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Peace and Justice: Notes on the Evolution and Purposes of Legal Processes

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Inaugural Lecture of the A.B. Chettle, Jr. Chair in Dispute Resolution and Civil Procedure,
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LECTURE

Peace and Justice: Notes on the Evolution and Purposes of Legal Processes

Inaugural Lecture of the A.B. Chettle, Jr. Chair in Dispute Resolution and Civil Procedure

CARRIE MENKEL-MEADOW*

Throughout human history, tragically, we have seen more advances in tools for waging war than in the art of making peace.

President William Jefferson Clinton¹

Law is but the means, justice is the end.

Attributed to a Georgetown University Law Center Student²

Life is itself a process, and by making process the center of our attention we are getting closer to the most enduring part of reality. For that reason I believe that the recommended emphasis on procedures for solving conflicts will not tend simply to suppress those conflicts, but will promote their just solution. If we do things the right way, we are likely to do the right thing.

Lon Fuller³

Process is the human bridge between justice and peace.

Professor Carrie Menkel-Meadow⁴

* A.B. Chettle, Jr. Professor of Dispute Resolution and Civil Procedure; Director, Georgetown-Hewlett Program in Conflict Resolution and Legal Problem Solving. © 2006, Carrie Menkel-Meadow. Thanks to the entire Georgetown University Law Center community for making this event one of the intellectual and emotional highlights of my life. Thanks especially to Dean Alex Aleinikoff, Associate Dean Vicki Jackson, and former Dean Judith Areen for their ongoing support. Thanks to Robin West, Peter Reilly, Marc Spindelman, David Mattingly, and especially Robert Meadow for what I consider to be the best of engaged intellectual and emotional friendships on these and other issues. Thanks to Robert Valentine, Esq. and Richard Burkley as representatives of the Chettle family, for their generosity to the Law Center. Thanks to Kara Tershel, Katherine McCarthy, Shari Thomas, and their staffs for making this event beautiful, with the smoothest of processes. And finally, thanks, most importantly, to my students, who continue to engage with the issues presented here in increasingly diverse locations of our increasingly multicultural international reality.

1. William J. Clinton, Acceptance Speech for the Second Annual International Advocates for Peace Award, Benjamin N. Cardozo School of Law (Mar. 19, 2001).

2. Attributed to a Georgetown University Law Center Student, Inscription on the Edward Bennett Williams Law Library, perhaps paraphrased from Rudolph von Jhering, *DER ZWECK IM RECHT* (1913), "law is merely a means to an end."

3. Lon L. Fuller, *What the Law Schools Can Contribute to the Making of Lawyers*, 1 J. LEGAL EDUC. 189, 204 (1948).

4. Carrie Menkel-Meadow, Inaugural Lecture of the A.B. Chettle, Jr. Chair in Dispute Resolution and Civil Procedure (Apr. 25, 2005).

I. FOUNDATIONS AND INFLUENCES: THE IMPORTANCE OF PROCESS PLURALISM FOR BUILDING A “HOUSE OF PEACE AND JUSTICE”

This Chair honors the importance of legal process, whether it be formal, as in civil procedure and rules, or more informal, as in human forms of conflict and dispute resolution. I have devoted my professional life to both of these, first as a litigating lawyer, seeking justice in civil rights and poverty law, and later as a teacher and practitioner of negotiation, mediation, and more complex forms of dispute resolution, including, most recently, consensus building, restorative justice (such as truth and reconciliation processes), and deliberative democracy, which seek not only justice, but peace, in both domestic and international contexts.

As a process person, I am often asked what my “substantive commitments”⁵ are. So, I hope here to elaborate on why I think process is so important for those of us who seek justice and peace in the world, and what I hope the Chettle Chair will contribute to the study and practice of legal processes, beyond the rules of civil procedure. The modern world has given us many new forms of injustice, violence, continuing discrimination and subordination, and a new set of deadly challenges in our responses to so-called “clashes of civilizations”⁶ and terrorism. We have many conventional institutions of law and justice and governmental decisionmaking, but, in my view, they have been inadequate to make the kind of justice and peace I want for this world. So my study of “process pluralism” comes from a belief that new processes of human engagement, including reason, principle, fair bargaining, passions, and moral and emotional empathy, will be necessary for us to solve new (and old) human problems so we can live together in peace, with justice.

Here I will explore how we might build a “house”⁷ of justice” with the possibilities of achieving justice and human understanding in a variety of different ways. I hope to do this by giving you both some autobiographical and intellectual histories, which, given that I am a scholar, teacher, and practitioner, all at the same time, I hope will get you all to think about what we think, how

5. Most recently I have been asked this question by Georgetown University Law Center Visiting Professor of Law Marc Spindelman, whom I thank for several vigorous conversations about the topics herein and our “performance” of the best of academic processes—the intellectual coffee klatsch. Professors Hart and Sacks (and to some extent, for different reasons, Lon Fuller), as proponents of the “Legal Process” school of the 1950s (see below) were often taken to similar task for abandoning some of the substantive commitments of the Legal Realists. See MORTON J. HOROWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1870–1960: THE CRISES OF LEGAL ORTHODOXY* 254–55 (1992). My own substantive commitments are to fairness, equality, reduction of human pain and suffering, care for all human beings, tolerance (indeed, enjoyment of differences and diversity), peaceful coexistence wherever possible, and justice, while recognizing that all of these are aspirations with ill-defined boundaries and too much abstract content.

6. Samuel P. Huntington, *The Clash of Civilizations*, in *THE INTERNATIONAL SYSTEM AFTER THE COLLAPSE OF THE EAST-WEST ORDER* 7, at 7 (Armande Cleese et al. eds., 1994).

7. Not a court! Apologies to Frank Sander, one of my predecessors in this, for his earlier attempts to create a “multi-door courthouse.” See Frank E.A. Sander, *Varieties of Dispute Processing*, 77 F.R.D. 111 (1976).

we learn, what we do, and what we can pass on to others who come after us, whether you are a teacher, lawyer, student, parent, or citizen.

I hope to persuade you that process matters (a lot), by exploring the meaning of different processes to legal and political philosophers, practitioners of process, and “receivers” of process (we, the constituents of any legal order). I will do this by reviewing my own formative influences—in theory (Lon Fuller and other classic “process school” theorists) and practice—which constitute the foundations of my house. I will build a “main floor” from some recent academic work on the structures and functions of different kinds of process for different problems (from the comparative constitutionalism of scholar Jon Elster), and from new forms of actualized process (like truth and reconciliation commissions in post-conflict and newly democratic societies, as well as the September 11 Victims Compensation Fund). And then, I will ask you to imagine with me the upper (and more aspirational) floors of innovations in legal process to build this “house” of justice, considering such recent experiments as deliberative democracy and consensus-building as new forms of citizen engagement and decisionmaking in both domestic and international contexts. I will then worry a bit about the winds or rains that could damage or tear the house down (impediments or challenges to achieving a responsive house of justice).⁸ As our needs for new kinds of justice and peace (and respect for living together with great differences) have changed and expanded, so must the kinds of process we have expand to meet the ever-increasing complexities of our culturally plural world.

Learning about law and legal process has been for me a deeply experiential and interdisciplinary journey, and so I want you all to think about law as a subject to be learned through many different lenses. I will elaborate here on some of the underlying values of what it means to care about modern process and procedure, what I call “process pluralism.” Process pluralism means paying attention to a variety of different systemic values (some of which may seem oppositional to each other) and party needs at the same time, and offering variegated possibilities of process for engagement and decisionmaking. Such values include the attempt to achieve peace with justice, choice and self-determination of the individual with care and responsibility for others, and recognition of the harms of the past with hopes for reconciliation in the future. I will illustrate efforts to do these things by describing some new processes that are making their way into the legal and political system (not just negotiation and mediation, but deliberative democracy and consensus building) and by reflecting a bit on some of the problems still to be considered in the use of these processes. Some of the nettlesome issues to explore here include: (1) the relation of principle and social justice to compromise and consensus; (2) the need to include at least three forms of human discourse in human problem

8. This turn of phrase seems particularly apt after the destruction caused by Hurricane Katrina in the Gulf Coast region of our country, with which came claims of inequality in rescue activities and lack of coordination by federal, state, and local governmental authorities.

solving and legal decisionmaking: principled argument, traded or bargained preferences,⁹ and passionate commitments of emotion, religion, and moral values; (3) the tensions presented by needing rules of process and (perhaps different) rules of decision; and finally, (4) what I call the Oscar Wilde problem—if socialism takes up too many evenings,¹⁰ imagine what process pluralism and participatory democracy will do to our social lives. Do we have the time, desire, and commitment to fully participate in the processes of our politics and personal lives?

In my work and life I have had many mentors, both personally known and unknown, who have taught me intellectually and conceptually through their ideas, and behaviorally and inspirationally through their actions. Coming of age when I did (through the complacent 1950s and the turbulent 1960s), the key question for me (as it was for Emma Goldman) is how to remake the world to be fair and just while using processes that honor the world we want to create through those processes.¹¹ Coming of age as a scholar and teacher in a later era of postmodern skepticism about universal human “truths” and exciting, if rupturing, intellectual diversity in legal studies, the social sciences and the humanities; demographic diversity in our society; and increased international interaction in the world, I became a fervently committed “pluralist.”¹²

9. See generally MARTIN BENJAMIN, *SPLITTING THE DIFFERENCE: COMPROMISE AND INTEGRITY IN ETHICS AND POLITICS* (1990); NOMOS XXI: COMPROMISE IN ETHICS, LAW, AND POLITICS (J. Roland Pennock & John W. Chapman eds., 1979).

10. OSCAR WILDE, *A LIFE IN QUOTES* 238 (Barry Day ed., 2000) (“The trouble with Socialism [sometimes rendered as “democracy”] is that it takes up too many evenings [sometimes rendered as “meetings”].”). In his witty way, Oscar Wilde, concerned about the pleasures of life, reminds us that politics, if fully participatory, as democrats would have it be, may leave us with nothing else to do or enjoy!

11. “If I can’t dance, I don’t want to be in your revolution.” The quotation is attributed to Emma Goldman, but its pedigree is actually more complicated. See Alix Kates Shulman, *Dances with Feminists*, *WOMEN’S REV. OF BOOKS*, Dec. 19, 1991, available at http://sunsite.berkeley.edu/Goldman/Features/dances_shulman.html. Its more complex origin can be found in Emma Goldman’s autobiography. See EMMA GOLDMAN, *LIVING MY LIFE* (1931); see also Alix Kates Shulman, *Emma Goldman’s Feminism: A Reappraisal*, in EMMA GOLDMAN, *RED EMMA SPEAKS: AN EMMA GOLDMAN READER* 3 (Alix Kates Shulman ed., 1996). What I take from this infamous quote, emblazoned on the tee shirts of my feminist 1960s, was that the process used to create a new society (anarchism, which I have never supported) should be a process that should survive the revolution—we should employ the same means to govern and run our society as those which created it. “[A] revolution without dancing, without ‘beautiful radiant things’ [is] not worth fighting for.” Shulman, *Emma Goldman’s Feminism: A Reappraisal*, *supra*, at 15 (quoting GOLDMAN, *LIVING MY LIFE*, *supra*, at 56).

