

# Toward a Jurisprudence of Law, Peace, Justice, and a Tilt Toward Non-Violent and Empathic Means of Human Problem Solving

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## *I. Introduction: Can There be a Jurisprudence or Law of Peace? The Questions*

For too long attaining “justice” has been defined by fights, struggles and “winning” rights. As Robert Cover acknowledged eloquently, years ago, the law can be “violent.”<sup>1</sup> Judges who interpret law, legislators who make law, and lawyers who argue conclusions of law all create categories of pain and death, of winning and losing, of gain and loss, in rigid legal dividing lines of “justice,” that can have grave and serious consequences. These categories of law and their interpretations can create, with words and acts, a strong-armed “violent” way of creating polar divisions of right(s) and wrong(s) and separation of wrongdoers from those “wronged.” Many justice seekers today still conceive of rights in such on-off and brittle terms, though the language of rights has also been creative, in developing new rights, and many new sites for their definitions, claims, and sometimes enforcement.<sup>2</sup>

For me, there are many questions implicated in the consideration of whether legal rights alone create justice or a “just world”: *Does a demand for legal justice necessarily result in human justice?*<sup>3</sup> As moral and legal philosophers have debated the relationship of

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<sup>1</sup> Robert Cover, *Violence and the Word*, 95 YALE L.J. 1601 (1986) (“Legal interpretation takes place in a field of pain and death. This is true in several senses. Legal interpretative acts signal and occasion the imposition of violence on others: A judge articulates her understanding of a text, and as a result, somebody loses his freedom, his property, his children, even his life.”); see also MARTHA MINOW, MICHAEL RYAN & AUSTIN SARAT, *NARRATIVE, VIOLENCE AND THE LAW: ESSAYS OF ROBERT COVER* (1992).

<sup>2</sup> RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977); LYNN HUNT, *INVENTING HUMAN RIGHTS: A HISTORY* (2007).

<sup>3</sup> See Carrie Menkel-Meadow, *Whose Dispute Is It, Anyway? A Philosophical and Democratic Defense of Settlement (In Some Cases)*, 83 GEO. L.J. 2663 (1995).

“positive” law to morality, I want here to consider the relationship of formal law to the achievement not only of “legal justice” (justice according to legal principles), but what human beings experience when they seek “human” (or social) justice. As in the famous Fuller-Hart debate on the morality of law,<sup>4</sup> I seek here to start or continue a conversation about whether law and legal principles are either necessary or sufficient for human beings to experience the world as just and “safe” (peaceful) enough for human flourishing. This is a big question and here I only outline some preliminary thoughts on some of the answers, based on both biographical experiences and my own scholarly and practical engagement with these issues in a variety of comparative legal, historical and sociological arenas. My observations here are drawn, in large measure, from my work as a peace seeker and mediator, who seeks not to cut legal and human categories with too sharp (or blunt?) a tool, but seeks instead to examine the “and” (or peaceful coexistence) of human differences.

In this essay I set out some questions about whether law can be made a site of encouraging more positive, peace seeking, non-violent, and pro-social behaviors. These questions derive from my own family history, as well as from my experience as a social and political activist, and also as a practicing lawyer and legal scholar. I begin in this introduction by setting out these questions in light of current conditions of domestic and international violence and some past considerations of categories of law. In the second section of this essay I explain where my questions come from—my personal and professional biography—and how these influences have led to my conclusions, in the third section, that 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 peace, with appreciation, empathy and sympathy for human differences and more varied modes of working and living together. In the fourth section of this essay I explore whether we, as human beings, actually have the capacity (biologically and historically) to aspire to develop a social consciousness able to support a more peaceful existence. In the fifth section I explore how our modern social and legal consciousness is attempting to grapple with the tensions implicit in searches for both justice and peace at the same time. In the sixth section I set out some possibilities for seriously considering what it would mean to construct a non-violence jurisprudence. Finally, in the last section I point out some of the limits of a jurisprudence of non-violence in the face of on-going violence and evil in the world, and ask if we can maintain the hopefulness and optimism needed to effectuate a more peaceful co-existence in a world that challenges our commitments at almost every turn.

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<sup>4</sup> See Lon Fuller, *THE MORALITY OF LAW* (1964), and *Positivism and Fidelity to Law – A Reply to Professor Hart*, 71 *HARVARD L. REV.* 630 (1958) and H.L.A. HART, *THE CONCEPT OF LAW* (1961, 2d ed. 1997), for the classic debate about whether morality is both larger and more capacious, and unachievable through the enactment of positive law or whether positive law is the full measure of human agency around issues of right and wrong and justice creation. As I write this Ronald Dworkin has just died and even the *New York Times Obituary* has attempted to explain this complex legal philosophical divide to the general public. See Ronald Dworkin, *Legal Philosopher Dies at 81*, *N.Y. TIMES* (Feb. 14, 2013).

I begin with the questions of how laws and legal process do or do not bring us closer to peace and non-violence in a still unjust world: Are the legal dividing lines of right and wrong always the best way to achieve justice? Are there laws and norms that could move us closer, rather than further away, from peace and non-violence and caring for each other? Is law what polices us or what can turn us toward each other, rather than away? Can theories of law and justice move us to a better world or merely a world in which people know their legal place? Is the absence of violence or injustice enough for us? Or should law and theories of law also provide for human flourishing and well-being? This is a question of what the substantive norms of law and justice should be, and to what end states they should aspire. Can law be a source of positive, life enhancing and flourishing values and obligations, or is law solely a source of prohibitions and negative obligations? What processes of law making, interpretation and implementation are best suited to enhancing both legal and social justice?

Legal philosophers<sup>5</sup> have long queried whether law and legal institutions are necessarily coercive, needed most when “ordinary” human consent and voluntary compliance with (social) norms fails. Do we turn to law to enforce legal norms because we know that moral or social norms are not adequate on their own?<sup>6</sup> Who decides what those norms, laws, and enforcing institutions should say and do? We speak of *en-forcing* law, signaling that law is a “force,” often brutal, requiring strength. The law acts “upon” someone who must be brought into compliance with the rules. Most often that “force” acts harshly with a focus on punishment and damages, binary judgments of right and wrong, and consequent liability, both civil and criminal, with some softening around the edges of comparative liability standards and some “negotiated” outcomes.

In both substantive and process domains law is a statement of and means for policing, controlling, and demarcating what is permissible. Most of the time the law tells us what we cannot do (*e.g.*, kill, steal, infringe on the liberty of others, hurt other people, “be” negligent or reckless, break promises); it seldom tells us positively what we should do (*e.g.*, be nice to other people, try to understand others and appreciate their own experiences, care for our families and others, be generous,<sup>7</sup> share what we have with others, seek and promote justice and peace for others,<sup>8</sup> as well as ourselves).

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<sup>5</sup> See MINOW et al., *supra* note 1; SALLY ENGLE MERRY & NEAL MILNER, THE POSSIBILITY OF POPULAR JUSTICE: A CASE STUDY OF COMMUNITY MEDIATION IN THE UNITED STATES 3-30 (1993).

<sup>6</sup> The relationship of positive law to morality is an ongoing and still unresolved issue in jurisprudential debates; for some of the classic treatments see *supra* note 4.

<sup>7</sup> For an interesting take on how norms of generosity might work in different ways than our assumed notions of individual wealth maximization, see Lela Love & Sukhsimranjit Singh, *Following the Golden Rule and Finding Gold: Generosity and Success in Negotiation*, in EDUCATING NEGOTIATORS FOR A CONNECTED WORLD VOL. IV, RETHINKING NEGOTIATION PEDAGOGY SERIES (James Coben, et al. eds., 2012).

<sup>8</sup> For a recent argument that the century of “introspection” needs to be reoriented to think about others and “outropsection,” see Roman Krznaric, *RSA Animate - The Power of*

That is left for religion, ethics, and “proper” upbringing. Increasingly, however, even legal scholars have begun to examine the incentives for “pro-social” or “norm-based” behavior in behavioral economics, law and psychology, socio-legal studies, and legal philosophy.<sup>9</sup>

In recent years the theories, practices, law, and jurisprudence of non-violence,<sup>10</sup> peace,<sup>11</sup> problem solving,<sup>12</sup> restorative justice,<sup>13</sup> peacemaking,<sup>14</sup> and peace building and keeping<sup>15</sup> have gained some, but not enough, ascendancy. I will focus here on the way new processes of less violent or “brittle” ways of dealing with injustice<sup>16</sup> may be better suited to modern multivalent instances of injustice—using a set of plural processes to ameliorate injustice in different ways, including mediation, restorative justice, transitional justice,<sup>17</sup> truth and reconciliation commissions,<sup>18</sup> consensus building initiatives,<sup>19</sup> and other forms of legal problem solving and decision making.<sup>20</sup> If Cover enabled us to see the violence in legal categories and interpretation, it is now time (given the on-going violence in our world<sup>21</sup>) to focus on the non-violent (or “less-violent”) possibilities in legal processes that seek to solve problems and reduce pain and injustice in multiple and different ways, without the rigid certainties of

*Outrospection*, YOUTUBE, (Dec. 3, 2012), <http://www.upworthy.com/why-the-self-help-industry-is-an-enormous-failure>.

<sup>9</sup> See, e.g., Carrie Menkel-Meadow, *Is Altruism Possible in Lawyering?*, 8 GEORGIA ST. U. L. REV. 385 (1992); ROBIN WEST, *NORMATIVE JURISPRUDENCE* (2011); see generally *Law, Norms and Informal Order e-Journal*, SOCIAL SCIENCE RESEARCH NETWORK, <http://www.ssrn.com/link/law-norms-informal-order.html>.

<sup>10</sup> COLMAN MCCARTHY, *ALL OF ONE PEACE: ESSAYS ON NON-VIOLENCE* (1994).

<sup>11</sup> CHRISTINE BELL, *ON THE LAW OF PEACE: PEACE AGREEMENTS AND THE LEX PACIFICATORIA* (2008).

<sup>12</sup> Carrie Menkel-Meadow, *Peace and Justice: Notes on the Evolution and Purposes of Legal Processes*, 94 GEO. L.J. 553 (2006); Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754 (1984).

<sup>13</sup> Carrie Menkel-Meadow, *Restorative Justice: What is it and Does it Work?*, 3 ANNUAL REV. OF LAW & SOC. SCI. 161 (2007).

<sup>14</sup> COLMAN MCCARTHY, *I'D RATHER TEACH PEACE* (2002).

<sup>15</sup> *BUILDING PEACE: PRACTICAL REFLECTIONS FROM THE FIELD* (2009); LISA SCHIRCH, *THE LITTLE BOOK OF STRATEGIC PEACEBUILDING* (Craig Zelizer & Robert A. Rubenstein eds., 2004).

<sup>16</sup> See, e.g., Menkel-Meadow, *supra* note 13; Carrie Menkel-Meadow et al., *Senses of Sen: Reflections on Amartya Sen's ideas of justice*, 8 INT'L J. OF LAW IN CONTEXT 155 (2012).

<sup>17</sup> RUTI TEITEL, *TRANSITIONAL JUSTICE* (2000).

<sup>18</sup> PRISCILLA HAYNER, *UNSPEAKABLE TRUTHS: CONFRONTING STATE ATROCITY AND TERROR* (2001).

