

# Are There Systemic Ethics Issues in Dispute System Design? And What We Should [Not] Do About It: Lessons from International and Domestic Fronts

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## I. INTRODUCTION: IS DISPUTE SYSTEM DESIGN (“DSD”) A PROFESSIONAL FIELD READY FOR A CODE OF ETHICS?

The process by which new fields of knowledge and practice are defined, developed, and demarcated from other fields has long been described by sociologists of the professions.<sup>1</sup> As new competencies are created and studied, the progression from initial theorization, to the development of practice protocols, training and education, attempts at credentialing, and “monopolization of expertise,” to the development of “best practices” and ethics codes, marches on to the eventual state of exclusionary practices, such as degree requirements, licensing, and formal professional discipline. All the basic professions (medicine, law and clergy) have gone through this process and many other professions exist in different stages of this inexorable march toward “professionalization”—e.g. nursing, social work, psychological counseling, building contracting, hairstyling, and paraprofessionals in medicine and law. Recent work by an interdisciplinary team of scholars, including Howard Gardner (education and cognitive psychology), Mihaly Csizkszentmihalyi (social psychology) and William Damon (developmental psychology and education) has explored how

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1. See, e.g., ANDREW D. ABBOTT, *THE SYSTEM OF PROFESSIONS: AN ESSAY ON THE DIVISION OF EXPERT LABOR* (1988); ELIOT FRIEDSON, *PROFESSIONAL POWERS: A STUDY OF THE INSTITUTIONALIZATION OF FORMAL KNOWLEDGE* (1986); MARGALI S. LARSON, *THE RISE OF PROFESSIONALISM: A SOCIOLOGICAL ANALYSIS* (1979).

professions attempt to constitute “cultures” of professional excellence, using both internal and external social and ethical commitments.<sup>2</sup> Whether a field or discipline requires ethical standards to be considered a profession remains an issue of some debate due to its tendency to “exclude” some professions or to mark them as separate from important lay expertise and service.

The field of conflict resolution, broadly defined, is currently at what I would describe as a “mid-point” in this quest for formal recognition as a profession. There are competing theories of practice in each of the constituent fields. Mediators advocate evaluative, facilitative,<sup>3</sup> transformative,<sup>4</sup> understanding,<sup>5</sup> narrative,<sup>6</sup> and eclectic models of mediation.<sup>7</sup> Negotiators contrast different models or approaches to negotiation, pitting adversarial-competitive models “against” collaborative and problem-solving models, with still others suggesting negotiation is more often “mixed” in its conceptual goals and behaviors (creating and claiming value).<sup>8</sup> Another set of dispute resolution professionals offer yet a different set of practices for arbitration,<sup>9</sup> where there are already some relatively established practice protocols. The larger, more inclusive, field of conflict resolution has

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2. See also HOWARD GARDNER ET AL., *GOOD WORK: WHEN EXCELLENCE AND ETHICS MEET* (2001) (exploring and contrasting the internal ethics and integrity of the profession of geneticist-scientist with the more externally directed profession of journalism).

3. See Leonard Riskin, *The New Old Grid and the New New Grid System*, 79 NOTRE DAME L. REV. 1, 3 (2003).

4. See generally ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION* (2nd Ed. 2006).

5. See generally GARY FRIEDMAN & JACK HIMMELSTEIN, *CHALLENGING CONFLICT: MEDIATION THROUGH UNDERSTANDING* (2008).

6. See generally JOHN WINSLADE, GERALD D. MONK & GERALD MONK, *NARRATIVE MEDIATION: A NEW APPROACH TO CONFLICT RESOLUTION* (2000).

7. See generally CARRIE MENKEL-MEADOW ET AL., *MEDIATION: PRACTICE, POLICY AND ETHICS* (2006) (summarizing presentations of different models of mediation); Carrie Menkel-Meadow, *The Many Ways of Mediation: The Transformation of Traditions, Ideologies, Paradigms and Practices*, 11 NEGOT. J. 217 (1995); DEBORAH KOLB ET AL., *WHEN TALK WORKS-PROFILES OF MEDIATORS* (1994).

8. See Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754 (1984); Carrie Menkel-Meadow, *Why Hasn't the World Gotten to Yes?*, 22 NEGOT. J. 485 (2006).

9. See, e.g., Carrie Menkel-Meadow, *Are Cross-Cultural Ethics Standards Possible or Desirable in International Arbitration?*, in *MÉLANGES EN L-HONNEUR DE PIERRE TERCIER* (P. Gauch, F. Werro & P. Pichonnaz, ed. 2008).

developed more or less agreed-to knowledge bases,<sup>10</sup> and a robust effort to develop codes, standards of practices and ethical rules.<sup>11</sup>

A few states have begun processes to require specific numbers of training hours and some form of certification, especially with respect to mediation within the courts.<sup>12</sup> Recently, the American Bar Association's Section on Dispute Resolution published a report from its Task Force on Improving the Quality of Mediation<sup>13</sup> that addressed questions of quality, ethics, subject matter expertise, and other issues related to the choice and use of mediators. In a similar vein, a new international group called the International Mediation Institute, based in The Hague, The Netherlands, is also engaged in a project to develop standards of Competency in International Mediation,

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10. As evidenced by the growing number of both school and degree programs, and professionally based courses and texts in all fields of dispute resolution – arbitration, mediation, negotiation, facilitation and consensus building, as well as dispute system design, *see, e.g.*, CATHY A. COSTANTINO & CHRISTINA S. MERCHANT, *DESIGNING CONFLICT MANAGEMENT SYSTEMS: A GUIDE TO CREATING HEALTHY AND PRODUCTIVE ORGANIZATIONS* (1995); WILLIAM L. URY ET AL., *GETTING DISPUTES RESOLVED: DESIGNING SYSTEMS TO CUT THE COSTS OF CONFLICT* (1988); LAWRENCE SUSSKIND ET AL., *THE CONSENSUS BUILDING HANDBOOK* (1999); LAWRENCE SUSSKIND & DAVID CRUICKSHANK, *BREAKING ROBERT'S RULES* (2006); MICHAEL L. MOFFITT & ROBERT C. BORDONE, eds., *THE HANDBOOK OF DISPUTE RESOLUTION* (2005); MENKEL-MEADOW ET AL., *DISPUTE RESOLUTION: BEYOND THE ADVERSARY MODEL* (2005); ANDREA SCHNEIDER & CHRISTOPHER HONEYMAN eds., *THE NEGOTIATOR'S FIELDBOOK* (2006).

11. *See, e.g.*, ABA LITIGATION SECTION, *STANDARDS FOR NEGOTIATION OF SETTLEMENTS* (2005); AAA ETHICS RULES FOR COMMERCIAL ARBITRATORS (2006); AAA-ABA-ACR STANDARDS FOR MEDIATORS (2005); GEORGETOWN-CPR PROPOSED MODEL RULE FOR LAWYERS AS THIRD PARTY NEUTRALS AND GEORGETOWN-CPR PRINCIPLES FOR ADR PROVIDER ORGANIZATIONS (2001), *available at* <http://www.cpradr.org/Portals/0/final-Provider.pdf> (last visited May 20, 2009). SPIDR GUIDELINES FOR THE DESIGN OF INTEGRATED CONFLICT MANAGEMENT SYSTEMS WITHIN ORGANIZATIONS (2001). For related efforts, *see also* Peter Adler, *A Credo for Facilitators*, *mediate.com*, July 24, 2008 and Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters, May 21, 2008.

12. *See, e.g.*, FLORIDA, MASSACHUSETTS, CALIFORNIA, *DEVELOPMENT OF QUALIFICATION STANDARDS FOR MEDIATORS SERVING IN COURT-CONNECTED MEDIATION PROGRAMS FOR CIVIL CASES* (California Judicial Council, Notice for Public Comment by July 7, 2008).