In a modern scholarly inquiry into this problem, Archon Fong has attempted to elaborate an “ethics of politics” that calibrates the use of deliberative or non-deliberative political processes to the degree that post-revolutionary conditions of equality and fairness have been achieved in particular political settings. See Archon Fong, *Deliberation Before the Revolution: Toward an Ethics of Deliberative Democracy in an Unjust World*, 33 *POL. THEORY* 397, 397–401 (2005) (discussing the contradictions in trying to use deliberative strategies in environments where deliberation is structurally problematic, e.g., economic, cultural, and political inequalities).

12. My religious training in the Ethical Culture Society no doubt played a large role in this. Each year as children in Sunday school, we studied another religion—from Buddhism to Taoism, Protestantism to Catholicism, Judaism to Islam—leaving me with a skepticism about the details of agreed-upon

A. THEORY

The British social philosopher Stuart Hampshire, in what turned out to be his last major work, *Justice Is Conflict*,¹³ opined that because we are unlikely ever to reach any real, uniform consensus on what constitutes the “substantive good” in a deeply pluralist and divided world, perhaps we can, at best, arrive at some close-to-universal principles for processes that enable us to live together within these differences. For him, this process is *audi alterum partem* (“hear the other side,” or the Anglo-American adversary principle). For me, as I will elaborate below, it is closer to “understand all sides” of our modern multi-partied and multi-issued disputes.¹⁴ So I substitute “understand” for Hampshire’s “hear” (a deeper level of human engagement and empathy, as well as reason) and “all” sides for Hampshire’s “other” or “two” sides. Modern social and legal life needs to get beyond the binary, adversarial idea that there are only two sides to an argument or the “truth.”¹⁵

“Understanding” and “coexistence” as aspirational values of peace¹⁶ give us some goals and end-states but do not tell us much about how to get there. Political theorists and philosophers over the years have elaborated many theories of political and social organization, from Hobbes’s *Leviathan*¹⁷ and Rawls’s “veil of ignorance”¹⁸ to Habermas’s “ideal speech conditions for uncoerced communicative action.”¹⁹ Most recently, a movement and plea for “deliberative democracy” harkening back to Aristotelian notions of participatory democracy

values but an abiding hope for some universal notions of care and concern for others. From this important socialization experience I also developed a deeply felt love of anthropological study—the deep appreciation of human differences and the importance of man’s (and woman’s) work on respectful coexistence on this earth. See generally 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). I also grew up in the shadow of the United Nations, which was born the same year I was. See MARY ANN GLENDON, *A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS* (2001) (reporting on the founding of the U.N. and Eleanor Roosevelt’s “mediational” role in the drafting of the Universal Declaration of Human Rights).

13. STUART HAMPSHIRE, *JUSTICE IS CONFLICT* 8–12, 16–17 (2000).

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

15. See generally DEBORAH TANNEN, *THE ARGUMENT CULTURE: MOVING FROM DEBATE TO DIALOGUE* 3–26 (1998) (exploring the adversarial “agonism” of politics, law, journalism and media, education and American cultural practices, and communication patterns). Or as my dear research assistant and Editor in Chief of this Journal put it, “traditional legal education conceptualizes all thought in binary—us vs. them—form.” E-mail from David Mattingly to Carrie Menkel-Meadow (Apr. 20, 2005) (on file with author).

16. See generally, e.g., COLMAN MCCARTHY, *ALL OF ONE PEACE: ESSAYS ON NONVIOLENCE* (1994); COLMAN MCCARTHY, *I’D RATHER TEACH PEACE* (2002); LISA SCHIRCH, *THE LITTLE BOOK OF STRATEGIC PEACEBUILDING* (2004); MICHAEL WALZER, *ON TOLERATION* (1997). For the difficulties of actually achieving understanding and coexistence in ethnically diverse communities, see generally MICHAEL IGNATIEFF, *BLOOD AND BELONGING: JOURNEYS INTO THE NEW NATIONALISM* (1993) (exploring the ethnic conflicts in Bosnia-Herzegovina, Kurdistan, Northern Ireland, and other sites of modern ethnic conflict).

17. THOMAS HOBBS, *LEVIATHAN* (E.P. Dutton & Co. 1950) (1660).

18. JOHN RAWLS, *A THEORY OF JUSTICE* 136–42 (1971).

19. 2 JÜRGEN HABERMAS, *A THEORY OF COMMUNICATIVE ACTION* 72–74 (Thomas McCarthy trans., 1985).

and argument have inspired much writing on how we can achieve legitimate and fair consensus and good decisions at all levels of human interaction and conflict, even when we have deep conflicts about facts and values.²⁰ These recent efforts seek to provide a legitimating and explanatory framework for how to seek fair and “just” outcomes in highly conflictual situations of disputes, conflicts, policy, and law-making.

It is my hope to marry this work on deliberative democracy to conflict resolution theory and practice so that we might seek peace and justice (always provisional and evolving in a postmodern world) simultaneously. In doing so, I am extending and expanding on the work and influences of many in a variety of important legal movements that have formed me: the Legal Process School, Law & Society (socio-legal studies), feminism, the Civil Rights movement, the Vietnam antiwar movement, clinical legal education, critical legal studies, postmodernism, and Georgetown University Law Center’s very own interdisciplinary Curriculum B.²¹

B. TEACHING, PRACTICE, AND THE REAL WORLD

I begin with the person who inspired me to be the kind of teacher I am today—committed to experiential, phenomenological, “in-role” (and clinical²²) learning: David Filvaroff, my professor of Judicial Process²³ (using Hart and

20. See generally, e.g., JAMES BOHMAN, PUBLIC DELIBERATION: PLURALISM, COMPLEXITY, AND DEMOCRACY (1996); JOHN S. DRYZEK, DISCURSIVE DEMOCRACY: POLITICS, POLICY, AND POLITICAL SCIENCE (1990); AMY GUTMANN & DENNIS THOMPSON, DEMOCRACY AND DISAGREEMENT (1996); LAWRENCE SUSSKIND & JEFFREY CRUIKSHANK, BREAKING THE IMPASSE (1987); Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998) (all outlining and discussing various conceptions of the use of deliberative, i.e., more participatory, democracy in positive decisionmaking at all levels of government). See also NAT’L CIVIC REV., Winter 2004 (special issue on public deliberation).

21. In Curriculum B, I have taught our interdisciplinary version of Civil Procedure—Legal Process and Society. Curriculum B, or Section 3, as it is called at Georgetown, is an elective full first-year section devoted to enriched, interdisciplinary study of the traditional law school first-year courses. Courses include Legal Justice (a jurisprudence seminar), Democracy and Coercion (combining criminal and constitutional law), Bargain, Exchange, and Liability (contracts and torts), Legal Process and Society (Civil Procedure), Property in Time, Government Processes (administrative, litigative, and policy solutions to particular issues of legal and social regulation), and Legal Process (legal research and writing). In all of these courses, the study of law is enriched with the study of the sources of law in philosophy, political science, economics, sociology, anthropology, history, and other “mini-disciplines,” such as game theory, cost-benefit analysis, critical legal studies, critical race theory, and legal feminism, among others. This curriculum seeks to explore the more “public” aspects of law, as contrasted with the more traditional curriculum’s emphasis on private law.

22. As Gary Bellow first defined it, clinical teaching is teaching about lawyering from inside a “role,” but a role to serve social justice. See Gary Bellow, *On Teaching the Teachers: Some Preliminary Reflections on Clinical Education as Methodology*, in COUNCIL ON LEGAL EDUC. FOR PROF’L RESPONSIBILITY, CLINICAL EDUCATION FOR THE LAW STUDENT: LEGAL EDUCATION IN A SERVICE SETTING 374 (1973).

23. At the University of Pennsylvania Law School, circa 1971. Judicial Process was inaptly named, because the purpose of this required first-year course was to “de-center” judicial processes and introduce conventionally trained law students, immersed in appellate cases, to lawmaking activities outside of courts, including legislation and law office practice. It was really an immersion in the Legal Process School that several decades of law students were exposed to at Harvard and elsewhere. See William N. Eskridge, Jr. & Philip P. Frickey, *An Historical and Critical Introduction* to HENRY M. HART

Sacks's famous 1958 Temporary Edition of *The Legal Process: Basic Problems in the Making and Application of Law*²⁴). In a required first-year course, intended to teach us about legal institutions, using both cases and non-case report materials, Professor David Filvaroff asked his students to enact the roles of legal process by proposing that we consider whether a new law (whether slumlordism²⁵ should be an actionable legal tort, crime, or regulatory infraction) would best be adopted by a legislature, a regulatory agency, or a court. For several weeks, students in that class assumed roles of clients, lawyers, legislators, advocates, judges, administrative officials, politicians, sociologists, experts, and critics as we sequentially enacted legislative, administrative, and judicial processes of lawmaking. I served as a judge on a state supreme court and wrote a dissenting opinion when I could not convince a majority of my nine-member court to recognize a common law action for slumlordism (so much for my advocacy skills!).²⁶ I learned how to persuade, how to make arguments, how to listen, and importantly, how to write. Whenever I now write an arbitral opinion and think of the phrase, "the decision would not write," I think of how I learned to write with elaborated reasons in that class.

For those few weeks I was mesmerized by legal education in ways I had not been in my first-year, standard, Professor Kingsfield²⁷-*One L*²⁸ experience. We had to act, we thought, we argued, we researched, we wrote, and we even yelled and screamed passionately (more on that later) at each other—because we cared so much that the right thing be done and that it be done in the right way. (This was the end of the 1960s, remember, which really did not end until 1974 with the end of the Vietnam War and the resignation of President Richard Nixon, after the Watergate scandal.) In those weeks I decided to "fight for justice" through law, but I also saw that litigation-based court strategies were not the only or best ways to get things done. The class, as a body of the whole, passed a "tenancy conditions" statute as a legislature, with a majority vote, and also managed to craft a pretty sophisticated administrative regulation when we could not get five votes on our small court to do the same through common law processes.

I also vowed that if I ever became a teacher I would never teach without an experiential component to the learning—for each concept, each course, and each theme of a course. So I became a legal services attorney to seek justice for

& ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW*, at li (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

24. HART & SACKS, *supra* note 23.

25. See generally Joseph L. Sax & Fred J. Hiestand, *Slumlordism as a Tort*, 65 MICH. L. REV. 869 (1967).

26. Let the record reflect that a few years later I won my first case in the U.S. Court of Appeals for the Third Circuit as a young legal services attorney. See *McKnight v. Se. Pa. Transp. Auth.*, 583 F.2d 1229 (3d Cir. 1978) (concerning the process due a discharged public employee under local, state, federal, and constitutional law).