<sup>19</sup> *THE CONSENSUS BUILDING HANDBOOK: A COMPREHENSIVE GUIDE TO REACHING AGREEMENT* (Lawrence Susskind et al. eds., 1999).

<sup>20</sup> SUSAN PODZIBA, *CIVIC FUSION* (2012); SUSAN CARPENTER & W.J.D. KENNEDY, *MANAGING PUBLIC DISPUTES: A PRACTICAL GUIDE FOR GOVERNMENT, BUSINESS AND CITIZEN'S GROUPS* (2001).

<sup>21</sup> See *infra* note 26.

“universal” values, processes and judgments. Legal analysis and processes can include the “and,” as well as the “but,” as a famous gestalt therapist once taught me.<sup>22</sup> Truth, justice and human needs can actually present many possibilities.<sup>23</sup> As I will suggest below, our humanity is both more advanced and more threatened than we commonly think. It is time to conceive of and implement other ways of achieving justice in the world, through more peaceful and less violent means.

When so much law and jurisprudence is framed to define and police the bad, punish wrongs, or create “negative” rights of liberty and separation between individuals and their governments, little law and jurisprudence seems available to theorize and more positive and life-affirming ways of being in the world.<sup>24</sup> Nevertheless, some thinkers like Robin West have attempted to reframe jurisprudence studies to focus more on “normative jurisprudence”<sup>25</sup> and the obligations of law and government to care for us and undertake “positive” obligations, such as keeping us safe, well fed, healthy, housed, educated, engaged in work or work substitutes, and connected to community and each other.<sup>26</sup> Similarly, some newer constitutions<sup>27</sup> have attempted to state such social, economic and positive rights (aspirationally, if not totally realistically).

My work has 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<sup>28</sup> or become sources of serious human strife, hostility and war. Since social psychologists have now clearly demonstrated that it is far easier to escalate a situation than to de-escalate it,<sup>29</sup> it seems imperative that we develop theories, strategies, and programs for encouraging (dare I say “incentivizing”?) obligations (laws?) and behaviors to de-escalate conflicts and search for better and more peaceful solutions to a myriad of

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<sup>22</sup> Thank you Janet Lederman (of the Esalen Institute).

<sup>23</sup> Carrie Menkel-Meadow, *The Trouble With The Adversary System in a Post-Modern, Multi-cultural World*, 38 WILLIAM & MARY L. REV. 5 (1996).

<sup>24</sup> For some exceptions, see Mari Matsuda, *I and Thou and We and the Way to Peace*, ISSUES LEGAL SCHOLARSHIP Art. 6 (Aug. 2002), <http://www.bepress.com/ils/iss2/art6>. As more fully explored in the text *infra*, efforts to create a more “positive” jurisprudence can be traced to Adam Smith’s *The Theory of Moral Sentiments* (D.D. Raphael & A.L. Mcfie eds., 1984) (1759) in which “sympathy” for others (or the more modern conceptions of “empathy”) is argued to be the single touchstone concept of justice, with “resentment of harm” to be the source of our conception of justice. *Id.* at 13).

<sup>25</sup> WEST, *supra* note 9.

<sup>26</sup> ROBIN WEST, *CARING FOR JUSTICE* (1997).

<sup>27</sup> See, e.g., CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA (1996); VICKI JACKSON & MARK TUSHNET, *COMPARATIVE CONSTITUTIONAL LAW* (2d ed. 2006) (exploring cases demonstrating interpretations of more “positive” rights in more recent constitutions, including the right to housing, education, healthcare, etc. in other non-American legal regimes).

<sup>28</sup> Carrie Menkel-Meadow, *Aha? Is Creativity Possible in Legal Problem Solving and Teachable in Legal Education?*, 6 HARV. NEGOT. L. REV. 97 (2001).

<sup>29</sup> DEAN PRUITT & JEFFREY Z. RUBIN, *SOCIAL CONFLICT: ESCALATION, STALEMATE AND SETTLEMENT* (1986).

human difficulties and “injustices.” This involves deeper engagement with differences while promoting the possibility of mutual understanding, empathy, sympathy, and “fellow-feeling.” This approach opposes the conceptions of winners and losers, plaintiffs and defendants, and rights holders and deniers which characterize so much of our legal system.

So, a project to create a “jurisprudence of peace, justice, and non-violence” should necessarily entail preventative measures, approaches to dealing with human difficulties and differences *during* conflicts and finally, more sensitive and tailored approaches to post-conflict resolutions<sup>30</sup> I hope in this essay to spark an interest in a more positive jurisprudence of peace and non-violence. I have many questions and few answers but I think we should be looking for ways to reconceptualize the study and practice of law to focus on these more positive approaches to human existence. Rather than preventing us from being bad, how can we encourage ourselves to be better human beings? While some focus on religion, theology, ethics, or a new-age spirituality of love and appreciation of our fellow human beings,<sup>31</sup> I think law in a more positive form has a role to play in the pursuit of peace *and* justice.

## II. *Some Autobiographical Notes to Answer the Questions*

I begin with a few important autobiographical notes. My German grandfather shot off part of his own finger to get out of front-line military service in the German army in World War I and became a pacifist (and promoter of Esperanto, in the hope that unifying the world with a single language would allow human beings to better understand each other and ensure peaceful co-existence). He was part of the *friedengeschellschaft* (Association of Peace) “*nie wieder Krieg*” movement (Never Again War!).<sup>32</sup> But then my pacifist, but political, paternal family escaped Nazi Germany and my father joined the American army to help defeat the Nazi monster. (He was sent to Hawaii to make maps to fight the Japanese since the Americans feared he could still be sympathetic to the Germans—a ridiculous suspicion given that my father was half Jewish and attended Communist meetings in New York when that was still legal.<sup>33</sup>) My father returned from Hawaii convinced that inter-marriage of all

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<sup>30</sup> Indeed, one of the major problems with our “brittle” legal system is that convictions, verdicts, punishments, and judgments often result in a desire for revenge that continues conflicts.

<sup>31</sup> See, e.g., ANDRE COMTE-SPONVILLE, *THE LITTLE BOOK OF ATHEISTIC SPIRITUALITY* (2008).

<sup>32</sup> See lithographs, sculptures, and etchings of Käthe Kollwitz, the *War* series, and her famous cry, “There has been enough of dying! Let not another man fall!” (after losing one of her sons in WWI).

<sup>33</sup> There remains a continuing question in my family about whether my father actually ever had a card membership or just attended Communist Party (“CP”) meetings in New York before the party was banned. The company my father worked for all of his life in the United States as an engineer later made part of the plastic casing for the nuclear bomb and my father’s activities (he was not at the company at the time, but in the Pacific theatre himself) were not a security risk—remember in the 1940s the Soviets and the US were allies. The CP

kinds was the future for peaceful co-existence in the world. By mingling and mixing “pure” ethnic forms it would become impossible to hate in a purely ethnic way. Thus, the essence of my legal career was born from a pastiche of metaphors, ideas and realities—one language on earth, no “essence” of ethnicity or religion (from intermarriage), relativism in pacifism, preferring non-violence but prepared to fight against “systemic evil,” and appreciating the immigrant salad and hybrid identities of the United States, and the progressive expression of its founding values filtered through the teachings of European history and philosophy.

As a young girl I was raised in the secular humanist religion of Ethical Culture,<sup>34</sup> which was noted for, among other things, its support of SANE (the anti-nuclear weapons movement, National Committee for a Sane Nuclear Policy) in the 1950s. I demonstrated against the war in Viet Nam (at the first organized anti-war march in Central Park in 1965<sup>35</sup>), became a political activist with Students for a Democratic Society and occupied a building at the Columbia University student protests of 1968 (which had a seven-item list of demands, including dismantling the military-industrialist establishment (first named by President Dwight Eisenhower<sup>36</sup>) and then

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and its members only became an issue in the McCarthy-era 1950s, and despite the Republican conservatism of the management of my father’s company, he was never fired and advanced to management himself (while maintaining a lifelong commitment to labor and the Democratic party). I was a labor and employment lawyer in the early years of my practice.

<sup>34</sup> Carrie Menkel-Meadow, *And Now A Word About Secular Humanism, Spirituality and the Practice of Justice and Conflict Resolution*, 28 FORDHAM URB. L.J. 1073 (2001).

<sup>35</sup> Which upset not my own family, who were proud of me, but many of my family’s German refugee friends —“How can you let your daughter protest against the country that took us in?” I remember my parents being asked when I returned soaked from the rainy protest. I remember the arguments the protesters had with the “underreporting” of our numbers by the New York Times that day and I never quite trusted newspapers again.

<sup>36</sup> President Dwight D. Eisenhower, Farewell Address (January 17, 1961), in *Public Papers of the Presidents, Dwight D. Eisenhower*, at 1035- 1040, *available at* <http://www.youtube.com/watch?v=8y06NSBBRtY> (warning Americans about the dangers of a “permanent military establishment” and the dangers to our “liberties and democratic processes” if this “military-industrial complex” accrued too much “misplaced power.”). President Eisenhower warned about the change in America since an armament industry had become permanent (employing over 3 and a half million Americans) following World War II. He expressed concern about the political, economic and “spiritual” effects of this military establishment on America’s future and warned us to “guard against its misplaced influence.” If given today this speech would sound like a lefty peace plea, demonstrating how much more polarized we have become, even since the bi-polar Cold War years. Like many who leave office (including our own Presidents and Prime Ministers of many nations, in the UK and Israel, to name a few), Eisenhower’s message, after holding military and political office, was to seek and work for peace:

Together we must learn to compose differences, not with arms, but with intellect and decent purpose . . . We pray that peoples of all faiths, all races, all nations, may have their great human needs satisfied; that those now denied opportunity shall come to enjoy it to the full; that all who yearn for freedom may experience its spiritual blessings; that those who have freedom will understand, also its heavy responsibilities; that all

by the protesters), ending the Viet Nam war, terminating “war research” at the university, and eliminating plans to build an exclusionary (racist) university gymnasium in our Harlem location).

The Columbia student protests were profoundly formative for me. At first we really thought we were making a revolution. It was 1968 after all, and Danny the Red<sup>37</sup> was already fomenting revolution in France. Later there would be protests on other campuses, and Martin Luther King, Jr. and Bobby Kennedy would both be assassinated, as violence was used to fight violence on all sides.<sup>38</sup> When I left my occupied building for a few days and heard the rumors the university was going to call the police on us, I joined a group of more pacifist students. We divided up the campus and laid our bodies down on the ground outside to occupy, sleep, and, we hoped, prevent the police from stepping on us. By “inter-mediating” and protecting our more radical colleagues still holding four buildings hostage from the university we tried to prevent the university from using violence. Or so we thought. The police were called by University President Grayson Kirk and they did more than step on us. They used billy clubs and worse. Many students were hurt, bloodied, and arrested.<sup>39</sup> So, I was literally caught up in what later became my career of resistance, protests and struggles (and litigation), and at the same time, I felt the desire to “mediate” and calm things down. I was horrified by the violence I saw that night and also by the failure of the largely “working class” police to see that we (mostly, but not all, middle class students) were fighting for “their” justice too. When the tear gas cleared we regrouped and SDS, like many political action groups, splintered. Part of SDS became more committed to violence (“you don’t need a *weatherman* to see which way the wind blows”<sup>40</sup>) and I quit. For some of us, it was the beginning of our feminist consciousness and Columbia’s (and Barnard’s) “women’s liberation” movement was born out of the sexist behavior of our protests’ leaders. Disputes about ideology and

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who are insensitive to the needs of others will learn charity; that the scourges of poverty, disease, and ignorance will be made to disappear from the earth, and that in the goodness of time, all peoples will come to live together in a peace guaranteed by the binding force of mutual respect and love.