13. ABA SECTION OF DISPUTE RESOLUTION, *TASK FORCE ON IMPROVING THE QUALITY OF MEDIATION* (April 2006-March 2007) Final Report (convened to consider a national credential in mediation, concluding that market conditions made it not feasible and suggesting other indicators of mediator quality to be further studied).

including a specialized Inter-Cultural Mediator Competency Certification.<sup>14</sup> Similar optional and private, *i.e.* not state sanctioned, certification programs exist for arbitrators.<sup>15</sup>

Even the relatively newest forms of dispute resolution practice have begun developing professional associations and discussion of appropriate standards, practice protocols and ethics, such as IAP2<sup>16</sup> (the International Association of Public Participation, which includes mediators, public policy facilitators, and consensus builders) and the Deliberative Democracy Network.<sup>17</sup>

As an ethicist, scholar, and practitioner, I have participated in a variety of efforts to specify the professional content of work and ethics standards for many of these dispute resolution professions. As Chair of the Georgetown-CPR Commission on Ethics and Standards of Alternative Dispute Resolution (“ADR”), I helped convene a diverse commission of practitioners and consumers to draft suggested ethical standards for lawyers acting as third party neutrals in a variety of roles, and worked with a committee to specify standards and principles for organizations providing ADR services.<sup>18</sup>

As a member of the self-appointed “Senior Mediators Group,” I participated in an effort to develop a “credo” for mediators, suggesting, among other values, that mediators, particularly in public policy disputes should:

1. Do no harm;
2. Involve a broad array of interested and affected stakeholders;
3. Facilitate maximum opportunities for participation and voice of participants;

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14. See Draft Competency Certification Scheme, [www.IMImediation.org](http://www.IMImediation.org) (last visited Mar. 12, 2009).

15. See The Chartered Institute of Arbitrators, [www.arbitrators.org](http://www.arbitrators.org) (offering courses and credentials, including degrees, etc. in arbitration and other dispute resolution services, “seeking to set global standards for professional education in dispute resolution”) (last visited Mar. 12, 2009).

16. See the homepage for the International Association for Public Participation, <http://www.iap2.org> (last visited Mar. 14, 2009) for organization’s goals, training programs and information about facilitated public policy mediation, deliberation and decision making.

17. See, *e.g.*, The Deliberative Democracy Consortium, <http://www.deliberative-democracy.net> (last visited Mar. 14, 2009); The Collaborative Policy Center, <http://www.csus.edu/ccp> (last visited Mar. 14, 2009); The Policy Consensus Initiative, <http://www.policyconsensus.org> (last visited Mar. 14, 2009).

18. See generally CPR PRINCIPLES FOR ADR PROVIDER ORGANIZATIONS, *supra* note 11.

4. Encourage participants to develop their own agreements on process and ground rules;
5. Encourage participants to develop (and understand the significance of) decision rules and voting procedures;
6. Encourage participant recognition of opportunities for joint, and not only, individual, gain;
7. Require that parties express and explain their reasons and justifications for views, arguments, proposals and needs;
8. Provide an atmosphere of fair hearing and respect for all participants;
9. Seek to explore creative and tailored decisions and solutions to problems, issues and disputes;
10. Be impartial, unbiased and “clean” (with adequate disclosures) with respect to their relationships to parties;
11. Facilitate open dialogue, discussion and deliberation between and among parties;
12. Encourage and educate for enhanced capacity of parties to participate in decision making that affects them;
13. Probe the practical implementation issues and consequences of all agreements reached;
14. Monitor the parties’ process and decision rules, consistent with whatever law, rules or other governing materials are applicable to the context;
15. Ensure an atmosphere of respectful awareness and sensitivities to differences, whether substantive, institutional, social and cultural;
16. Avoid presiding over any outcomes which would be “unfair” or “unjust” to participants or those affected by decision making of the parties.<sup>19</sup>

And now, as one of the newest strands of this new profession, Dispute System Design, begins to consolidate definitions, skills, techniques, knowledge, and practices, the question is raised: Should there be a separate set of ethics standards or guidelines for those who design “systems” of dispute resolution for institutions or other parties with recurring disputes and internal processes for their resolution?

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19. See Carrie Menkel-Meadow, *The Lawyer as Consensus Builder: Ethics for a New Practice*, 70 Tenn. L. Rev. 63, 105-10 (2002). This “credo” was never formally endorsed by any group, including the self-appointed Senior Mediators Group at which it was first discussed.

In this essay I explore some of the issues implicated in the question of whether DSD should develop its own Code or Credo of Ethics, specifying good and bad practices of those professionals who design systems of dispute resolution in recurring or aggregated conflict situations. Defining what an ethics code is or should be is problematic enough. Should an ethics code serve the consumers of services or the providers of services (they will be constructed differently depending on who the audience is)? At what level of aspiration or code should rules be designed? For many years the American Bar Association Code of Professional Responsibility for Lawyers (“the CPR”) contained three levels: Canons (aspirational statements of good practices), Disciplinary Rules (specific rules for which lawyers could be sanctioned and disciplined by appropriate ethics bodies), and Ethical Considerations (fuller textual commentary designed to explicate the meaning of rules and good practices with no disciplinary bite). When the CPR was changed to the Model Rules of Professional Conduct in 1983, the form changed to “simple” blackletter rules with accompanying Comments to explicate the rules (in part because many thought the aspirational canons and ethical considerations were hardly observed).

Does drafting ethical “rules” cut with too blunt a knife — opposing what is prohibited or permitted in simplistic and binary terms for discipline that is contrary to the more nuanced form of judgment that most professionals must exercise to behave well or with due consideration of situations that do not fall into easy black and white categories? Should ethics codes aim high for encouragement (“best practices”), the mean or “norm” of practice (“good practices”), or for the bottom or bad practices that should be prohibited, condemned and disciplined (“worst practices”)?) When is ethical practice the same as effective practice? When does practice become so poor it raises issues of ethics? Is malpractice an ethics matter?

Those who perform dispute system design services come from several different constituent professions, including law, city and urban planning,<sup>20</sup> social work, psychology, political science, journalism,<sup>21</sup> and those who are newly educated in formal degree programs

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20. See, e.g., JOHN FORESTER, *THE DELIBERATIVE PRACTITIONER: ENCOURAGING PARTICIPATORY PLANNING PROCESSES* (2001).

21. Some of the eclectic founders of this field come from a wide variety of backgrounds including John Marks of Search for Common Ground who began in the State Department, was a journalist and now designs peace seeking programs through media and other interventions and Patrick Phear who became a mediator after a career as a dentist (is resolving conflicts better/easier than pulling teeth?).

in conflict resolution<sup>22</sup> or self-educated facilitators. So, one important preliminary issue is what self-constituted group could effectively and legitimately develop the content of such ethical standards? And, perhaps even more problematically, what enforcement of such standards could there be without an underlying professional organization or structure? Each of the above mentioned fields and professions has its own set of professional standards, or as some would say, the values of craft or calling that might be compromised or diluted by a more eclectically formed field. What are the “core values” of a dispute system designer?

Furthermore, given the wide range of activities that could be included in any definition of system design (developing procedures and processes for resolving or handling internal organizational conflicts, settling and paying claims in adversarial mass legal actions (e.g. consumer, employment, or torts<sup>23</sup>), mass human rights violations,<sup>24</sup> governmental and citizen disputes (e.g. negotiated rule-making or reg-neg),<sup>25</sup> peace seeking or peacekeeping in on-going or post-conflict situations among nations, ethnic, religious or other cultural groups, or facilitating competing groups in seeking good political outcomes, such as in the field now denominated “deliberative democracy”),<sup>26</sup> is it possible to develop a general enough set of standards of good practices that will provide guidance in a field characterized by many different contexts and locations of use?