27. JOHN JAY OSBORN JR., *THE PAPER CHASE* (1971).

28. SCOTT TUROW, *ONE L* (1977).

those too poor and disempowered in our society to be heard by those in power. And, when I became a law teacher, I became a clinical teacher so that students would come to understand the possibilities—or as my colleague Robin West would say, the “nobility” of the law’s power²⁹—from successful advocacy. (And, I taught trial advocacy, civil procedure, and pre-trial process to show students just how to use the law’s majestic, if overly complicated, rules, procedures, and practices to achieve justice).

However, two other very important influences on my life turned me intellectually, spiritually, and existentially away from remaining what I have called others—“litigation romanticists.” The first is my family (seated here with us today)—refugees from the Nazi Holocaust—a regime legitimated, regulated, and empowered *by law to kill and commit injustice*. Those of you in the audience who are descendants of slaves yourselves, or relatives of black citizens of South Africa, or “undocumented” immigrants will know the power of law to commit injustice in its name, or as Robert Cover put it so famously, “violence.”³⁰ So, as legal philosophers and jurists theorized about “the morality of law”³¹ in the wake of what law actually did (and still does), I, the child of escapees from a system of unjust laws, approached American law school and law practice with some hearty “justice skepticism.” Or, as I have argued in several places, “justice is not necessarily the same as legal justice.”³²

Second, while litigating as a legal services lawyer against large institutions (state welfare departments, prisons, large employers, governmental agencies, and school systems) I saw that we would often win the legal battle in those glorious days of liberal law reform. Summary judgments on constitutional and federal statutory claims, easy “law” cases, or intensive fact cases (involving, for example, prison conditions or statistical employment discrimination) at trial or before judges were “easy” to win in those heady days of liberal law reform and a more progressive judiciary. But I learned quickly that winning judgments did not so easily translate into changed policies or better lives for my clients. In the back of my legal services office was one woman lawyer, who, instead of bringing dramatic class action lawsuits, quietly cultivated relationships and negotiated good outcomes for her clients. I learned that something I had not been taught in law school—negotiation—could sometimes (not always) accomplish much good. This presented, of course, the age-old dilemma in legal justice work of whether to do the greater good for the greater number (class actions?) or solve individual problems of human need one at a time.

My practical experience of successful bargained-for outcomes in some social

29. Robin West, *Law's "Nobility,"* YALE J.L. & FEMINISM (forthcoming 2006).

30. Robert Cover, *Violence and the Word*, in NARRATIVE, VIOLENCE AND THE LAW: THE ESSAYS OF ROBERT COVER 203, 213–14 (Martha Minow et al. eds., 1992).

31. LON L. FULLER, *THE MORALITY OF LAW* (1964); H.L.A. HART, *THE CONCEPT OF LAW* (1961).

32. Carrie Menkel-Meadow, *Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (In Some Cases)*, 83 GEO. L.J. 2663, 2672–76, 2687–91 (1995); see also David Luban, *Settlement and the Erosion of the Public Realm*, 83 GEO. L.J. 2619, 2639 & n.86 (1995).

justice cases resonated with my Legal Process learning in Professor Filvaroff's class, and I joined academe to teach and study legal processes with a decidedly pragmatic and pluralist cast. The teaching and study of law should reflect the multiple ways in which legal process serves as the means of "human problem-solving,"³³ including a variety of processes with their own "moral integrity." And in this, Lon Fuller, Harvard jurist and continuing practicing lawyer and arbiter, was my teacher.

II. THE MORAL INTEGRITY OF PROCESS PLURALISM: FOUNDATIONS OF A HOUSE OF JUSTICE

Lon Fuller, known for many ideas, was best known to me as the theorist of "eumonics" or "the science, theory or study of good order and workable arrangements."³⁴ Though he never fully elaborated this theory in one place, Fuller spent a large portion of his career (inspired by his own law and arbitration practice) writing and theorizing about the differences among ten different legal processes, each of which he claimed had its own "moral integrity" and particular uses for assisting in the solution of widely different issues of human problem-solving and governance. Those ten processes are:

1. *Adjudication*—the objective, neutral, and authoritative ruling by an officer of the state to settle a dispute with "ordered principles, where the parties have an opportunity to present proofs and reasoned arguments."³⁵
2. *Arbitration*—a decision or resolution of a dispute by principles of a contract and by a decisionmaker chosen by the parties (generally in ongoing relationships, such as labor-management and commercial relations).³⁶
3. *Mediation*—a process directed to "bringing about a more harmonious relationship between the parties, whether this be achieved through explicit agreement, through a reciprocal acceptance of the social norms relevant to their relationship or simply because the parties have been helped to a new and

33. I titled my first major scholarly article on the theory of an alternative, non-competitive approach to legal negotiation "Toward Another View of Legal Negotiation: The Structure of Problem Solving," 31 *UCLA L. REV.* 754 (1984), as a structural-functionalist plea for recognition of the purpose of law as human problem-solving, described in earlier decades by Lon L. Fuller. See LON L. FULLER, *THE PRINCIPLES OF SOCIAL ORDER: SELECTED ESSAYS OF LON L. FULLER* 45 (Kenneth Winston ed., 2001) (hereinafter *The Principles of Social Order*).

34. Lon L. Fuller, *American Legal Philosophy at Mid-Century*, 6 *J. LEGAL EDUC.* 457, 457, 477 (1954). Kenneth Winston supposes that this neologism was inspired by Jeremy Bentham, which seems an appropriate ancestry for me, a bona fide utilitarianist and currently co-editor (with Professor Michael Freeman) of the *International Journal of Law in Context* at Bentham's university—the University of London.

35. Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 *HARV. L. REV.* 353, 369 (1978).

36. Lon L. Fuller, *Collective Bargaining and the Arbitrator*, in *COLLECTIVE BARGAINING AND THE ARBITRATOR'S ROLE: PROCEEDINGS OF THE FIFTEENTH ANNUAL MEETING OF THE NATIONAL ACADEMY OF ARBITRATORS* 8, 8–11 (Mark L. Kahn ed., 1962).

more perceptive understanding of one another's problems."³⁷ This is a process intended to "reorient the parties toward each other,"³⁸ particularly in the ongoing relationships of marriage, commercial dealings, labor and employment, closely held corporations, tenants of public housing, and co-authors of a book—where there is heavy (or thick) and complex interdependence of the parties.

4. *Legislation*—the lawmaking function by which legitimately chosen representatives create the rules to govern the society. Fuller is most famous here for elaborating the eight canons of lawmaking required by the "internal morality of law" (and without which law would not be legitimate). These eight canons are: (1) rules must be general; (2) rules must be promulgated publicly; (3) rules must be prospective and not retrospective; (4) rules must be clear (and understandable for the governed); (5) rules must not require contradictory actions; (6) rules must not be impossible to conform to; (7) rules must remain relatively constant over time; and (8) there should be congruence between the rules as declared and the actions of rule enforcers or administrators.³⁹

5. *Contract*—the creation of voluntary associations of mutual aid and enforceable promises of those wishing to act together, characterized by an ethic of reciprocity and shared objectives with a "reliance" interest (and Fuller's related concerns with the "limits of individual autonomy").⁴⁰

6. *Managerial direction* (or administration)—the process by which rules made (both publicly enacted laws and privately made contracts) are administered and enforced and actions and resources are allocated.⁴¹

7. *Voting and elections*—the processes by which decisions are reached in a variety of human gatherings and which can vary by choice of voting procedure from simple majority, proportional voting, weighted voting, or superma-

37. Lon L. Fuller, *Mediation—Its Forms and Functions*, 44 S. CAL. L. REV. 305, 308–09 (1971). Appropriately, this essay was written as a festschrift honoring Fuller's friend and colleague Henry M. Hart and his Legal Process materials for asking the question, "What is the nature of the basic problem and how shall we choose among the various procedures of social ordering that might be applied to it?" *Id.* at 307.

38. *Id.* at 325.

39. LON L. FULLER, *THE MORALITY OF LAW* 39, 46–91 (1964); see also Lon L. Fuller, *The Implicit Laws of Lawmaking*, in *THE PRINCIPLES OF SOCIAL ORDER*, *supra* note 33, at 175. This is not the place to rehearse the famous jurisprudential debate between Fuller and H.L.A. Hart about the nature, morality, or concept of law, variously styled as a debate grounded in legal positivism, natural law, legal realism, and legal process theory. Compare H.L.A. Hart, *The Morality of Law*, 78 HARV. L. REV. 1281 (1965) (book review), and H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958), with Lon L. Fuller, *Positivism and Fidelity to Law: A Response to Professor Hart*, 71 HARV. L. REV. 630 (1958).

40. See Lon L. Fuller, *The Role of Contract in the Ordering Processes of Society Generally*, in *THE PRINCIPLES OF SOCIAL ORDER*, *supra* note 33, at 187–205.

41. Here Fuller's most famous piece bears important relevance to us today in considering which processes are most appropriate for complex allocation issues, as in the scarce resources of environmental law. See generally Lon L. Fuller, *Irrigation and Tyranny*, 17 STAN. L. REV. 1021 (1965).

majorities,⁴² foreshadowing what we now call the study of “decision-rules” in multiparty dispute resolution or decisionmaking.

8. *Lottery*—the process of “picking lots” when there is no fair or just substantive principle for choosing a particular process or decision rule.

9. *Customary law*—“the reciprocal expectations that arise out of human interaction,” or the “inarticulate older brother of contract,” or the informal “patterns of interaction” that govern people who interact with each other more than once and adopt implicitly ways and means of dealing with each other⁴³ (the ultimate of “informal” processes, but still governed by some “internal morality,”⁴⁴ in Fuller’s language).

10. *Property*—that which a person has “command” over to use, control, or give away.⁴⁵

For Fuller, the lawyer’s role was to be a social structure or process “architect” whose job was to consider questions of “appropriate” (as we say today, rather than “alternative”) institutional design. Given the range of problems facing a particular society (or the larger world), what are the best means for “effective” problem solving? Fuller thought it important that lawyers and law students study all of these processes in their locational specificity, and he was, to me, a consummate sociologist and anthropologist who understood that there was unlikely to be a single, unitary, or uniform legal process (or “concept of law”) that would be appropriate for all circumstances. In this, Fuller, like me, was also

42. Fuller was among the first of legal scholars to acquaint himself with the rigors of game theory and the uses of strategic means of voting and decisionmaking so relevant in today’s processes of deliberative democracy and social choice theory. See generally Lon L. Fuller, *An Afterword: Science and the Judicial Process*, 79 HARV. L. REV. 1604 (1966). He also recognized the importance of the social-psychological study of group dynamics and attempted to draw law teachers’ attention to the work of Kurt Lewin’s *Field Theory in Social Science* (1951)—work that is today so important to those who study social and cognitive psychology in dispute resolution and behavioral economics. See, e.g., BARRIERS TO CONFLICT RESOLUTION (Kenneth J. Arrow et al. eds., 1995); Chris Guthrie, *Insights from Cognitive Psychology*, 54 J. LEGAL EDUC. 42 (2004); Donald C. Langevoort, *Behavioral Theories of Judgment and Decision Making in Legal Scholarship: A Literature Review*, 51 VAND. L. REV. 1499 (1998); Jeffrey J. Rachlinski, *Gains, Losses and the Psychology of Litigation*, 70 S. CAL. L. REV. 113 (1996).