Id.

<sup>37</sup> Daniel Cohn-Bendit (known as Dany Le Rouge) was a student leader in the French student protests of 1968. A German, he later became active in Green politics in Germany and France, serving in the European Parliament.

<sup>38</sup> See, e.g., TODD GITLIN, *THE SIXTIES: YEARS OF HOPE, DAYS OF RAGE* (1993).

<sup>39</sup> By a total fluke, I was not arrested and so I sit before you today as a fully admitted member of three state bars and an “establishment” law professor. To this day, I advise students who have been arrested for political protests about what to do and say about their arrests on bar applications (disclose!).

<sup>40</sup> BOB DYLAN, *SUBTERRANEAN HOMESICK BLUES* (Columbia 1965). Ironically, many of the more radical activists in the 1960s went on to pursue traditional careers in law, politics, and social change. Bernadine Dohrn, a member of SDS’s Weatherman and a controversial political activist, later became a committed juvenile justice advocate and clinical professor at Northwestern Law School. Tom Hayden, one of the founders of SDS, was a major legislator in California for many years. We old time radicals are all more establishment now!



means for achieving social justice and the end of war then consumed the rest of my political education before I marched off to law school to become a poverty and civil rights lawyer.

My early years as a poverty lawyer framed the rest of my practice and scholarly career. Like many of my generation I brought class action lawsuits challenging prison conditions, school systems, welfare regulations, and discriminatory employment practices in both the public and private sector, all while maintaining a crushing (over 300 cases at one time) load of individual cases involving evictions, unemployment compensation, family and custody disputes, collections, consumer cases, welfare denials, Social Security disability, and special education hearings. We were evaluated by how big our cases were and what courts they were filed in. No one then was able to measure the impact of these cases on actual people (though in my early years as a clinical professor there was much talk about doing this).<sup>41</sup> I sat in my office and saw that even when we won (often easily through statutory and constitutional summary judgments) “the battle,” we would then lose “the war.” Regulations would be changed, business would return to usual, another ground for welfare or Social Security denial would be “found” or manufactured. Class actions changed or voided rules but they did not change lives often enough. I watched as one very quiet lawyer in my office (later to become an administrative law judge in the Social Security system) conscientiously and diligently negotiated her cases on behalf of individuals, often, but not always, securing more long lasting, if more individualized, results for her clients. Thus was born my desire to learn, and then teach, other forms of attaining justice – negotiation, later mediation and “alternative” (now appropriate) dispute resolution and even later, group and community facilitation, and deliberative democracy.<sup>42</sup>

### *III. Process Pluralism or Justice Without War or Litigation?*

As one of the founders of the “ADR” movement in American law (along with Frank Sander of the Harvard faculty and others), I have focused my work as a

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<sup>41</sup> See, e.g., Gary Bellow & Jeanne Kettleson, *From Ethics to Politics: Confronting Scarcity and Fairness in Public Interest Practice*, 58 B.U. L. REV. 337 (1978); I. Glenn Cohen, *Rationing Legal Services*, J. OF LEGAL ANALYSIS (forthcoming), available at <http://ssrn.com/abstract=2180453>. See also Scott Cummings, *Empirical Studies of Law and Social Change: What is the Field? What are the Questions?*, 2013 WIS. L. REV. 171 (2013).

<sup>42</sup> For modern texts on facilitating deliberative democracy through dispute resolution processes see, e.g., SUSAN L. PODZIBA, *CIVIC FUSION: MEDIATING POLARIZED PUBLIC DISPUTES* (2012); CAROLYN J. LUKENSMEYER, *BRINGING CITIZEN VOICES TO THE TABLE* (2013); LAWRENCE SUSSKIND, SARAH MCKEARNAN & JENNIFER THOMAS-LARMER, *THE CONSENSUS BUILDING HANDBOOK: A COMPREHENSIVE GUIDE TO REACHING AGREEMENT* (1999), and LAWRENCE E. SUSSKIND & JEFFREY L. CRUICKSHANK, *BREAKING ROBERT'S RULES: THE NEW WAY TO RUN YOUR MEETING, BUILD CONSENSUS, AND GET RESULTS* (2006); Carrie Menkel-Meadow, *The Lawyer's Role(s) in Deliberative Democracy*, 5 NEV. L.J. 347 (2005).

theorist, teacher and practitioner or “pracademic”<sup>43</sup> on other forms of justice seeking besides (in addition to, not totally supplanting of) litigation.<sup>44</sup> As a poverty and civil rights lawyer I observed how winning a case might make a new precedent or void an unjust law, but would not always change lives.

One of my favorite cases was a race discrimination class action against a trucking company that assigned whites the more lucrative “over-the-road” hauls, while black drivers were assigned to inner-city driving with more difficult conditions, less mileage and lower wages. My clients wanted better jobs and higher wages, not a many year fight in federal court to have this discriminatory practice declared illegal (as it had in a number of other jurisdictions<sup>45</sup>). During this case I learned the art of negotiation by settling with the trucking company for new trucks to be delivered to the named plaintiff to create his own trucking company. This did not immediately end discrimination in the trucking industry but my clients felt empowered. Through cases like this I learned, early in my legal career, the power of creative problem solving in negotiation.

No court would have been empowered to order the results we achieved through negotiation. Litigation, with its focus on the fact-specific past, and its “limited remedial imagination” as I later argued in one of my first law review articles<sup>46</sup>, was too “brittle” or rigid and backward focused, for future-oriented problem solving and the particular kind of (more immediate) “justice” my clients desired. My clients wanted to separate from their discriminatory bosses; others might have preferred to stay with a lawsuit for a longer legal “haul.” I learned that not all clients wanted the same thing and too many “cause” lawyers<sup>47</sup> were more focused on their own political agendas than their clients’ desires and well being. This tension between law reform lawyering and client service remains an ongoing challenge for social justice lawyers and legal clinicians, but it taught me there was a need for many different ways of pursuing legal justice, both in terms of process pluralism (different kinds of process) and in terms of more varied fact-based, client-tailored “solutions” to different legal problems.

The avoidance of the labels “winners” and “losers” in litigation, where possible, also can end the conflict more amicably and prevent the resentment and desire for

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<sup>43</sup> Maria Volpe & David Chandler, *Resolving and Managing Conflicts in Academic Communities: The Emerging Role of the ‘Pracademic,’* 17 NEGOT.J. 245 (2001).

<sup>44</sup> CARRIE MENKEL-MEADOW, LELA LOVE, ANDREA SCHNEIDER & JEAN STERNLIGHT, DISPUTE RESOLUTION: BEYOND THE ADVERSARIAL MODEL (2d ed. 2011); Carrie Menkel-Meadow, *When Litigation is Not the Only Way: Consensus Building and Mediation As Public Interest Lawyering*, 10 WASH. U. J.L. & POL’Y 37 (2002).

<sup>45</sup> Carrie Menkel-Meadow, *The Inevitable Interplay of Title VII and the National Labor Relations Act: A New Role for the NLRB*, 123 U. PA. L. REV. 158 (1974).

<sup>46</sup> Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem-Solving*, 31 UCLA L. REV. 754 (1984).

<sup>47</sup> Carrie Menkel-Meadow, *The Causes of Cause Lawyering: Toward An Understanding of the Motivations and Commitments of Social Justice Lawyers*, in CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES (Austin Sarat & Stuart Scheingold eds., 1998).

revenge that often follows losses. Though I never use the phrase “win-win” (which inaccurately promises too much in most conflicts), at least some forms of dispute resolution result in better than “win-lose” outcomes and can prevent the “loser” from seeking to avenge a loss through further conflict or violence. Though many people continue to criticize negotiated settlements as unprincipled compromise, for me, “principled” negotiation<sup>48</sup> in fact acknowledges the engagement of parties to apprehend each other’s realities and attempt to “meet” in a place where needs and interests on both or all sides can be met.<sup>49</sup>

With a focus on negotiation, mediation, facilitation of complex multiparty disputes and other hybrid forms of dispute resolution domestically, we now see many forms of formal, informal and “semi-formal” dispute resolution designed to develop less brittle (win-lose) outcomes, out of processes that empower parties and permit them to participate in the tailored resolution of their own disputes.<sup>50</sup> Mediation approaches permit parties to participate in making solutions that might be more long-lasting, consensual, tailored to their own needs, contingent and re-visitible, and less likely to lead to desires for revenge, as losing often does. Giving parties greater control of how they confront those they are in conflict with and encouraging more possibilities of resolution, including reconciliation, as well as restitution, responsibility and accountability, for example, may itself lead to more peaceful, robust and enduring outcomes. These are the claims of process pluralism and “appropriate” dispute resolution for a more diversified sense of justice, where agreement on the “universal” substantive good may be more difficult to achieve.<sup>51</sup>

As domestic dispute resolution processes have proliferated, a similar process pluralism has also developed in the international arena. Human “rights,” like the American civil “rights” described above, began with strong claims of “rights” (freedom, self-determination, no discrimination, no killing, murder, no rape, etc.) which, by definition also define and describe the “wrongs” committed by some people, against others. Those “wrongdoers” are now prosecuted and punished (not always) with models based on trials and adjudication, from the Nuremberg trials, as our civil rights violations are addressed in courts (in both criminal and civil contexts). However, in the international arena, with the greater recognition of occurrences and definitions of human rights,<sup>52</sup> there has also been the development of more and varied international tribunals to adjudicate, and treat in other ways, the expansion of both state- to-state and individual and organizational claims in a time of “transnational”

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<sup>48</sup> ROGER FISHER, WILLIAM URY & BRUCE PATTON, *GETTING TO YES; NEGOTIATING AGREEMENT WITHOUT GIVING IN* (3d ed. 2011).

<sup>49</sup> Carrie Menkel-Meadow, *Compromise, Negotiation and Morality*, 26 *NEGOT. J.* 483 (2010); Carrie Menkel-Meadow, *To Negotiate or Not to Negotiate? That is the Question: The Ethics of Compromise in THE NEGOTIATOR’S FIELD GUIDE: THE DESK REFERENCE FOR THE EXPERIENCED NEGOTIATOR* (Andrea Schneider & Christopher Honeyman eds., 2006).

<sup>50</sup> Carrie Menkel-Meadow, *Formal, Informal and Semi-Formal Justice in the United States, in CIVIL PROCEDURE IN CROSS-CULTURAL DIALOGUE* (D. Malesin ed., 2012).

<sup>51</sup> STUART HAMPSHIRE, *JUSTICE IS CONFLICT* (2000).

