose, and morality — a theme we follow throughout the book.

We then turn to the three foundational processes of dispute resolution: negotiation, mediation (as facilitated negotiation), and arbitration (party controlled adjudication). Each process is studied in three separate chapters. The first focuses on the concepts, frameworks, and approaches characterizing different conceptualizations of the process; another explores the skills and practices needed to conduct that process; and a third examines the legal, ethical, and policy issues the process raises. This section of the book is primarily concerned with how lawyers (whether as negotiators, mediators, representatives in mediation and arbitration, or arbitrators) can more effectively solve their clients' problems and the problems of those with whom their clients interact.

Each of these processes has become more complex, both in study and in practice, since the modern field was founded about thirty years ago. To help students cope with that complexity, we present materials for practice (role-plays and simulations are provided in the Teacher's Manual); for analysis (questions and problems are posed in the text's Notes and Questions sections, following each of the readings, drawn from law, social science, popular culture, and examples of the processes in use); and for speculation on future dispute resolution designs. Throughout these chapters, we focus on the multiple roles that lawyers can play and on the importance of the interaction, consultation, and participation lawyers should have with the parties and clients whose disputes and conflicts they are hoping to help resolve. We also suggest more active roles for parties and clients in participating with lawyers in the resolution of their own issues and problems. Our conception of these roles goes beyond what many have suggested before. We maintain that participation, empowerment, creativity, and self-determination are important values in the successful and satisfying resolution of disputes and conflicts.

Beyond the foundational processes, this book goes on to explore the sophisticated adaptations of these basic processes sometimes required by modern life. Beginning with Part III, we explore how the basic processes combine to form hybrid processes; how the addition of multiple parties and the introduction of more complex issues change our understanding of how these processes can be used; how we might anticipate and avoid disputes by using conflict resolution in transaction planning and contracts; and how international conflicts may differ from or require adaptation of the processes commonly used in domestic legal disputes.

Dispute resolution is no longer just about avoiding or settling lawsuits. It should be thought of before relationships are formed, throughout their duration, and then, if necessary, when things go bad. Since various forms of ADR have now been in use for at least three decades, we are in a position to present some important critiques of and challenges to ADR's use. A separate chapter in this text therefore asks practitioners and students to consider how the claims of dispute resolution processes in different fora can be properly assessed and evaluated. Our concluding chapter examines the issues involved in counseling clients on the most appropriate process to use to resolve their disputes and conflicts and to plan transactions.

Our goal in this book is to help you as lawyers and future lawyers to be as well educated and informed as possible about effective options for dispute resolution. From this basis, you will be better prepared to advise your clients about the many ways they can go about their dealings with others, both when putting things together and, sadly, when dealing with the consequences of relationships that fall apart.

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This book is the culmination of many years of study, teaching, research, and writing by all of us, and we have many intellectual, personal, and work-related debts. We cannot begin to acknowledge all of those debts, but we would like to recognize a few.

First, our intellectual sources. In some ways, the field or "movement" of ADR is a continuation of earlier schools of legal thought, including both Legal Realism and the Legal Process school of the 1950s (see Henry M. Hart and Albert M. Sacks, The Legal Process: Basic Problems in the Making and Application of Law [1958, reissued in 1994, edited by Professors William N. Eskridge, Jr., and Philip P. Frickey]), both of which saw legal doctrine as insufficient to explain what lawyers did and how law is made, enforced, and lived. Both approaches sought to add people and processes to the study of law and its operations. The Law and Society field added empirical study of dispute processes by sociologists, anthropologists, psychologists, political scientists, and economists to the work of legal scholars, broadening the disciplinary reach of dispute processing studies during a period of both domestic and international conflict and ferment.

The 1960s and 1970s saw a tremendous explosion of legal rights, with many more laws added to the books than could easily be enforced in courts, no matter how actively managed. Those decades were further characterized by political movements that encouraged people with legal problems or issues to participate directly in the system, diminishing the involvement of professionals.

At the same time, two different schools of thought arose questioning the adequacy of lawsuits and traditional adversarialism to solve all social and legal problems. One group was concerned about finding qualitatively better solutions to conflicts and increasing parties' participation, while the other group was more concerned about efficiency and the costs in money and time of so much litigation. These two movements coalesced at a famous conference held in 1976 — "Causes of Popular Dissatisfaction with the Administration of Justice" — and a speech delivered there by Professor Frank Sander officially launched the field of ADR. Concurrently, some of us (including the authors of this book) asked lawyers to learn to "problem solve" rather than to "beat or best the other side" in legal negotiations (Menkel-Meadow, 1984).

The study of negotiation was institutionalized as several law schools began to teach and study negotiation processes related to a variety of settings, producing a founding generation of negotiation scholars, many of whose works are cited and explored in the pages that follow. The concept of third party neutrals was added to facilitate negotiation, and two of us were early mediators when mediation found its place in the law school curriculum. The adaptation of the mediation process to legal disputes and conflicts is also chronicled in this book, with excerpts from those who founded and elaborated that field as well.