43. FULLER, *supra* note 33, at 194. These would be the practices constituting “the law of the shop” in labor contexts and “standard practices,” “reasonable terms” in contracting, Uniform Commercial Code settings, and customary international law.

44. *Id.*

45. *Id.* at 195–96. In many places Fuller began to collapse property into the contract category and he often excluded customary law as a “process,” so his listings of “process pluralism” vary, in several sources from five to seven to eight or nine different processes. The point is, Fuller recognized many different legal processes, with adjudication being only one, and urged the study and teaching of the different processes for both scholars and practicing lawyers. My own teaching of Civil Procedure in our enriched Curriculum B is called “Processes and Society,” as an illustration of both process pluralism and the social situatedness of different processes.

a student of that American philosopher pragmatist—John Dewey.⁴⁶ For Fuller’s approach to legal process, like our more recent attempts to describe process pluralism, evolved from seeing how particular institutions were created, developed, and performed their functions,⁴⁷ or evolved over time.⁴⁸ In the words of a more modern student of professional practice, this is “theory-in-use.”⁴⁹

At the same time, while Fuller’s own “morality of law” seems deeply procedural (see the eight canons of properly enacted legislation above), he was quite concerned with the “ethics” of the use of process—that is, with the ends to which processes would be put. Fuller’s lawyer as an “architect of structure”⁵⁰ has the same responsibility, in the drafting of contracts and the giving of advice to clients as “the author of a constitution” in the creation of “just” forms of structured interactions designed to avoid “waste,” save costs, develop “procedures for readjusting prices to fluctuating business conditions” and effective and fair dispute resolution in the event of a dispute, while “anticipating possible sources of trouble” and “generally constructing a satisfactory framework for . . .

46. See Lon L. Fuller, *The Needs of American Legal Philosophy*, in *THE PRINCIPLES OF SOCIAL ORDER*, *supra* note 33, at 269. “The object of legal philosophy is to give an effective direction to the work of judges, lawyers, legislators and law teachers,” and law students, I would add. *Id.* at 269–70. “If it leaves the activities of these men [sic] untouched, if it has no implications for the question of what they do with their working days, then legal philosophy is a failure.” *Id.* See generally ROBERT B. WESTBROOK, *JOHN DEWEY AND AMERICAN DEMOCRACY* (1991).

47. Kenneth Winston, Fuller’s intellectual executor, has opined that Fuller is not to be considered a member of the structuralist-functionalist school of 1950s–60s sociology, Kenneth Winston, *Introduction* to *THE PRINCIPLES OF SOCIAL ORDER*, *supra* note 33, at 45, but I disagree. Fuller’s models of institutional description and “design” seem to be closely related to Talcott Parsons’s famous sociological “pattern variables” in which particular institutions and social roles are designed to “meet” social needs and structure human interaction. TALCOTT PARSONS, *ON INSTITUTIONS AND SOCIAL EVOLUTION* 106–16 (1982). Whether Fuller was at all actually influenced by Parsons (who was in Harvard’s sociology department while Fuller taught at the Law School and with whom Fuller taught) remains to be more closely examined, but like those of Parsons, Fuller’s institutional descriptions were a bit static. In general, he was quite concerned with “mixed, parasitic or perverted” forms of social ordering when his processes were combined, or hybridized, as in med-arb today. *THE PRINCIPLES OF SOCIAL ORDER*, *supra* note 33, at 118. As my modern students read of Fuller’s distaste for combining processes because of the potential violations of their “internal” morality (consensual decisionmaking as in mediation and negotiation versus authoritative decisionmaking in adjudication and arbitration), I ask them what he would make of our modern hybrid processes such as the mini-trial, the summary jury trial, and the community consensus-building forum (combining various forms of negotiation, mediation, voting, and lottery). See generally CARRIE J. MENKEL-MEADOW ET AL., *DISPUTE RESOLUTION: BEYOND THE ADVERSARIAL MODEL* (2005); Carrie Menkel-Meadow, *Mothers and Fathers of Invention: The Intellectual Founders of ADR*, 16 OHIO ST. J. ON DISP. RESOL. 1 (2000).

48. Elsewhere, I have recently described a longer and broader view of the history of the evolution of our legal processes and institutions from early customary law and procedures, to trial by ordeal and oath, to trial by jury, to a “post-trial” and evolving legal system. See generally Carrie Menkel-Meadow, *Is the Adversary System Really Dead? Dilemmas of Legal Ethics as Legal Institutions and Roles Evolve*, 57 CURRENT LEGAL PROBS. 85 (Jane Holder et al. eds., 2004); Carrie Menkel-Meadow, *Roots and Inspirations: A Brief History of the Foundations of Dispute Resolution*, in *HANDBOOK OF DISPUTE RESOLUTION* 13 (Michael L. Moffitt & Robert C. Bordone eds., 2005).

49. DONALD A. SCHON, *THE REFLECTIVE PRACTITIONER: HOW PROFESSIONALS THINK IN ACTION* (1983).

50. Fuller attributed this phrase to his Harvard colleague, Milton Katz, a fellow professor of law. See Lon L. Fuller, *The Lawyer as Architect of Social Structures*, in *THE PRINCIPLES OF SOCIAL ORDER*, *supra* note 33, at 285–92 (a memo Fuller distributed to his jurisprudence class in 1952).

future dealings.”⁵¹ But ends were, for Fuller, both more variable, not unidimensional or unidirectional, and complex (“we eat to live, but we also live to eat”⁵²) and were to be more open-ended and examined within the choices of process (consistent with the pleas of modern deliberative democracy theorists that “outcomes” be left contingent and open if we are really to deliberate and learn anything from each other). In short, good process should allow outcomes to be “open and contingent” as they are arrived at in the best (most appropriate, integrated, and ethical) way.

And, foreshadowing where I am going next, Fuller, the rationalist jurist, recognized that ends or goals depend not only on rationality but on emotions, intuitions, and feelings of what is right or fair. For him the goal of legal study and philosophy was to do what this new Chettle Chair is devoted to—developing a “coherent theory of forensic procedure.” For Fuller this meant asking the question: “What kinds of human relations are best organized and regulated by adjudication, and what others are better left to other procedures, such as negotiation and voluntary settlement, majority vote, or expert managerial authority?”⁵³ I would rephrase this to ask, “What human problems are best resolved, handled, or solved by what processes?” My question broadens the kinds of processes that might be available and expands on the ways in which problems in the legal and political arenas can be dealt with⁵⁴ beyond “regulation” and formal legal processes.

III. COMPARATIVE LEGAL AND POLITICAL PROCESSES: THE MAIN FLOOR OF THE HOUSE OF JUSTICE

Now I want to turn to a more modern examination of process pluralism which could have been inspired as one set of answers to Fuller’s questions. While the Legal Process School of the 1950s⁵⁵ tended to look for clarity in abstractions and intellectual categories, more modern analysts have looked empirically at how those processes actually work on the ground. Jon Elster, a political theorist and student of comparative constitutional law, has examined the varieties of processes we have used to create both constitutive governments and constitutions and more “ordinary” and routine forms of citizen dispute resolution and decisionmaking. In a short and compelling adaptation of his theoretical work for

51. *Id.* at 274.

52. *Id.* at 277. Fuller was definitely a man after my own heart!

53. *Id.* at 281.

54. In many contexts I have resisted the popular notion of conflict “resolution” because some conflicts, in my view, should not be “resolved” or “managed.” Conflicts have been necessary for justice—as with the passive resistance of Mahatma Ghandi, Martin Luther King, Jr., and the struggles of the Civil Rights Movement; the antiwar protests I participated in in the 1970s, which turned the ship of state around; the women’s movement and the millions of divorces and other social changes it facilitated; and most revolutionary struggles for self-determination. *See generally* PETER ACKERMAN & JACK DUVALL, *A FORCE MORE POWERFUL: A CENTURY OF NONVIOLENT CONFLICT* (2000).

55. *See* FULLER, *supra* note 33; HART & SACKS, *supra* note 23.

conflict resolution professionals,⁵⁶ Elster has mapped the different process choices made in the formation of the American and French constitutions. This analysis has been instrumental in my own attempt to expand Fuller's ten processes and our Framers' three or four (executive, legislative, judicial, and administrative) into a matrix of different processes, possible when we use different motives, goals, and discourses in our interactions to seek decisions, dispute resolution, or the creation of new transactions or entities. In short, when we add Elster's observations about the different (and strategic) uses of process, our architecture may become more complicated, but the "house" of process will be much more commodious.

Elster begins with three basic human motivations (or what I have called "modes of discourse"):⁵⁷ reasoned argument or principles, interests and preferences which may be bargained for or traded, and passions (including emotions and religious or ethical beliefs). We think of law and legal process as the realm of arguments, appeals to reason, and the rule of law and principles. Trading of preferences and utilities is a process of interested but often "unprincipled" bargaining: This is the realm of economics, Machiavelli, game theory, compromise, and second-best politics.⁵⁸ Over the centuries, philosophers have argued about which of these basic human motivations trumps (think rock-paper-scissors game) at various times and in various settings and whether group or individual reasons, interests, or passions motivate us differently in different settings (think altruism, blood feuds, getting into law school). Elster explores how different versions of these motivations or "modalities" were enacted in the political processes of constitution formation where reasons require claims of validity (reasoned persuasion) and bargaining requires claims of credibility (threats and promises). By reading transcripts of the deliberations and rhetoric surrounding these constitutive processes, Elster concludes that the processes used were quite different, with great impact on the resulting documents and institutional formation.

The Americans were concerned with short-term self-interest,⁵⁹ mostly economic, despite our civics educations about high democratic principles. The

56. See Jon Elster, *Strategic Uses of Argument*, in BARRIERS TO CONFLICT RESOLUTION 236 (Kenneth J. Arrow et al. eds., 1995).

57. Carrie Menkel-Meadow, *From Legal Disputes to Conflict Resolution and Human Problem Solving*, in DISPUTE PROCESSING AND CONFLICT RESOLUTION: THEORY, PRACTICE AND POLICY, at xi, xxx-xxxii (2003); Carrie Menkel-Meadow, *The Lawyer's Role(s) in Deliberative Democracy: A Commentary by and Responses to Professor Carrie Menkel-Meadow*, 5 NEV. L.J. 347, 365 (2004-2005).

58. Whether bargaining and negotiation are philosophically inferior to principle and reasoned argument is a separate question about which I, and others, have written a great deal. See generally Melvin Aron Eisenberg, *Private Ordering Through Negotiation: Dispute Settlement and Rulemaking*, 89 HARV. L. REV. 637 (1976); Menkel-Meadow, *supra* note 32. The theory of "compromise" is currently an active area of philosophical, political, and sociological inquiry. See *Compromise/Compromis* (Special Issue), 43 INFORMATION SUR LES SCIENCES SOCIALES 131-305 (2004).

