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## **It's in the "Telling" (by Asking): A Passover Analogy to Explain the Enduring Foundational Nature of Carrie Menkel-Meadow's Dispute Resolution Scholarship**

### **Abstract**

One true measure of whether ideas are "foundational" is whether they will resonate with future generations. One of the world's oldest religions, Judaism, offers an annual ritual – the Passover Seder – that is a case study for successfully passing down foundational ideas. That ritual, among other things, posits that to tell an enduring story, it must be told in ways that inspire many different kinds of people – with widely disparate motivations, perspectives, and abilities – to engage with, relate to, and understand the story. This essay asserts that Carrie Menkel-Meadow's dispute resolution scholarship is very much a successful "telling" with many characteristics remarkably similar to the Passover Seder. And that, in turn explains why Menkel-Meadow's work has been so important to the first generation of dispute resolution scholars and practitioners and why it will endure as foundational for generations to come.

### **Disciplines**

Dispute Resolution and Arbitration

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**It's in the "Telling" (by Asking): A Passover Analogy to Explain the Enduring Foundational Nature of Carrie Menkel-Meadow's Dispute Resolution Scholarship**  
James R. Coben\*

**I. Introduction: One (Successful) Model for Story-telling Across Generations**

One true measure of whether ideas are "foundational" is whether they will resonate with future generations. One of the world's oldest religions, Judaism, offers an annual ritual – the Passover Seder – that is a case study for successfully passing down foundational ideas. That ritual, among other things, posits that to tell an enduring story, it must be told in ways that inspire many different kinds of people – with widely disparate motivations, perspectives, and abilities – to engage with, relate to, and understand the story. This essay asserts that Carrie Menkel-Meadow's dispute resolution scholarship is very much a successful "telling" with many characteristics remarkably similar to the Passover Seder. And that, in turn explains why Menkel-Meadow's work has been so important to the first generation of dispute resolution scholars and practitioners and why it will endure as foundational for generations to come.

I admit to taking a risk here. At first glance, it might seem odd to assert that a many-centuries-old religious tradition – the Passover Seder from Judaism – provides a compelling framework for analyzing a self-proclaimed<sup>1</sup> secular humanist's prolific body of dispute resolution scholarship. Bear with me.

The annual spring Passover holiday has been observed continuously for over 3,000 years, celebrating the liberation of a people from slavery in Egypt.<sup>2</sup> The holiday gets its name from the story that the angel of death "passed over" the homes of the Jews during a night of a

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<sup>1</sup> See, e.g., Carrie Menkel-Meadow, *And Now a Word About Secular Humanism, Spirituality, and the Practice of Justice and Conflict Resolution*, 28 FORDHAM URB. L.J. 1073, 1075 (2001) (noting that "[m]y parents strongly rejected their own traditional religious birthrights and I was raised in the quasi-secular religious crucible of Ethical Culture in the religious "revival" of the 1950s.").

<sup>2</sup> E.g., BEN M. EDIDIN, JEWISH HOLIDAYS AND FESTIVALS 131 (1940). See also MARTIN SICKER, A PASSOVER SEDER COMPANION AND ANALYTIC INTRODUCTION TO THE HAGGADAH 4 (2004) (deeming it "self evident that Passover is a commemoration of the liberation of the Israelites from in Egypt, the central theme of the holiday therefore being the celebration of human freedom from oppression."); MICHAEL STRASSFELD, THE JEWISH HOLIDAYS: A GUIDE AND COMMENTARY 5 (1985) (explaining that "[t]he name Passover is taken from the Exodus story: during the tenth and ultimate plague inflicting on Pharaoh to break his will, God passed over the Israelites and struck down only the Egyptian firstborn. That night Pharaoh finally agreed to let the Israelites go; and ever since then, we gather together on that night to commemorate that time, and to contemplate the meaning of being freed by the mighty hand and outstretched arm of the Holy One.").

God-imposed plague on the first-born of Egypt.<sup>3</sup> The crux of the holiday is the Seder – an elaborate ritual meal with many symbolic components to remind us “on the one hand, of the bitterness of slavery and, on the other of the great joy of our liberation.”<sup>4</sup> During the Seder, using a ritual guide known as the Haggadah,<sup>5</sup> the Passover story is told, re-told, and inevitably constantly re-invented, and applied in new contexts.<sup>6</sup> Indeed, a central theme is the necessity for even the learned to tell the story and by doing so “expand the frontiers of our freedom a little farther, since we understand that if we simply recite the story as a tale told about others, we can easily slip into being enslaved to the ‘pharaohs’ of our own creation.”<sup>7</sup>

While “the learned” who expand upon the telling are considered “praiseworthy,”<sup>8</sup> it is the children who are a key focus of the ritual.<sup>9</sup> For example, the youngest child in a family is tasked with asking “The Four Questions” (all designed to help explain why this ritual night is different than other nights of the year).<sup>10</sup> Later in the Haggadah, invoking biblical references to children’s understanding of the Exodus, comes discussion of “The Four Children” – the wise child, the wicked child, the simple child and the child who does not know.<sup>11</sup> There is no

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<sup>3</sup> EDIDIN, JEWISH HOLIDAYS AND FESTIVALS, *supra* note 2 at 134-35 (noting also that some scholars believe that Passover was celebrated even earlier as a spring Thanksgiving festival by a nomadic people tending to their flocks of sheeps and goats; the holiday was called “Pesach because this Hebrew word also means skipping, and refers, so some think, to the gamboling or skipping of the lambs and kids in the new pasture.”).

<sup>4</sup> STRASSFELD, THE JEWISH HOLIDAYS, *supra* note 2 at 8.

<sup>5</sup> *Id.* (noting that “*Haggadah* comes from the root meaning “to tell” and reflects the purpose of the evening--the retelling of the story of the Exodus.”).

<sup>6</sup> *Id.* at 7 (explaining that “[a]t Passover we are commanded to tell the story of the Exodus. This commandment, unique to this holiday, leads us not simply to remember the Exodus but to expand upon the tale, to explore its complexities and develop its meaning.”).

<sup>7</sup> *Id.* at 22.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 8 (describing Passover as a “family holiday because of the importance it places on conveying the story and meaning of Passover to the next generation.”); SICKER, A PASSOVER SEDER COMPANION, *supra* note 2 at 34 (noting that “the focus of the seder is on the instruction of the young, who were to be the first casualties of the oppressive designs against the Israelites that were conceived by Pharaoh and his ministers.”).

