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Context and Pretext in Conflict Resolution

Kevin Avruch

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I. INTRODUCTION

In her wide ranging and provocative essay, Carrie Menkel-Meadow manages to portray both the self-assurance of the mature scholar and experienced practitioner, as well as (serially, if not quite simultaneously) the anxiety and doubt of the self-critical agnostic thinker.[1] These comprise the two "texts" of my title and, in my reading of it, the underlying dynamic of her essay: *Context matters* in conflict analysis and dispute resolution practice, says the assured scholar and experienced practitioner. And if it does, then two problems arise. The first problem is conceptual: As a social scientist, what can I say that is empirically valid or generalizable across cases and contexts? The second, not unrelated, problem is at root political: As a trainer-educator-practitioner coming from U.S. domestic contexts and now working internationally in other societies and cultures, what is my ostensible or professed purpose, *what is my pretext*, my excuse, as an American, Western, liberal, white, feminist, middle-class, professor of law . . . in telling differently contextualized Others what to do with their conflicts and disputes?

The first problem—what happens to "general theory" when context is privileged—is hardly limited to the field of conflict analysis or dispute resolution. It is the dilemma of many *début de millénaire* social scientists in this post-positivist moment. Over the last two decades or so, the steady disparagement of what postmodernists called the universalizing and totalizing thrusts of "the Enlightenment project" has advantaged, for now at least, the sorters over the lumpers, and the foxes over the hedgehogs. The nomothetic promise of nineteenth century grand theory—a universal field theory of human behavior—dating back explicitly to Comte's first conception of sociology as "social physics," seems to many unfulfilled and, except for evolutionary psychologists and unreconstructed economists, unfulfillable. Clifford Geertz, poking fun at his Harvard mentor, the great sociological systems builder and synthesizer Talcott Parsons, characterized it as the moment when it is finally realized: "The Sociology is not About to Begin."[2]

In her skepticism about general theory, Menkel-Meadow in effect addresses the founding generation of conflict resolution scholars, researchers, and practitioners—including Kurt Lewin and Morton Deutsch, Anatol Rapoport and John Bur-

* Kevin Avruch is Professor of Conflict Resolution and Anthropology in the Institute for Conflict Analysis and Resolution, and a senior fellow in the Peace Operations Policy Program, School of Public Policy, at George Mason University. My thanks to Rich Rubenstein and Dennis Sandole for their comments on this essay, to Professor Jean Sternlight for inviting my participation in this symposium, and to Carrie Menkel-Meadow for convening (and feeding) the Culture and Conflict Resolution Group in Washington, D.C.

1. *See* Carrie Menkel-Meadow, *Correspondences and Contradictions in International and Domestic Conflict Resolution: Lessons from General Theory and Varied Contexts*, 2003 J. DISP. RESOL. 319.

2. CLIFFORD GEERTZ, LOCAL KNOWLEDGE 4 (1983).

ton; those game theorists around Kenneth Boulding at the University of Michigan who founded the *Journal of Conflict Resolution* in 1957; and those lawyers and economists at Harvard who distilled the essence of rational choice and bargaining theory to derive a universal model of interest-based negotiation—to express her doubts about the science of conflict analysis and dispute resolution that is (perennially) "About to Begin."[3] But who can address such an august group in this way without some anxiety and doubt? And if one gives up on general theory in favor of context, what precisely has one gained—and what are some potential costs?

In this essay, I want to reflect on some of the problems raised by context and pretext from a different angle. I want to first consider some aspects of the varied contexts in which *conflict resolution* and *alternative dispute resolution* (ADR) developed in the United States, particularly in the academy. Historically, there have been some differences between the two, partly evident in the different meanings of the notion of "dispute" adopted by theorists and practitioners.[4] I then want to examine some of the underlying pretexts for doing this work, and some possible consequences—especially as we more frequently engage in the "contested export," as Menkel-Meadow has put it,[5]—of American-style dispute resolution practice into the international arena or into other "domestic" (social and cultural) domains.

II. A CONTEXT AND PRETEXT OF CONFLICT RESOLUTION IN THE U.S.

When I arrived at George Mason University in 1980, as an assistant professor hired to teach undergraduate anthropology, there was already in place a faculty group, from all the various social science departments (save economics), meeting to consider the possibility of starting the first postgraduate program in the world devoted to conflict resolution. The group was chaired by the cultural anthropologist Thomas Rhys Williams, then graduate dean, and had the crucial support of the canny chair of the Department of Sociology and Anthropology, Joseph Scimecca. The patronage of the graduate dean and the support of a key social science chair (the new program "incubated" and was nurtured inside Scimecca's department in

3. KENNETH M. BOULDING, CONFLICT AND DEFENSE: A GENERAL THEORY (1962); KENNETH M. BOULDING, PERSPECTIVES ON THE ECONOMICS OF PEACE (1961); JOHN W. BURTON, CONFLICT & COMMUNICATION: THE USE OF CONTROLLED COMMUNICATION IN INTERNATIONAL RELATIONS (1969); ROGER FISHER & WILLIAM URY, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN (1981); KURT LEWIN, RESOLVING SOCIAL CONFLICTS (Gertrude Weiss Lewin ed., 1948); HOWARD RAIFFA, THE ART AND SCIENCE OF NEGOTIATION (1982); ANATOL RAPOPORT & ALBERT M. CHAMMAH, PRISONER'S DILEMMA: A STUDY IN CONFLICT AND COOPERATION (1965); THOMAS C. SCHELLING, THE STRATEGY OF CONFLICT (rev. 1980); Morton Deutsch, *A Theory of Cooperation and Conflict*, 2 HUMAN RELATIONS 129 (1949).