Finally, as the work we have discussed includes both domestic, and multi-national and international forms of dispute system design,

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22. See George Mason University Institute for Conflict Analysis and Resolution, <http://icar.gmu.edu/> (last visited Mar. 14, 2009) which offers both masters and PhD degree programs; Other universities also offer degree programs in conflict management and related fields, both as separate degree programs and as elements, specialization or certificates within other programs. See, e.g., American Association of Law Schools, Section of Alternative Dispute Resolution, Programs in Conflict Resolution; Association of Conflict Resolution, Programs in Conflict Resolution.

23. Francis McGovern, *Dispute System Design: The United Nations Compensation Commission*, 14 HARV. NEGOT. L. REV. 171 (2009); KENNETH FEINBERG, WHAT IS LIFE WORTH? (Public Affairs 2006).

24. See Andrea Schneider, *The Intersection of Dispute Systems Design and Transitional Justice*, 14 HARV. NEGOT. L. REV. 289 (2009).

25. Philip Harter, *Negotiating Regulations: A Cure for the Malaise*, 71 Geo. L. J 1 (1982); Susskind, et.al, *supra* note 10; Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. Rev. 1 (1997).

26. JAMES BOHMAN, PUBLIC DELIBERATION: PLURALISM, COMPLEXITY AND DEMOCRACY (MIT Press 1996); DELIBERATIVE DEMOCRACY (Jon Elster, ed., 1998); Carrie Menkel-Meadow, *The Lawyer's Role(s) in Deliberative Democracy*, 5 Nev. L.J. 347 (2004-2005); Amy J. Cohen, *Negotiation Meet New Governance: Interests, Skills and Selves*, 33 Law & Soc. Inquiry 503 (2008).

an important question is whether ethics or standards can be described and enforced across cultural and political boundaries and jurisdictions (what ethicists have labeled the universality vs. particularity problem). As I will more fully explore below, recent work on “ethics” in good works in international economic and humanitarian aid is raising similar questions about how transborder, trans-disciplinary, well-intentioned work can be monitored and scrutinized for ensuring best possible outcomes and disciplining of bad acts and bad effects.<sup>27</sup>

I will state my views at the outset and then explore, with examples, and my own analysis, why even though we clearly have ethical *issues* to consider and deal with in this nascent field, at this point in time I still think it is premature to draft a separate *ethics code* for our field. Since I have long advocated for separate ethics codes for mediators and arbitrators<sup>28</sup> (including in international settings<sup>29</sup>), I will have to explain why dispute system design is different or, in my view, “not quite ready for prime-time” in terms of ethics regulation.

On the other hand, just because I do not think the field of DSD is ready for a formal ethics code, does not mean that I do not see some very important ethics issues in the field. I hope this essay will contribute to an on-going discussion of those issues so that in time, after deliberation on some of the more controversial issues, we might be able to begin to specify our core ethical principles.<sup>30</sup>

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27. See, e.g., ETHICS AND INTERNATIONAL AFFAIRS: EXTENT & LIMITS (Jean-Marc Coicaud & Daniel Warner eds., 2001) (exploring international ethics issues from a traditional (statist), analytic (universality-cosmopolitan vs. particularity) and critical perspective, with a focus on both principles and institutions needed for international ethics in diplomacy, war, foreign aid, etc.)

28. See e.g., Carrie Menkel-Meadow, *The Silences of the Restatement of the Law Governing Lawyers: Lawyering as Only Adversary Practice*, 10 Geo. J. Legal Ethics 631 (1996-1997); Carrie Menkel-Meadow, *Ethics in Alternative Dispute Resolution: New Issues, No Answers From the Adversary Conception of Lawyers' Responsibilities*, 38 S. Tex. L. Rev. 407 (1997); Carrie Menkel-Meadow, *Ethics and Professionalism in Non-Adversarial Lawyering*, 27 Fla. St. U. L. Rev. 153 (1999-2000); Carrie Menkel-Meadow, *The Limits of Adversarial Ethics*, in ETHICS IN PRACTICE (Deborah L. Rhode ed., 2000).

29. Menkel-Meadow, *supra* note 9, at 18-22.

30. I can't resist at this point describing my own naiveté when I set about some 15 years ago to delineate what I thought were “core” and uncontroversial ethical issues in mediation, including conflicts of interests, fees, etc. See Menkel-Meadow, *Professional Responsibility for Third Party Neutrals*, 11 (9) ALTERNATIVES (Sept. 1993); see also Menkel-Meadow, *Ethics in ADR: The Many “Cs” of Professional Responsibility and Dispute Resolution*, 28 FORDHAM URB. L.J. 979 (2000-2001). What turned up instead was a maelstrom of controversy and disagreement about downstream/upstream conflicts of interests in law practice and mediation and arbitration, and whether fees

First, we must identify the method by which we should develop ethical reasoning in DSD: either *inductively*, what the ethical problems are or might be (reasoning from examples and cases presented with ethical dilemmas) or *deductively* determine what core principles our field should be expressing, which should then be applied to particular cases. Then we will have to specify rules, standards, principles, and the organizational or institutional apparatus for enforcement of those standards. Pending clear enforcement mechanisms, we must also consider what should happen in this “interim” period of discussion and debate, before codes and rules are framed, but while problematic activities are still occurring. Are “DSDers” subject to the professional codes of their professions of origin for their acts as DSDers?<sup>31</sup>

## II. THE INDUCTIVE METHOD OF ETHICS: SOME EXAMPLES OF QUESTIONABLE PRACTICES AND ISSUES IN DSD

The inquiry of whether ethics rules or standards should be promulgated for the new field of DSD stems from its use and problems that have already been exposed. In this section, I will consider and illustrate some examples of core ethical dilemmas and issues that arise in the use of a professional to design a system of

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could be contingent, paid by one party only, or a third party, or waived for some parties, but not all. See e.g., Carrie Menkel-Meadow, *When Dispute Resolution Begets Disputes of Its Own: Conflicts Among Dispute Resolution Professionals*, 44 UCLA L. Rev. 1871 (1997); Carrie Menkel-Meadow, *Ethics in ADR Representation: A Roadmap of Critical Issues*, 4(2) DISP. RES. Mag. 3 (1997). As ADR practice has both matured and ventured into new forms and locations, the “ethics” of particular practices continues to evolve, so my basic point is that a new field, like DSD, derived from ADR, needs some “habitus” or common routines and enough experience (PIERRE BOURDIEU, *OUTLINE OF A THEORY OF PRACTICE*, 1977) of practice, before we can “codify” anything. This does not mean, of course, that we can’t “know it when we see it” (bad conduct, worthy of some condemnation, apologies to Justice Stewart, concurring opinion in *Jacobellis v. Ohio*, 378 U.S. 184, (1964)).

31. For many years, in the absence of special ethical rules and codes for mediators and arbitrators, this question has been asked about lawyers serving in those capacities. There are now such ethical codes for mediators and arbitrators but relatively little enforcement. Lawyers can be disciplined for any act which would constitute professional misconduct, regardless of whether the act is formally performed as a lawyer. See MODEL RULES OF PROF’L CONDUCT R. 8.4 (2009). (Thus, real estate, sports, entertainment or other agents who have law degrees and licenses can lose their legal license for deceptions or lies committed while serving as agents. Recall that both Presidents Nixon and Clinton were disbarred for acts of deception while they were President of the United States.).

dispute resolution for a wide variety of different clients, organizations and causes.<sup>32</sup>

A. *For What Purpose Are We Designing a Dispute Resolution System?*

Is DSD a “neutral” activity? Consider the following: A major cultural institution seeks a DSD professional to design a new internal grievance system for its employees. Some of the employees are unionized (security guards and other low wage employees) and others (mid-wage and more professional workers are not). After several information gathering sessions with institutional managers, it becomes clear that one of the intended purposes of designing an internal employment conflict system is to marginalize and make unpopular the union’s contractual grievance system (usually utilizing some form of arbitration) and to structure an environment in which union support is eroded.

Is this a purpose a DSD professional should facilitate with her expertise? What, if like me, the DSD professional was a former labor and employment lawyer particularly concerned about employee choice, rights of collective bargaining and due process? When, in this case, I asked that union stewards and employee representatives become part of an internal planning committee for the internal grievance system design process, it became clear that management was not interested in encouraging multilevel participation and preferred, instead, a top-down designed system.