<sup>10</sup> The questions (and answers) differ from Haggadah to Haggadah, but here is a typical example:

Why is this night different from all other nights? On all other nights we eat leavened products and matzah, and on this night only matzah. On all other nights we eat all vegetables, and on this night only bitter herbs. On all other nights, we don’t dip our food even once, and on this night we dip twice. On all other nights we eat sitting or reclining, and on this night we only recline.”

*The Four Questions: How to Say the ‘Mah Nishtana,’* MY JEWISH LEARNING, <https://www.myjewishlearning.com/article/the-four-questions/> (last visited April 16, 2022). See also EDIDIN, JEWISH HOLIDAYS AND FESTIVALS, *supra* note 2 at 145 (“Why MAZOT? Why MAROR? Why dip twice? Why recline on pillows?”)

<sup>11</sup> See, e.g., Rabbi Sandi Intraub, *Lessons from the Four Children of the Seder*, <https://reformjudaism.org/lessons-four-children-seder> (last visited April 14, 2022):

**The wise** child asks details about the specific meaning of the laws of Passover observance....**The wicked** child asks “whatever does this mean to you?”...reminding us of the importance of not separating ourselves from our community or from traditions that might seem uncomfortable or

shortage of ruminations over the centuries to interpret the meaning of these archetypes of questioners, but a typical contemporary summary is that “each child is different and should be told the story on level of his or her own understanding.”<sup>12</sup>

Why is any of this relevant to Menkel-Meadows’ work? It is not simply that, among her many writings, she authored the old testament-invoking “Ten Commandants of Appropriate Dispute Resolution” (though they are wonderful).<sup>13</sup> Nor is it the sheer prolific volume of her scholarship, which for anyone familiar with Passover immediately brings to mind one of the holiday’s most popular songs – *Dayenu* (“literally ‘it would have been enough’”).<sup>14</sup>

Rather, there are five important themes that I will explore using Menkel-Meadow’s own words: First, she “tells” the dispute resolution story with a prolific number of questions. And questions, as noted above, are at the heart of the Passover Seder. Second, her commitment to process pluralism<sup>15</sup> speaks to diverse constituencies – potentially reaching, to use the language of Passover, “all of the children.” Third, she is an exquisite, self-revealing storyteller and dedicated historian taking the long view on societal progress. Passover is, if nothing else, an annual history lesson – one that recognizes that true liberation is always aspirational, never complete; we have to continually do the work. Fourth, she lives the journey of “theory in use”<sup>16</sup>

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foreign to us .... **The simple** child asks, “What does this mean?” to which a straightforward summary of the story is given, directly from the Torah: “It was with a mighty hand that God brought us out from Egypt, the house of bondage.”...In response to **the child who does not know how to ask**, we are instructed to “open it up” and explain, “It is because of what God did for me when I went free from Egypt (Exodus 13:8).” (emphasis is original).

There are numerous variations on names for these archetypes, ranging from the more traditional patriarchal language loyal to ancient texts (“wise son, wicked son, simple son, and son who does not know how to ask”, *Nechama Leibowitz Haggadah*, THE JEWISH AGENCY FOR ISRAEL, <https://archive.jewishagency.org/nechama-leibowitz-haggadah/content/24076> (last visited April 12, 2022)) to progressive and gender-changing contemporary interpretations (“daughter possessing wisdom of the heart, rebellious daughter, simple and pure daughter, and the daughter who cannot ask,” Andrea Steinberger, *Four Daughters*, WOMEN’S SEDER, <https://www.haggadot.com/haggadah/womens-seder-1> (last visited April 12, 2022)).

<sup>12</sup> STRASSFELD, *THE JEWISH HOLIDAYS*, *supra* note 2 at 22.

<sup>13</sup> Carrie Menkel-Meadow, *Ethics and Professionalism in Non-Adversarial Lawyering*, 27 FLA. ST. L. REV. 153, 167-168 (1999).

<sup>14</sup> Joshua Ratner, *What Does “Dayenu” Mean Today?*, RABBIS WITHOUT BORDERS (April 1, 2014), <https://www.myjewishlearning.com/2014/04/01/what-does-dayenu-mean-today/> (describing that “Dayenu consists of 15 stanzas referencing different historical contexts the Israelites experienced, from slavery in Egypt to the building of the Temple in Israel. After each stanza, we sing the chorus, signifying that if this was the total of God’s miraculous intervention into the lives of the Israelites, it would have been sufficient.”).

<sup>15</sup> See, e.g., Carrie Menkel-Meadow, *What Is an Appropriate Measure of Litigation? Quantification, Qualification and Differentiation of Dispute Resolution*, 11 ONATI SOCIO-LEGAL SERIES 320, 334 (2021) (asserting “[w]e need process pluralism. Different disputants want different things from dispute resolution.”).

<sup>16</sup> See, e.g., Carrie Menkel-Meadow, *From Legal Disputes to Conflict Resolution and Human Problem Solving: Legal Dispute Resolution in a Multidisciplinary Context*, 54 J. LEGAL EDUC. 7, 8 (2004) (noting that “my work in the field of dispute and conflict resolution has always been

and has given us incredibly useful tools to apply in our day to day conflict resolution work, just as the symbolic rituals of Passover provide guidance throughout the year. Fifth, her scholarship is at its core fundamentally about justice, as is the Passover story of liberation.