4. I am stressing the differences, but in the field generally there seems to be convergence, as evidenced by the merger in September 2001, of the Academy of Family Mediators, the Conflict Resolution Education Network, and the Society for Professionals in Dispute Resolution, into the umbrella Association for Conflict Resolution. The Association's new journal, *Conflict Resolution Quarterly*, replaced *Mediation Quarterly* and seeks to represent this convergence. Equally, the older journal of Harvard's Program on Negotiation, the NEGOTIATION JOURNAL ON THE PROCESS OF DISPUTE SETTLEMENT (founded in 1984), never limited itself to topics in negotiation, but ranged broadly in conflict resolution theory and practice from its beginnings. Withal, some of the individuals whom I later refer to as "restricted" conflict resolution theorists/practitioners, would insist that the differences I outline are valid and ought to be sustained.

5. Menkel-Meadow, *supra* note 1, at 323.

its formative years)—especially in a new, tradition-free and institutionally pliant university, meant that what was then the Center for Conflict Resolution—today the free-standing Institute for Conflict Analysis and Resolution (ICAR)—would grow very quickly. By 1982, a curriculum was in place (sort of: curriculum in conflict resolution has been a moveable feast from the beginning), the first cohort of master's students arrived, and some faculty began to orient their research and writing specifically toward the emergent discipline.

But if George Mason and some of its faculty provided the institutional home for the program, its motive force came from the late social psychiatrist Bryant Wedge. In addition to his clinical practice, Wedge consulted with U.S. government agencies, like the State Department and the Arms Control and Disarmament Agency, on psychological aspects of crisis management and international negotiation. He was also an activist domestically, including co-chairing (with the late James Laue) from 1975 the campaign to get Congress to create a United States Peace Academy. In fact, Wedge first came to George Mason with the idea that if a master's program and matriculating students already existed, then perhaps the Peace Academy would locate itself at the University. In the event, no bricks-and-mortar academy devoted to peace was created—though as a result of the campaign the U.S. Institute of Peace was begun in 1984.

What was interesting is that although the citizen campaign Wedge co-led was directed toward the establishment of a *Peace* Academy, and the new postgraduate degree program was housed in a Center for Conflict *Resolution*, Wedge was insistent that the degree proclaim its professional *bona fides* by being an M.S. (master's of science) rather than M.A. (master's of arts). Moreover, not only was the word "peace" conspicuously absent from the Center's name or its course titles, but the first degree was a Master's of Conflict Management (MSCM), the key course in the first curriculum (designed by Dennis Sandole, the Center's first official faculty hire) was a "Pro-seminar in Conflict and Conflict Management," and the first publication (arising from that seminar), that in some way represented the Center's faculty's collective sensibility favored the notion of conflict *management* over *resolution*.[6]

None of this was accidental. In fact, we are once again in the realm of context and pretext. Wedge and his co-director Henry Barringer, a retired foreign service officer, were consummate American pragmatists, and wanted the new discipline, its degree and its graduates, to be accepted and taken seriously by the hardheaded neo-realists of the Washington policy establishment—the state departments and arms control and disarmament agencies of that world. In many ways, the word "peace" might compromise this. First, there was the lingering Cold War, indeed McCarthyite, suspicion that anything to do with "peace" was a communist front. Less conspiratorially, but more recently, the division of America over the Vietnamese War and the identification of the "Peace Movement" with anti-Washington political dissent, made it a fraught term, especially as the Carter era gave way to the Reagan one. Wedge quite self-consciously wanted to differentiate this new field of conflicts studies, fronted by a conflict management degree, from the several extant "Peace Studies" programs that existed in colleges

6. CONFLICT MANAGEMENT AND PROBLEM SOLVING (Dennis J.D. Sandole & Ingrid Sandole-Staroste eds., 1987).

and universities, many of them in religious or otherwise church connected schools. Why "management" over "resolution" in the first degree's name? I suspect here Wedge's medical training and background came into play. He wanted the sort of professional and clinical, indeed *technical*, competence that medical specialists could claim, to be accorded his MSCM graduates as well. He preferred clinicians to theorists, and argued for a curricular concentration in technique and process-expertise over academic model building. Finally—adverting to "context"—I believe that in an increasingly medicalized and pharmacological psychiatry, the notion of "management" was undoubtedly much closer to his own clinical experience and practice than was the notion of "cure" or "resolution."[7]

Although I have phrased this tension between peace and resolution on the one hand and management on the other, in terms of ICAR and George Mason's genealogy, Wedge's decision was actually very much in line with the same technical, positivist, and pragmatic impulse that gave rise to the *Journal of Conflict Resolution* in 1957. And just as the field of conflict resolution—eventually "management" disappeared from the degree name, definitively done in by John Burton's arrival in 1985[8]—attracted critics in the United States from Peace Studies who decried it as overly technocratic, "cold," without values and spiritualness,[9] so too did the *Journal of Conflict Resolution* group attract the fierce critique of some Europeans (especially from Scandinavia), led by Johan Galtung and exemplified in the journal—he began partly as a counterweight to the Americans.[10] The basic critique, and one that still resonates in conflict resolution circles, is that the field's preoccupation with conflict's management, and with technique and process, dominates the need to work for deeper structural change and social justice.[11]