<sup>52</sup> LYNN HUNT, *INVENTING HUMAN RIGHTS* (2008).

interactions. The arenas and processes by which new kinds of claims can be made and either adjudicated or handled in some other manner has increased exponentially.<sup>53</sup> In times of great violence we can now turn to specialized tribunals for prosecution, first developed at Nuremberg, now the International Criminal Tribunal for the Former Yugoslavia or Rwanda, or the International Criminal Court<sup>54</sup> or turn instead to a variety of Truth and Reconciliation processes or hybrid international, supra-national or domestic courts or other institutions for criminal, civil and hybrid legal treatment.<sup>55</sup>

These new institutions and processes provide the opportunity to explore different theories of justice and jurisprudence, with different *purposes* (retribution, punishment, reconciliation, forgiveness, restitution, history making, truth finding, and compensation), different *goals and outcomes* (apologies, compensation, documentation, restitution, reintegration, reconciliation, as well as or in lieu of conviction and imprisonment, shaming<sup>56</sup>) and different *processes, procedures and forms of participation*. Already a series of important jurisprudential and ethical questions have developed around these new institutions, stemming from our increased sensitivity to and confrontation with the violence of the past (*e.g.*, Holocaust) and present (war crimes, genocides and civil wars). For peace and justice to be achieved, what is the relationship of the past to the present and future? What must be remembered?<sup>57</sup> What can be forgiven, and by whom? When must there be punishment, and for what purposes (deterrence, incapacitation, retribution, vengeance)? Who should decide how grievous wrongs should be dealt with? What is the role of the (violent) past in creating (the more peaceful/just) future?<sup>58</sup> Can there be peace without justice? Can there be justice without peace? Must only law, principle and rule be used to achieve justice or is it (and when is it) permissible to use something other than legal principle to resolve, terminate or even just “handle” violence? When are cease-fires, peace,

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<sup>53</sup> J. G. MERRILLS, *INTERNATIONAL DISPUTE SETTLEMENT* (5th ed. 2011); *INTERNATIONAL LAW AND DISPUTE SETTLEMENT* (Duncan French, Mathew Saul & Nigel D. White eds., 2010); Andrea Schneider, *The Intersection of Dispute System Design and Transitional Justice*, 14 *HARV. NEGOT. L. REV.* 289 (2009).

<sup>54</sup> The U.S. is not a ratified party to the International Criminal Court, but is proceeding with prosecutions of war crimes and crimes against humanity. See The Rome Statute for the International Criminal Court, July 17, 1998, U.N. Doc. A/Conf.183/9.

<sup>55</sup> See, *e.g.*, *ACCOUNTING FOR ATROCITIES: NATIONAL AND INTERNATIONAL RESPONSES* (Jane Stromseth ed., 2003); JANE STROMSETH, DAVID WIPPMAN & ROSA BROOKS, *CAN MIGHT MAKE RIGHTS? BUILDING THE RULE OF LAW AFTER MILITARY INTERVENTION* (2006).

<sup>56</sup> JOHN BRAITHWAITE, *CRIME, SHAME AND REINTEGRATION* (1989).

<sup>57</sup> On the ethics of memory, see AVISHAI MARGALIT, *THE ETHICS OF MEMORY* (2002); EVA HOFFMAN, *AFTER SUCH KNOWLEDGE: MEMORY HISTORY AND THE LEGACY OF THE HOLOCAUST* (2004); Carrie Menkel-Meadow, *Remembrance of Things Past? The Relationship of Past to Future in Pursuing Justice in Mediation*, 5 *CARDOZO J. CONFLICT RESOL.* 97 (2004); Susan Coutin, *Re/Membering the Nation: Gaps and Reckoning within Biographical Accounts of Salvadoran Émigrés*, 84 *ANTHROPOLOGICAL QUARTERLY* 809 (2011).

<sup>58</sup> See, *e.g.*, Yxta Maya Murray, *From Here I Saw What Happened and I Cried: Carrie Mae Weems' Challenge to the Harvard Archive*, this issue.

compromise, temporary agreements justified? An enormous outpouring of useful scholarship and practice has developed around these issues of permissible and impermissible compromise in outcome<sup>59</sup> and process,<sup>60</sup> as scholars are now evaluating and studying how the variety of efforts at peacemaking and peacekeeping are nested in a widely diverse set of conflicts.<sup>61</sup>

I have been a student, practitioner and promoter of “process pluralism” as we attempt to design new structures, processes and institutions to develop creative, flexible and suitable-to-context means for resolving and managing past violence and conflict in order to create a more peaceful and just future.<sup>62</sup> The questions presented by using different processes for different purposes include:

- whether *processes* themselves can encourage different forms of peace seeking, and problem solving, *before, during or after* particular *conflicts*;
- whether *substantive legal, moral, political or philosophical commitments* are necessary to promote more peaceful means of engagement;
- what forms of *formal enforcement or institutionalization* of such processes and substantive commitments might be necessary to make them a reality.

The UN Charter, for example, specifies that it was created in the hope that its member signatories could “practice tolerance and live together in peace with one another as good neighbors and to unite in strength to maintain international peace and security.”<sup>63</sup> Article 33 provides that a “party to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice and the Security Council shall, when it deems necessary, call upon the parties to settle their disputes by such means,” but these non-enforcing provisions are hardly “mandatory” assignments to ADR, as practiced by many courts

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<sup>59</sup> AVISHAI MARGALIT, ON COMPROMISE AND ROTTEN COMPROMISES (2010); ROBERT E. GOODIN ON SETTling (2012); Carrie Menkel-Meadow, *Compromise, Negotiation and Morality*, 26 NEGOT. J. 483 (2010); Carrie Menkel-Meadow, *The Variable Morality of Constitutional (and Other) Compromises: A Comment on Sanford Levinson’s Compromise and Constitutionalism*, 38 PEPP. L. REV. 903 (2011).

<sup>60</sup> ROBERT MNOOKIN, BARGAINING WITH THE DEVIL? WHEN TO NEGOTIATE, WHEN TO FIGHT (2010).

<sup>61</sup> See, e.g., GABRIELLA BLUM, ISLANDS OF AGREEMENT: MANAGING ENDURING ARMED RIVALRIES (2007); ANTONIA CHAYES & MARTHA MINOW, IMAGINE COEXISTENCE: RESTORING HUMANITY AFTER VIOLENT ETHNIC CONFLICT (2003); BELL, *supra* note 11.

<sup>62</sup> Carrie Menkel-Meadow, *Are There Systemic Ethics Issues in Dispute System Design? And What We Should (Not) Do About It: Lessons From International and Domestic Fronts*, 14 HARV. NEG. L. REV. 195 (2009); Carrie Menkel-Meadow, *Correspondences and Contradictions in International and Domestic Conflict Resolution: Lessons From General Theory and Varied Contexts*, 2003 J. DISP. RESOL. 319 (2003).

<sup>63</sup> UN Charter, pmbll..

in the United States (and now other parts of the world).<sup>64</sup> While the UN has sponsored both official and second-track or more informal and private dispute resolution efforts, and many “notables” have offered their services to intervene in international disputes (former Presidents Jimmy Carter and Bill Clinton in North Korea; Tony Blair, George Mitchell and Henry Kissinger in the Middle East), there is little formal mechanism for the more stringent pursuit of peaceful means. Legal disputes, according to Article 36, “should, as a general rule, be referred to the International Court of Justice,” (which is a court of generally voluntary and consent-based jurisdiction of disputes between legal states).<sup>65</sup> As any international law student knows, actions by the Security Council require concurrence of all permanent members (including the United States, France, the United Kingdom, Russia and China)<sup>66</sup> and so formal actions have been quite limited in the UN’s history, though they have included resolutions and actions for formal economic sanctions, as well as peacekeeping and more formal actions in some settings.<sup>67</sup>

Since UN action has been relatively limited, these new institutions have developed to deal with conflict, both within and between nation-states, in different ways. Modern international scholars are now engaged in efforts to evaluate and assess whether there is any general learning or conclusions to be drawn about when and how different processes might be appropriate for different kinds of conflict. To the extent that punishment of evil doers is one goal that many regard as fundamental, while others worry about worsening conflict in post-conflict societies without more capacity building and reconciliation efforts, process pluralism might be required to punish and then heal conflict and violence, even within the same society (*e.g.*, current efforts in Cambodia).<sup>68</sup>

So, one major question for domestic, national, and international legal regimes is whether we as human beings, and the institutions we create, can encourage, if not require, more effective, alternative, positive, peace seeking processes at the same time that we often still cleave to older notions of wrongdoing with punishment, and meeting violence and conflict with more violence and conflict.

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<sup>64</sup> BRYAN CLARK, *LAWYERS AND MEDIATION* (2012).

<sup>65</sup> Statute of the International Court of Justice art 34, 36, 37, June 26, 1945, 59 Stat. 1055.

<sup>66</sup> UN Charter art. 23.

<sup>67</sup> Security Council actions were quite rare during the Cold War with effective vetoes by either the US or the Soviet Union or China, then increased for some interventions in Eastern Europe and Africa after the fall of the Berlin Wall in 1989, and more recently have been more difficult again in such conflicts as Syria, where alliances of the permanent members with other nations in conflict prevent the needed votes for authorizing actions. Without rehearsing all of the considerable scholarship, media commentary, and political analysis of formal actions of the UN and global powers in general, suffice it to say here that world government has been controversially inadequate to the task of applying many peaceful processes to deal with many modern post WWII conflicts.

<sup>68</sup> For efforts to describe and evaluate such different processes *see* STROMSETH, WIPPMAN & BROOKS, *supra* note 55.

#### IV. *Are Humans Hard or Soft-Wired for War or Peace?*

As we contemplate the possibilities of different modes of responses and processes to human violence and conflict it may be instructive to review some of the continuing debates about where our human behavior comes from. Since the beginning of political philosophy theorists have debated the nature of human nature. Are men<sup>69</sup> basically evil, and life “brutish and short,”<sup>70</sup> unless we make social and political contracts with each other and a state to bind ourselves with promises to regulate (if not suppress) our inherent selfishness, resource maximization and competition with each other?<sup>71</sup> Or, when educated, socialized<sup>72</sup> or politicized<sup>73</sup> to realize our common nature and need for each other to prosper, will men (and women) join together to shed their differences and shackles and create a world for the common good? Can we learn to sympathize or empathize with others, different from ourselves, the human source of “pleasure in mutual sympathy?”<sup>74</sup> Is there such a thing as a single or universalizable “human nature?” With the additions of empirical

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<sup>69</sup> In this context I use “men” deliberately, since so much of the political philosophy on the origins of human political action assumes men are the primary, if not sole, actors. For more recent feminist political philosophy on the origins of the social and political contract, see CAROLE PATEMAN, *THE SEXUAL CONTRACT* (1988) (suggesting that women have been assigned different (family and caretaking roles) in this initial, and “fictional” period of social contracting). In even more controversial work in recent periods of feminist scholarship, some feminist theorists have suggested that if women were more seriously considered in these speculations about the origins and sources of human nature we might have a more nuanced, more “caring” perspective on the “essential” nature of “personhood.” See, e.g., NEL NODDINGS, *CARING* (1984); CAROL GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN’S DEVELOPMENT* (1982); *WOMEN AND MORAL THEORY* (Eva Feder Kittay & Diana T. Meyers eds., 1987). Though I have often been considered an “essentialist” in this debate, my own view is more nuanced about the “origins” of gendered and human behavior—socialization, education, and context matter enormously, but so should there be “inclusion” of more variegated theories of human “nature,” “nurture,” and interactions. See, e.g., Carrie Menkel-Meadow, *Portia In A Different Voice: Speculations on a Women’s Lawyering Process*, 1 *BERKELEY WOMEN’S L.J.* 39 (1985); Carrie Menkel-Meadow, *Portia Redux: Another Look at Gender, Feminism and Legal Ethics*, in *LEGAL ETHICS AND LEGAL PRACTICE: CONTEMPORARY ISSUES* (S. Parker & C. Sampford eds., 1995); Carrie Menkel-Meadow, *Women in Dispute Resolution: Parties, Lawyers and Dispute Resolvers—What Difference Does ‘Gender Difference’ Make?*, *DISPUTE RESOLUTION MAG.*, April 2012).