The study, practice, and teaching of first negotiation and then mediation were part of another important movement in legal education: clinical legal education, which seeks to teach law students how to behave as well as to think like lawyers. While litigation was the focus of most early clinical programs, frustration with enforcement of winning lawsuits or with the inefficacy of lawsuits to effect both individual and social change led some early clinicians to look for other methods of legal and social problem solving, all while teaching law students to understand

that there are many ways to serve one's clients and solve legal problems. The clinical movement, like the study of ADR, is an "experiential" field, and we also owe intellectual debts to those, like Donald Schön and Chris Arygris, who developed, in professional education, the concepts and practices of "theories-in-use." This book elaborates theories of dispute resolution, in various forms, and asks students to put those theories into use immediately, while learning about them.

We have all been supported greatly by the institutions at which we teach, including Georgetown University Law Center (and before that UCLA); Benjamin N. Cardozo School of Law/Yeshiva University; Marquette University Law School; and the University of Nevada, Las Vegas, Boyd Law School (and before that the University of Missouri-Columbia School of Law). We thank our respective deans, colleagues, and disbursers of research funds for their ample support in producing this book, and, more importantly, for encouraging our teaching, scholarship, and practice in this field. The William and Flora Hewlett Foundation has done much to support the field and indirectly supported much of the work of this book (both the publications in it and the work described therein).

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Most importantly, we want to publicly thank one another. We have been calling this "the girl" book, to mark the fact that still so few law casebooks are written by women, never mind totally written by women. (OK, so most of the authors in this edited volume are men. . . .) We hope this book will appeal to all genders, but still, we are proud that we have not only worked and played well together but that we also created life-time friendships and wonderful working relationships. We may have had some disputes (did we?), but we are proud to say that we have lived the words on these pages as we negotiated, mediated, and built consensus to bring you this book. We know this relationship will continue into many more editions (and the separate books on negotiation, mediation, and arbitration to be derived from this book).

Finally, we also want to thank our many students who worked with this book in draft and through its various stages of development. It is for you that this is written: May you all go forth and make the world a better place, using appropriate dispute processes to make more peace and justice in the world and to solve as many human problems as you possibly can.

Carrie J. Menkel-Meadow
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DISPUTE RESOLUTION

PART I INTRODUCTION

Chapter 1

Introducing the Fields of Conflict and Dispute Resolution

The skillful management of conflicts, [is] among the highest of human skills.
— Stuart Hampshire, *Justice Is Conflict* 35 (2000)

The core mission of the legal profession is the pursuit of justice, through the resolution of conflict or the orderly and civilized righting of wrongs.
— Howard Gardner, Mihaly Csiksentmihali & William Damon, *Good Work: When Excellence and Ethics Meet* 10 (2001)

Conflicts among human beings are as old as life itself. From the time we began to work and socialize with other people we have had to learn how to resolve conflicts. Using approaches ranging from negotiation to violence we have, in some eras, been more successful than in others in resolving our conflicts effectively and productively. Indeed, our degree of success in dealing with the conflicts inevitable to human interdependence is one mark of our success (or not) in achieving an advanced civilization.

In striving to deal with our differences, we often have focused on trying to establish fair processes to resolve these differences. Stuart Hampshire, the philosopher quoted above, has suggested that while we will never reach agreement about the substantive good in our culturally and politically diverse world, we can come close to achieving a human universal value by committing to "procedural fairness." Thus we have developed law, legal institutions, and other procedural mechanisms to try to regulate our conflicts or potential conflicts with one another. Both substantive law and legal processes are modes of conflict resolution. These processes include judicial, legislative, and executive entities. But it is also important to recognize that law and traditional legal institutions are not the only viable means for resolving human problems.

Because you are in law school, it probably now seems commonplace for you to think of all human problems as having a "legal" solution. Yet many problems, even when strictly legal, never go further than the lawyer's office. Instead, negotiation and drafting are used to resolve many problems, both small and complex, even when the disputes are bitterly contested. Sometimes such disputes are resolved in noncourt settings, such as employee grievance systems, internal ombuds or complaint services, with privately contracted dispute resolution professionals, community action organizations or these days, perhaps with an online customer service process. Even after

a case has been filed with a court, the parties sometimes voluntarily choose some other means of dispute settlement or are assigned to one of the newer forms of dispute resolution you will study in this book. In addition, as both transactions and disputes increasingly transcend national boundaries, processes other than one nation's legal system may be needed to structure relationships and solve problems involving multiple parties of different legal systems. That is, the field of dispute resolution or alternative or "appropriate" dispute resolution (ADR) in law has grown out of recognition that the conventional legal systems of legislative enactments, litigation practices, trials, and court decisions are not always adequate to deal with all kinds of human problems.