59. See generally CHARLES A. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES (1998) (analyzing self-interested actions of propertied classes at the Constitutional Convention and specific constitutional provision drafting).

French were motivated by high principle (*Liberté, Egalité, et Fraternité!*), as well as high passion (from commitment to principles, revenge against the monarchy, and *amour-propre* (vanity)). From these different motivations,⁶⁰ the French and American framers made a variety of different process choices. Elster argues that these process choices affected which discourses were used and which institutions were built, which in turn affected the modes of dispute resolution or constitution formation, which in turn affected both the actual outcomes of these processes and the robustness of their life expectancy.

The Americans chose secret meetings to avoid “public” posturing and what they thought would lead to inflexibility⁶¹ and committee, rather than plenary, meetings. The French chose—after great debate about the different effects of cool reason and experience in committee settings versus more passionate commitment in plenary sessions—open, public meetings (with the equivalent of the modern press conference at the end of the day to report to the bloodthirsty revolutionaries) and appealed to both high principles and great passions. (Recall how each change of principled regime during the years of the French Revolution led to violent removal of those who did not share those high principles and same passions!⁶²)

Elster suggests that when the ideal (reasoned argument seems better than self-interested interest bargaining, and open and transparent meetings seem more democratic than secret meetings) is contrasted with the real (what actually happened at the two conventions), “second best” processes actually produced more robust (longer lasting) governance. The Americans engaged in some pretty unprincipled bargaining (permitting the slavery compromise with the commercial states) and some secret deals (power balancing between more agricultural and more commercial states) but wound up (yes, with a civil war that killed one million people and with many amendments) with a more robust document (and government).

By creating a social scientist’s four-fold table of arguing and bargaining as modes of discourse and open and secret as modalities of meetings, Elster explores how the second and third best (in theory) forms of secret bargaining and open arguing produced better outcomes than first best secret arguing (where there would be avoidance of public pre-commitments and more principled claims).⁶³

	<i>Arguing</i>	<i>Bargaining</i>
<i>Secret</i>	1 (best)	2 (3)
<i>Open</i>	3 (2)	4 (worst)

60. Note that neither Elser nor I make any claims here about immutable “cultural” differences of the French or American framers. Both of us adhere, I believe, to notions of historical, social, and political contingencies, rather than cultural determinism.

61. Think public positional bargaining of Ronald Reagan’s behavior during the air traffic controller’s strike in 1991.

62. See, e.g., CRANE BRINTON, *THE ANATOMY OF REVOLUTION* (1965).

63. Elster, *supra* note 56, at 251–52.

A bargaining mode at the American Convention permitted small states (with less power) to use the discourse of bargaining and threats, and to suggest that they would leave the new nation in anarchy if they walked out and did not get “equal” representation in the upper house (Senate). Thus, the good of the greater number (preservation of a “union”) was possible through a bargaining, not principled, mode⁶⁴ (the threatened use of the “sword” rather than a principled argument). Elster goes on to explore other dimensions of the interaction of particular techniques of human discourse (principled argument and truth claims, the uses of threats and warnings in bargaining) with particular modes of meeting and deliberating (or not) and their impact on lawmaking. For example, the French Constitutional Assembly of 1789–91 prohibited its constitutional delegates from serving in the first Assembly, while the American Convention did not (providing both some intertemporal conflicts of interests, but also some responsibility for enforcing originalist intentions). Other students of process have now also examined the American Constitutional Convention in process terms to study whether particular modes of negotiation and bargaining—self-interest-based versus group-interest-based, dyadic versus multiparty modes, facilitated versus unfacilitated discourse—were more or less likely to produce particular outcomes.⁶⁵

Whether you have followed all of these details of process differences up to this point or not (if you have, you would have noticed that Elster drops the motivation, or mode of “passion,” from his four-fold table, though he has written eloquently on the role of emotions and passions in political and social life⁶⁶), the point here is that process matters. As human beings, we engage in all of these three different modes of discourse (appeals to principles, arguments, and reasons; bargained-for or traded interests or preferences (whether individualized or collectively based, whether self-interested or altruistic); and passions, emotions, and beliefs), and the challenge of modern legal process is to use Fuller’s process architecture to design

64. It could be argued that one-state-one-vote is a principled argument too—although just not a fully democratic principle.

65. See generally Dana Lansky, *Proceeding to a Constitution: A Multi-Party Negotiation Analysis of the Constitutional Convention of 1787*, 5 HARV. NEGOT. L. REV. 279 (2000); Jack N. Rakove, *The Great Compromise: Ideas, Interests, and the Politics of Constitution Making*, 44 WM. & MARY Q. 424 (1987). And, in a titillating suggestion in his recent book *Founding Brothers*, the historian Joseph Ellis suggests that Abigail Adams asked her husband, John Adams, to consider a coalition government with Thomas Jefferson when the 1796 election results remained in doubt. See JOSEPH J. ELLIS, *FOUNDING BROTHERS* 179–83 (2000). Imagine how different our governmental processes might have been if that advice had been heeded. According to Ellis, Jefferson considered it and discussed it with James Madison, who discouraged the idea of a coalition or shared government, instead urging Jefferson to return to Monticello to lead the new Republican party. *Id.* Thus was formed our contentious two-party system.

66. See generally JON ELSTER, *ALCHEMIES OF THE MIND: RATIONALITY AND THE EMOTIONS* (1999); JON ELSTER, *SOLOMONIC JUDGMENTS: STUDIES IN THE LIMITATIONS OF RATIONALITY* (1997); see also JACK KATZ, *HOW EMOTIONS WORK* (1999); Peter Reilly, *Teaching Law Students How To Feel: Using Negotiations Training To Increase Emotional Intelligence*, 21 NEG. J. 301 (2005) (both discussing the importance of emotions in human decisionmaking, including the commission of crimes and choice of negotiation strategies).

processes that are appropriate for the expression of all of these modes. We want a house of justice, after all, that has room enough for all forms of productive and peace-seeking engagement.

IV. MODERN PROCESS PLURALISM:

BEYOND THE RULES OF CIVIL PROCEDURE AND LITIGATION

This combination of the work of Hart & Sacks and Fuller (the “classics of the Legal Process School”), and Elster’s more theoretical and empirical work, has led me in recent years to try to answer some of Fuller’s (and my own) questions about process. Does each of the “basic” processes identified by Fuller have its own moral identities or, as he put it, “integrity”? Do different processes call not just for different decision rules (e.g., consensual agreements, authoritative decisions, empathetic understandings, and collective compromises) but different process rules and different ethical obligations?⁶⁷ Can processes be combined and hybridized to meet modern varieties of decisionmaking and political choice? And, is there a greater truth in Madison’s claim in *The Federalist Papers* Nos. 10 and 51 of the need for “checks and balances” of different kinds of processes and different sources of power, argument, and modalities of decisionmaking to prevent the control and domination of either a dominant majority or the unruliness of factions?⁶⁸

To all these questions I have answered “yes” and have begun to map the greater varieties of legal processes, along dimensions suggested by Elster, but expanded to include the modern variations on basic process themes:

67. I have spent much of the last seven years participating in efforts to craft both ethical “credos” and specific ethical rules for different dispute resolution modalities. Lon Fuller and David Filvaroff would be proud to see how much I have learned about lawmaking by attempting to draft rules and policies for a multi-disciplinary profession. See, e.g., CTR. FOR PUB. RESOURCES, GEORGETOWN COMMISSION ON ETHICS AND STANDARDS IN ADR, MODEL RULE FOR THE LAWYER AS THIRD PARTY NEUTRAL (2002), available at <http://cpradr.org/pdfs/CPRGeorge-ModelRule.pdf>; Carrie Menkel-Meadow, *The Lawyer as Consensus Builder: Ethics for a New Practice*, 70 TENN. L. REV. 63 (2002).

68. Madison’s analysis of the causes and effects of factions (including the observation that where there are many, there is less likely to be domination by the one or few on all issues or interests) is a masterful and quite modern discussion of the role of “numbers” and “interests” in group decisionmaking and democracy, as well as the “agent-principal” issues of direct versus represented actions. See Nos. 47–51 for Madison’s artful elaboration of the necessity for having separate processes and governmental institutions for the “separation of powers” that will preserve a republican, not direct, democracy. “[T]he Government’s several constituent parts may, by their mutual relations, be the means of keeping each in their proper places.” THE FEDERALIST NO. 51 (James Madison). Thus, different processes, like different branches of government, “check” each other and allow particular issues to be dealt with in appropriate fora.

<i>Forms of Process</i>	Modes of Conflict Resolution		
	<i>Principles (Reasons)</i>	<i>Bargaining (Interests and Needs)</i>	<i>Passions /Emotions/ Religion</i>
<i>Closed</i>	<ul style="list-style-type: none"> ● Some court proceedings ● Arbitration 	<ul style="list-style-type: none"> ● Negotiation (e.g., U.S. Constitution) ● Diplomacy 	<ul style="list-style-type: none"> ● Mediation (e.g., divorce) ● Jury trials (some)
<i>Open</i>	<ul style="list-style-type: none"> ● French Constitution ● Arbitration (some) 	<ul style="list-style-type: none"> ● Public negotiations (e.g., some labor) ● Problem-solving courts 	<ul style="list-style-type: none"> ● Dialogue movement ● Truth and reconciliation commissions
<i>Plenary</i>	<ul style="list-style-type: none"> ● French Constitution 	<ul style="list-style-type: none"> ● Reg-neg (negotiated rulemaking) 	<ul style="list-style-type: none"> ● Town meetings
<i>Committees</i>	<ul style="list-style-type: none"> ● Faculty committees ● Task groups 	<ul style="list-style-type: none"> ● U.S. Constitution ● U.S. Congress 	<ul style="list-style-type: none"> ● Caucuses ● Special interest groups
<i>Expert/Facilitator</i>	<ul style="list-style-type: none"> ● Consensus-building 	<ul style="list-style-type: none"> ● Mini-trials ● Mediation 	<ul style="list-style-type: none"> ● Public conversations
<i>Naturalistic (Leaderless)</i>			<ul style="list-style-type: none"> ● Grassroots organizing ● WTO protests ● Support for troops
<i>Permanent</i>	<ul style="list-style-type: none"> ● Government ● Institutions 	<ul style="list-style-type: none"> ● Business organizations ● Unions 	<ul style="list-style-type: none"> ● Religious organizations ● Alcoholics Anonymous ● Weight Watchers
<i>Constitutive</i>	<ul style="list-style-type: none"> ● United Nations ● National constitutions 	<ul style="list-style-type: none"> ● National constitutions ● Professional associations 	<ul style="list-style-type: none"> ● Civil justice movements ● Truth and reconciliation commissions
<i>Temporary/Ad Hoc</i>	<ul style="list-style-type: none"> ● Issue organization/social justice ● War crimes tribunals 	<ul style="list-style-type: none"> ● Interest groups 	<ul style="list-style-type: none"> ● Yuppies ● New Age devotees ● Vigilantes

Principles = reasons, appeals to universalism, law

Bargaining = interests, preferences, trading, compromises, needs as differentiated from interests in social-welfare terms, self-interest as differentiated from group interests

Closed = confidential, secret processes or even outcomes (settlements)

Open = public or transparent meetings or proceedings

Plenary = full group participation, joint meetings

Committees = task groups, caucuses, parts of the whole

Expert-facilitator = led by expertise (process or substantive or both)

Naturalistic = leaderless, grassroots, ad hoc, direct democracy

Permanent = organizational, institutional
Constitutive = “constitutional”

Some predicted effects of process on outcome:

Closed (confidential) proceedings allow more expression of interests, needs, and passions = more “honest” and “candid,” allowing more “trades” and less posturing, but exposing vulnerability

Open (transparent) proceedings require more principled/reasoned justifications = more rigidity

In Fuller’s terms, different human problems will require different processes for effective “solution.” With Elster’s analysis we know that we can choose to use different modalities of expression in different stages of decisionmaking to achieve different ends.