<sup>70</sup> THOMAS HOBBS, *LEVIATHAN* (J. Plamenatz ed. 1963) (1651).

<sup>71</sup> JOHN LOCKE, *TWO TREATISES ON GOVERNMENT* (Peter Laslett ed., Cambridge Univ. Press 1988) (1690); CAROLE PATEMAN, *THE SEXUAL CONTRACT* (1988).

<sup>72</sup> JEAN JACQUES ROUSSEAU, *THE SOCIAL CONTRACT* (Charles Frankel trans., Hafner Pub. Co. 1947) (1762); JEAN JACQUES ROUSSEAU, *EMILE, OR ON EDUCATION* (Allan Bloom trans., Basic Books 1979) (1762).

<sup>73</sup> FRIEDERICH ENGELS & KARL MARX, *THE COMMUNIST MANIFESTO* (Joseph Katz ed., Samuel Moore trans., Washington Square Press 1964) (1848).

<sup>74</sup> ADAM SMITH, *THE THEORY OF MORAL SENTIMENTS* (D.D. Raphael & A.L. Macfie, eds., 1984) (1759).

social and developmental psychology to the more abstract musings about human nature, more modern treatments of the nature of man have recognized that human beings are more complicated than a single reductionist conception of the individual or group, let alone all of humankind. Individuals are “made” not just born, to paraphrase Simone De Beauvoir’s observation about gender,<sup>75</sup> and thus social learning and construction of the individual depends on both situations (both the material and non-material conditions of social learning) and personal and interpersonal psychological development as more modern theories of human development now tell us.<sup>76</sup>

As modern developmental, social and cognitive psychology have made more complex the story of how the individual becomes a person, with emotions, language, morality and preferences, so too has the sociological story of how and why groups are made, formed, and conduct their work and survive or disintegrate, including how groups interact with each other, become more complex over time. Based on modern empirical study, we now know that not all groups behave in the same way, and situations and circumstances can mark, transform and change how groups interact with each other.<sup>77</sup> Just as we try to understand and “intervene” in cell biology as a result of modern cancer research, one might consider how social and other interventions now alter the structure and functions and “sociology” of groups, and the psychology of individuals. Thus, I have often been skeptical about whether there is an essential knowable and unchangeable human nature of competition, self-interest and preservation of only kin.<sup>78</sup> Though political philosophers often opine and describe from places of overly general abstractions, more modern approaches to behaviorism attempt more empirically based, nuanced, and “plastic” conceptions of human behavior that seem to allow for both more “agency,” as well as more complex understandings of the constraints on human behavior (*e.g.*, geography and biology<sup>79</sup>).

In a recent effort to combine new studies and knowledge of human, animal and technical “behavior,” futurist Jeremy Rifkin has argued that the story of human development is one of ever transforming (through material and non-material change) consciousness.<sup>80</sup> What the caveman needed to know to survive (hunt, kill and later gather and cook), was succeeded by what the serf needed to know to farm land (and pray to various religions and belief systems for rain and good soil), then succeeded by

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<sup>75</sup> SIMONE DE BEAUVOIR, *THE SECOND SEX* (1949).

<sup>76</sup> *See, e.g.*, D.W. WINNICOTT, *HUMAN NATURE* (1988); JEROME KAGAN, *THE NATURE OF THE CHILD* (1982).

<sup>77</sup> *See, e.g.*, IRVING JANIS, *GROUPTHINK: PSYCHOLOGICAL STUDIES OF POLICY DECISIONS AND FIASCOS* (2nd ed. 1982); Cass Sunstein, *Deliberative Trouble: When Groups Go to Extremes*, 110 *Yale L.J.* 71 (2000); LEE ROSS & RICHARD NISBETT, *THE PERSON AND THE SITUATION* (1991).

<sup>78</sup> *See also* RICHARD SENNETT, *TOGETHER: THE RITUALS, PLEASURES AND POLITICS OF COOPERATION* (2012).

<sup>79</sup> JARED DIAMOND, *GUNS, GERMS AND STEEL: THE FATES OF HUMAN SOCIETIES* (2005).

<sup>80</sup> JEREMY RIFKIN, *THE EMPATHIC CIVILIZATION: THE RACE TO GLOBAL CONSCIOUSNESS IN A WORLD IN CRISIS* (2009).



freethinking, human mobility (navigation, construction, language) and commerce, and now technology and mass communication. Changes in our human geography, family and work structures, and mastery over nature,<sup>81</sup> if not yet over disease and poverty, have changed what we need to know in order to survive, and what we do know and create with that knowledge is historically contingent. For Rifkin, such transformations, regardless of their sources, have produced an alteration of human consciousness in favor of the recognition of the necessity of *interdependence*, rather than a more brutish and competitive sense of survival. Whether one agrees with this “transformation” story or not, it provides a more optimistic narrative of how we might conceive of *socialized* human (if not essentialized) behavior.<sup>82</sup>

Most importantly to Rifkin, and to me, is that, like the child who becomes conscious of himself and can articulate needs at about age 18 months (recognition in the mirror while also recognizing the difference between self and other) and then understand ideas and concepts between age 2 and 3, human beings have become conscious of their own consciousness. For some, but not all of us, we come to recognize the ability to transform that consciousness, not only through material conditions but also through education, social interaction, and the situations we encounter. Not unlike Adam Smith’s complex “impartial spectator”<sup>83</sup>, we have come to judge ourselves by seeing how others might view us –we are conscious of both public opinion and how that public opinion influences our own sense of ourselves. The nature *versus* nurture debate is now clearly nature *and* nurture for the individual – so it is likely to be in human group development as well. We are not all the same throughout human history, regardless of what your views of human nature might be. As scientists study, document, and change their views of the stages of human development, so have sociologists, anthropologists and historians documented that the very nature of “man” and human consciousness has also evolved over time (and place and space, as well). And the more optimistic philosophers and ethicists among us, like Smith and Rifkin, would argue that our consciousness which recognizes our need for others also should encourage us to interact more favorably with others and to judge ourselves (adversely) when we do not.

Rather than the distorted (through social Darwinist Herbert Spencer) ideas about “survival of the fittest” competition among human groups,<sup>84</sup> Rifkin argues that our modern consciousness will lead us to empathize with others, perhaps only out of necessity, but still we will focus on our need for others, as well as self, in order to survive. He argues that as we come to apprehend the potential death of the planet, through climate change, overpopulation, threat of nuclear war and other possible

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<sup>81</sup> Sometimes! Clearly tsunamis, earthquakes, and hurricanes demonstrate that man has not fully mastered his environment, though we continue to seek methods of prediction, prevention, preparation, and then, if necessary, recuperation.

<sup>82</sup> For an amusing and condensed visualization of a 600 page argument about our expanding global consciousness see <http://www.youtube.com/watch?v=17AWnfFRc7g&feature=youtu.be>.

<sup>83</sup> SMITH, *supra* note 74 at 9-10, 16.

<sup>84</sup> Herbert Spencer, *Principles of Biology* (Univ. Press of the Pac. 2002) (1864).

catastrophes (as we come to understand our individual mortality), we will be “encouraged” (or “forced”) to build new ideas, behaviors and institutions to build an “empathic civilization” for our survival. In his view, not only do we have the capacity to do this; we *must* do so. If we need each other in order to (cooperate) to survive, we will, by necessity have to create, support and empower the processes and institutions that will make more peaceful coordination of human activity possible.<sup>85</sup>

Thus, Rifkin’s “global consciousness” story feeds into my hopes for an institutional design project to produce more collaborative and less violent modes of human interaction. Evidence that these projects are already being undertaken can be seen in the formal institutional coordination of global health, aviation, anti-terrorism, and other “transnational” activities that have spawned both formal and informal “networks” of transsystemic legal activity.<sup>86</sup> The impulse to reach across legal systems to create formal (and informal) mechanisms for collaborative and coordinated human behavior can be seen as early instantiation of a realization for the necessity of a jurisprudence of peaceful, non-violent, mutually sustaining activity, often based on legal concepts, processes and institutions.

For Rifkin (and for me), necessity should be the mother (and father) of invention for continued existence. Using recent research on “mirror neurons” developed while watching monkeys then other mammals react to each other by mirroring behaviors and feelings when observing other “like” creatures, Rifkin argues that we are “wired” (whether “hard” in our neuron paths or “soft” in our learned responses) to feel our fellow beings’ plights (the “fellow-feeling” described by many moral philosophers, starting with Adam Smith). Coupled with an argument that, at about age 8, children begin to understand the concepts of their own and other’s mortality, Rifkin argues that human beings who learn about their own mortality will empathize with others and develop human understanding out of our mutually recognized fates. By further extending his argument to recount the evidence we now have about the possible mortality of the planet, Rifkin argues that human beings must (inevitably) develop a “global empathic consciousness” if we and our planet are to survive. Rifkin’s argument suggests that both as individuals and as groups we need to gather and learn from the (scientific) information now generated about our mutual fates, and then to figure out how to use that information to engage in productive survival problem solving. While our current world (at least Rifkin’s and my own secular humanist approach) substitutes a “scientific” story for an older, more religious one<sup>87</sup>, (based on “facts” about the state of the physical world), there is a spiritual and moral theme here

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<sup>85</sup> This is, after all, similar to Adam Smith’s joint philosophical project of *The Theory of Moral Sentiments* and *The Wealth of Nations* (1776) where morality, conscience, and an efficient, as well as peaceful, world order comes from sympathetic, as well as self-interested economic, relationships.

<sup>86</sup> ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* (2005) (describing both formal and informal transnational networks of “global governance”).

<sup>87</sup> Virtually all religions have some version of the “do unto others as you would have others do unto you” maxim, which preaches some empathy or at least instrumental or self-interested altruism.

as well. Instrumentally we need others to cooperate in the survival project, but morally we should recognize we can flourish only if others do as well. A jurisprudence of non-violence and recognition of the fates of others, as tied to our own, may facilitate the development of concrete institutions to further these instrumental and spiritual ideas (the human necessity of interdependence, coordination and collaboration).

Much in the summary above is contested in rigorous evolutionary, biological, religious, political, psychological, and sociological theory and history, as well as in both the human and physical sciences, but whether the whole story is persuasive to you or not, Rifkin and the evolutionary biologists who have been studying genetic predispositions to cooperative versus competitive behavior,<sup>88</sup> would argue that it is at least as likely that we are “wired” for sociability as competition. The somewhat bloodied but persistent existence of the human race is evidence enough of that fact.<sup>89</sup>

So, whatever your views about the “nature” of human nature, my own are that human nature is more complex than the simple origin stories of political philosophy and that our human natures are in fact, more “plastic”<sup>90</sup> and capable of being transformed by will, circumstances, and education.