The bottom line: Menkel-Meadow’s prolific dispute resolution scholarship does exactly what the Passover Seder aims each year to accomplish: making a history accessible to a new generation “by teaching it in ways that lead to understanding, engagement, and action.”<sup>17</sup>

An important disclaimer before going any further with the analysis: I am not an expert on Jewish tradition, and instead rely on my own lived experience in the Jewish faith (one largely secular in its orientation).<sup>18</sup> From my perspective, this is no liability; there is no better example of the process pluralism Menkel-Meadow praises,<sup>19</sup> than the myriad number of ways that people run Seders and tell the Passover story.<sup>20</sup>

## II. The “Telling” of an Enduring ADR Story

### A. It’s All About Questions

*Isidor I. Rabi, the Nobel laureate in physics...was once asked, "Why did you become a scientist, rather than a doctor or lawyer or businessman, like the other immigrant kids in your neighborhood?"...[His answer:]: "My mother made me a scientist without ever intending it. Every other Jewish mother in Brooklyn would ask her child after school: 'So? Did you learn anything today?' But not my mother. She always asked me a different question. 'Izzy,' she would say, 'Did you ask a good question today?' That difference - asking good questions - made me become a scientist."*<sup>21</sup> Donald Sheff

Questions abound in the Passover Seder. Children, in particular, are encouraged to ask. As Michael Strassfeld summarizes it, “children give us insights into the meaning of freedom,

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a movement back and forth from theory development to practice, seeking what Donald Schön has called “theory-in-use” and what I have called “ethical practice”— practice that is informed by theory and by morally legitimate uses.”).

<sup>17</sup> Rabbi Sandi Intraub, *Lessons from the Four Children of the Seder*, *supra* note 11.

<sup>18</sup> Moreover, in the Menkel-Meadow spirit of self-revelation (*see infra* notes 49-51 and accompanying text), I feel compelled to share that my own organized religious experience was to say the least, not inspiring. Among other things, the Rabbi of my early youth, Fred Neulander, was convicted of murder years after our studies concluded, confirming my youthful intuition that something was a “little off” in his spiritual guidance. *See Fred Neulander*, WIKOPEDIA, [https://en.wikipedia.org/wiki/Fred\\_Neulander](https://en.wikipedia.org/wiki/Fred_Neulander) (last visited April 13, 2022).

<sup>19</sup> *See, e.g.*, Menkel-Meadow, *What Is an Appropriate Measure of Litigation?* *supra* note 15 at 334.

<sup>20</sup> For example, Haggadot.com, the self-proclaimed “largest online resource for the Passover Haggadah” lists thousands of options, featuring such diverse titles as “Liberal Haggadah,” “Women’s Seder,” “A Haggadah for Justice,” “Comedy Seder,” and, unbelievably, even a “Schitt’s Creek Haggadah.” <https://www.haggadot.com/> (last visited April 13, 2022).

<sup>21</sup> Donald Sheff, Izzy, *Did You Ask a Good Question Today?* NEW YORK TIMES (Jan. 19, 1988), <https://www.nytimes.com/1988/01/19/opinion/l-izzy-did-you-ask-a-good-question-today-712388.html>.

because they take nothing for granted. They “are constantly questioning the hows and whys, and thereby make us reexamine our complacent explanations, which are often forms of subtle enslavement.”<sup>22</sup>

That same type of constant questioning and challenge to the complacency of “brittle” adversarial thinking<sup>23</sup> is the very heart of Menkel-Meadow’s ADR scholarship. She does not use questions simply as rhetorical devices. Rather, I see in them the legitimate curiosity of a mediator and problem-solving negotiator<sup>24</sup> – a clear example of a scholar and clinician-practitioner “walking the walk.”<sup>25</sup> Just to give you a sampling *over five decades*:<sup>26</sup>

### **1) *The Twenty-Twenties***

So what doctrines or policies can properly adjudicate the tensions between “too much or too little litigation” and personal choice and autonomy with respect to what should happen to legal claims? Should the harmed (plaintiffs) control how their cases are ultimately handled? When should our legal doctrines and policies trump individual desires and choices because of an important public “right to know” about relevant wrongdoing?<sup>27</sup>

### **2) *The Twenty-Tens***

[D]o we need wise elders again? And if so, who should they be, how wise should they be and must they be elders?<sup>28</sup>

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<sup>22</sup> STRESSFELD, *THE JEWISH HOLIDAYS*, *supra* note 2 at 32.

<sup>23</sup> *See, e.g.*, Menkel-Meadow, *What Is an Appropriate Measure of Litigation?* *supra* note 15 at 320 (stating that “[l]itigation, in some cases, produces too “brittle” (binary) or costly outcomes, which is what led to the American “A” (alternative/appropriate) Dispute Resolution movement.”); Carrie Menkel-Meadow, *Toward a Jurisprudence of Law, Peace, Justice, and a Tilt Toward Non-Violent and Empathic Means of Human Problem Solving*, 8 UNBOUND: HARV. J. LEGAL LEFT 79, 132 (2012) (“What legal *remedies* or outcomes can be re-imagined, beyond our more limited existing set of dichotomous, brittle and binary solutions to human conflicts?”) (emphasis is original).

<sup>24</sup> *See, e.g.*, ROBERT H. MNOOKIN ET AL., *BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES* 58 (2000) (exhorting negotiators to “[b]e curious about the other side” and to always ask “[w]hat is the other side’s story, anyway?”) (emphasis original); DOUGLAS STONE ET AL. *DIFFICULT CONVERSATIONS: HOW TO DISCUSS WHAT MATTERS MOST* 167 (1999) (describing the “stance of curiosity”).

<sup>25</sup> CAMBRIDGE DICTIONARY ONLINE (defining “walk the walk” as “to show that something is true by your actions rather than your words”), <https://dictionary.cambridge.org/us/dictionary/english/walk-the-walk> (last visited April 13, 2022).

<sup>26</sup> Dayenu! *See* Ratner, *What Does “Dayenu” Mean Today?*, *supra* note 14.

<sup>27</sup> Menkel-Meadow, *What Is an Appropriate Measure of Litigation?*, *supra* note 15 at 340..

<sup>28</sup> Carrie Menkel-Meadow, *Mediation 3.0: Merging the Old and the New*, 2018 ASIAN J. MEDIATION 1, 1.