When John W. Burton arrived at ICAR in 1985, he brought with him a conception of conflict resolution that was much closer to the European one, though Burton always eschewed what he saw as the strains of hyper-spiritualized and moralizing utopianism in some Peace Studies approaches; he regarded himself as tough a pragmatist as the so-called realists were, and his own theories much closer to political realities. His kinship with the European Peace Studies community was that, like many of them, he saw conflict as originating from deeply rooted repres-

7. It should be noted that even today, in the John Hopkins School of Advanced International Studies (SAIS)—an institution infinitely closer to the pulse of policy making (it supplies many of the policy makers) in Washington than ICAR or the Kroc Institute for International Peace Studies at the University of Notre Dame are—the cognate program is called Conflict Management. For a view from SAIS on the "management/resolution" distinction—he calls it one between the "negotiators" and "dialoguists"—see I. William Zartman, *Conflict Management: The Long and the Short of It*, SAIS REV., Winter-Spring 2000, at 227.

8. JOHN W. BURTON, RESOLVING DEEP-ROOTED CONFLICT (1987).

9. *See* Maire A. Dugan, *Peace Studies at the Graduate Level*, 504 ANNALS AM. ACAD. POL. SOC. SCI. 72 (1989); Neil H. Katz, *Conflict Resolution and Peace Studies*, 504 ANNALS AM. ACAD. POL. SOC. SCI. 14 (1989); George A. Lopez, *Trends in College Curricula and Programs*, 504 ANNALS AM. ACAD. POL. SOC. SCI. 61 (1989). More on ICAR's early years can be found in Peter W. Black & Kevin Avruch, *Anthropologists in Conflictland: The Role of Cultural Anthropology in an Institute for Conflict Analysis and Resolution*, 16 POL. & LEGAL ANTHROPOLOGY REV. 29 (1993).

10. *The Journal of Peace Research* was founded in 1964. For an example of an early European critique along these lines, see Herman Schmid, *Peace Research and Politics*, 5 J. PEACE RES. 217 (1968).

11. For a recent example, see Pauline H. Baker, *Conflict Resolution Versus Democratic Governance: Divergent Paths to Peace?*, *in* MANAGING GLOBAL CHAOS: SOURCES OF AND RESPONSES TO INTERNATIONAL CONFLICT 563 (Chester A. Crocker et al. eds., 1996).

sive social institutions, and thus "conflict resolution" required the transformation of these institutions. He eventually coined the neologism conflict *pro*vention to refer to techniques for addressing the root causes of social conflict, rather than their symptomolgies.[12] But he was also amenable to one crucial aspect of Wedge's vision of the field: the idea that one could *engineer* social change through elaborated and rigorous techniques, and that students could be trained (*qua* technicians) to utilize them. Most of these techniques conduced to the "analytical problem-solving workshop," and Burton wrote a handbook on the proper way to run one.[13] Over the years, others who worked in this tradition (though all worked in effect with variations on Burton's theme) include Edward Azar, Tony de Reuck, Leonard Doob, A.J.R. Groom, Herbert Kelman, and Christopher Mitchell.[14]

Burton was also concerned with a very specific class of conflicts, those that Edward Azar had called "protracted social conflicts," and Burton "deep-rooted ones."[15] According to his theory, these were conflicts created when social institutions repressed individuals' basic human needs, needs such as security or identity. (Today, some consider "deep-rooted" conflict to be virtually synonymous with "identity-group" conflict.) Crucially, such needs were literally *nonnegotiable*, and therefore any techniques for their resolution based upon simple bargaining or even facilitated negotiation (that is, simple mediation), were bound to fail. Here Burton insisted on a basic division in the field coming loosely to be called "conflict resolution." Elsewhere, I called this the distinction between a broad conception of the field, and a narrow or "restricted" one.[16] Broadly (and colloquially) conflict resolution refers to any strategy that brings a public dispute to a nonviolent conclusion. More narrowly, it refers to a subset of specialized techniques that address the sources or root causes of needs-based social conflict. This would be Burton's "provention" or Galtung's "positive peace." One can see now why Burton objected to the term "conflict management." For him, when misapplied to deep-

12. The similarity to Galtung's distinction between ("surface") direct violence and (deeply rooted) "structural violence," correlated to the distinction between "negative peace" and "positive peace," is evident. J. Galtung, *Violence, Peace, and Peace Research*, 6 J. PEACE RESEARCH 167 (1969). Burton elaborates the idea of "provention" in his book, CONFLICT: RESOLUTION AND PROVENTION (1990). Here he also presents his vision of "conflict resolution as a political system," revealing his faith in the totalizing and socially transformative potential of his theory and method. *Id.*

13. BURTON, *supra* note 8. Two of Burton's younger colleagues subsequently produced a less orthodox (but pedagogically much more useful) version. CHRISTOPHER MITCHELL & MICHAEL BANKS, HANDBOOK OF CONFLICT RESOLUTION: THE ANALYTICAL PROBLEM-SOLVING APPROACH (1996). The analytical workshop technique is described more broadly and contextualized as a genre of third party intervention in RONALD J. FISHER, INTERACTIVE CONFLICT RESOLUTION (1997).