What should a DSD professional do? I withdrew from this particular work, suggesting a few other names of professionals whom the institution could consult, and some reading materials. I suspect—but do not know—that many of the people I offered in referral would have reactions similar to mine. Consider how many mediators, facilitators and other ADR professionals of the first generation also have employment, labor, civil rights and anti-discrimination backgrounds. I imagine that at some point another DSD professional who would do the work would be found.<sup>33</sup>

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32. A disclaimer – all examples are taken from my own practice (with names of clients changed or concealed to protect both confidentiality and the “guilty”). Some examples are in the public domain.

33. One reader of this paper suggested that the initial commitments and professions of origin of the first generation of dispute system designers might be particularly important in situations like this. For example, the former labor and discrimination lawyer, former divorce lawyer, former social worker or city planner might have commitments to social justice that a “deracinated” or specifically trained dispute system designer might not. On the question of whether dispute resolution

In another example, discussed more fully below, I report on an internal dispute resolution system for employees that was clearly designed to discourage employees from filing any formal employment litigation claims or charges (a common and more or less legitimate purpose) but one which can be used to have an “*in terroram*” effect on employees with potentially legitimate claims. In one matter with which I am familiar, a multi-national corporation used its domestically created employment dispute system to give workers outside of the United States the perception that they had grievance and conflict resolution rights, which appeared generous because domestic employment laws do not necessarily apply abroad.<sup>34</sup> But, in fact, the employer used the system to deflect employment disputes and litigation, and failed to enforce its own procedures and outcomes.

Who is ethically responsible for such design? The original designers of the domestic employee grievance system? Or, only those who implement and transfer its use from one arena to another?

When DSD professionals, lawyers, or other professionals<sup>35</sup> do not feel ethically comfortable with the uses to which their services will be put, they can usually withdraw or reject a particular assignment.<sup>36</sup>

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professionals in general should be neutral, see BERNARD MAYER, *BEYOND NEUTRALITY: CONFRONTING THE CRISIS IN CONFLICT RESOLUTION* (2004).

34. In *EEOC v. Arabian American Oil Co.*, 499 U.S. 244 (1991), the United States Supreme Court held that Title VII prohibiting discrimination in employment did not apply outside of the United States. This decision was subsequently reversed by Congressional action. Civil Rights Act of 1991, Pub. L. No. 102-166, § 109, 105 Stat. 1071 (1991). However, in my experience as a mediator of such cases, many employees do not think that they have any American legal rights for work performed outside of the United States. In general, courts will look to Congressional intent for the decision about whether a particular statutory scheme is intended to have extraterritorial effect, and many domestic labor and employment protections have been held not to apply abroad. *Cf. O'Mahony v. Accenture Ltd.*, 2008 WL 344710 (S.D.N.Y. 2008).

35. As I write this, an ethics issue in the field of court language translation and interpretation has erupted. A certified U.S. federal court translator of twenty-three years broke confidentiality to denounce the U.S. Customs and Immigration Service raids on a meat-packing plant in Iowa which, in his view, violated basic human rights. In a powerful essay and a series of interviews, Dr. Erik Camayd-Freixas has defended his decision to break neutrality and go public when he felt a “conflict of interest” because his translating services were being used to wrongfully convict undocumented workers of identity theft. See Julia Preston, *An Interpreter Speaking Up for Migrants*, N.Y. TIMES, July 7, 2008, at 1; Erik Camayd-Freixas, *Interpreting after the Largest ICE Raid in US History* (June 13, 2008) (unpublished manuscript, on file with the author). I also defended Professor Camayd's actions. See *Aqui y Ahora* (Univision television broadcast, July 22, 2008).

36. This is in contrast, for example, to the British “cab rank” rule which does not entitle British barristers to turn down a “brief,” but which they do manage to control and manipulate through other means. See Peter Tague, *Criminal Defense in the U.K.* (unpublished manuscript, on file with the author).

Refusing to work, withdrawing on principle or ethical objections, and referring others to do the work are somewhat analogous to the “noisy withdrawal” problem faced by lawyers who learn that clients are engaged in unlawful or unethical behavior and seek to withdraw without violating client confidences.<sup>37</sup>

B. *Selection of the DSD Professional: Serving Few or Many?*

As the above examples illustrate, the DSD professional usually serves an institutional client. When should a DSD professional engage in due diligence to determine who seeks the dispute system design and for what purpose, particularly, where, as above, there is some evidence of conflicting interests within the organization? Consider this next example: I am often engaged, as a member of the Association of American Law School Resource Corps,<sup>38</sup> to facilitate and organize strategic planning events for law schools. Usually the Dean of the school is the contact person, but our protocol is that Resource Corps facilitators communicate privately with virtually all faculty members, senior administrative staff, and occasionally, some students before convening meetings and planning the work. Sometimes the request for facilitation may come from a faculty planning committee or the request might be initiated by a particular interest group on the faculty. What should a DSD professional do when it becomes clear, either before, or during the facilitation, planning, or structuring of the process, that a particular interest group is using the process for its own ends?<sup>39</sup>

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37. See, e.g., Geoffrey Hazard, *The Duty or Option of Silence*, 23 LAW & SOC. INQUIRY 339 (1998); William H. Simon, *The Kaye Scholer Affair: The Lawyer's Duty of Candor and the Bar's Temptation of Evasion and Apology*, 23 LAW & SOC. INQUIRY 243 (1998).

38. The AALS Resource Corps consists of a group of about twenty legal educators who have been specifically trained to conduct strategic planning and other organizational retreats and conflict resolution programs for “developing the capacity for collegial deliberation and decision-making” in law schools. We perform our work without fees. See AALS Resource Corps Resources Page, [http://www.aals.org/resources\\_resourcecorps.php](http://www.aals.org/resources_resourcecorps.php) (last visited Mar. 10, 2009). Some of us (and others not part of this group) are also engaged, for fees, to perform similar functions for law schools or universities who seek particular expertise outside of the Resource Corps. See, e.g., Report of Center for Collaborative Governance, California State University at Sacramento (2008) (on file with author).

39. In several cases in which some of us have worked, it has become clear that one faculty group organized such planning events in order to expose decanal mismanagement or other negative internal and private events in order to provoke a crisis or effectuate a change of leadership. I am familiar with at least one case in which this strategy was successful. The facilitator became the unknowing “tool” of a well organized and legitimated (through faculty committee structure) faculty faction.

Once again, although the goal of this work may be to act “neutrally” or to serve “the organization’s best interest,” such overarching principles may be difficult to observe when choices must be made (specific interventions, exposure of secret or private meetings or plans, advice for leaders or managers, withdrawals of service), particularly in cases where the DSD professional may be *manipulated*, either by management, or the representatives of the organization who have selected him. Obviously, good practice and due diligence suggest that any DSD professional should undertake preliminary inquiries about the organization, its constituents, and the reasons DSD is being sought, but in some cases, such issues may not emerge until the consultation has begun or, where selection as a DSD professional is competitive, candidates may not fully scrutinize or investigate those who are hiring them.

### C. *Professional Responsibilities of the DSD Professional*

There are a host of issues and ethical dilemmas that confront the DSD professional before, during, and after engagement in dispute system design. For example, should the DSD professional have particular subject matter, as well as process, expertise when undertaking a matter? Increasingly, large corporations, universities, hospitals, research facilities, and government departments are utilizing Ombuds or Ethics Officers to develop internal complaint, grievance and justice systems of various sorts. In situations where the organization’s mission (e.g. science, technology, religion) is highly specialized, should the DSD professional self-select away from that which he does not know? Or is the DSD professional, like many lawyers, a generalist who can prepare and learn about new fields and new organizational schemes?<sup>40</sup>

As organizations become more multi-national and multi-cultural, should dispute system designers, like managers, mediators, and other dispute resolution professionals have inter-cultural competencies (see more below)? The newly formed International Mediation Institute thinks so and has drafted standards and a protocol for certification of mediators with intercultural competency,<sup>41</sup> applying specific standards, measures and client feedback.