[C]an dispute resolution theories and practices be ‘scaled up’ from dyadic negotiation or triadic mediation to whole polities and complex decision making in deliberative democracies (and elsewhere)?<sup>29</sup>

[W]hat would it take to imagine a conception of law and justice that insists upon more than tolerance, but appreciation for difference, for recognition of our humanity, for care and rescue of those in need, and for healing and reintegrative or rehabilitative processes for other human beings?<sup>30</sup>

### 3) *The Aughts*

How much should individual or group parties be able to craft their own arrangements or agreements to proceed with social, economic, and political life without consideration of the effects of their arrangements on others? .... If there is process pluralism, how are we to judge if the “proper” process has been chosen for the particular matter at hand?<sup>31</sup>

What ought the role of the mediator to be? Facilitator of compromises? Active participant in morally constructed narratives? Peaceseeker? Ceremonial healer? Should we eliminate mechanistic groundrules (e.g., turntaking, or no interruptions) to allow greater spiritual and more spontaneous feelings to be expressed?<sup>32</sup>

Thus, we must always interrogate the purposes for which a process of dispute resolution is being invoked. How did this particular institution come to be? What values does it serve? Who is achieving what with the particular structure of the system in place?<sup>33</sup>

### 4) *The Nineties*

What if, for example, we saw lawyers and the legal system seeking to solve not only client problems, but also seeking to work on community-based or even larger social problems? What if *needs*, as well as *rights*, were part of the lawyer's vocabulary?<sup>34</sup>

[T]he question is not "for or against" settlement (since settlement has become the "norm" for our system), but when, how, and under what circumstances should cases be settled? When do our legal system, our citizenry, and the parties

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<sup>29</sup> Carrie Menkel-Meadow, *The Historical Contingencies of Conflict Resolution*, 1 INT' L J. CONFLICT ENGAGEMENT & RESOL. 32, 34-35 (2013).

<sup>30</sup> Menkel-Meadow, *Toward a Jurisprudence of Law*, *supra* note 23 at 102.

<sup>31</sup> Menkel-Meadow, *From Legal Disputes to Conflict Resolution and Human Problem Solving*, *supra* note 16 at 10-11.

<sup>32</sup> Menkel-Meadow, *And Now a Word About Secular Humanism*, *supra* note 1 at 1086.

<sup>33</sup> Carrie Menkel-Meadow, *Mothers and Fathers of Intervention: The Intellectual Founders of ADR*, 16 OHIO ST. J. DISP. RESOL. 1, 11-12 (2000).

<sup>34</sup> Menkel-Meadow, *Ethics and Professionalism in Non-Adversarial Lawyering*, *supra* note 13 at 159 (emphasis is original).



in particular disputes need formal legal adjudication, and when are their respective interests served by settlement, whether public or private?<sup>35</sup> [W]hether new forms of dispute resolution will transform the courts or whether, in a more likely scenario, the power of our adversarial system will co-opt and transform the innovations designed to redress some, if not all, of our legal ills. Can legal institutions be changed if lawyers and judges persist in acting from traditional and conventional conceptions of their roles and values?<sup>36</sup> 1991

### 5) *The Eighties*

What, in the aggregate, would our system of dispute resolution and transaction planning look like if problem solving were the more usual model? How would it affect the parties, the legal system and society?<sup>37</sup>

### B. Process Pluralism that Speaks to “All of the Children”

*Obviously, I am not happy with all of the developments and turns that ADR has taken. By opposing its mandatory, court-institutionalized forms, I find myself in an awkward position—considered by some to be an unmitigated apologist for ADR, and by others to be downright hostile to ADR.*<sup>38</sup> Carrie Menkel-Meadow

As Rabbi Sandi Intraub succinctly puts it, “[r]eciting The Four Children reminds us of the ... obligation to teach the next generation about this powerful story, and, importantly, not to tell the story in the one way that might be easiest for us.”<sup>39</sup> Rabbi Intraub goes on to suggest, that

[W]e should invite our children to be a part of the conversation, strive to meet the children where they are individually, respect the way each one learns and interacts in the world, and respond accordingly and appropriately.... There is wisdom in the idea that we should “open it up” for the one who does not know how to ask. How can we find creative ways to *open* the story of Passover – with all its history, values, and relevance to today – to all those who are eager to learn?<sup>40</sup>

Arguably, Menkel-Meadow does exactly this. First, she is comfortable with complexity:

I have often thought myself ill-suited to my chosen profession. I love to argue, but I am often too quick to say both, "yes, I see your point" and concede something to

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<sup>35</sup> Carrie Menkel-Meadow, *Whose Dispute Is It, Anyway? A Philosophical and Democratic Defense of Settlement (In Some Cases)*, 83 GEORGETOWN L. J. 2663, 2664-2665 (1995).

<sup>36</sup> Carrie Menkel-Meadow, *Pursuing Settlement in An Adversary Culture: The Law of ADR*, 19 FLA. ST. L. REV. 1, 5 (1991).

<sup>37</sup> Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem-Solving*, 31 UCLA LAW REVIEW 754, 763 (1984).

<sup>38</sup> Menkel-Meadow, *Pursuing Settlement in An Adversary Culture*, *supra* note 36 at 45.

<sup>39</sup> Rabbi Sandi Intraub, *Lessons from the Four Children of the Seder*, *supra* note 11 (emphasis is original).

<sup>40</sup> *Id.*

the "other side," and to say of my own arguments, "yes, but, it's not that simple." In short, I have trouble with polarized argument, debate, and the adversarialism that characterizes much of our work. Where others see black and white, I often see not just the "grey" but the purple and red--in short, the complexity of human issues that appear before the law for resolution.<sup>41</sup>

Second, she has been willing to both critique and endorse mediation and adjudication.

In my career, I have most often defended mediation against attacks made by the litigation romanticists who tend to see conventional adjudicative processes and the "rule of law" as the only measure of justice. Mediation offers an often better process, by providing direct party engagement, open dialogue unrestricted by rigid rules of evidence and the possibilities that parties can craft their own solutions. To the extent that this process has all too often restricted discussion of the past in its promise to "move forward constructively," I now think it is time for us to reconsider some of our dogmas and doctrines to see whether mediation is as adaptive and fair as we have claimed.<sup>42</sup>

Despite my great support of ADR (and my practice of it too, as an arbitrator and mediator), I am not in favor of ending adjudication. Adjudication is necessary to generate rules and norms, and to exist as a final resort when the parties cannot resolve things themselves and require a particular kind of decisionmaker – whether judge or jury – each with its own logic, rationales, and functions within our judicial system.<sup>43</sup>

Third, she offers a persuasive message about process pluralism.