This book uses the theory of "process pluralism" to explain why different kinds of matters may require different kinds of procedures or ways of dealing with the underlying conflict. If trial-by-court is an evolved form as compared to the trial-by-ordeal or trial-by-combat of medieval days, then our newer forms of dispute resolution may be thought of as an evolutionary improvement over trial-by-court. Recent empirical research has documented that, for many people, being treated fairly, by being heard and acknowledged, may be as important as achieving a good result or "winning" a dispute, known as the measure of "procedural justice," as distinguished from substantive justice.

Although not all disputes are legal, and not all legal disputes have to be "tried" in order to be resolved, lawyers play a key role in helping to resolve a broad array of conflicts in our society. To be effective in this role, you will need to expand your knowledge base and behavioral repertoires. That's why this book is called "beyond the adversarial model." This book presents a particular point of view that human relationships and well-being are improved by a greater number of choices about how to resolve human problems and that some choices are better than others in particular cases. Usually (though not always) the maximum participation of parties in the decisions that affect their lives should be an essential part of any choice about how decisions should be made. While the adversary process has its place, modern life, with multiple parties and multiple issues present in almost every human endeavor, may not fit so easily in the casebook headings where often only one name appears on either side of the "v." Your job as a well-educated lawyer and citizen is to know about and assist others in making choices about what process is best for the particular matter at hand. In recent years you have likely witnessed the failure of these processes at the international and national level as the United States has been engaged in a variety of armed conflicts (e.g., Afghanistan, Iraq) and has had more bellicose relations with some nations (North Korea and Iran), even while attempting diplomatic negotiations. The larger culture and changes over time often affect not only how nations and governments conduct themselves, but also how lawyers, clients, and ordinary citizens decide what processes to use.[1] But even war has its "rules" (*jus in bello*)[2]; and many new international organizations (e.g. United Nations; treaty monitoring committees) and processes (e.g., international mediation, fact-finding

1. Carrie Menkel-Meadow, The Historical Contingencies of Conflict Resolution, 1(1) Intl J. of Conflict Resol. 32-55 (2013).

2. E.g., Geneva Conventions for Protections of War Victims (1949).

inquiries) now try to promote a variety of dispute prevention, avoidance, management, and resolution efforts.

To perform well in your job of assisting with process choices, you need to "*think outside of the box*," to be aware of many alternative modes of conflict resolution, and to communicate and consult well with your clients. In each chapter we will offer problems for you to solve (which, ironically, will sometimes appear "*inside the box*" to demarcate the problems from the text). Thus, this book exposes you to more varied forms of human problem solving (including negotiation, mediation, arbitration, and variants of these).

This book is organized to help you move from the simpler forms of conflict and dispute resolution to the more complex. This first chapter introduces some key concepts that describe the frameworks or theories human beings have developed to understand themselves and how they interact with each other, the history of these concepts, and the institutions and practices that have been built around them. The second chapter will introduce the key skills needed to solve problems for clients, including interviewing clients about their needs and goals, and counseling them about available processes and potential outcomes. Subsequent sections of this book then examine particular forms of dispute resolution. The focus initially is on the three foundational processes, other than litigation, that are most frequently used to resolve disputes in the United States and most parts of the world: negotiation, mediation, and arbitration. Later chapters explore the infinite possibilities of dispute resolution in our complex world. The chapter on hybrid processes shows how we can creatively combine aspects of negotiation, mediation, arbitration, and even adjudication to form other processes that may better serve the needs of disputants or society in particular situations. Next you will examine particular processes that are used to deal with multiparty disputes, conflicts arising in the transactional context and developing systems of dispute resolution. Finally, we conclude with a few words about the future and potential of different means of dispute resolution.

As the book presents these various processes, it elaborates the *theories*, *frameworks*, *models*, *concepts*, and *basic premises* of a particular process; examines each process's *internal* or *institutional structures*; describes the *skills* and *practices* involved in each process; and explores the *policies*, *ethics*, and *issues* or *dilemmas* challenging the use of each particular process.

This book focuses on theory of process, with the hope that such a grounding will serve you in counseling clients, making and affecting policy and law, and structuring your own professional (and personal) life. In particular, the book is conceptualized to present "theories-in-use," as Donald Schön of MIT has defined that phrase in The Reflective Practitioner (1983). To practice good dispute resolution and problem solving, we need to have theories to inform our actions and assist the choices we make about what process is appropriate for a particular human problem. At the same time, our theories should be useful, so we should constantly test the assumptions on which we base our actions and correct them if they do not serve us well. If what we are doing cannot be understood or adequately explained, we need to refine our theories and practices.