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40. See, e.g., MODEL RULES OF PROF’L CONDUCT R. 1.1 cmt. (2009).

41. International Mediation Institute Independent Standards Commission, [http://www.immediation.org/isc\\_list.html](http://www.immediation.org/isc_list.html) (last visited Mar. 10, 2009). See also Judith Meyer, *Mediators’ Alert: Now, Certification Goes Global*, 26 ALTERNATIVES TO THE HIGH COST OF LITIG. 57 (2008).

Should a DSD professional ever advise a potential client that a new design or any design of a dispute system is not necessary? Like most professionals with particular expertise, when would a DSD professional recommend against the use of her services on efficiency, judgment, fairness, or other grounds, especially if she stands to earn a fee?

Consider this example from my own experience: Virtually all of the international bodies created by the Bretton Woods agreement (the World Bank, the International Monetary Fund and now, the World Trade Organization) and the United Nations, as well as many other non-governmental, and governmental international and multi-national organizations, have created internal systems of conflict and dispute resolution, particularly for their own employees. Indeed, some have also created quite effective systems for external conflict resolution. Companies selling goods offer online or other forms of speedy and systematic complaint handling.<sup>42</sup> The World Bank has not only an internal and “integrated” conflict resolution system for its own employees,<sup>43</sup> but it offers a separate body to deal with complaints of those affected by World Bank Projects,<sup>44</sup> and a formal arbitration system for private investor-state disputes (the International Center for Settlement of Investment Disputes, ICSID). Many organizations must craft internal (and external) dispute and complaint systems for a wide variety of constituents—customers, different classes of employees, patients, doctors, students, union members, part-time workers, vendors, suppliers, etc. and so the need for multiple or ever-changing dispute systems may be great. What should a DSD professional do when confronted (as I have been) with organizations that repeatedly engage consultants and dispute designers to design, and then consult and evaluate dispute or conflict resolution programs repeatedly at a potential cost to the organization and adding confusion about the stability of any one system?

Similarly (and related to section A above), what should a DSD professional do when a particular consultation is designed to increase

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42. See, e.g., E-bay Online Dispute Resolution, <http://pages.ebay.com/help/buy/disputes.html> (last visited Mar. 10, 2009).

43. World Bank Integrated Conflict Management System, <http://www.worldbank.org/crs> (last visited Mar. 10, 2009).

44. World Bank Inspection Panel, <http://www.worldbank.org/inspectionpanel> (last visited Mar. 10, 2009).

services and funding for dispute systems in institutional or organizational environments in competition for funds with perhaps more deserving needs?<sup>45</sup>

As noted above, the DSD professional has a particularly tricky ethical dilemma or conflict of interest in the organizational setting. Most often hired by management or the “top” of an organization to design a conflict system for workers, customers, or others who constitute the “bottom” or lateral tiers of an organization, to whom does a DSD professional owe his or her professional duty? I was not a designer of the dispute resolution system created for arbitration of claims in the Dalkon Shield mass tort case,<sup>46</sup> but I was a dispute resolver (arbitrator) in the system, and I felt the ethical dilemmas of presiding over a process I thought was sometimes ill-suited to its purpose. I would have preferred a more mediational, rather than “arbitrary”/arbitration process. And, since I was a neutral “judge,” I could feel the instrumental use of the arbitration process to efficiently allocate limited funds (located within a bankruptcy proceeding) which failed, in my view, to fully compensate or deliver justice to the users (“victims” of the tort) of the system. Designers and managers of that process were well qualified dispute resolution experts (some of whom appeared at this Symposium – Francis McGovern and Kenneth Feinberg, along with Georgine Vairo), but they were responsible to the bankruptcy judge and proceedings (and later to a Board managing the limited Dalkon Shield Trust), not directly to the claimants.

Thus, in formal terms, DSD professionals also suffer from agent-principal and moral hazard dilemmas and conflicts when users or those affected by professional work are not the same as those directing or controlling the work, who may seek implementation of other values (efficiency, for example, over “justice” or even due process).

Finally, what responsibility does a DSDer have for the implementation, evaluation, and enforcement mechanisms of any systems

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45. From my own experience, I know that I have been asked to evaluate and re-design a well financed international dispute resolution system and help make the case for more internal funding. Is it ethical or appropriate for me to recommend a “top of the line,” multi-tiered and expensive program when there are competing and perhaps better uses of the scarce resources inside the organization? Is it enough to say that that decision belongs to the managers and not to the system designer? (I say this as someone who was once queried by a member of the board of a major institution about whether I would advise spending limited funds on an “integrated, multi-tier dispute resolution system” or higher wages for the employees.).

46. Carrie Menkel-Meadow, *Taking the Mass Out of Mass Torts: Reflections of a Dalkon Shield Arbitrator on Alternative Dispute Resolution, Judging, Neutrality, Gender and Process*, 31 *LOY. L.A. L. REV.* 513 (1998).

he helps effectuate? Like the growing controversy in mediation practice about how much responsibility a mediator should have for implementation and enforcement of contracts, promises and outcomes,<sup>47</sup> is the DSDer's job complete when the design is described or does responsibility extend to its appropriate development, implementation and enforcement?

Consider another example: In a matter I alluded to above, I served as a mediator in a multi-tiered, well designed, and much acclaimed multi-national corporation employee grievance system, in a case involving employment outside of the United States. Both parties (a discharged employee), and a representative from Human Resources, appeared without counsel and participated willingly and effectively in a mediation which resulted in a signed agreement, pursuant to all the standards, rules and policies of a written dispute resolution program published by the corporation and distributed to all employees. Many months later I was contacted by the employee who indicated that the company had not fulfilled any of the conditions of the mediation agreement and no lawyer would take his case because in their view there were no legally enforceable employment rights for an international worker and because, by the time of the "breach," the company had moved completely offshore.<sup>48</sup> So why do I think the application of the dispute systems program developed domestically was merely window-dressing in the international context? Does anyone, such as designers (internal and law firm lawyers), implementers (managers), and participants (Human Resources) have ethical responsibility for this (participation in a dispute resolution proceeding with probably no intention of adhering to its outcomes)?

If ethics or best practice standards have no possibility of enforcement, what does that do to the legitimacy of the whole enterprise?

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47. See, e.g., Lawrence Susskind, *Expanding the Ethical Obligations of the Mediator: Mediator Accountability to Parties Not at the Table*, in *WHAT'S FAIR: ETHICS FOR NEGOTIATORS* 513-18 (Carrie Menkel-Meadow & Michael Wheeler eds., 2004) (suggesting that mediators have responsibility for parties not at the table and should 1) consider the precedent effects of any agreement reached, 2) use their leadership roles to do all they can to maximize joint gain for all relevant stakeholders, and 3) consider the reputation and educative function of the highest quality of the field of mediation).

48. This situation would not preclude an effective lawsuit. Although corporate headquarters are elsewhere, personal and subject matter jurisdiction requirements for a lawsuit in the United States are met by sufficient minimum contacts and by the fact that a contract was effectively formed under American law inside the United States. More likely, the monetary stakes were not high enough and the likelihood of enforcing the company's non-monetary promises by injunction was very small.