There is no one right way forward. Rather, we need process pluralism, as well as different substantive commitments, to advance a society of true social justice and

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<sup>41</sup> Menkel-Meadow, *Whose Dispute Is It, Anyway?* *supra* note 35 at 2663. See also Carrie Menkel-Meadow, *When Winning Isn't Everything: The Lawyer As Problem Solver*, 28 HOFSTRA L. REV. 905, 911 (2000) ("[T]he major theme of my life's work has been to try to see and/or when others see only either/or, but a problem solving approach to legal issues does suggest other goals (joint-gain, acknowledging that the other party is part of the problem to be solved), which should produce different behaviors and different outcomes. Problem solving does not mean cooperation (cooperation must be earned--we do not simply give in to the other side) or unnecessary compromise.").

<sup>42</sup> Carrie Menkel-Meadow, *Remembrance of Things Past? The Relationship of Past to Future in Pursuing Justice in Mediation*, 5 CARDOZO J. CONFLICT RESOL. 97, 114-115 (2004).

<sup>43</sup> Carrie Menkel-Meadow, *Introduction: What Will We Do When Adjudication Ends? A Brief Intellectual History of ADR*, 44 UCLA L. REV. 1613, 1623 (1997) (explaining that "[t]he interesting question for me, then, is not what will we do when adjudication ends, but when and how should we use adjudication and when should we use something else? And, must adjudication be structured the way it is?").

peace, with appreciation, empathy and sympathy for human differences and more varied modes of working and living together.<sup>44</sup>

Fourth, she does not shy away from the merits of compromise.

I have argued in many places that compromise is itself morally compelled. If we want to live peacefully on this earth, with all of our complexity, diversity, and differences, “we need to give a little, to get a little.”<sup>45</sup>

We should learn to consider in the ethics of compromise not only when we should not compromise to preserve our integrity and basic principles but when we should compromise as a matter of human humility, fallibility, and the possibility that we may not be the only one who is morally, politically, or socially right.<sup>46</sup>

### **C. A Self-Revealing Storyteller and Dedicated Historian Taking the Long View on Societal Progress**

*Sometimes in the shadowy evenings of “afterthoughts” or late-night gabfests at ADR conferences you can hear the whisper of people talking about how racial injustice, child or domestic abuse, divorce, alcoholism, the Holocaust, or religious intolerance in their past or families has motivated them to seek more productive ways to heal the flesh and hearts and minds torn by human cruelty. There is a story dwelling in the social and personal origins of those who labor in the dispute resolution field.*<sup>47</sup> Carrie Menkel-Meadow

There is power in self-revealing. “At the seder,” writes Michael Strassfeld, “we must be telling our own story, our own experience. Telling the story of others is not enough. We must relive slavery and freedom, and we must question our values.”<sup>48</sup> Unlike most academics, Menkel-Meadow remarkably has never shied away from self-disclosure. Two examples:

I am the daughter of Holocaust survivors, both German, one Jewish, one Catholic, who arrived in the United States during the diaspora of the Second World War.

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<sup>44</sup> Menkel-Meadow, *Toward a Jurisprudence of Law, Peace, Justice*, *supra* note 23 at 80. See also Carrie Menkel-Meadow, *Do the Haves Come Out ahead in Alternative Judicial Systems? Repeat Players in ADR?*, 15 OHIO ST. J. DISP. RESOL. 19, 57 (1999) (stating “I have always been a proponent of pluralism in disputing, recognizing that the structuring of disputes may require different processes for different kinds of cases or issues.”).

<sup>45</sup> Carrie Menkel-Meadow, *Applying Conflict Resolution Insights to Hyperpolarization: When Will (we) Ever Learn?* CONFLICT RESOL. Q. 2 (online early view February 2022).

<sup>46</sup> Carrie Menkel-Meadow, *The Ethics of Compromise*, in GLOBAL ENCYCLOPEDIA OF PUBLIC ADMINISTRATION, PUBLIC POLICY, AND GOVERNANCE 7 (Ali Farazmand ed. 2016).

<sup>47</sup> Carrie Menkel-Meadow, *What Trina Taught Me: Reflections on Mediation, Inequality, Teaching and Life*, 81 MINN. L. REV. 1413, 1416 n. 10 (1997).

<sup>48</sup> STRASSFELD, THE JEWISH HOLIDAYS, *supra* note 2 at 44.

Both of my parents were comfortable in Germany before their immigration and after some struggle and harrowing experiences, became "comfortable" again. But in my family, where the Holocaust was revisited constantly in conversation and retelling of experiences, the conclusion was not to cling to our different religious traditions, but to see the harm that religious and racial "belonging" causes when difference and discrimination turn to hate and violence. For me, religious and racial divisions and differences meant horrific violence, and so my childhood was spent thinking about ways to reduce such human suffering.<sup>49</sup>

I am a white woman, daughter of Holocaust survivors, who, growing up with this family history in the 1950s, became a "race" conscious activist who heard and saw the damage that racial categories and exclusions could do to staggering numbers of people as well as to the spirit and material well-being of individuals and families. So as a young girl of a religiously mixed marriage, I was determined to spend my life working against racial discrimination and other forms of cruelty, intolerance, incivility, and injustice. Like many of my generation with these values, I went to law school and became a legal services and civil rights lawyer.... I knew that lawsuits were only one way, and seldom the best way, to solve problems or to "reorient people to each other." For many of us in the New Left, the interpersonal and the psychological were also the political. As many in the women's movement were, I was interested in how oppressive social forces and institutions of exclusionary privilege constructed both the public spaces and private places that controlled, enforced and limited our lives. Lawsuits and courts were "public spaces," the everyday negotiations, interactions and "mediations" of social life were the more private places where people really did their work and lived their lives.<sup>50</sup>

She marries that self-revelation with the long-view of the dedicated historian.

One of our greatest practitioners, John Paul Lederach has often reminded us that our field is a long multi-generational process – he can touch the hands of both his grandparents and grandchildren to see a span of over 100 years of human struggle with conflict – perhaps, little by little, each generation will learn from the one that went before.<sup>51</sup>

In reviewing these contributions of our intellectual forbearers, a question comes to

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<sup>49</sup> Menkel-Meadow, *And Now a Word About Secular Humanism*, *supra* note 1 at 1074-75.

<sup>50</sup> Menkel-Meadow, *What Trina Taught Me*, *supra* note 47 at 1414-1415.