14. The first analytical problem solving workshop—then called a "controlled communication workshop"—was held in London in December 1965, to work on then rising tensions among Indonesia, Malaysia, and Singapore. One of the expert panelists at that time was Roger Fisher. In October 1966, Burton convened another panel to consider Cyprus. This time, Herbert Kelman was a panelist. Both Kelman and Fisher ended up at Harvard, but each pursued a very different conception of conflict resolution practice (see *infra* note 19). *See* RONALD J. FISHER, INTERACTIVE CONFLICT RESOLUTION 21-25 (1997).

15. EDWARD E. AZAR, THE MANAGEMENT OF PROTRACTED SOCIAL CONFLICT (1990); Edward E. Azar, *Protracted International Conflict: Ten Propositions*, *in* 12 INT'L INTERACTIONS 59 (1985). Burton's first major articulation of basic human needs theory and its relation to deep-rooted conflict is in JOHN W. BURTON, DEVIANCE, TERRORISM, & WAR: THE PROCESS OF SOLVING UNSOLVED SOCIAL AND POLITICAL PROBLEMS (1979).

16. KEVIN AVRUCH, CULTURE AND CONFLICT RESOLUTION 25-27 (1998).

rooted, needs-based conflict, management implied the suppression of symptoms but not the addressing of causes. Alternatively, management was appropriately called for in the sorts of disputes (say, over simple wages) that were amenable to distributive bargaining or negotiation. Perhaps the great majority of disputes were of this sort, Burton freely admitted. But the ones that interested him, and that were the source of mass violence and human suffering, were not amenable to mere bargaining, negotiation, or simple mediation. They certainly were not amenable to coerced or authoritative interventions—everything from war to arbitration or adjudication. At best, these processes would result in temporary "truces"—conflict management, mitigation, regulation, or settlement.[17] Conflict *resolution* was something very different, a far more radical undertaking.[18]

One of the effects of this was to separate some forms and understandings of conflict resolution, what I called "restricted" conflict resolution, from the rest of the developing field—particularly from ADR theory and practice, as they were developing domestically, both "in the field"—in community and neighborhood action groups, mediation centers, and programs affiliated with some lower courts, as well as in the academy through a growing number of schools of law. Also separated out were developing conceptions of negotiation theory and practice, as they were increasingly taught in law, business, management, and even some schools of public policy.[19]

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17. *See* JOHN W. BURTON & FRANK DUKES, CONFLICT: PRACTICES IN MANAGEMENT, SETTLEMENT, AND RESOLUTION (1990) (setting out distinctions among the different sorts of practice).

18. Indeed, this is why Burton insisted that conflict resolution was a total "political system." Of course, yesterday's radical ideas can become today's clichés—or at least lose their "punch." By the late 1990s, some scholar-practitioners argued that "mere" resolution didn't go far enough, and that one must aim for conflict *transformation*. In a sense, "resolution" was becoming devalued coinage—it began to resemble "management." John Paul Lederach writes, "Unlike resolution and management, the idea of transformation does not suggest we simply eliminate or control conflict, but rather points descriptively toward its inherent dialectic nature." JOHN PAUL LEDERACH, PREPARING FOR PEACE: CONFLICT TRANSFORMATION ACROSS CULTURES 17 (1995). The locus for transformation work is in the dynamics of the social relationships among individuals in conflict. *Id.*

19. With respect to negotiation theory and practice, Burton (and others) believed that interest-based principled negotiation, as identified with Harvard's Program on Negotiation ("PON"), was appropriate for addressing many, that is, non-deep-rooted, conflicts, especially interpersonal ones or those in commercial settings. But deep-rooted conflicts (especially around identity issues) were not susceptible to interest-based bargaining, since while interests may be "negotiable," basic human needs were not. Thus, both Roger Fisher and Herbert Kelman were early participants in Burton's analytical problem-solving workshops, and both ended up at Harvard. But their respective practices were very different, the former at the center of Harvard's PON and negotiation work, the latter working more closely in the Burtonian tradition. (*See also* Zartman, *supra* note 7, and Zartman's distinction between what he calls the "negotiators" and the "dialoguists.") The *locus classicus* for principled negotiation is GETTING TO YES, *supra* note 3, though one should now consult the second edition: ROGER FISHER & WILLIAM URY, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN (Bruce Patton ed., 2d ed., Penguin Books 1991) (1981). Kelman discusses his workshop theory and practice, especially with Israelis and Palestinians, in many places. *See* Herbert C. Kelman, *The Interactive Problem-Solving Approach*, *in* MANAGING GLOBAL CHAOS 501 (Chester Crocker et al. eds., 1996). I must add that Roger Fisher emphatically does not share Burton's views on the range of applicability of principled interest-based negotiation, as evidenced by his wide-ranging third party practice, domestically and internationally, over the years.

III. CONFLICTS AND DISPUTES

Nowhere is this clearer than in the very definition and conception of the word "dispute." Burton and Dukes begin their volume by decrying the fact that "dispute" and "conflict" are usually used interchangeably, as are "management," "settlement," and "resolution." They want to restrict the meaning of *dispute* to those disagreements around clashing goals or perceptions rooted in divergent interests that are susceptible to "ordinary" processes of negotiation, mediation, arbitration, or adjudication: disagreements that can be *managed* and result in *settlement*. The notion of *conflict* they want to reserve for deep-rooted social discord based on repressed and non-negotiable basic human needs.[20]

Within our field broadly speaking, this is not the way the terms are typically distinguished—if they are at all. Sometimes the terms conflict and dispute, as well as conflict resolution, dispute resolution, conflict management, or dispute settlement, are, consciously or not, used interchangeably.[21] Sometimes a distinction between conflict and dispute is made, but it is not the same one Burton and Dukes support. Here, the notion of "dispute" comes to us from a tradition in the anthropology of law, that is, from ethnographers who studied social conflicts in small-scale social settings. This sense was also adopted (and modified) by sociologists, political scientists, and legal scholars who joined anthropologists to form the influential Law and Society movement in the mid-1960s.[22] For them, the key notion became "dispute processing."