To explore the theoretical underpinnings of process pluralism, this text looks to law and other disciplines, drawing at times from such fields as economics, game

theory, political science, psychology, sociology, anthropology, philosophy, sociolegal studies, peace studies, communication, and urban planning and public policy studies.

As globalization increases our contacts with others — individuals, groups, organizations, nation-states, and cultures — we can see both the existence of other forms of conflict resolution embedded in other legal systems and cultures and the need for different forms to deal with our many human problems and interactions, in varied regional and worldwide interdependent political, economic, and legal regimes. Perhaps you will develop your own new form of dispute resolution or process for some human, social, or legal problem we have yet to confront.

A. THEORETICAL UNDERPINNINGS OF CONFLICT AND DISPUTE RESOLUTION

Although law school focuses on disputes or cases, the disputes that make it into casebooks represent the tip of the iceberg of all the kinds of conflicts that people have. Lawyers are often called on not only to bring or defend lawsuits, but also to help prevent conflicts from arising or to deal with disputes other than in court. Thus it is useful for lawyers to have a broad understanding of the types of conflicts that may exist. Scholars in a wide variety of the social sciences have attempted to define and develop taxonomies of different kinds of conflicts so as to better understand the different possible treatments or interventions available in conflict settings. At the same time, it is important to realize that not all conflict is bad or ought to be avoided. Carrie Menkel-Meadow explores these multiple aspects of conflict.

❖ *Carrie Menkel-Meadow*, CONFLICT THEORY

in Encyclopedia of Community: From the Village to the Virtual World 323-326 (Karen Christensen & David Levinson eds., 2003)

There are many reasons for conflicts to develop, at both the individual and at the group level. Some conflicts are based on belief systems or principles, some are based on personality differences, and others on conflicts about material goods or personal or group status or reputation. Because there are so many different reasons conflicts develop and because much conflict is dangerous and unproductive, the theory of conflict attempts to understand the different sources of conflict, the dynamics of how conflict develops, escalates or declines and how conflict can be managed, reduced or resolved.

At the same time, it must be recognized that conflict can have social utility as well. Many important changes in human society, many for the betterment of human life, have come from hard-fought conflicts that resulted in the change of human institutions, relationships or ideas. The United States Civil War, for example, was a bloody and painful war in which over a million Americans died, but this war eliminated

slavery in the United States and ushered in a long period of change in race relations. . . . Even small interpersonal conflicts (like between a husband and wife or parent and child) can lead to important changes, not only in relationships between the people in conflict, but in larger social movements, such as the women's rights or feminist movement and the children's rights movement. Conflicts with outsiders often clarify and reinforce commitments and norms of one's own group. And internal conflict within the individual can lead to changed views and intellectual and emotional growth.

Conflict theory tries to explain the types of conflicts that exist and whether they are productive or destructive and then goes on to attempt to explain the ways in which conflict proceeds or is structured . . . and how it can be managed or resolved.

A conflict can be experienced as a simple disagreement, a feeling of discomfort or opposition, and a perception of difference from others, or a competition or incompatibility with others. Conflicts, then, can be perceptual, emotional or behavioral. When a conflict is actually acted on it becomes a dispute with someone or a group of others. In order for a conflict to fully develop into a dispute we have to experience some sense of wrong to ourselves, someone else to "blame" for that wrong and some way to take action against those we think caused our difficulty — what one set of scholars have called, "naming, blaming and claiming."[3] How the conflict turns into a dispute and how it is labeled ("framing") then may affect how it progresses and how it may either escalate and get worse, leading in extreme cases to war, or how it can be handled, managed or resolved.

TYPES OF CONFLICTS

Conflict can exist on many different levels, including the intrapersonal, interpersonal, intragroup, intergroup, and international. Conflicts can exist about different subject matters — ideational or beliefs, values, materiel and resources, emotions, roles and responsibilities. Conflicts vary in terms of the social contexts in which they are located (two old friends, family members, neighbors, strangers, consumers and merchants, distant nation-states) and in the time span in which they are located ("one-off" or "one-shot" encounters and conflicts, long-standing or "embedded" conflicts, temporary or "repeated" conflicts in on-going relationships like families and employment settings). Conflicts vary, even within the same social environment or subject matter by how the disputants treat the conflict, in the strategies, tactics and behaviors they employ (avoidance, self-help, peaceful negotiation, argument, escalation, physical violence, peace seeking, mediation or settlement) and how the strategies chosen interact with each other. And conflicts are often classified by how they affect the parties in the conflict (the consequences of the conflict) and those outside of the conflict (the "externalities" of the conflict, like children in a marital argument or divorce and neighbors of warring states who accept refugees). . . .

3. William L.F. Felstiner, Richard Abel & Austin Sarat, The Emergence and Transformation of Disputes: Naming, Blaming and Claiming . . . , 15 L. & Socy. Rev. 631-654 (1980-1981).