<sup>51</sup> Menkel-Meadow, *Toward a Jurisprudence of Law*, *supra* note 23 at 106. *See also* Carrie Menkel-Meadow, *Making Peace With Your Enemy: Nelson Mandela and His Contributions to Conflict Resolution*, 16 NEV. L.J. 281, 289 n. 10 (2014) (praising Nelson Mandela for his ability to connect with the younger generation in South Africa, thereby "demonstrating the importance of John Paul Lederach's message that we in peace and justice work must touch the hands of our grandparents and grandchildren, peace and justice may require the span of three generations or one hundred years to accomplish.").

mind. Is there nothing new under the sun? Can every new insight about dispute processes be traced to some earlier theorist, scholar, or empiricist? I think the answer to that question is that humans and legal scholars (sometimes co-extensive groups) do often "create" ideas without tracing their origins and considering what intellectual and social forces produce particular questions and answers at particular times. There may be no new questions to ask, but there are plenty of new situations and conditions against which to measure and re-consider pronouncements by earlier generations. In reviewing our mothers and fathers of invention in the field of dispute resolution, I am both awed by how much they have given us and challenged by how much has changed that requires new thinking on these old themes.<sup>52</sup>

This self-revealing, long-view historian, also happens to be a superb storyteller, whether it be invoking the parable of who to bring on "the good camping trip," when advocating for the importance of "conflict resolver[s] or process expert[s],"<sup>53</sup> or giving a speech to offer a devastating, succinct indictment of "Mediation 2.0" as "mediation lite."<sup>54</sup>

#### **D. "Theory in Use": The Back and Forth Journey**

*Disputes and conflicts are human constructs. We need theory to understand their causes, dynamics, and trajectories of actions and reactions, but ultimately we need practice to use conflict creatively and constructively, to make "justice" in legal terms and to make "peace" in human terms.*<sup>55</sup> Carrie Menkel-Meadow

While Passover is in part the telling of history, it is also a guide to living life today. As Strassfeld puts it,

even if we think we know all the details of the story, we must retell it to remind ourselves not only that freedom is possible but that in an unredeemed world we must continue to strive for liberation in both personal in national ways. And

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<sup>52</sup> Menkel-Meadow, *Mothers and Fathers of Intervention*, *supra* note 33 at 37.

<sup>53</sup> Menkel-Meadow, *From Legal Disputes to Conflict Resolution and Human Problem Solving*, *supra* note 16 at 29.

<sup>54</sup> Menkel-Meadow, *Mediation 3.0*, *supra* note 28 at 7:

The truth is for us in the US, mediation 2.0 has a very bad name. We call it "mediation lite." Mediation lite is what happened when some courts decided it is a very good idea to have mediation and they made everyone attend mediation without any regulation at all of who the mediators would be or what they should do. No wise elders - we had lots of unwise youngsters doing mediation. They were people who thought it was a lovely way to make peace in the world and they had wonderful intentions but they did not know what they were doing and so people were ordered to show up at hearings or go to mediation without any clear purpose about what was intended. And so, what was supposed to be remembered as pure mediation - a voluntary process of selfdetermination and communication - became compelled and mandatory. And our judges then had to decide if the parties were there with good faith and intentions and if they were not, they got fined - there were penalties and things happened to them. And so, we begin to get formal rules and the requirement that one had to go to mediation before litigation.

<sup>55</sup> Menkel-Meadow, *From Legal Disputes to Conflict Resolution and Human Problem Solving*, *supra* note 16 at 8.

whoever elaborates on the story – that is, whoever understands that the story is not just about a Pharaoh way back then or even the modern Pharaohs of our day, but about all the different ways we can be enslaved – he or she is deserving of praise.<sup>56</sup>

Similarly, Menkel-Meadow tells the history and likewise gives us practical tools to navigate our own conflict resolution challenges. Like Mary Parker Follet, praised by Menkel-Meadow as “one of the leading ‘mothers’ of invention in ADR,”<sup>57</sup> Menkel-Meadow has herself carried on the grand tradition of marrying theory and practice. The fruits of that marriage benefit everyone who teaches dispute resolution. Indeed, each year, in a ritual of my own (reminiscent of the annual cycle of Passover), I challenge incoming law students with the cogent wisdom of three invaluable Menkel-Meadow lists: 1) Her criteria for evaluation of approaches to negotiation, authored in 1984;<sup>58</sup> 2) Her “rethinking IRAC” recommendations, authored in 1999;<sup>59</sup> and 3) her brilliant 420-word summary of eight major precepts from our fields’ intellectual founders,

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<sup>56</sup> STRASSFELD, *THE JEWISH HOLIDAYS*, *supra* note 2 at 37.

<sup>57</sup> Menkel-Meadow, *Mothers and Fathers of Intervention*, *supra* note 33 at 7.

<sup>58</sup> Menkel-Meadow, *Toward Another View of Legal Negotiation*, *supra* note 37 at 760-761:

1. Does the solution reflect the client's total set of "real" needs, goals and objectives, in both the short and the long term?
2. Does the solution reflect the other party's full set of "real" needs, goals and objectives, in both the short and long term?
3. Does the solution promote the relationship the client desires with the other party?
4. Have the parties explored all the possible solutions that might either make each better off or one party better off with no adverse consequences to the other party?
5. Has the solution been achieved at the lowest possible transaction costs relative to the desirability of the result?
6. Is the solution achievable, or has it only raised more problems that need to be solved? Are the parties committed to the solution so it can be enforced without regret?
7. Has the solution been achieved in a manner congruent with the client's desire to participate in and affect the negotiation?
8. Is the solution "fair" or "just"? Have the parties considered the legitimacy of each other's claims and made any adjustments they feel are humanely or morally indicated?

<sup>59</sup> Carrie Menkel-Meadow *Taking Problem Solving Pedagogy Seriously*, 49 J. LEGAL EDUC. 14, 15-16 (1999):

- [I]magine if the teacher (and the student while briefing a case) asked not only the usual IRAC questions but the following additional questions.
- What brought these parties/clients to a lawyer? What were they trying to accomplish?
  - What were their underlying needs or interests, in their actual experience and as expressed to the lawyer? What translation occurs by both client and lawyer when they first address each other across the legal-issue-spotting divide?
  - What were the likely/possible needs or interests of the other parties involved in the case—the actual adversaries, other possible litigants, or involved parties who may not have been joined?
  - What is really at stake? Scarce commodities, reputation, or legal principles? Some harm or hurt not traditionally considered compensable?
  - How would you evaluate the legal, social, economic, political, psychological, moral, or ethical risks and benefits of litigation? Of nonlitigated outcomes?
  - What other resolutions/transactions/arrangements might have better dealt with this “case” or “problem” than the court's resolution?
  - Are there other processes that might have led to different/better/worse outcomes?"

authored in 2000.<sup>60</sup> In my view, these three lists are a modern-day Haggadah (“ritual guide”)<sup>61</sup> of ADR.