Briefly, the anthropology of law came to "dispute processing" by way of the more familiar method—in legal education at least—of "case analysis." Early ethnographies concerned with law, based mainly on work with Native Americans or Africans, took the "case" as their basic unit of analysis.[23] A succeeding generation critiqued this method for its overly static and socially isolating tendencies. They argued for a more "processual" (and less structural) approach, as well as one that paid attention to the broader social "ecology" of the conflict—its embeddedness in a wider matrix of social (and particularly power) relationships. In an influential article, P.H. Gulliver differentiated dispute from conflict as a "disagreement between persons" that is brought by one or both (some or all) of them "to the public arena."[24] Laura Nader, adopting a processual approach, underlined this meaning, a dispute doesn't exist until it is made public. Therefore a dispute is one stage in a multi-staged conflict, there is a pre-conflict or grievance stage wherein one party sees a cause for complaint in the actions of another party; a conflict

20. *See* JOHN BURTON & FRANK DUKES, CONFLICT: PRACTICES IN MANAGEMENT, SETTLEMENT, AND RESOLUTION (1990).

21. *See* STEVEN VAGO, LAW AND SOCIETY 247-49 (7th ed. 2003).

22. Many of the classic articles that appeared in the L. & SOC'Y REV., the journal of the Law and Society Association, can be found in THE LAW & SOCIETY READER (Richard L. Abel ed., 1995).

23. In North America, anthropologist E. Adamson Hoebel collaborated with law professor K.N. Llewellyn in the retrospective analysis of Cheyenne law through "trouble cases." K.N. LEWELLYN & E. ADAMSON HOEBEL, THE CHEYENNE WAY: CONFLICT AND CASE LAW IN PRIMITIVE JURISPRUDENCE (1941). For a similar analysis of African law, see MAX GLUCKMAN, THE JUDICIAL PROCESS AMONG THE BAROTSE OF NORTHERN RHODESIA (2d ed. 1967). *See also* ISAAC SCHAPERA, A HANDBOOK OF TSWANA LAW AND CUSTOM (2d ed. 1959).

24. P.H. Gulliver, *Introduction to Case Studies of Law in Nonwestern Societies*, *in* LAW IN CULTURE AND SOCIETY 14 (Laura Nader ed., 1969).

stage wherein the aggrieved party brings the grievance to the attention of the other party—thus far the conflict is dyadic. If no remedy is attained, then one or the other party may make the disagreement public, and it becomes a dispute. The analysis of these stages, as well as the analysis of remedy-seeking or settlement moves that follow this (by the parties or by others representing the parties or the wider community), are collectively understood as "dispute processing."[25] Because the notion of "remedy" was broadened as part of the increased concern with the social ecology of the dispute, scholars interested in dispute processing moved away from formal court or otherwise adjudicative settings (and eventually away from an overriding concern with elucidating the formal if implicit rules in exotic judicial processes) toward consideration of other forms and fora, including informal or alternative and non-authoritative third party forms such as conciliation, facilitation, mediation, etc.[26]

The difference between Burtonian "conflict resolution" and the "dispute processing" approaches to defining dispute is of more than terminological significance. Burton presumed that disputes (in his definition) are amenable to settlement, and conflicts, properly analyzed, could be resolved, indeed, *prevented.* (Following him came others who worked in the same vein toward conflict *transformation.*) Galtung too argued for the possibility of "positive peace."[27] By contrast, many scholars working in the dispute processing tradition argued that management or regulation—in effect the removal of the conflict/dispute from the public arena—rather than its resolution, is all that can be expected, and that the deeper, structural causes of the conflict will remain unaddressed.[28] This essential skepticism (if not pessimism) toward the claims of conflict resolution (theorists and practitioners) has underlain much of the critique, on both conceptual and political grounds, directed by some social scientists against conflict resolution, including many forms of ADR.

25. These principles underlay her work with graduate students on a series of comparative projects that were part of the Berkeley Village Law Project from 1965-1975. Some of these were reported in THE DISPUTING PROCESS: LAW IN TEN SOCIETIES (Laura Nader & Harry F. Todd, Jr. eds., 1978).

26. Scholarship moves on, of course, and eventually the focus on "dispute" was critiqued for its narrowness and abandoned for even more expansive concerns with larger-scale historical process (such as colonialism), or with political economy. *See e.g.,* HISTORY AND POWER IN THE STUDY OF LAW: NEW DIRECTIONS IN LEGAL ANTHROPOLOGY (June Starr & Jane F. Collier eds., 1989). Nowadays a Foucauldian concern with language and discourse, as well as feminist theorizing, dominates the field. *See* JOHN M. CONLEY & WILLIAM M. O'BARR, JUST WORDS: LAW, LANGUAGE, AND POWER (1998). Human rights and aspects of transnationalism and globalization also feature strongly in today's legal anthropology. *See e.g.,* PRACTICING ETHNOGRAPHY IN LAW: NEW DIALOGUES, ENDURING METHODS (June Starr & Mark Goodale eds., 2002).