Thus, as Rifkin (and others) recount our ever-changing history of human consciousness, the theories upon which our laws and jurisprudence are built might also be subject to transformation and change as we become conscious of both their underlying abstract claims and their unrealized realities on the ground. As our knowledge bases, consciousnesses and situations change, so have our conceptions of justice changed over time. Indeed, so many major shifts in human history have been accompanied by or instigated by legal transformations (*e.g.*, the Reformation, the Enlightenment and the political and legal revolutions it produced, the two World Wars and the international legal order produced thereafter, and the post-colonial period). Thus, if we are in a “new” period of “global consciousness” we will need a new jurisprudence of peace and non-violence to help us create and structure the human interactions we will need to insure our survival and human flourishing. Here the question is: can we 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)?

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<sup>88</sup> See, *e.g.*, ROBERT AXELROD, *THE EVOLUTION OF COOPERATION* (1984); ROBERT AXELROD, *THE COMPLEXITY OF COOPERATION: AGENT BASED MODELS OF COMPETITION AND COOPERATION* (1997).

<sup>89</sup> Though as my insightful editor, Max Utschneider, points out, Social Darwinists might claim that we (at least some of us) have survived precisely because it is the victors of the competitions who are still here. I protest this notion because so many of us “weaker” humans are still here, both in terms of less advantaged groups, as well as particular individuals.

<sup>90</sup> ROBERTO UNGER, *POLITICS, PLASTICITY INTO POWER 3* (1987).

### *V. Evolving Notions of Justice and Peace*

As notions of justice are variable and temporally specific (distributive, equitable, retributive, restitutionary, restorative) so has the relationship of justice to “peace” been an ongoing and variably contested notion.<sup>91</sup> Following World War II and the establishment of the Nuremberg Trials, with their contested assessments as “victor’s justice” and “retroactive” criminal law,<sup>92</sup> newer models of legal actions for “transitional justice” and restorative justice have been added to our legal repertoire, in addition to the prosecutorial model of the International Criminal Court and the International Tribunals for the former Yugoslavia and Rwanda. This proliferation of other modes of legal and quasi-legal forms, in the form of Truth and Reconciliation Commissions, hybrid international and national courts, and indigenous processes,<sup>93</sup> represent an effort to recognize that “healing,” apology, and coming together to make peace and create new societies and institutions for reconciliation<sup>94</sup> may be just as important as prosecution and punishment.

Even under the most horrific conditions of civil war, genocide, and post-independence and revolutionary wars, many seeking justice now recognize that, if a new order is to be fashioned after great conflict, it may be important to create different approaches to post-conflict co-existence and peaceful relations. From the first modern Truth and Reconciliation Commission (not in South Africa as is commonly thought, but Bolivia<sup>95</sup>), each new emergence from conflict has produced an iterative process of “truth” finding, reconciliation, restitution, new narrative creation, and in some cases punishment and lustration.<sup>96</sup> The Truth and Reconciliation Commission (“TRC”) in Chile was more private (though records of human rights violations were meticulously kept by the Jesuits<sup>97</sup>). The Argentine TRC

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<sup>91</sup> See Menkel-Meadow, *supra* notes 3 and 44.

<sup>92</sup> Justifications in the nascent international criminal law of the time were that the war crimes and crimes of genocide were clear violations of international customary law and legitimated by the treaties and statutes that formed the basis for the Nuremberg prosecutions. Theodor Meron & Jean Galbraith, *Nuremberg and Its Legacy*, in *INTERNATIONAL LAW STORIES* (John Noyes et al. eds., 2007).

<sup>93</sup> See, e.g., Maya Goldstein-Bolocan, *Rwandan Gacaca: An Experiment in Transitional Justice*, *J. DISP. RES.* 355 (2004); Catherine Honeyman et al., *Establishing Collective Norms: Potentials for Participatory Justice in Rwanda*, 10 *PEACE & CONFLICT J. OF THE AM. PSYCH. ASSOC.* 1 (2004).

<sup>94</sup> ERIN DALY & JEREMY SARKIN, *RECONCILIATION IN DIVIDED SOCIETIES* (2007).

<sup>95</sup> HAYNER, *supra* note 18; Kevin Avruch & B. Vejarano, *Truth and Reconciliation Commissions: A Review Essay and Annotated Bibliography*, 1 *SOC. JUSTICE, ANTHROPOLOGY, PEACE AND HUMAN RIGHTS* 47 (2001).

<sup>96</sup> For a slightly fuller discussion of these cultural variations on truth and reconciliation processes see Menkel-Meadow, *supra* note 57 at 221-28.

<sup>97</sup> Jose Zalaquett, *Balancing Ethical Imperatives and Political Constraints: The Dilemma of New Democracies Confronting Past Human Rights Violations*, 43 *HASTINGS L.J.* 1425 (1992). See also ARIEL DORFMAN, *DEATH AND THE MAIDEN* (1991) (fictionalized theatrical account of Chile’s and other South American countries’ human rights commissions following the collapse of military dictatorships).

process was more public and produced a best-selling report,<sup>98</sup> still available on newsstands today<sup>99</sup> (including documentation of torture. Lastly, the South African TRC (though criticized for many things), was televised and has had some demonstrable effects on the development of a human rights consciousness in post-Apartheid South Africa.<sup>100</sup> These new institutions and processes have not all been successful in the same way, but neither has prosecution always succeeded.<sup>101</sup> In some of the TRC processes, the emphasis has been on “truth,” or telling families what has happened to their loved ones. In others, the emphasis has been on creating new national narratives and “truth” for the larger society. Still others have focused on “moving forward toward reconciliation” (with amnesties, lustration and other devices to move quickly to a new legal and political order). By contrast, in South Africa, nationally televised proceedings were intended to educate even those who felt “uninvolved” in or even denied the injustices of apartheid. At least these new processes and institutions are trying “another way,” dedicated to reconciliation, healing, restorative justice and a broader moral conception of dealing with injustice and violence:

The reconciliation commissions and restorative justice programs are a formal recognition that the question of morality extends beyond the issue of fairness to include the equally important issue of caring and that righting a wrong includes emotional reparations as well as criminal convictions. These novel legal entities are a new way of dealing with conflict resolution that puts as much emphasis on empathy as on equity. Such bodies would have been unheard of in previous periods of history. Their success in mitigating future abuses and criminal behavior, while mixed, is nonetheless

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<sup>98</sup> THE NAT'L COMM'N ON THE DISAPPEARED (CONADEP), *NUNCA MÁS! INFORME DE LA COMISIÓN NACIONAL SOBRE LA DESAPARICIÓN DE PERSONAS* (8th ed. 2006). See also Carlos Santiago Nino, *The Duty to Punish Past Abuses of Human Rights Put into Context: The Case of Argentina*, 100 YALE L.J. 2619 (1991); Diane Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537 (1990-91).

<sup>99</sup> And Argentina, like other sites of human atrocities, has begun to develop museums and educational programs to commemorate the sites of evil. For example, see the Escuela de Mecánica de la Armada (ESMA), a Naval Military School in Buenos Aires with a prison on site at the naval mechanical school in the center of the city.

<sup>100</sup> JAMES GIBSON, *OVERCOMING APARTHEID: CAN TRUTH RECONCILE A DIVIDED NATION* (2004).

<sup>101</sup> Most recently the Appellate Chamber of the Criminal Tribunal for the Former Yugoslavia has acquitted and reversed judgment on two Croatian defendants (Gotovina and Markac) after expensive criminal trials where the two were tried and convicted of crimes against humanity for actions taken in removal of Serbs in Croatia in 1995 (Nov. 16, 2012, Appellate Chamber, ICTY). To date, of the more than 160 indicted in the ICTFY, 130 have been brought to trial. Many criticize these criminal prosecutions as being one-sided and are heavily discounted and politicized in post-conflict politics “back home.” The International Criminal Tribunal for the former Yugoslavia is in The Hague and the International Criminal Tribunal for Rwanda is in Arusha, Tanzania.

encouraging and suggests a broadening of the vision of criminal justice and the role of law in addressing wrongdoing in society.<sup>102</sup>

The issue of the proper response to outrageous acts of violence has been with us since the beginning of humankind. Whether one adheres to what we (westerners) now regard as the more primitive “eye for an eye, tooth for a tooth” form of “equitable revenge” or the more generous Christian principle of “turning the other cheek,” there has been no successful single universally acceptable reaction to violence and evil-doing in others. Neither have we fully figured out how to prevent violence among our own (whether kin, countrymen or even allies), not to mention the less lethal but disturbing ways in which we engage in conflict and even everyday interaction with others in competitive and hostile environments. Calls for civility in litigation and lawyering behavior are legion now, but these appeals co-exist with a culture based on violent sports competitions (*e.g.*, American football and hockey) and now, in our case, an almost continuous state of war somewhere in the world (Persian Gulf, Afghanistan, Iraq and the more subtle but insidious “War on Terror”). Even the important anti-poverty program I participated in in the 1960’s was the “War’ on Poverty.” As many others have described,<sup>103</sup> the words, metaphors and images we use to describe our actions, reveal a culture based on conflict, competition and violence: “let’s go to the mat on that,” “we sure killed them on that issue,” “we cut them off at the knees,” “we shot down that argument,” “we won that battle,” rather than one built on justice or gentleness toward others in pain or need. If we are to seek peace and less violent forms of justice our language, metaphors, social commitments, and larger legal culture will have to reflect a different set of values, as well as institutional forms. In the final two sections I outline some thoughts about how such an articulation of values and developments of new forms might begin, as well as noting some of the on-going challenges such a project must face.

## VI. Notes Toward a Jurisprudence of Peace

In my view, what is needed for a jurisprudence of peace and non-violence is nothing short of a reconfiguring of what law is for—how it should be created, enforced, and studied. At the level of substantive norms, what would it take to imagine the creation of more “positive” entitlements to a sufficiently meaningful and fulfilling life,<sup>104</sup> so at least some forms of violence might be eliminated? For those who attribute “structural violence” to continued inequalities of life situations and the social

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<sup>102</sup> RIFKIN, *supra* note 80 at 16-17.

<sup>103</sup> Elizabeth Thornberg, *Metaphors Matter: How Images of Battle, Sports and Sex Shape the Adversary System*, 10 WIS. WOMEN’S L.J. 225 (1995). See Menkel-Meadow, *supra* note 4 and 10.