### **E. It’s All About Justice**

*Can peace be achieved without justice? Can justice be achieved without peace? Is law a proper measure of justice? If not law, what is?*<sup>62</sup> Carrie Menkel-Meadow

As a ritual holiday centered on liberation from slavery, it is easy to draw a connection between Passover and justice.<sup>63</sup> “The Passover story serves as a model for any struggle for freedom” and reminds us that “[t]hings do not always have to remain as they are” and that “radical change is possible.”<sup>64</sup>

Menkel-Meadow likewise challenges us to change. She has advocated forcefully to expand the lawyer’s role in pursuing justice:

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<sup>60</sup> Menkel-Meadow, *Mothers and Fathers of Intervention*, *supra* note 33 at 36-37:

1. Conflict can be good and a potential source of creativity. It is not always to be resolved or squelched. Conflict handled appropriately can put the parties (and the rest of us) in a better position than we were before or than we might be in if left to our own devices (or litigation).
2. Good resolutions of conflicts and problems in the law can occur when people realize that valuing different things differently is good. Money need not be a proxy for everything, an assumption that can lead to bitter zero-sum games and distributive or unnecessary compromise outcomes. More issues and more trades enhance the likelihood of both the number and quality of possible resolutions.
3. Different dispute resolution processes produce different kinds of outcomes. Where there is a need for a decision, with a reasoned and reported basis, adversarial argumentation may be more important to framing the resolution. Where there is more than one party or more than one issue (“polycentric” disputes), however, single decision outcomes may not be wise, and mediation, or a negotiated consensus, rather than a single issue, externally imposed decision may be better.
4. Settlements or mediated solutions do not have to be compromises or “split the difference” outcomes. By exploring different values and underlying interests, creative solutions and integrative outcomes may be possible.
5. Institutionalized choices about processes facilitate an appropriate range of public and private participation in different kinds and levels of matters and may legitimate both individual cases and the larger legal and political system in which those cases are handled. Different dispute institutions will have their own special competencies, expertises, and morality for handling particular kinds of matters, which may change over time, developing a kind of “process integrity.”
6. Processes produce different kinds of outcomes--there are no universal processes that will always be better, fairer, or more efficient than others. Dispute processes are part of the larger culture in which they are embedded and also help create a community’s sense of self. Different kinds of disputes will call for different kinds of “handling,” “managing,” or “resolution.”
7. Variations and choices in processes used to resolve particular matters or to plan future arrangements or transactions in a society are likely to increase participation in and legitimacy of the outcomes reached.
8. The human conditions under which peaceful collaboration and cooperation versus conflict and aggression exist are variable, and we continue to need more theory and more practice to elaborate when we mortal actors can influence each other’s behavior.

<sup>61</sup> See *supra* note 5 and accompanying text.

<sup>62</sup> Menkel-Meadow, *From Legal Disputes to Conflict Resolution and Human Problem Solving*, *supra* note 16 at 10.

<sup>63</sup> SICKER, A PASSOVER SIDER COMPANION, *supra* note 2 at 2 (suggesting that “the central theme of the holiday...[is] the celebration of human freedom from oppression.”).

<sup>64</sup> STRASSFELD, THE JEWISH HOLIDAYS, *supra* note 2 at 36.

Because I believe justice is bigger and more complex than both "legal justice" and legal ethics, and includes a set of values in addition to those commonly associated with legal justice, the lawyer's role in "pursuing justice" must expand to pursuing other forms of actions – including peace-seeking, consensus-building and problem-solving, as well as our more conventional roles of advocacy and representation.<sup>65</sup>

She has asked us to consider whether we can “marry old conceptions of determining what is ‘right’ or ‘wrong’ (justice) with what it might take to forge more complex, diversified and contingent relationships with others for mutual cooperation and co-existence (peace)?<sup>66</sup> She has suggested that “the key to understanding the appropriateness of any negotiation process is whether justice is ill-served by the processes the parties choose, be they public litigation or private negotiation.”<sup>67</sup> Finally, in eulogizing her dear friend and colleague Trina Grillo, Menkel-Meadow gave us a powerful definition for the socially committed mediator – “she listened, she talked, she asserted and did not ‘consent’ to oppression or injustice.”<sup>68</sup>

#### IV. Conclusion

*Passover reminds us annually that no matter how terrible our situation, we must not lose hope. Passover holds out the possibility of renewal, proclaiming that such change is as intrinsic to human nature as our blossoming trees to the natural world.*<sup>69</sup> Michael Strassfeld

The Seder, wrote Ben Edidin, “has everything--ceremony, songs and stories, games and pranks, good food and drink.”<sup>70</sup> According to Edidin, “it is a pageant with everyone taking part, reenacting the ancient story of liberation, reminding the Jew of his eventful history, and rekindling hope for the future.”

Menkel-Meadow’s scholarship likewise offers relentless optimism, hope and faith for the future. As she wrote in 2001:

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<sup>65</sup> Carrie Menkel-Meadow, *Practicing In the Interests of Justice in the 21st Century: Pursuing Peace As Justice*, 70 *FORDHAM L. REV.* 1761, 1767 (2002). See also, Carrie Menkel-Meadow, *The Lawyer As Consensus Builder: Ethics For a New Practice*, 70 *TENN. L. REV.* 63, 112 (2002) (opining that lawyers serve justice when they strive for peace and develop “the skills and the ethical commitments to attempt to make social, legal, political, and economic problems more amenable to democratic, creative, and life-enhancing resolutions that include more active participation by more of the people affected by decisions made and actions taken.”).

<sup>66</sup> Menkel-Meadow, *Toward a Jurisprudence of Law, Peace, Justice*, *supra* note 23 at 97.

<sup>67</sup> Carrie Menkel-Meadow, *Lawyer Negotiations: Theories and Realities. What We Learn From Mediation*, 56 *MODERN L. REV.* 361, 369 (1993).