27. Galtung, *supra* note 12.

28. *See* Richard Abel, *A Comparative Theory of Dispute Institutions in Society*, 8 LAW & SOC'Y REV. 217 (1973); William Felstiner, *Influences of Social Organization on Dispute Processing*, 9 LAW & SOC'Y REV. 63 (1974). In seeing deep conflict as beyond the reach of mere dispute processing, many of these works reflect the dramaturgical analysis of structural conflict—and its ritualized "resolution"—in an African tribal society set out by VICTOR WITTER TURNER, SCHISM AND CONTINUITY IN AN AFRICAN SOCIETY (1957).

IV. CRITIQUES AND RESPONSE

Burton or Galtung might consider these critiques, when aimed at ADR, unjust, since they never believed it had much to do with resolution in any case. But the critics have gone after ADR (first in U.S. domestic settings), and later, after ADR and conflict resolution (as an international endeavor), on broader political terms. Early on, some have pointed to the class implications of court-affiliated ADR, even to the development of a two-tiered system of justice, one for the poor and one for the well to do.[29] More recently, issues of gender, especially with regard to the widespread use of mediation in divorce cases, have been considered.[30] Perhaps no one has been more outspoken over the years than Laura Nader, who once referred to the whole "harmony ideology" underlying the ADR movement as nothing more than a "cultural soma that tranquilizes potential plaintiffs" at the potential forfeit of their legal rights.[31] Peter Black and I summarized the objections of these critics in the following terms: "All of them argue in effect that ADR functions primarily as an instrument of social control, not social change. Concentrating on individual remedies . . . it neglects macrostructural questions of power and inequality."[32]

Advocates of ADR have certainly responded to these critiques. Some have sought "remedies" in improved training in process (from problem-solving to active listening and appreciative inquiry), or enhanced attention to ethics, especially around the issue of mediator neutrality or impartiality.[33] Another response has been to devise mediation strategies specifically around the empowerment of less powerful parties, around the notion of "transformative mediation."[34] But even here, where power is addressed directly, the question of "transfer effect"—how does one bring empowerment out of the mediation room into the "real" world—arises. On the website for its dispute resolution services run by the state courts of Virginia, the pages under "Consumer Guide" note that some kinds of cases are not

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29. CHRISTINE B. HARRINGTON, SHADOW JUSTICE: THE IDEOLOGY AND INSTITUTIONALIZATION OF ALTERNATIVES TO COURT (1985); NO ACCESS TO LAW: ALTERNATIVES TO THE AMERICAN JUDICIAL SYSTEM (Laura Nader ed., 1980); Marc Galanter, *Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC'Y REV. 95 (1974); Christine B. Harrington & Sally Engle Merry, *Ideological Production: The Making of Community Mediation*, 22 L. & SOC'Y REV. 709 (1988).

30. CONLEY & O'BARR, *supra* note 26, at 39-60; MARTHA FINEMAN, THE ILLUSION OF EQUALITY: THE RHETORIC AND REALITY OF DIVORCE REFORM (1991); Penelope Bryan, *Killing Us Softly: Divorce Mediation and The Politics of Power*, 40 BUFF. L. REV. 441 (1992); Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545 (1991).

31. Laura Nader, *Harmony Models and the Construction of Law*, *in* CONFLICT RESOLUTION: CROSS-CULTURAL PERSPECTIVES 41, 52 (Kevin Avruch et al. eds., Praeger 1998) (1991).

32. Kevin Avruch & Peter W. Black, *ADR, Palau, and the Contribution of Anthropology*, *in* ANTHROPOLOGICAL CONTRIBUTIONS TO CONFLICT RESOLUTION 47, 52 (Alvin W. Wolfe & Honggang Yang eds., 1996).

33. On the nature of these skills in ADR see the chapters on "Mediation and Arbitration" and "Facilitation and Consultation" in CONFLICT: FROM ANALYSIS TO INTERVENTION (Sandra Cheldelin et al. eds., 2003). On ethics and third parties generally, see James Laue & Gerald Cormick, *The Ethics of Intervention in Community Disputes*, *in* THE ETHICS OF SOCIAL INTERVENTION 205 (Gordon Bermant et al. eds., 1978). On neutrality, see Sara Cobb & Janet Rifkin, *Practice and Paradox: Deconstructing Neutrality in Mediation*, LAW & SOC. INQUIRY, Winter 1991, at 35.

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

appropriate for mediation, including those wherein a party wishes to establish a legal precedent, those family cases involving ongoing physical or psychological abuse, and those "where there is an extreme inequality of knowledge or sophistication of the parties."[35] Presuming the Virginia judges are up on their Foucault and know that "knowledge" equates to "power"—or more impressively, have read their Bourdieu and know that sophistication and "taste" comprise fungible social capital!—this seems a fair and ethical warning.[36] Meanwhile, Menkel-Meadow herself has responded in a different vein, to argue that Nader and others have perhaps overestimated the "justice" to be dispensed in many courtrooms, and underestimated the costs (of all sorts) of the adversarial process to those caught up in it.[37]

All of these responses have their merits—I am especially sympathetic to Menkel-Meadow's, and I heartily support full disclosure for ADR's consumers. Yet, the problem of power asymmetries in ADR and conflict resolution practice—part of its inherent social *context*—and the problem of the uses to which ADR and conflict resolution can be put given this context—a part of the multiple political *pretexts* of its different users and beneficiaries—remains in my view an obdurate one, and one that is centrally implicated in any discussion of the relationship between ADR, conflict resolution, and justice. And as complex and contested as these issues are when at least some amount of "social context" is held constant, in the domestic U.S. sphere, they become even more problematic when the technologies of ADR and conflict resolution—and *technologies* is precisely what many in the founding generation of our field had hoped to achieve—are exported to other contexts, to other societies and cultures.