<sup>104</sup> See, *e.g.*, AMARTYA SEN, DEVELOPMENT AS FREEDOM (2000); MARTHA NUSSBAUM, CREATING CAPABILITIES: THE HUMAN DEVELOPMENT APPROACH (2011); and JOHN RAWLS, THE LAW OF PEOPLES (2001) for contrasting efforts to elucidate different jurisprudential ideas of “world justice” from measures of human development and empowered human capabilities, to basic jurisprudential and human rights principles (freedoms) for both liberal and non-liberal political orders.

institutions that enable them, legal expressions for the more “material” rights to health, work, education, and a safe environment, as is common, if not yet enforced, in modern Constitutions, would be an important addition to our currently configured less tangible rights to “liberty” (usually from the interference of government, as well as each other). In modern constitutional jurisprudence, this is the difference between “primary” (or “negative”) rights and freedoms (civil and political), “secondary” or “positive” rights to social and economic entitlements and justice, and “tertiary” conceptions of group and cultural rights.<sup>105</sup>

In addition to a reconfiguration of legal rights and entitlements, what 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,<sup>106</sup> and for healing and reintegrative or rehabilitative processes for other human beings? Many years ago I hoped that an “ethic of care” (derived from Carol Gilligan’s work *In A Different Voice*<sup>107</sup>) might infuse our legal system with kinder, forgiving, and less rigid processes.<sup>108</sup> Others, like my colleague Robin West, argued that substantive legal principles should be informed by an “ethic of care and connection”<sup>109</sup> rather than a legal liberal notion of separation. Rather than assuming liberty as “freedom” from attachment to others, what would a legal system look like if it tried to prevent harm, heal those who were hurt, and cared for those without other means of care? What if the legal documents that we have created from revolutionary splits from unjust “parents,” instead reflected more aspirational goals of trying to craft a fair and just new family or society from the beginning, with a government that was not necessarily viewed as the “enemy” to be distanced from, but rather a source of empowerment, care and protection from harm? What if our legal aspirations included duties to care for, listen to, rescue, support and be kind to our fellow human beings, in addition to the usual prohibitions not to harm them? How could such substantive norms possibly be enforced?<sup>110</sup> In my view, attention to our recognition

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<sup>105</sup> See, e.g., International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, (ratified by the U.S. 1992); International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 (not yet ratified by the U.S.); see also VICKI JACKSON & MARK TUSHNET, *COMPARATIVE CONSTITUTIONAL LAW* (2d ed. 2006). Others now argue for yet a fourth generation of “rights” – the rights of non-persons (e.g., animals and resources such as trees, rivers, oceans, land, etc.). This includes rights that may be asserted for their survival and those for fair and existence-preserving treatment.

<sup>106</sup> I have come to use an important phrase from the disability rights movement – we are all only “temporarily abled.” Eventually, even the most “abled” of all us (who grew up from infancy) will likely require care from someone.

<sup>107</sup> CAROL GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN’S DEVELOPMENT* (1982).

<sup>108</sup> Carrie Menkel-Meadow, *Portia In A Different Voice: Speculations on A Women’s Lawyering Process* 1 *BERKELEY WOMEN’S L.J.* 39-63 (1985),

<sup>109</sup> WEST, *supra* note 26.

<sup>110</sup> As I have argued in a variety of other venues, law appeals to the rational and principled in our human processes and creates certain institutions to sustain that rationality, see Menkel-Meadow, *supra* note 42, when in fact much human activity may be “irrational” or “arational.”

of emotional, psychological and other human needs is an important element of how we might consider reframing legal issues—to see law as not only prohibitory, but also as pro-active, life-supporting and enhancing, and empowering. To think about what is “right” and good, and not just what is “wrong” and punishable.<sup>111</sup>

In addition to reframing substantive legal and moral norms, we should also reconfigure the processes we use to deal with conflict in our world. Imagine, as was more common in earlier periods of post-war rethinking of older paradigms, that there were courses of “peace studies” and conflict resolution in the first year of law school.<sup>112</sup> Imagine that there was more than legalistic “A” (now appropriate, not alternative) DR (dispute resolution) in the curriculum, but a broader study of human conflict processes, including constructive, as well as destructive ones.<sup>113</sup> Suppose we looked at both successful peace and non-violence projects (*e.g.*, constitution drafting,<sup>114</sup>

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Thus, when people do things for emotional (which may in fact be quite understandable, if not “rational,” reasons, *see* JACK KATZ, *SEDUCTIONS OF CRIME: MORAL AND SENSUAL ATTRACTIONS IN DOING EVIL*, (1990); JACK KATZ, *HOW EMOTIONS WORK* (2001), or for totally irrational motivations (psychological infirmities, evil, etc.), the law in its “rationality” may not be the proper forum for addressing such human behavior.

<sup>111</sup> Whenever I am accused of being too “touchy-feely” in my legal work, I ask who doesn’t want to feel better and be “touched”?

<sup>112</sup> *See, e.g.*, Johan Galtung, *Peace Studies a Curriculum Proposal*, Center of International Studies, Princeton University (May 1987) (on file with the author); Johan Galtung, *Peace Theory: An Introduction*, Department of Politics, Princeton University, 1986 (on file with the author); Johan Galtung, “Is Peaceful Research Possible?”, Chair in Conflict and Peace Research, University of Oslo (on file with the author, N.D.); *see also* HUGH MIALI, OLIVER RAMSBOTHAM & TOM WOODHOUSE, *CONTEMPORARY CONFLICT RESOLUTION* (1999); LOUIS KRIESBERG, *CONSTRUCTIVE CONFLICTS: FROM ESCALATION TO RESOLUTION* (1998); MORTON DEUTSCH, *THE RESOLUTION OF CONFLICT: CONSTRUCTIVE AND DESTRUCTIVE PROCESSES* (1973).

<sup>113</sup> Even the most conventional of my law students now ask why forms of dispute resolution like negotiation and mediation are not taught more formally in Civil Procedure as they come to realize those forms of dispute resolution are, in fact, more common than the trial form still so lauded in our “thinking like a lawyer” curriculum. *See* Jean Sternlight, *ADR is Here: Preliminary Reflections on Where It Fits in a System of Justice*, 3 NEV. L.J. 289 (2003); Stephen Subrin, *A Traditionalist Looks at Mediation: It’s Here to Stay and Much Better Than I Thought*, 3 NEV. L.J. 196 (2003).

<sup>114</sup> In addition to the more conventional doctrinal analysis of constitutional law, we might look at the complex and highly conflictual drafting and ratification processes, which involved intense political negotiation in the early years of our republic. *See, e.g.*, PAULINE MAIER, *RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION 1787-1788* (2011). At my current law school, University of California, Irvine, a group of students has created a Global Justice Summit, a constitutional drafting exercise (each year for a different, new fictional country) to teach students more “constructive” legal processes and to learn to work in complex and conflictual settings with collaborative methods. *See* EDGAR AGUILASOCHO & CARRIE MENKEL-MEADOW, *THE GLOBAL JUSTICE SUMMIT: LEARNING TO CONSTRUCT JUSTICE* (forthcoming).



treaty formation, organization (NGO and government) creation and development,<sup>115</sup> transactional and transnational cooperation), and as much “settlement” and negotiation study (as reflects real world practice<sup>116</sup>) as there was study of litigation and adversary processes.<sup>117</sup> Note, I am not calling for the substitution or elimination of traditional law study, but for its supplementation and enhancement with a focus on constructive, peace-seeking legal processes.<sup>118</sup> Lawyers help “make” things in the world—from concepts,<sup>119</sup> entities, organizations, and transactions to legal rights, laws, and constitutions. Might they not also be a force for peace, as well as conflict, in our world? Can we not teach young lawyers to be more gentle with each other and the clients they represent, rather than to instill the norms and practices of competition, debate, oppositional thinking and the desire to “win” at all costs?<sup>120</sup> Shouldn’t lawyers, of all professionals, be taught to resolve disputes and make peace and to “intermediate” within conflicting elements of society?<sup>121</sup>

As a legal educator, mediator and professional trainer of the “gentler” arts of dispute resolution, I have now taught and trained mediators, negotiators, and facilitators in over 20 countries, including diplomats, government officials, lawyers and other legal educators and professionals. I have attempted to teach rigorous problem solving, empathy, active listening, drafting, meeting management, facilitation, multi-party negotiation and mediation, as well as substantive concepts for

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<sup>115</sup> Some business schools have now incorporated an NGO or non-profit organizational management curriculum, e.g., Wharton School, University of Pennsylvania and University of Oxford Said Business School.

<sup>116</sup> See Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. OF EMPIRICAL LEGAL STUD. 459 (2004) (documenting that less than 2% of all cases filed in courts actually go to trial).

<sup>117</sup> See, e.g., Carrie Menkel-Meadow, *Taking Problem Solving Pedagogy Seriously*, 49 J. LEGAL EDUC. 14 (1999), and Carrie Menkel-Meadow, *To Solve Problems, Not Make Them: Integrating ADR in the Law School Curriculum*, 46 SMU L. REV. 801 (1993) for some earlier suggestions. Increasingly law school courses do add simulations and drafting exercises in the creation of entities, institutions, transactions, and relationships, in both domestic and international contexts, as opposed to purely litigation based learning.

<sup>118</sup> For a fuller elaboration of how I would reconstruct the legal curriculum see generally, Carrie Menkel-Meadow, *Taking Law and \_\_\_\_\_ Really Seriously: Before, During and After “The Law,”* 60 VANDERBILT L. REV. 555 (2007); Carrie Menkel-Meadow, *Taking Problem Solving Pedagogy Seriously*, 49 JOURNAL OF LEGAL EDUCATION 14 (1999); Carrie Menkel-Meadow, *To Solve Problems, Not Make Them: Integrating ADR in the Law School Curriculum*, 46 SMU L. REV. 801 (1993).

<sup>119</sup> See Menkel-Meadow, *supra* note 26.

<sup>120</sup> My students at UCI who came to create a new law school (like their predecessors years ago at CUNY or Antioch) were full of ideas about how to make the world a better place. For me, it is sad to see how quickly some of them assimilate to the “norms” of conventional legal education and values.

<sup>121</sup> This was what Alexis de Tocqueville claimed was the particular talent of American lawyers—their ability to “intermediate” both class and political conflicts, as “arbiters of the citizens.” See ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 264 (J.P. Mayer ed., George Lawrence trans., 1969).

resolution of difficult conflicts in geo-political relations,<sup>122</sup> environmental disputes,<sup>123</sup> multi-cultural disputes, and more traditional legal disputes, and I have been heartened by how much the rest of the world, and especially “newer” polities, and newer law schools, have been open to exploring both new concepts and new processes for teaching about these subjects. Nevertheless, given my own background, and our present national political climate (gridlocks in Congress, the “fiscal cliff,” heightened partisanship), as well as the global situation, I sometimes despair that we are not getting any better at this. And, as explored briefly below, I do not and cannot minimize the challenges of real evil, both systemic and individual. There are real philosophical, substantive and processual issues here about how we really can develop a jurisprudence of peace and non-violence in our world of scarce or maldistributed resources and multiple religions, cultural belief systems, classes, races, and other differences.

*Limits on a Jurisprudence of Peace: If There is “Just War” is There “Unjust Peace” in the Face of Systemic Evil?*

After one of my recent international educational efforts, I went to Dachau, the site of a major Nazi concentration camp<sup>124</sup> where neither law, nor conflict resolution, nor peace seeking prevented the worst of human behavior from occurring.

And before Dachau there was slavery, and after Dachau there continues to be genocide, murder, torture, rape, human trafficking, wars and other human atrocities. So how can one who teaches and believes in non-violent, creative and human-empowering modes of conflict resolution deal with such violence, injustice and inhumanity? If there is a theory of “just war,”<sup>125</sup> can there be a coherent theory of “just peace”? When does one committed to peace, non-violence, and creative problem solving reach her own limits? When is a “peace” or ceasefire unjust (without justice) because it ends physical violence but does not prevent hatred, discrimination, other bad treatment, or unkindness or harm to others?