<sup>68</sup> Menkel-Meadow, *What Trina Taught Me*, *supra* note 47 at 1427.

<sup>69</sup> STRASSFELD, *THE JEWISH HOLIDAYS*, *supra* note 2 at 6.

<sup>70</sup> EDIDIN, *JEWISH HOLIDAYS AND FESTIVALS*, *supra* note 2 at 142.



As a member of the Ethical Culture Society, and as a member of the human race, I still believe that “god” is spelled with two “o’s.” What that means in lawyering and conflict resolution practice remains to be elaborated. The challenge will be to see whether we can join pursuit of connection, communion, and collective meaning with autonomy, self-determination, and justice. Good conflict resolution practice recognizes that when ADR works, our knowledge and understanding transcend different conceptions of facts, interpretations, and meaning-making systems. We find value in the valuing of our fellow human beings.<sup>71</sup>

In 2012-2013, she summarized her own work as “focused on developing legal and other processes that encourage the ‘best’ in us to seek creative, less rigid, more contingent, and more tailored solutions to a wide variety of human problems that wind up in the legal system or become sources of serious human strife, hostility and war.”<sup>72</sup> She challenged us to consider: “Rather than preventing us from being bad, how can we encourage ourselves to be better human beings?”<sup>73</sup>

Earlier this year, having emerged out of the Trumpian end of the 2010s, during which she penned the only pessimistic note I could find in her scholarship<sup>74</sup> (including a delightful thought experiment),<sup>75</sup> she expressed her hope that “we have enough time left to learn how to really listen, explore our needs and interests and search for solutions that enhance human flourishing, rather than diminish it” and guessed that “the optimist in me is still hopeful.”<sup>76</sup>

Not only an optimist, it turns out she also is an enthusiastic, self-identified embracer of food metaphors in scholarly writing.<sup>77</sup> This is especially low-hanging fruit joyfully picked

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<sup>71</sup> Menkel-Meadow, *And Now a Word About Secular Humanism*, *supra* note 1 at 1087.

<sup>72</sup> Menkel-Meadow, *Toward a Jurisprudence of Law*, *supra* note 23 at 83.

<sup>73</sup> *Id.* at 84.

<sup>74</sup> Carrie Menkel-Meadow, *Why We Can't "Just All Get Along": Dysfunction in the Polity and Conflict Resolution and What We Might Do About It*, 2018 J. DISP. RESOL. 5, 7 (noting “I have written about the dangers of brittle adversarial thinking and behavior in the legal system and polity for decades, now seemingly to little avail.”).

<sup>75</sup> *Id.* at 25 (“I do experiments in my head to try to imagine how Donald Trump and some of his supporters would do in a “healing circle,” negotiated rule-making, facilitated strategic planning exercise for the West Wing, family mediation, or simply a “brainstorming” Cabinet meeting, and I can't even conjure up a good fantasy movie. As Charles Dickens famously said, “it was the worst of times” (I am leaving out “the best of times”), for us, at least at the national policy implementation level.”).

<sup>76</sup> Menkel-Meadow, *Applying Conflict Resolution Insights to Hyperpolarization*, *supra* note 45 at 4.

<sup>77</sup> Menkel-Meadow, *From Legal Disputes to Conflict Resolution and Human Problem Solving*, *supra* note 16 at 19 (“At the level of searching for creative ways to manage conflict, to seek integrative solutions, and to create pie-expanding rather than pie-diminishing solutions (I use many food metaphors in my work!), the early work of administrative scientist Mary Parker Follett and related work in labor-management relations were key.”). *See also* Menkel-Meadow, *Applying Conflict Resolution Insights to Hyperpolarization*, *supra* note 45 at 4 (observing “[i]f we do not learn to make lemonade out of lemons together, our lives will be quite bittersweet....I thank Heidi [Burgess], Guy [Burgess], and Sanda [Kaufman] for giving us some recipes.”).

when, as I have tried here, to analogize her writing to a ritual-based meal. There are many examples, but these are my favorites, from 2000 and 2013, respectively:

Thus, a good legal problem solver needs a greater repertoire of intellectual choices or "tropes" as well as a much broader and deeper set of behaviors. (Note, I did not say more arrows in the quiver, tools in the chest, or weapons in the arsenal—all terms of military destruction. How about, instead, more spices or ingredients for a more flavorful meal? More human diversity for a greater source of ideas?).<sup>78</sup>

[T]he ultimate challenge of the future of conflict resolution study and practice is our need to combine different kinds of discourses into productive engagement with each other – the combinations of the human brain (head), heart, and yes, “gut.” To live together, with productive conflict engagement, we need to think about, feel with, and get along with, tolerate (dare I say “digest”) other human beings, whose land, water and air we must share, even if we do not ultimately share all our values of what is most important in life.<sup>79</sup>

It is a full and immensely satisfying meal to digest Menkel-Meadow’s entire body of dispute resolution scholarship.<sup>80</sup> In final reflection on the feast, I close with this: A year ago, when writing a book chapter commentary about one of Menkel-Meadow’s early journal articles, I deemed it foundational because it was prescient.<sup>81</sup> In reflecting on the entire body of her work, I have a different perspective. Her scholarship is foundational and destined to inspire future generations of dispute resolution theorists and practitioners because it tells such a hopeful dispute resolution story that speaks to all. And that, in the spirit of the Passover Seder the true measure of passing down foundational knowledge. A successful “telling” indeed.

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<sup>78</sup> Menkel-Meadow, *When Winning Isn’t Everything*, *supra* note 41 at 910.

<sup>79</sup> Menkel-Meadow, *The Historical Contingencies of Conflict Resolution*, *supra* note 29 at 41.

<sup>80</sup> I offer my heartfelt thanks to the Texas A&M Symposium planners for the invitation to the feast, and remain, as I have always been, in awe of the cook!

<sup>81</sup> James Coben, *Foundational Because Prescient (and Unfortunately)*, *Cassandra-like Prescience* in DISCUSSIONS IN DISPUTE RESOLUTION 387, 387 (Art Hinshaw et al. eds. 2021) (commenting on Menkel-Meadow’s *Pursuing Settlement in an Adversary Culture*, *supra* note 36).