And thus, the modern study and practice of legal process must include more than the Federal Rules of Civil Procedure or the Federal Rules of Evidence (though I teach those too!). Conventional learning about litigation and legal process has been enhanced by the study of negotiation, mediation, and other new, “alternative” processes. Let me illustrate the variations of modern processes with some examples of some newer forms of process which make possible the combination of a greater variety of human forms of discourse, with the potential to achieve a greater number of human goals (peace and justice, as well as freedom, restitution, needs-satisfaction, etcetera), all at the same time.

As modern legal and governmental processes have proven inadequate in settings that involve party polarization, gridlock, impasse, or a greater number of parties than can use dyadic negotiation or triadic adjudication and arbitration processes, we have recently begun to use a variety of different processes intended to give expression and empowerment to greater numbers of people (this is “justice” in the participatory form). Such new processes are also beneficial when there are a greater number of legitimate claims or issues than traditional litigation can assimilate into its binary mode.⁶⁹ For example, in the pages of our very own *Georgetown Law Journal* twenty years ago, administrative lawyer Philip Harter proposed a new form of administrative rulemaking—

69. In the United States, the law reforms of the New Deal and the Civil Rights era have provided more legal rights for employees, minorities, welfare recipients, school children, and millions of new citizens. In the international arena, new institutions and treaties have provided for “legitimate claims” for human rights violations and other substantive rights to millions of people. In newly independent nations or nations transformed by political struggles, new constitutions have created many more rights. See generally *DEFINING THE FIELD OF COMPARATIVE CONSTITUTIONAL LAW* (Vicki C. Jackson & Mark Tushnet eds., 2002). Combined with the new processes I describe herein, new legal claims and new processes for their enactment, expression, and enforcement have expanded how the whole world views legal process—the study of which is emphasized in our new global curriculum at Georgetown. See, e.g., Georgetown Univ. Law Ctr., Georgetown Law Initiates *Week One: Law in a Global Context* (Jan. 6, 2006), <http://www.law.georgetown.edu/news/weekone.html>.

“reg-neg,” or negotiated rulemaking—which sought to bring all interested parties or “stakeholders”⁷⁰ into a single room, with sufficient time to negotiate, using the newly elaborated principles of “problem solving or principled bargaining.”⁷¹ In these proceedings, parties⁷² negotiate such matters as health and safety standards, environmental standards and siting, and allocation of scarce resources (e.g., water and clean air) with skilled facilitators to arrive at “solutions” fully negotiated by interested parties. The theory is that negotiated rules or outcomes will be less likely to be litigated than with the conventional (and adversarial) notice and comment process mandated by the Administrative Procedure Act. The jury is still out on the full efficacy and efficiency of these particular processes,⁷³ but their more general use as “consensus building” processes⁷⁴ for use in federal, state, and local governmental decisionmaking, as well as in a myriad of local, community, and multiparty disputes, is growing exponentially.

V. RECENT INNOVATIONS: THE UPPER FLOORS

With an expressed goal of enhancing democratic participation by interested parties in matters that affect their lives, skilled process facilitators⁷⁵ (my students here and others!) assist parties who have conflicts or disputes, or who have to make decisions together, to communicate effectively, empathically, and with understanding. Such process facilitators help to explain the significance of, and help formulate, ground rules or process rules (the “constitutions” of group decisionmaking) and decision rules (majority, supermajority, full unanimity, or some other form of consensus)⁷⁶ to assist parties to work together in a mixture

70. Though this has become the common term of art in the field of conflict resolution, I worry about its rootedness in conventional and colonial property principles. I prefer “interested or affected parties.” One who has a “stake” or drives a stake onto property may privilege particular legal regimes or ownership schemes.

71. Philip J. Harter, *Negotiating Regulations: A Cure for Malaise*, 71 GEO. L.J. 1, 1, 28–31, 33–34, 42, 82–86 (1982).

72. Of course, some will argue this is just another form of “substituted representation,” because real parties or the larger number of citizens seldom actually participate, but instead depend on articulate and well-resourced representatives.

73. See, e.g., Cary Coglianese, *Assessing Consensus: The Promise and Performance of Negotiated Rulemaking*, 46 DUKE L.J. 1255 (1997); Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1 (1997); Philip J. Harter, *A Plumber Responds to the Philosophers: A Comment on Professor Menkel-Meadow’s Essay on Deliberative Democracy*, 5 NEV. L.J. 379 (2004–2005) (each arguing about the efficacy, legitimacy, and effectiveness of completed reg-neg processes).

74. See generally SUSAN L. CARPENTER & W.J.D. KENNEDY, *MANAGING PUBLIC DISPUTES: A PRACTICAL GUIDE FOR GOVERNMENT, BUSINESS, AND CITIZEN’S GROUPS* (2001); *THE CONSENSUS BUILDING HANDBOOK: A COMPREHENSIVE GUIDE TO REACHING AGREEMENT* (Lawrence Susskind et al. eds., 1999).

75. See generally, e.g., GARY T. FURLONG, *THE CONFLICT RESOLUTION TOOLBOOK: MODELS & MAPS FOR ANALYZING, DIAGNOSING AND RESOLVING CONFLICT* (2005); SUZANNE GHAI, *EXTREME FACILITATION: GUIDING GROUPS THROUGH CONTROVERSY AND COMPLEXITY* (2005); ROGER M. SCHWARZ, *THE SKILLED FACILITATOR: PRACTICAL WISDOM FOR DEVELOPING EFFECTIVE GROUPS* (1994).

76. As an example of the effects of different voting or decision rules, I often point to the outcomes produced by different voting rules for law faculty appointments. Consider how unanimity or consensus

of principled argument, traded preferences, and full expression of emotions and beliefs. Those urging more “democratic deliberation” in our polarized society have applied such processes to such matters as the uses of the World Trade Center site,⁷⁷ inter-ethnic and inter-racial community tensions, and the setting of land use, environmental, and educational policies in areas requiring decision and action.

In addition, but with different purposes, these processes have been used to facilitate “dialogue,” study circles, or “public conversations”⁷⁸ on such contested matters as abortion, gun control, animal rights, affirmative action, and the war in Iraq, where the goal is enhanced human understanding across deeply felt value divides, rather than the making of a decision.⁷⁹ With different sorts of procedural rules than the Federal Rules of Civil Procedure, ground rules specify how people can speak directly to each other with respect and dignity, with requests for reasons, more information, and justification for views, and in a spirit of “appreciative inquiry” rather than adversarial besting or winning. Such processes are intended to enhance public participation, create more enlightened citizens, and produce higher quality and more variegated, creative, and tailored solutions to modern complex problems than conventional on/off decisions produced by the conventional adversary system of trial, or unprincipled compromise in its shadow.⁸⁰

As one of the creators of these modern hybrid processes has put it, “consensus building allows a group to reach the best agreement it can find, not just one

rules tend to reproduce the sameness of faculty interests (University of Chicago Law School for many years as an example), while simple majorities might produce greater diversity at the appointment stage but could lead to more divisiveness and tension at the tenure stage. Law faculties vary from simple majority to two-thirds supermajorities to virtual consensus voting rules in such matters, and the outcomes are much affected by the voting rules. Consider also how the Electoral College voting system affects campaigns (presence in only the most populous or contested states) and how we are currently embattled over the filibuster rules in the Senate because of the effects these process rules have on the outcomes.

77. Civil Alliance to Rebuild Downtown N.Y., *Listening to the City: Report of Proceedings* (2002), available at http://www.americaspeaks.org/resources/library/as/project_files/lrc/final_report_lrc2.pdf. See also descriptions of various facilitated democratic discussions at America Speaks, *Our Projects*, <http://www.americaspeaks.org/projects/index.htm> (last visited Jan. 4, 2006).

78. See Laura Chasin, *How To Break the Argument Habit*, CHRISTIAN SCI. MONITOR, Oct. 26, 2004, at 8; see, e.g., Public Conversations Project, *Constructive Conversations That Reach Across Differences*, <http://www.publicconversations.org> (last visited Jan. 4, 2006) (suggesting protocols and providing discussion guides for facilitating “difficult” conversations across value divides).

79. See LAWRENCE SUSSKIND & JEFFREY CRUIKSHANK, *BREAKING THE IMPASSE: CONSENSUAL APPROACHES TO RESOLVING PUBLIC DISPUTES* 1031 (1989); see generally LAWRENCE SUSSKIND & PATRICK FIELD, *DEALING WITH AN ANGRY PUBLIC: THE MUTUAL GAINS APPROACH TO RESOLVING DISPUTES* (1996).

80. Whether negotiated settlements of legal cases are “unprincipled” or based on settling for “transaction costs” or based on principled legal endowments remains a hotly contested issue among scholars in my field, and anecdotally among practicing lawyers and mediators. Compare Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 STAN. L. REV. 497 (1991), with Robert Mnookin & Louis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

that is barely acceptable to a majority” (or, I would add, commanded by someone external to the group).⁸¹

With my own experience with such processes, I helped design⁸² a process for dialogue on the contested issue of affirmative action in California—Proposition 209,⁸³ which proposed the abolition of the use of affirmative action in education, employment, and contracting with the state. In a series of workshops, based on the process protocols of the group Public Conversations, we asked a diverse set of participants to talk about their views, while identifying the source of their own views (political, demographic, experiential), the questions they had about their own views, the questions they had about others’ views, and what further data they might need to consider the merits of the issue. In such dialogic settings, participants actually revealed complex views. Some favored affirmative action in education but not in state contracting, some favored affirmative action for African-Americans still burdened by the effects of slavery and discrimination, but not for other more recently arrived ethnic groups. Participants learned they could share information, learn from each other, and actually change their views.⁸⁴ Such a political issue was seen for what it is—an issue of value differences, with empirical claims about effectiveness,⁸⁵ and great complexity. If the electoral system had not required a simplistic yes/no vote⁸⁶ on this complex issue, I believe the outcomes would have been different and could have provided more tailored solutions to a complex set of social issues and demands. The dilemma of electoral democracy is that it often prevents the more deliberative process in which people can actually learn things from each other.⁸⁷

Another illustration of such new processes is the recent completion of the September 11 Victims Compensation Fund, mastered by our own Adjunct

81. Lawrence Susskind, *Breaking Robert's Rules: Consensus-Building Techniques for Group Decision Making*, NEGOTIATION (Harvard Business Sch. Publ'g and the Program on Negotiation at Harvard Law Sch.), May 1, 2005, at 3.