In order to inform the development of more positive theories of law and peace, I want to mark the limits of such hopefulness with some reality. I take as my marker the

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<sup>122</sup> Carrie Menkel-Meadow & Irena Nutenko, *The Next Generation: Creating a New Peace Process in the Middle East*, 25(4) NEGOT. J. 567 (2009).

<sup>123</sup> Carrie Menkel-Meadow & Joseph DiMento, *A Natural Peacemaking Opportunity*, DAILY JOURNAL, Sept. 13, 2010, at 8.

<sup>124</sup> Given my family history I have visited many sites of the Holocaust in Europe; I currently serve on the Board of the American Friends of the Auschwitz-Birkenau Foundation (which seeks to preserve the concentration camp in Poland as a museum and educational site) and like many Americans, I have visited sites in our own nation of Indian massacres, slavery, incarceration, detention, and other locations of human cruelty.

<sup>125</sup> MICHAEL WALZER, *JUST AND UNJUST WARS WITH HISTORICAL ILLUSTRATIONS* (2006); David Luban, *Just War and Human Rights*, 9 PHILOSOPHY AND PUB. AFFAIRS 160 (1980).

notion of “systemic or systematic evil.”<sup>126</sup> When a government or large group of people systematically targets other groups of people (not just as currently defined racial, ethnic or religious “cleansing” or genocide<sup>127</sup> but any form of systemic harm) it may be even harder to “reconcile” and “restore.”<sup>128</sup> This time at Dachau I was angry, not just sad, and those two emotions lie at the base of all our efforts to deal with evil and murder in this world. How can human beings inflict such horrors on each other? How can the rest of us stand by when it happens? How is it that even after the German people have memorialized and expiated so much of their own guilt, other groups continue to engage in systematic torture, murder, rape and desired extinction of others?<sup>129</sup> Have we learned nothing from our past?

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<sup>126</sup> These are not, in my view, the same thing. Systems like the Nazi system of persecution and death, slavery, and apartheid, are “systems” of evil. They begin in evil dehumanizing design and are continued and enacted by many people within a more or less permanent and even legal (slavery, apartheid, Nuremberg laws) structure. “Systematic” evil may develop more gradually, as when a few killings or heinous actions, seemingly random or individualized, are repeated, mimicked, or proliferated, either by an official political regime or by less formal groupings of “gangs,” factions, or groups of people with a goal of doing harm or simply doing bad things to many people (*e.g.*, Rwandan genocide, which was not “legal,” but became systematic very quickly). “Systematic” evil can develop without formal rules or leaders, but represents an absence of conscious morality or thinking about what is being done. Some political regimes, like many military dictatorships, begin with a few killings of perceived or actual enemies and then proliferate and become both “systematic” and systemic. *See, e.g.*, PAMELA CONSTABLE & ARTURO VALENZUELA, *A NATION OF ENEMIES: CHILE UNDER PINOCHET* (1993) (discussing the years of Pinochet’s dictatorship in Chile); CARLOS SANTIAGO NINO, *RADICAL EVIL ON TRIAL* (1998) (discussing the Dirty War in Argentina); NATHAN ENGLANDER, *THE MINISTRY OF SPECIAL CASES* (2007) (providing a remarkably vivid novelization of real events in Argentina’s period of recent military rule and “desparecidos”).

<sup>127</sup> The definition of genocide in relevant legal documents is relatively narrow, comprising acts committed with intent to *destroy in whole or in part, a national, ethnical, racial or religious group*. *See, e.g.*, The Rome Statute for the International Criminal Court, July 17, 1998, U.N. Doc. A/Conf.183/9, which does not include many other “groups” (*e.g.*, gender, political, etc.) that could be subjected to violent acts, including killing, maiming, raping, assault, false imprisonment, etc. In my jurisprudence of non-violence this crime would be “groupocide”: “the targeted harming of any group or members of groups with some affinity with the intent to destroy, harm or seriously hurt the group or any of its members.”

<sup>128</sup> *See, e.g.*, JOHN PAUL LEDERACH, *BUILDING PEACE: SUSTAINABLE RECONCILIATION IN DIVIDED SOCIETIES* (1997); *see also* GEORGE MITCHELL, *MAKING PEACE* (1999).

<sup>129</sup> *See, e.g.*, PETER GOUREVITCH, *WE WISH TO INFORM YOU THAT TOMORROW WE WILL BE KILLED WITH OUR FAMILIES: STORIES FROM RWANDA* (1998); MICHAEL IGNATIEFF, *BLOOD AND BELONGING: JOURNEYS INTO THE NEW NATIONALISM* (1993). For a moving and depressing depiction of some of the most recent atrocities in the Bosnian War see *IN THE LAND OF BLOOD AND HONEY* (GK Films 2011). *See also* JOHN BURTON, *VIOLENCE EXPLAINED* (1997) (John Burton was the founder of several departments of Conflict Analysis and Resolution, including at University College London, the University of Maryland, and George Mason University, the latter being among the first to grant graduate degrees in Conflict Analysis and Resolution). Burton uses the concepts of “structural violence” to explain

In my view, what we need is the hopefulness of people like John Paul Lederach who conceive of peace building as a multi-generational effort, the imperatives of Jeremy Rifkin who tells us that new human science should help us to see the importance of empathizing with each other as we become increasingly conscious of our shared human fates, the more cautionary theory building and quantitative analyses of political scientists who study actual human conflicts, and yes, the lawyers who still prosecute injustice in an increasing set of venues in our newly transnational legal system. But I mostly think, at least in our own field of law, that what we need is new conceptualizations of what a jurisprudence of peace and non-violence would look like. Below I suggest some areas of concerns and questions that have emerged from my own work in conflict resolution, peacework, deliberative democracy and jurisprudence, for consideration and further elaboration:

1. How can we *prevent* “dangerous and unproductive” conflict?
2. How can we *use* productive or constructive conflict?<sup>130</sup>
3. How can law *create* categories of meaning that do not create more injustice (and “violence”) but allow variations and contingencies of human behavior?<sup>131</sup>
4. What legal *remedies* or outcomes can be re-imagined, beyond our more limited existing set of dichotomous, brittle and binary solutions to human conflicts?
5. What legal *incentives* and rewards should there be for conflict preventing behaviors?
6. How can law *encourage collaboration and cooperation* at all levels of human interaction—local, national, transnational?
7. What *punishments are just*; what punishments make conflict and human flourishing worse?
8. When should law encourage *forgiveness, apology, reintegration, and reconciliation*?

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continuing violence in our societies as a product of structural inequalities and adversarial social institutions.

<sup>130</sup> Much of the human progress we have experienced so far has emerged from periods of great conflict—*e.g.*, the Civil War, the civil rights movement, the women’s rights movement, and the gay rights movement. Other progress has proceeded more peacefully—*e.g.*, environmentalism, some religious and integrationist tolerance, some economic development, and some world health initiatives and cooperation (*e.g.*, AIDS research, Avian flu containment, etc.).

<sup>131</sup> As one telling example here, consider how in criminal law determinate sentencing developed from a belief in greater equality with specified and uniform standards, now widely criticized by many. For an earlier, richer discussion of how tailored criminal sentencing can lead to better outcomes, see PAMELA UTZ, *SETTLING THE FACTS: DISCRETION AND NEGOTIATION IN A CRIMINAL COURT* (1978); *see also* Allegra McLeod, *Confronting Criminal Law’s Violence: The Possibilities of Unfinished Alternatives*, 8 UNBOUND: HARV. J. LEGAL LEFT 109 (2012-2013)

9. How can law *facilitate* transitions, changes, and new regimes, *without violence*, as the circumstances of human conditions change?<sup>132</sup>

But in addition to jurisprudential *concepts and ideas* we still do also need education and training in how we should approach each other in this world. Can we in a law school environment teach such *processes* as:

1. How to approach each other with *grace, generosity and true curiosity*, instead of the competitive adversarial mode so common now in legal discourse? Our language and orientations to each other must be trained to be “non-violent” in our daily lives, as well as in our legal ones?<sup>133</sup>
2. How to *listen to learn* from each other about our differences, commonalities and where we can come together?
3. How to *solve the problems* of allocation of resources, material and human, in equitable ways?
4. How to *create new forms of human collaboration* to work together to literally make the world a better place?

These days, given the on-going conflicts in domestic and foreign settings, and my own work in conflict resolution, I find myself moving back and forth between continued hopefulness and despair about the state of our human species. Nevertheless, though I do not think we are necessarily on a linear upward moving slope, (more like a curvilinear up and down with a slightly upward moving slope), I do think our human history so far has demonstrated increased consciousness about our own and other’s fragility in the world, a slowly expanding norm of inclusion and social justice, and a recognition that every human being has a “right” to a life of hope for human improvement on both spiritual and material levels.

My own personal and legal biography has been one that began in violence and human harm (the experience of my parents in the Holocaust and my work in the civil rights and anti-war movements) but moved from the search for legal justice (through anti-poverty and civil rights litigation) in conventional terms to my current work in “softer” forms of social, political and personal justice, seeking mediative human understanding and problem-solving oriented conflict resolution. I currently work in both domestic contexts of traditional legal and interpersonal conflicts, as well as in the almost intractable international disputes and conflicts in the Middle East, with a belief

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<sup>132</sup> I am always amazed at how much we have forgotten Thomas Jefferson’s admonitions that a political generation is about 30 years and we should probably reconsider even some of our foundational legal and human structures periodically.

<sup>133</sup> MARSHALL ROSENBERG, *NON-VIOLENT COMMUNICATION: A LANGUAGE OF LIFE* (2003); LISA SCHIRCH, *THE LITTLE BOOK OF STRATEGIC PEACEBUILDING* (2004); CAROLYN YODER, *THE LITTLE BOOK OF TRAUMA HEALING* (2005); JOHN PAUL LEDERACH, *THE LITTLE BOOK OF CONFLICT TRANSFORMATION* (2003); DOUGLAS STONE, BRUCE PATTON, & SHEILA HEEN, *DIFFICULT CONVERSATIONS: HOW TO DISCUSS WHAT MATTERS MOST* (1999).

that the more brittle and conventional forms of legal justice (courts, tribunals, prosecutions, civil damages) are not the best answers for our human issues in managing conflict and violence.

And so for me, it seems imperative that as long as some of us continue to work in law, we must continue to explore broader conceptions of the substantive good, including positive entitlements, as well as liberties or freedoms, a sense of responsibility toward others to be cared for and to prevent harm, and to make process choices and encourage participation of those effected by such processes (different kinds of legal processes for different kinds of legal problems). To do this we will also have to remake the jurisprudential, ideational basis of law and its theories of justice, to work for more positive and affirmative, peaceful and sustaining, as well as just, lives. Without enough peace we cannot even talk to each other to create more just institutions, so for me at least, a jurisprudence of peace remains a condition precedent for the achievement of a just world. Or as my local poet and Viet Nam veteran has written:

“ E-V-I-L is always  
L-I-V-E reversed.”<sup>134</sup>

From my own personal history, I have learned, we should all live to reverse as much evil in the world as we can, so we may all live in peace and justice.

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<sup>134</sup> Wendell Brown, *Thanks, in POEMS TO GO* (2000).