#### D. *Outcomes/Consequences/Purposes of the Dispute System*

As the final example above indicates, once a dispute system has been designed and implemented, the question of what effects it has on its intended beneficiaries and constituencies is another important ethical question to be considered. Recently, at the First National Congress on Mediation in Brazil, I learned about a very effective new informal dispute resolution system. In the teeming “favelas” (shantytowns) of Rio de Janeiro, where drug lords and other gangs and community leaders essentially control the community, there are very effective systems of dispute resolution for handling internal community conflicts (so as to avoid contact with the police, courts and formal authority). Systems I have come to call A5 (Alternative Alternative) Dispute Resolution can be quite effective (as were the old dispute resolution systems of political ward leaders, or the “warlords” currently operating in many countries), operating outside of any formal justice system and providing peace and conflict solutions (often backed up by threats of force), in a sort of “wise elder” arbitration system. Should these gang leaders be credited as being effective dispute resolution designers, even if the effects of their programming is to establish systems outside of any formal institutions and are often backed by violence, intimidation, and fear, not to mention the patronage, bias, bribery and corruption that generally characterize such “outsider” dispute resolution systems?

But if conflict is reduced, “peace” is achieved, and the parties are satisfied, is that enough to characterize a dispute system design as effective and ethical? If not, whose principles are we using to judge these systems? The participants or some external measure of justice and ethics?

### III. DEDUCTIVE ETHICS IN DSD: ARE THERE CORE ETHICAL PRINCIPLES IN THE FIELD?

The examples I present above are only a few of the kinds of ethical dilemmas that a dispute system designer might face:

1. Who is the client? To whom is the DSDer accountable?
2. What is the purpose of the DSD? Are there any that are illegitimate?
3. When should a DSDer withdraw or refuse to design or consult about a particular process or system?
4. How does the DSDer make decisions or choose among alternatives and how are those choices/decisions justified?

5. How much responsibility does the dispute designer have for implementation, enforcement, consequences and effects of the system he designs?
6. What responsibility does the DSDer bear for most efficient and fair use of organizational/institutional/governmental resources? (How should DSD be weighed against competing organizational and individual needs and resources?)
7. How much independence does the DSDer have from the client? (When is the DSDesigner being used for illegitimate ends?)
8. When does a DSDer have a conflict of interest (because of different or competing needs within the client organization or because of other work for other clients or other professional commitments)?
9. What are the sources of “values,” norms, ethics or good practices in DSD?

These general questions, then, suggest some general principles for developing a set of “best practices” or ethics for the field of DSD centered around responsibility, accountability, fairness, independence, judgment, participation (of affected parties) and pursuit of legitimate goals. These “general” principles could be used to derive, deductively, some general norms for the profession of DSD.

Nevertheless, I suggest that the tension of universality or generality and particularity or cultural differences may make agreement on ethics principles difficult in DSD. I will make my arguments from both domestic and international forms of dispute resolution—mass torts and so-called “restorative or transitional justice.”<sup>49</sup>

If modern ADR theory and practice has taught us anything, it is that modern process is plural.<sup>50</sup> Claimants, victims, parties, defendants, law reformers, judicial officers and other decision makers, and policy analysts all may desire different things from a legal or dispute resolution system. Some want vindication, others want apologies and forgiveness; some want clear legal rules, others want more subtle terms for ongoing relationships. Some desire punishment and retribution.

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49. See, e.g., RUTI G. TREITEL, *TRANSITIONAL JUSTICE* (2000); Carrie Menkel-Meadow, *Restorative Justice: What Is It and Does it Work?*, 3 ANN. REV. L. & SOC. SCI. 161 (2007).

50. See Carrie Menkel-Meadow, *Peace and Justice: Notes on the Evolution and Purposes of Legal Processes*, 94 GEO. L.J. 553 (2006); Paul Schiff Berman, *Global Legal Pluralism*, 80 S. CAL. L. REV. 1155 (2007).

As Lon Fuller so clearly described and anticipated in his many articles on legal process,<sup>51</sup> DSD is based on the idea that different processes are necessary for different kinds of contexts and party needs. So mediation is appropriate in ongoing relationships for its flexibility, ability to tailor solutions to the particular needs of parties, and opportunity for open-ended narratives and human interaction. Arbitration is most appropriate when decisions and final settlements are required, but choice of law (contract provisions), decision makers (chosen by parties), privacy and flexibility on rules of procedure or evidence are consensually desired by the parties. Some processes are private (most forms of mediation and arbitration); other legal processes are intended to be public (courts, international tribunals, truth and reconciliation commissions) and parties may have different needs and desires with respect to the transparency and privacy of the legal harms they have suffered. Consider the case of discrimination claimants, some of whom desire to “go public” and make big statements on their cases and others who prefer some privacy (AIDS victims, gays or transsexual claimants, some rape and war crimes victims).

Thus, in a modern world characterized by “process pluralism,” is it possible to develop generalized, universal and robust ethics principles across process differences? Is the act of “designing” processes sufficiently coherent and uniform to allow general principles, even if the processes designed are themselves different or pluralistic?

#### A. *Domestic Cases: Mass Torts and Organizational Design*

Consider what we have heard at this Symposium from Kenneth Feinberg, designer of the September 11 Victim’s Compensation Fund.<sup>52</sup> Designed to swiftly and fairly allocate a relatively open-ended and significant amount of money provided by the government to victims, survivors and family members of the World Trade Center

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51. See, e.g., Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978); Lon L. Fuller, *Collective Bargaining and the Arbitrator*, in COLLECTIVE BARGAINING AND THE ARBITRATOR’S ROLE: PROCEEDINGS OF THE FIFTEENTH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS (Mark L. Kahn ed. 1962); Lon L. Fuller, *Mediation—Its Forms and Functions*, 44 S. CAL. L. REV. 305 (1971); LON L. FULLER, *THE PRINCIPLES OF SOCIAL ORDER: SELECTED ESSAYS OF LON L. FULLER* (Kenneth I. Winston ed., rev. ed. 2001).

52. See generally September 11th Victim Compensation Fund of 2001, 28 C.F.R. § 104.1-6, .21-.22, .31-.35, .41-.47, .51-.52, .61-.63, .71 (2003) (outlining claim process for the fund); KENNETH FEINBERG, *WHAT IS LIFE WORTH? THE UNPRECEDENTED EFFORT TO COMPENSATE THE VICTIMS OF 9/11* (2006) (describing the difficulty in compensating families of 9/11 victims).

terrorist attack, the Victims' Compensation Fund used an arbitral process. But, as Special Master Feinberg has indicated on more than one occasion, what many of the family members wanted was an opportunity to tell their story, to narrate the value of their loved one's life—perhaps suggesting a more mediative or “narrative” dispute resolution process, in a situation that was not very adversarial.

In contrast, with a similar desire to narrate (but in private) their injuries, the claimants I saw in the Dalkon Shield mass tort claims facility (also in an arbitral, but more adversarial context, with extremely limited funds to be allocated) also would have preferred a more mediative, less adversarial process. While some victims, survivors and family members of mass tort injuries, through single events (building collapses, natural disasters, man-made disasters) or more gradual processes (defective products, chemicals or environmental degradation) desire public hearings, others desire privacy.

In a creative attempt to design a particularly innovative process, Judge Sam Pointer, who presided over the Multi-District Litigation in the Silicon Breast Implant Litigation,<sup>53</sup> sought mediator-like consultants and counselors to advise claimants of their legal rights under a proposed settlement in private and group settings,<sup>54</sup> varied by client desires for privacy or group solidarity.

In other cases of mass injury some claimants have desired more public fora—victims or family members of injuries due to some medical products (heart valves, diet plans), or environmental disasters (Love Canal, Buffalo Creek dam disaster,<sup>55</sup> Woburn, Massachusetts water pollution<sup>56</sup>) have preferred high profile lawsuits or well publicized settlements.<sup>57</sup> Some have wanted to resist the now common design device of establishing “grids” of settlement that achieve fairness

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53. *In re Dow Corning Corp.*, 244 B.R. 705 (Bkrcty. E.D. Mich. 1997) (paying claims after bankruptcy in class action settlement).