V. CONTEXTS AND PRETEXTS OF CONFLICT RESOLUTION IN OTHER PLACES

The "context" that I want to consider briefly in this final section is *culture*. I say briefly because the points I raise are much too impacted to be treated in any but a suggestive manner here. A lot of empirical research needs to be done on these matters, along with a lot of hard and critical thinking.

Over the years I have written much about the neglect of culture in conflict resolution theory and practice, including some reasons for the neglect and some consequences of it.[38] By the new millennium, culture is no longer so neglected, and nowadays any self-respecting curriculum in ADR or conflict resolution without at least a "module" devoted to culture would be considered deficient. But the great majority of work on culture in our field both in terms of research and theory (from research traditions ranging from experimental to ethnographic), and training for practice, has treated the "culture question"—fittingly for a bunch of techni-

35. *Dispute Resolution through Mediation: A Consumer Guide*, *at* http://www.courts.state.va.us/cons/consumer.htm (last visited Nov. 22, 2003).

36. PIERRE BOURDIEU, DISTINCTION: A SOCIAL CRITIQUE OF THE JUDGMENT OF TASTE (Richard Nice trans., 1984); MICHEL FOUCAULT, POWER/KNOWLEDGE (Colin Gordon ed., Colin Gordon et al. trans. 1980).

37. Carrie Menkel-Meadow, *The Trouble With the Adversary System in a Postmodern, Multicultural World*, 38 WM. & MARY L. REV. 5 (1996).

38. *See* KEVIN AVRUCH, CULTURE & CONFLICT RESOLUTION (1998).

cians and pragmatists—as a technical issue, focused particularly around how culture (now an "independent variable") affects communication between parties or interlocutors. Attention to communication in this way means that we understand culture in order to understand inter-party communicational dynamics, in turn in order to train our conflict specialists to be culturally *competent*, as part of a broader requisite communicational competence. The result has been a growing number of studies on culturally-inflected "negotiating styles," on rules for mediating "across" cultures, on the differences between high and low context cultures, on face-threatening acts, and so on. Here, we worry about culture in order to make our practice more efficient and efficacious.

Culture *does* affect communication, and communication (whether thought of instrumentally or constitutively—say, as discourse or narrative) is at the heart of conflict resolution practice. But culture conceived as "context" is broader than communication, and affects other things as well, including the very meaning of *interest*, *norm*, and *value*—indeed, of the parties' social reality—that so many of our approaches, principled negotiation among them, grounded in *utility*-talk, take for granted, as given. There has been much less work in our field done with this sense of culture.

So much, in this brief discussion for culture, conflict resolution, and context. Now what about culture, conflict resolution, and pretext: what are our professed purposes for doing this work in other places? Ought questions of the instrumental efficiency of our processes be our only, or main concern? Would attention to the broader sense of culture as constitutive context, in fact, orient us beyond instrumentalities and efficacy, and toward self-critique and reflexivity? If it does, there is no lack of critical questions to be asked.

First, there are questions to be asked about our possible misapprehension of context and culture. Elsewhere I have written on the way in which "culture" may be apprehended and deployed by the parties in conflicts, especially in conflicts around identity issues and groups. Their understanding of "culture," affectively and politically saturated, may be very different from the instrumentalist and technical understandings we or our students bring to the field. Such misapprehensions carry ethical concerns.[39]

And then there are the questions around conflict resolution itself. In noting the increased "presence" of conflict resolution discourse and practice in approaching conflict in the post-Cold War world, the sociologist John Stone comments that, "to the more jaundiced eye," conflict resolution appears to be "a hybrid of military science and transnational social work."[40] Archness aside, he seems to have captured some sense of the core tension (if not quite paradox) at the heart of this technology coming from the West, and from North America in particular, to Others out there, a combination of enlightened Christian meliorism potentially backed up by the resources of NATO and "coercive diplomacy."[41] At the very

39. Kevin Avruch, *Type I and Type II Errors in Culturally Sensitive Conflict Resolution Practice*, 20 CONFLICT RESOL. Q. 351 (2003).

40. John Stone, *Teaching Ethnic and Racial Relations: Some Comments on Michael Banton*, 26 ETHNIC AND RACIAL STUDIES 511 (2003).

41. *See* LESTER B. PEARSON, CAN. INT'L PEACEKEEPING TRAINING CTR., PEACEKEEPING WITH MUSCLE: THE USE OF FORCE IN INTERNATIONAL CONFLICT RESOLUTION (Alex Morrison et al. eds.,

least, we should be aware, first, of how our efforts might be viewed by some of those Others; and secondly, of what some of the consequences, particularly the unintended ones, of these efforts might be.