82. With my colleague Howard Gadlin, present today, who was then co-director (with me) at UCLA of the Center for Study and Resolution of Interracial/Interethnic Conflict and is currently Ombuds for the National Institutes of Health.

83. Codified at Cal. Const. art. I, § 31(a) (approved Nov. 5, 1996).

84. See Menkel-Meadow, *supra* note 14, at 34–35 & n.139.

85. See the current debate about what affirmative action has done in legal education in Richard H. Sander's *A Systematic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367 (2004), and the many responses and refutations this article has generated. See, e.g., Katherine S. Mangan, *Hot Type*, CHRON. HIGHER EDUC., Apr. 22, 2005, at A23; Responses, 57 STAN. L. REV. 1807 (2005) (responses to Sander's article, *supra*, and a reply by Sander).

86. For a description of how the on/off vote led to further litigation, see Vikram D. Amar & Evan H. Caminker, *Equal Protection, Unequal Political Burdens, and the CCRI*, 23 HASTINGS CONST. L.Q. 1019 (1996).

87. James Fishkin's recent efforts to develop deliberative polling addresses some of these issues. In his experiments, citizens are given information about issues and talk to each other before they are “polled” to express an opinion on a particular political issue. His research supports the notion that people actually do change their minds and educate each other. See generally BRUCE ACKERMAN & JAMES S. FISHKIN, *DELIBERATION DAY* (2004); JAMES S. FISHKIN, *DEMOCRACY AND DELIBERATION: NEW DIRECTIONS FOR DEMOCRATIC REFORM* (1991); JAMES S. FISHKIN, *THE VOICE OF THE PEOPLE: PUBLIC OPINION AND DEMOCRACY* (1995).

Professor Kenneth Feinberg.⁸⁸ In order to prevent bankruptcy of our nation's airline industry (an economic and business efficiency motivating reason), our government authorized a one-time-only claims process (conducted in a hybrid form of arbitration and a little mediation) in which virtually all of the eligible victims filed claims and were entitled to have a hearing with the special master or his delegate and receive a payment from the government.⁸⁹ While many proclaim the sui generis nature of this claims process, I think it might open the possibility of alternative forms of treatment of our mass products, and natural, as well as man-made, disaster tort claims.⁹⁰

In yet another example of hybrid processes, in recent years there has been a growth of what are called "problem-solving or integrated courts," designed to deal in multi-disciplinary ways with a host of social-legal issues like vice, drugs, and complex family law issues.⁹¹ In these courts treatment programs are developed—including counseling, drug addiction remediation, and accountability—as alternatives to various forms of punishment. Judges often find themselves performing more client-centered social work functions than state-appointed law and order roles.

In a related development, various forms of "restorative justice,"⁹² where victims of crimes directly confront perpetrators and receive apologies and restitution and participate in reconciliation efforts, have been used as both substitutes for and supplements to the traditional criminal justice system. Here the animating purpose is reintegration into a community, rather than "mere" punishment, whether used for retributive or deterrent rationales.

Whether such hybrid processes are hurt by failing to have a clear "moral

88. See 1 KENNETH R. FEINBERG ET AL., FINAL REPORT OF THE SPECIAL MASTER FOR THE SEPTEMBER 11TH VICTIM COMPENSATION FUND OF 2001 (n.d.), available at http://www.usdoj.gov/final_report.pdf (last visited Jan. 4, 2006); KENNETH R. FEINBERG, WHAT IS LIFE WORTH? (2005).

89. For some discussion of many of the issues raised by this process, see Symposium, *After Disaster: The September 11th Compensation Fund and the Future of Civil Justice*, 53 DEPAUL L. REV. 205–928 (2003), and Nancy J. Knauer, *The September 11 Attacks and Surviving Same-Sex Partners: Defining Family Through Tragedy*, 75 TEMP. L. REV. 31 (2002).

90. Currently pending before the Congress is another attempt to provide such a process for a federal claims facility for the massive number of asbestos claims remaining in our court system. See FAIR Act of 2005, S. 852, 109th Cong. (2005).

91. See, e.g., GREG BERMAN & JOHN FEINBLATT, GOOD COURTS (2005); Greg Berman & John Feinblatt, *Problem-Solving Courts: A Brief Primer*, 23 LAW & POL'Y 125 (2001); Michael C. Dorf & Charles F. Sabel, *Drug Treatment Courts and Emergent Experimentalist Government*, 53 VAND. L. REV. 831 (2000); Judith S. Kaye, *Changing Courts in Changing Times: The Need for a Fresh Look at How Courts Are Run*, 48 HASTINGS L.J. 851 (1997); cf. Anthony C. Thompson, *Courting Disorder: Some Thoughts on Community Courts*, 10 WASH. U. J.L. & POL'Y 63 (2002) (describing uses of drug, vice, and integrated family courts and reporting on success rates, recidivism, and contested legal issues).

92. See generally David Lerman, *Restoring Justice*, TIKKUN, Sept.–Oct. 1999, at 13; Marty Price, *Personalizing Crime: Mediation Produces Restorative Justice for Victims and Offenders*, DISP. RESOL. MAG., Fall 2000, at 8; Mark S. Umbreit, *Mediation of Victim Offender Conflict*, 1988 J. DISP. RESOL. 85; see also SHARI TICKELL & KATE AKESTER, RESTORATIVE JUSTICE: THE WAY AHEAD (2004) (describing restorative justice practices in a variety of different legal jurisdictions); cf. Robert Weisberg, *Restorative Justice and the Danger of "Community"*, 2003 UTAH L. REV. 343 (challenging use of restorative justice where there is no real community).

mandate,” or “integrity” as Fuller would call it,⁹³ or whether they represent the creative flowering of a new process consciousness, is what we currently study in this field of “process pluralism.” How do we design processes appropriate for particular human and legal problems? Can we lay down rules in advance, or should we allow process to emerge from democratic deliberation? Can we develop processes in advance of conflicts or disputes to prevent various forms of human contention—or worse—violence?⁹⁴

Skilled process architects and managers, in a Fullerian sense, know that particular process structures and decision rules (who decides and by “how much,” or with what reasons) affect both the outcomes reached and their acceptability and legitimacy by those upon whom they act. So these newer combined processes of decisionmaking or human engagement form the upper floors of my house of justice, but what of the highest level—the achievement of peace and justice?

VI. THE WAY FORWARD

In the last ten years or so we have seen the flowering of process creativity in attempts to create whole new processes for human governance. Out of the horrors of apartheid, political oppression, genocide, and civil and ethnic wars, we, as a species, have created truth and reconciliation commissions⁹⁵ and have adapted traditional community justice systems like *gacaca*⁹⁶ in Rwanda, while using more traditional forms of adjudicated justice in the international war crimes tribunals of the former Yugoslavia,⁹⁷ Rwanda, and other sites.⁹⁸

These new processes are intended to work on the levels of the most aspira-

93. Or a clear set of defining rules and ethics.

94. The Committee on Conscience of the United States Holocaust Museum is developing a program on “early warning” genocide detection in the hopes of averting such tragedies as Rwanda, Bosnia, and Darfur. Interview with Jerry Fowler, Staff Director, United States Holocaust Museum, in Washington, D.C. (July 2005).

95. See generally JAMES L. GIBSON, *OVERCOMING APARTHEID: CAN TRUTH RECONCILE A DIVIDED NATION?* (2004); *IMAGINE COEXISTENCE: RESTORING HUMANITY AFTER VIOLENT ETHNIC CONFLICT* (Antonia Chayes & Martha Minow eds., 2003); MARTHA MINOW, *BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE* (1998); see also *ACCOUNTABILITY FOR ATROCITIES: NATIONAL AND INTERNATIONAL RESPONSES* (Jane E. Stromseth ed., 2003) (reporting on efforts to create and manage truth and reconciliation commissions in South Africa, Rwanda, and Guatemala and attempting to assess the effectiveness of these processes); David Dyzenhaus, *Debating South Africa's Truth and Reconciliation Commission*, 49 U. TORONTO L.J. 311 (1999).

96. See generally Maya Goldstein-Bolocan, *Rwandan Gacaca: An Experiment in Transitional Justice*, 2004 J. DISP. RESOL. 355; Catherine Honeyman et al., *Establishing Collective Norms: Potentials for Participatory Justice in Rwanda*, 10 PEACE & CONFLICT: J. PEACE PSYCHOL. 1 (2004) (authored by former students of mine who have studied, written about, and visited Rwanda).

97. See generally Patricia M. Wald, *Accountability for War Crimes: What Roles for National, International and Hybrid Tribunals?*, 98 AM. SOC'Y INT'L L. PROC. 192 (2004); Patricia M. Wald, *General Radislav Krstic: A War Crimes Case Study*, 16 GEO. J. LEGAL ETHICS, 445 (2003); Patricia M. Wald, *The Omarska Trial—A War Crimes Tribunal Close-Up*, 57 SMU L. REV. 271 (2004); Patricia M. Wald, *Why I Support the International Criminal Court*, 21 WIS. INT'L L.J. 513 (2003).

98. Including the International Criminal Court of which we (the United States) are not a participant. See Larry Charles Dembowski, *The International Criminal Court: Complimentarity and Its Conse-*

tional—of what could be best in our human species, often after what has been the worst—terrible violence. Intended to provide “truth” and “answers” for those who have been killed or seriously harmed (and their families), these processes “triage” cases so that the “least” serious can be dealt with by offering forgiveness, healing, and the possibility of reconciliation and the creation of a new and more peaceful society. These processes are the first I have seen to really take the emotional life of humans seriously. By use of narrative, storytelling, and some confrontation, victims and perpetrators meet head-on⁹⁹ in a protected setting in which they are called to account on legal, emotional, and, ultimately, human levels.¹⁰⁰

These new processes are also quite controversial, and their successes and limits are being explored by participants and scholars. Nevertheless, political scientist James Gibson has concluded, after rigorous public opinion research, that those who participated in (or even only watched) the South African truth and reconciliation processes, even with all their weaknesses,¹⁰¹ were more likely to have internalized a “human rights consciousness” with an enhanced belief (or hope) in the rule of law to improve human relations¹⁰² and achieve justice. This is consistent with decades of research in what is called “procedural justice,” by social psychologists Tom Tyler and Allan Lind, finding that people judge their satisfaction with legal processes by their participation in and perceptions of fairness of those processes, irrespective of the outcomes.¹⁰³

In many settings, these new processes of forgiveness, reconciliation, and new-constitution-drafting have come from new participants in the process design. Women¹⁰⁴ and disempowered racial, ethnic, or religious groups are increasingly finding their voices, after great catastrophe, in the creation of new

quences, in ACCOUNTABILITY FOR ATROCITIES: NATIONAL AND INTERNATIONAL RESPONSES, *supra* note 95, at 135.