54. I was one of these consultants. The innovative design for this mass tort was derailed by both the expert's report on scientific causation and bankruptcy proceedings for Dow Corning. See, e.g., Eric Green, *What Will We Do When Adjudication Ends? We'll Settle in Bunches: Bringing Rule 23 into the Twenty-First Century*, 44 UCLA L. REV. 1773 (1997); Deborah Hensler, *A Glass Half Full, A Glass Half Empty: The Use of Alternative Dispute Resolution in Mass Personal Injury Litigation*, 73 TEX. L. REV. 1587 (1995); Francis McGovern, *Settlement of Mass Torts in a Federal System*, 36 WAKE FOREST L. REV. 871 (2001); Carrie Menkel-Meadow, *Ethics and the Settlements of Mass Torts: When the Rules Meet the Road*, 80 CORNELL L. REV. 1159 (1995).

55. See generally GERALD STERN, *THE BUFFALO CREEK DISASTER: HOW THE SURVIVORS OF ONE OF THE WORST DISASTERS IN COAL-MINING HISTORY BROUGHT SUIT AGAINST THE COAL COMPANY—AND WON* (1974).

56. See generally JONATHAN HARR, *A CIVIL ACTION* (1996).

57. Many of these mass injuries and the subsequent litigation have spawned a variety of books and commentaries. Sometimes the critics and authors (who are either

by quantifying injuries and regularizing payments (as in worker's compensation schemes).<sup>58</sup> Critics of the use of ADR in the mass tort arena or of settlement generally continue to insist that every case of wrongful injury be exposed to public process and trial.<sup>59</sup>

Thus, in the context of aggregate injury claims (as contrasted to the slightly simpler aggregate consumer, stock, and antitrust claims which are perhaps easier to monetize and quantify) there are likely to be variations in the desires of claimants for types of processes (public vs. private; fast and final (arbitration) vs. more narrative and cathartic (mediation or some hybrid thereof); as well as type of relief (compensation, accountability, apologies, storytelling, changed practices)). When coupled with the great variety of contexts of mass claims (natural and man-made single disasters, more gradual degradation,<sup>60</sup> product design defects, etc.) and variations in the pool from which relief may be granted (limited funds, bankrupts, market share, insurance funded, government funded, less limited resources), the possible kinds of DSD are enormous if not infinite.

In the early years of mass torts, DSDers (including symposium participants Francis McGovern and Kenneth Feinberg and others working with ENDISPUTE<sup>61</sup> and JAMS<sup>62</sup>) tended to replicate a few simple plans (grids of payments for "mature" torts, hearing processes of arbitration to establish some claims, aggregate settlements with

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lawyers or journalists) make clear their own preferences for more public litigation, without necessarily polling or questioning the claimants. *See, e.g.*, RICHARD SOBOL, *BENDING THE LAW: THE STORY OF THE DALKON SHIELD BANKRUPTCY* (1991).

58. Efforts to establish a national claims fund for the hundreds of thousands of victims of asbestos lung disease have failed in almost every Congress for the last twenty years. This legal claim, perhaps the largest mass tort ever, continues to fill courthouses (in hundreds of thousands of cases) at both federal and state levels and to result in delayed individual and collective settlements, in my view because of the inflexibility of the American legal system (and Rule 23 class action law in particular) to adapt to such mass claims. *See* Menkel-Meadow, *supra* note 54. *See also* American Law Institute, *Principles of the Law of Aggregate Litigation* (Samuel Issacharoff, Richard Nagareda, Robert H. Klonoff and Charles Silver, Reporters, 2009)

59. *See, e.g.*, Hensler, *supra* note 54; Owen Fiss, *Against Settlement*, 93 *YALE L.J.* 1073 (1984); David Luban, *Settlements and the Erosion of the Public Realm*, 83 *GEO. L.J.* 2619 (1995); *cf.* Carrie Menkel-Meadow, *Whose Dispute Is It Anyway? A Philosophical and Democratic Defense of Settlement (in some cases)*, 83 *GEO. L.J.* 2663 (1995) (discussing the difficulties in choosing between settlement and adjudication of disputes).

60. *See* Carrie Menkel-Meadow, *Getting to Let's Talk: Comments on Collaborative Environmental Dispute Resolution Processes*, 8 *NEV. L.J.* 835, 844 (2008).

61. ENDISPUTE was one of the first private organizations to offer dispute system design. Formed by a group of lawyers, including Professor Eric Green (currently at Boston University Law School), this private firm provided the design ideas for "mini-trials" and other process innovations for large scale, usually corporate disputes.

class lawyers with the responsibility for payment allocation), with varying degrees of court monitoring and intervention.<sup>63</sup> More modern designs for mass claims (torts, consumer, anti-trust, securities) have been a bit more creative and varied, including auctions for class lawyers, in-kind, non-cash settlements or discounts on future goods or services (airline tickets, products, etc.), which suggests that process (and outcome) pluralism has come to the field of aggregate litigation and mass claims settlements.

Given the increasing diversity of designs for both process and outcomes, I wonder whether it is possible or desirable to craft ethical rules for this line of work. In my view, as both an ethicist and a proceduralist, I wonder whether, at least in the case of mass claims that could be or are litigated, some of these issues would better be dealt with by procedural rules for accountability, transparency, and due process, as are currently being drafted by the Reporters for the ALI Project on Aggregate Litigation (both restating the law and offering suggestions and solutions to legal issues in class litigation, including proposed revisions to Rule 23, attorney selection and fees, judicial approval of settlements and relief to be granted).<sup>64</sup> At least in this context there is the possibility of some court review of such issues as:

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ENDISPUTE and lawyers in private firms, as well as government agencies also provided advice on the development of internal grievance and organizational dispute resolution systems as a way to structure "preventative dispute resolution" and reduce litigation expenses for their clients.

62. Judicial Arbitration and Mediation Services (JAMS) was founded in Orange County, California by retired state court judge Warren Knight in the 1980s and ultimately grew from an organization primarily offering arbitration services by retired judges in California, to a national organization with offices in many major cities, offering mediation, arbitration, training, and dispute system design services by mediators, arbitrators, former judges, and other dispute resolution professionals. See [www.JAMSADR.com](http://www.JAMSADR.com) (last visited May 20, 2009). JAMS merged with ENDISPUTE (and several other ADR provider organizations in the late 1990s and early 2000's) to become one of the largest private providers of ADR services in the United States. There are many other provider organizations including the National Academy of Arbitrators (primarily labor arbitrators), the Center for Public Resources, the American Arbitration Association, and many others.

63. Indeed, although it is somewhat beyond the scope of this essay, serious ethical questions could be (and have been) raised about the selection and accountability of those who designed mass tort systems for the courts, (often serving as Special Masters under Rule 53, Fed. R. Civ. Proc.). See, e.g., Vicki C. Jackson, *Empiricism, Gender, and Legal Pedagogy: An Experiment in a Federal Courts Seminar at Georgetown University Law Center*, 83 GEO. L.J. 461 (1994) (reporting on the under-representation of women as special masters).

64. American Law Institute, *Principles of the Law of Aggregate Litigation* (Samuel Issacharoff, Richard Nagareda, Robert H. Klonoff and Charles Silver, Reporters, 2009)

1. Selection of the DSDer (or Special Master under Rule 53);
2. Monitoring of attorney/representative behavior;
3. Class certification hearings for determinations of representativeness of parties, lawyers, party preferences;
4. Hearings on proposed processes and settlements and finally;
5. Some monitoring of the fairness of actual processes and settlements (Rule 23 (e)).<sup>65</sup>

At least in this context, there is some possibility of public hearings and court monitoring. Increasingly, some state court systems are promulgating standards and requirements for their court mediators.<sup>66</sup> I recognize that this does not fully account for those mass claims settlement processes that are privately bargained for or fully negotiated in the shadow, not the light, of the courthouse<sup>67</sup> and that is why some urge that dispute designers develop ethics standards.<sup>68</sup>

In addition to domestic mass dispute litigation matters, dispute designers work for public and private organizations, corporations, government entities, and educational institutions and also design dispute processes for both ongoing and *ad hoc* matters, especially those involving multiple parties, such as in environmental disputes. Some who do this work, such as Ombuds who handle, manage, and

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65. See requirements of *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613 (1997); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 827-28 (1999).