As to the first, at least in much of the Arab world today, the very phrase "conflict resolution" smells of hegemony and neocolonialism. "The ideology of peace," the Lebanese political scientist Paul Salem writes, "reinforces a status quo that is favorable to the dominant power."[42] Elsewhere it is sometimes viewed as simply the latest in an ever-changing menu of buzzwords and catchphrases that USAID or "the Europeans" expect to see in grant applications from both outsiders (us) and "local/indigenous" non-governmental organizations.[43] As to the second, we must be attuned to the limitations of our interventions—here I am in complete agreement with Menkel-Meadow that grafting ADR onto an already essentially corrupted judicial system is bound to fail, and is ethically questionable to boot—and, more crucially, into what the unintended consequences of even our successful ones might be.[44]

"Can My Good Intentions Make Things Worse?" is the title of a chapter by Mary B. Anderson in a recent "handbook for international peacekeeping."[45] The subtitle, building on her work in aid and development, is "Lessons for Peacebuilding from the Field of International Humanitarian Aid." Pauline Baker (among many others) has raised the issue of trade-offs between resolving conflicts and achieving social justice—a version of older questions phrased around peace and justice, and nowadays hooked up to yet other questions in post-conflict settings—of guilt, liability, and impunity—say, in international tribunals or, more complicatedly, in truth and reconciliation commissions.[46] Laura Nader has extended her critique of domestic U.S. conflict resolution and ADR into the international arena, but in the same issue of *Law & Social Inquiry* Mark Goodale and Neal Milner (and in this journal Carrie Menkel-Meadow) offer countervailing views.[47]

1997). *See also* ALEXANDER L. GEORGE, FORCEFUL PERSUASION: COERCIVE DIPLOMACY AS AN ALTERNATIVE TO WAR (1991).

42. Paul E. Salem, *A Critique of Western Conflict Resolution from a Non-Western Perspective*, *in* CONFLICT RESOLUTION IN THE ARAB WORLD: SELECTED ESSAYS 11, 12 (Paul E. Salem ed., 1997).

43. We are latecomers and take a back seat to our colleagues in development on this score. *See* KATY GARDNER & DAVID LEWIS, ANTHROPOLOGY, DEVELOPMENT, AND THE POST-MODERN CHALLENGE (1996).

44. The combination of interventionary incompetence and extant corruption is a special case. *See* JANINE R. WEDEL, COLLISION AND COLLUSION: THE STRANGE CASE OF WESTERN AID TO EASTERN EUROPE (1998). The question of the impact of the mega ideas of the West—capitalism and democracy—on world stability, peace, and conflict, is the encapsulating one. *See* AMY CHUA, WORLD ON FIRE: HOW EXPORTING FREE MARKET DEMOCRACY BREEDS ETHNIC HATRED AND GLOBAL INSTABILITY (2003).

45. The chapter appears in A HANDBOOK FOR INTERNATIONAL PEACEBUILDING: INTO THE EYE OF THE STORM (John Paul Lederach & Janice Moomaw eds., 2002). Her now classic work on aid and conflict is MARY B. ANDERSON, DO NO HARM: HOW AID CAN SUPPORT PEACE — OR WAR (1999).

46. MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE (1998); Kevin Avruch & Beatriz Vejarano, *Truth and Reconciliation Commissions: A Review Essay and Annotated Bibliography*, 2 SOC. JUST. 47 (2001); Pauline H. Baker, *Conflict Resolution Versus Democratic Governance: Divergent Paths to Peace?*, *in* MANAGING GLOBAL CHAOS: SOURCES OF AND RESPONSES TO INTERNATIONAL CONFLICT 563 (Chester A. Crocker et al. eds., 1996).

47. Mark Goodale, *The Globalization of Sympathetic Law and Its Consequences*, 27 LAW & SOC. INQUIRY 595 (2002); Neal Milner, Response, *Illusions and Delusions about Conflict Management – In Africa and Elsewhere*, 27 LAW & SOC. INQUIRY 621 (2002); Laura Nader & Elisabetta Grande, *Cur-*

Goodale's response relies heavily on his deeply ethnographic, that is, localized and contextualized understandings of Bolivian society and human rights, to argue for some positive role for "Western" and American legal imports.[48]

This is why I say, in looking at both contexts and pretexts of conflict resolution and ADR, especially as we export them from domestic to other settings, there is much empirical work to be done, and we still have a lot of hard and critical thinking to do. In aid of critical thinking, let me pose a question, suggested by the political scientist Roy Licklider in his comparative study of civil wars and their termination.[49] We presume, almost as a matter of faith, that our first goal in conflict resolution work in conditions of violence and death is to stop the killing and ameliorate the violence. Licklider writes, "Of course it is not necessarily desirable to end all civil wars; it is interesting to speculate how we would now regard international mediators if they had appeared in 1862 and settled the American Civil War in a compromise, guaranteeing the institution of slavery in the process."[50]

How would you begin to respond?

rent Illusions and Delusions About Conflict Management – In Africa and Elsewhere, 27 LAW & SOC. INQUIRY 573 (2002).

48. *See* Goodale, *supra* note 47.

49. Roy Licklider, *Negotiating an End to Civil Wars: General Findings*, *in* U.S. INST. PEACE, NEW APPROACHES TO INTERNATIONAL NEGOTIATION AND MEDIATION 24 (Timothy Sisk ed., 1999). *See also* STOPPING THE KILLING: HOW CIVIL WARS END (Roy Licklider ed., 1993).

50. *See* Licklider, *supra* note 49, at 24.