99. In contrast to the “informal” encounter in Ariel Dorfman’s *Death and the Maiden* of victim and perpetrator. ARIEL DORFMAN, *DEATH AND THE MAIDEN* (1994).

100. See generally PUMLA GOBODO-MADIKIZELA, *A HUMAN BEING DIED THAT NIGHT: A SOUTH AFRICAN STORY OF FORGIVENESS* (2003).

101. See generally DAVID DYZENHAUS, *JUDGING THE JUDGES, JUDGING OURSELVES: TRUTH, RECONCILIATION AND THE APARTHEID LEGAL ORDER* (1998).

102. This “attitudinal” study, of course, does not speak to behaviors. Gibson also found quite pronounced racial variants in these views. Apartheid consciousness cannot be eliminated in a day or even several years and clearly must have economic redistributive equality counterparts. See generally GIBSON, *supra* note 95.

103. See generally E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* (1988); TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (1990); E. Allan Lind et al., *In the Eye of the Beholder: Tort Litigants’ Evaluations of Their Experiences in the Civil Justice System*, 24 *LAW & SOC’Y REV.* 953 (1990); see also Lawrence Solum, *Procedural Justice*, 78 *S. CAL. L. REV.* 181 (2004); cf. Laurens Walker et al., *Reactions of Participants and Observers to Modes of Adjudication*, 4 *J. APPLIED SOC. PSYCHOL.* 295 (1974).

104. It may be no accident that women and minorities of various sorts are disproportionately interested in creating new processes of democratization, participation, and more consensus-based forms of decisionmaking. As Audre Lourde put it so eloquently, “[T]he master’s tools will never dismantle the master’s house.” AUDRE LOURDE, *The Master’s Tools Will Never Dismantle the Master’s House*, in *SISTER OUTSIDER* 110, 111 (1984).

communities and governments, and seeking new processes to participate in, so that old factions and patterns of power domination will not be repeated. Those who are creating these new processes are interested in justice, but they also want peace—to live together with mutual respect, to have sufficient resources to be free from want or illness and to be able to seek their own forms of human flourishing. But many of these processes have still come too late—post hoc or after terrible conflict and violence and injustice.¹⁰⁵ Can we imagine the use of such processes before the terrible conflict, violence, and injustice happens, preventing the Rwandan genocide, the Holocaust, Darfur, and more unnecessary killing in the Mideast?¹⁰⁶ What processes can we develop for preventative dispute resolution, when our legal education and processes are so currently focused on the past (lawsuits and judicial decisionmaking from past disputes)?

This, then, is the top of my house of justice—a multi-purpose process room on the roof—in which creative process architects attempt to build new forms of human engagement. The roof may be a challenging place or metaphor with which to end my lecture. For while some of you will see it as “closer” to God or heaven, others will fear the elements (rain, wind, or even human falls and suicides) that can destroy or harm these new experimental efforts at human problem-solving. Social and political philosophers doubt whether we can achieve “consensus” on hotly contested value choices or whether consensus is unprincipled, unjust, or compromised. Many theorists and practitioners (my pollster husband among them) are skeptical that most people are well informed enough or have enough time, energy, and commitment to truly deliberate with each other,¹⁰⁷ let alone negotiate, listen, empathize with, and form consensus on the conflicts, disputes, and policies with which we live. Current examples of conflicts between the Palestinians and Israeli Jews, and Sunnis and Shiahns in Iraq, not to mention the Blues and Reds of our own country,¹⁰⁸ can make even the greatest process optimist a pessimist about deliberation, mutual respect, and shared governance. How can we use tame and humane processes to conquer the

105. And these processes raise the enormous issue of how to fully reconcile the past with the future in conflicts between choosing punishment, retribution, deterrence, and forgiveness and reconciliation. See generally Carrie J. Menkel-Meadow, *Remembrance of Things Past? The Relationship of Past to Future in Pursuing Justice in Mediation*, 5 CARDOZO J. CONFLICT RESOL. 97 (2004).

106. See DENNIS ROSS, *THE MISSING PEACE: THE INSIDE STORY OF THE FIGHT FOR MIDDLE EAST PEACE* (2004).

107. See generally AMY GUTMANN & DENNIS THOMPSON, *WHY DELIBERATIVE DEMOCRACY?* (2004); MICHAEL WALZER, *PASSION AND POLITICS: TOWARD A MORE EGALITARIAN LIBERALISM* (2004); IRIS MARION YOUNG, *INCLUSION AND DEMOCRACY* (2000); Frederick Schauer, *Talking as a Decision Procedure*, in *DELIBERATIVE POLITICS: ESSAYS ON DEMOCRACY AND DISAGREEMENT* 17 (Stephen Macedo ed., 1999); Symposium, *The Lawyer's Role(s) in Deliberative Democracy: A Commentary by and Responses to Professor Carrie Menkel-Meadow*, 5 NEV. L.J. 347 (2004–2005) (articles by Jennifer Gerarda Brown, Philip J. Harter, Katherine R. Kruse, Bobbi McAdoo & Nancy A. Welsh, Dmitri N. Shalin and Jeffrey W. Stempel). But see FISHKIN, *supra* note 87 (promoting deliberative polling by polling participants on their views about public issues only after they have participated in informational and interactive exchanges with other citizens).

108. See, e.g., Daniel Yankelovich, *Across the Red-Blue Divide: How To Start a Conversation*, CHRISTIAN SCI. MONITOR, Oct. 15, 2004, at 10.

real human and value divides among us?

The challenges for us are many in creating and sustaining new forms of processes with which to seek peace and justice:

1. What should the role of emotions/passions/beliefs be in our conflicts and deliberations with each other?¹⁰⁹ Transformative empathy is among the most significant and important ways of grounding justice and moving people to new places. (Think Martin Luther King, Jr., the Civil Rights Movement, and parents of gays whose love for their children teaches them to change their views; think contra the emotional appeals of fascists and demagogues that tap into the baser forms of group identity and values).

2. How do we reconcile the need to adjudicate and punish the past, with correction of injustice, with reintegration of the future with peace and forgiveness, if not forgetfulness?¹¹⁰

3. Do we need “rules” of process and decision rules “laid down” in advance, or can we negotiate and deliberate about the very processes we will use to achieve peace and justice in different contexts (historically, geographically, and culturally)?

4. How do we deal with the tyranny of the majority in a democracy and the needs of minorities for recognition and fulfillment (whether temporary, by issue or politics, or more permanent, by group or other identification)?¹¹¹

I have many suggestions for these challenges and refutations to these (and other) objections but am rapidly running out of time and space, so let me conclude with my best refutation and hope for the future—my students in this room and around the world. If I began my career as a justice-seeking legal services lawyer who brought lawsuits and knew only how to build one kind of house, our current students are learning to be truly Fullerian process architects

109. This has become one of the most important areas of new work in the field of legal process and negotiation. *See generally*, e.g., ROGER FISHER & DANIEL SHAPIRO, *BEYOND REASON: USING EMOTIONS AS YOU NEGOTIATE* (2005); Erin Ryan, *The Discourse Beneath: Emotional Epistemology in Legal Deliberation and Negotiation*, 10 HARV. NEGOT. L. REV. 231 (2005).

110. *See generally* EVA HOFFMAN, *AFTER SUCH KNOWLEDGE: MEMORY, HISTORY, AND THE LEGACY OF THE HOLOCAUST* (2004) (exploring philosophical and historical approaches to different forms of forgiveness and remembrance, accountability and reconciliation, seen through the lens of the Holocaust); AVISHAI MARGALIT, *THE ETHICS OF MEMORY* (2002).

111. *See generally* ROBERT A. DAHL, *ON DEMOCRACY* (1998); JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980); JANE J. MANSBRIDGE, *BEYOND ADVERSARY DEMOCRACY* (1980); CAROLE PATEMAN, *PARTICIPATION AND DEMOCRATIC THEORY* (1970); ROBERT D. PUTNAM, *MAKING DEMOCRACY WORK: CIVIC TRADITIONS IN MODERN ITALY* (1993); IAN SHAPIRO, *THE STATE OF DEMOCRATIC THEORY* (2003) (all discussing the longstanding debate by political theorists as to how to reconcile majoritarian and minority interests in participatory (and voting) democracies).

who can build many human-made structures to solve human problems.¹¹² With our talented and creative student body of domestic J.D. and international LL.M. students, we have, in my recent classes in multiparty dispute resolution, designed processes and facilitated consensus solutions to such problems as chemical weapon disarmament, community land use, global warming, cloning, Cyprus, Kashmir, the Middle East, diamond mining, Northern Ireland, and Georgetown journal policies. Learning how to negotiate, mediate, facilitate,¹¹³ and yes, litigate, in many different languages—participating in these processes in experiential ways, and every semester creating new ideas for new processes for the never-ending array of human problems needing solutions, resolutions, or handling—my best answers to doubters of new forms of consensus-building and deliberative democracy are the students of this law school and citizens of our global society who will fly off that roof with their hopes and plans for new ways to achieve peace and justice.

For if my years as a teacher of procedure and process have taught me anything, it is that process is the human bridge between justice and peace. I hope to be in this inspiring construction process¹¹⁴ with all of you for a long time to come.

112. This has important implications for what we teach and what I teach—meeting management, group facilitation, dealing with emotions as well as with logical arguments, asking questions, really listening and hearing, creative problem-solving, and process system design, among other topics new to the legal curriculum.

113. All I have said here about process diversity and variation has enormous implications for what we should be teaching as Process in law schools. Elsewhere, I have discussed the importance of teaching facilitation skills, meeting management, group dynamics, strategic voting theory and practice, and the economics, mathematics, sociology, and psychology of decisionmaking, along with our usual staples of rules, doctrines, and policy. Different process rules and different decision rules produce different outcomes. Any modern lawyer needs to understand these dynamics for designing, choosing, and advising about what processes to use for what purposes. *See generally* Carrie Menkel-Meadow, *Aha? Is Creativity Possible in Legal Problem Solving and Teachable in Legal Education?*, 6 HARV. NEGOT. L. REV. 97 (2001); Carrie Menkel-Meadow, *The Lawyer as Problem Solver and Third-Party Neutral: Creativity and Non-Partisanship in Lawyering*, 72 TEMP. L. REV. 785 (1999).

114. My father is an engineer and painter; my mother, a cook and seamstress; my brother, a doctor and photographer; so I come from pretty diverse process stock. And to build a house of justice, we will need the expertise of many different kinds of people.