66. See *e.g.*, Memorandum from Heather Anderson & Alan Wiener, Staff Counsel, Alternative Dispute Resolution Subcommittee, Civil and Small Claims Advisory Committee, Judicial Council of California, to members of the Administrative Office of the Courts, Judicial Council of California (May 6, 2008) (on file with the author).

67. Nancy Morawetz, *Bargaining, Class Representation and Fairness*, 54 OHIO ST. L. J. 1 (1993).

68. Some of the major private providers of dispute and dispute design services have promulgated internal ethics codes for their members. See *e.g.* CPR Commission on Ethics and Standards for the Third Party Neutral and CPR Provider Principles, *supra* note 11; JAMS Ethics Guidelines for Mediators and Arbitrators; <http://www.jamsadr.com> (last visited May 20, 2009); American Arbitration Association, Ethics for Commercial Arbitration, Ethics for Mediators, and Guidelines for Arbitrators Concerning Exchanges of Information in International Commercial Arbitration, [www.adr.org/icdr](http://www.adr.org/icdr) (including such matters as informing parties about process, voluntary participation of parties, competency of third party neutral, confidentiality, impartiality, refraining from giving legal advice, situations indicating withdrawals and avoidance of misleading marketing). There are also ethics standards that have been jointly promulgated by several organizations, such as AAA, ABA, CPR Ethics Rules for Commercial Arbitration; AAA, ABA, ACR, CPR, Standards of Conduct for Mediators. To my knowledge there is no currently existing set of standards or rules for dispute system design, even for those organizations that specialize in dispute design and multi-party facilitation, see *e.g.*, <http://www.policyconsensus.org> (last visited May 20, 2009).

design conflict resolution systems have established some very basic ethical guidelines or standards<sup>69</sup> including such matters as:

1. Maintaining confidentiality;
2. Maintaining impartiality and neutrality;
3. Maintaining independence (from management); and
4. Remaining an informal process (no participation in formal adjudicative matters).<sup>70</sup>

Other groups or organizations who design dispute systems in situations like environmental disputes (among competing groups) have suggested some basic rules and principles including:

1. Determine what process is appropriate for the situation;
2. Ensure appropriate parties participate in the process (or process design);
3. Engage an appropriate third party to facilitate or guide (or design) the process;
4. Ensure that parties have full capacity to participate;
5. Ensure that process/third party adds value in the situation;
6. Ensure that relevant information is incorporated into the process;
7. Ensure that participants can effectively communicate and collaborate and hear each other's views and perspectives in order to improve understanding of each other and any problem situation; and
8. Ensure any agreement achieved be long-lasting, implementable and of high quality;
9. Measure and assess impact;
10. Enhance participants and parties ability to resolve conflicts;
11. Ensure processes used are efficient and effective when compared to most likely alternatives;
12. Ensure benefits of a process (or design) outweigh the costs; and
13. Ensure party satisfaction and public benefits to the processes used.<sup>71</sup>

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69. See e.g. [www.ombudsassociation.org/standards](http://www.ombudsassociation.org/standards).

70. These basic guidelines are supplemented by a fuller set of standards of practice and a list of "best practices." See <http://www.ombudsassociation.org> (last visited May 20, 2009).

71. See Patricia Orr, Kirk Emerson & Dale Keyes, *Environmental Conflict Resolution Practice and Performance: An Evaluation Framework*, 25 (3) CONFLICT. RES. Q. 283 (2008).

Such general standards could be adapted for DSDers but are not likely to help deal with or resolve some of the more difficult issues described above, such as possible conflicts of interests between managers who hire a dispute system professional and those who will be the end users, such as employees or customers (efficiency and cost savings versus full hearings, documentation, and compensation). In many organizational settings, managers seek to establish dispute systems to develop fair, but cost-efficient processes in situations where employees, unions or others might want to pursue or preserve external dispute resolution rights.<sup>72</sup> These issues present complex questions of judgment, experience, and both personal and political values.

### B. *International DSD*

All of the issues reviewed above are compounded when one turns to implementation of DSD in transnational or international settings. Several other panels at the Symposium have focused specifically on institutional design and legitimacy in international disputing and constitution drafting,<sup>73</sup> whether focused on very formal systems for dispute resolution like constitutional allocations of governmental power at both the international and national level (courts, international tribunals) or the less formal processes used in inter-state conflicts (diplomacy, mediation, arbitration, appeals panels) or intra-state conflicts (truth and reconciliation commissions, consociative governments and power sharing<sup>74</sup> etc.).

I am skeptical of any efforts to generate sufficiently helpful normative standards for international DSD at this point in the development of the field because of the wide variety of contexts, situations, and cultures, which are involved at the international level.

I begin with an observation that I am not alone in making: without a strong and enforceable international legal order, backed up

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72. See Lauren Edelman, Howard Erlanger, John Lande, *Internal Dispute Resolution: The Transformation of Civil Rights in the Workplace*, 27 *LAW & SOCIETY REV.* 497 (1993) (work critical of "I(nternal) Dispute Resolution"); Laura Nader, *Controlling Processes in the Practice of Law: Hierarchy and Pacification in the Movement to Reform Dispute Ideology*, 9 *OHIO ST. J. OF DISP. RES.* 1 (1993) (criticizing "harmony culture" and its proliferation through legal and dispute resolution process reform).

73. Panel Discussion at the Harvard Negotiation Law Review Symposium: Dispute System Design on a Global Scale (March 7, 2008); Panel Discussion at the Harvard Negotiation Law Review Symposium: A Constitutional Issue: DSD at the Birth of a Nation (March 7, 2008).

74. See, e.g., Robert Mnookin, *Ethnic Conflict: Flemings and Wallloons, Palestinians and Israeli* 136 *DAEDALUS* 103 (2007); AREND LIPHART, *POWER SHARING IN SOUTH AFRICA* (1985).

with effective courts or peace-enforcing mechanisms and “the rule of law,” international dispute design does not have the backbone of default enforcement of courts and legitimate institutions on which domestic dispute design depends (if only as a shadowy “threat” of an alternative command process).<sup>75</sup> Despite the increasing caseloads of a number of international tribunals (particularly those dealing with human rights) and the effective development of new international institutions, like the World Trade Organization Appellate Body,<sup>76</sup> there are few effective enforcement mechanisms for trans-national or international disputes (though they are getting better, both courts and informal sanctions, at enforcing some notions of “rule of law”). Some would argue that without strong and effective formal institutions the design of voluntary, informal, and multiple systems for dispute resolution should flourish, offering “alternatives” where there may be none in formal settings. Nevertheless, enforcement of any set of standards or guidelines of behavior for informal dispute processes are not likely to be formally enforceable, if there are no formal institutions to enforce substantive agreements.<sup>77</sup>

There is, of course, the most effective form of regulation of ethical conduct: reputation, which is self-enforcing or market driven.<sup>78</sup> But in a field as new and dispersed as international DSD, information about activities generating an “ethical” reputation may be hard to come by.

More importantly, in international contexts we may not have agreement on some of the most basic, core values: peace at any cost, punishment of wrong doers, forgiveness, precedent setting, standard articulation, private vs. public proceedings, formal vs. informal mechanisms and institutions, local (indigenous) vs. national, regional or

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75. Carrie Menkel-Meadow, *Correspondences and Contradictions In International and Domestic Conflict Resolution: Lessons From General Theory and Varied Contexts*, J. OF DISP. L. RES. 319 (2003) at 348-349; Schneider, *supra* note 24; Andrea Schneider, *Not Quite a World Without Trials: Why International Dispute Resolution is Increasingly Judicialized*, 2006 J. DISP. RESOL. 119 (2006); JANE STROMSETH, DAVID WIPPMAN, ROSA EHRENREICH BROOKS, CAN MIGHT MAKE RIGHTS?: BUILDING THE RULE OF LAW AFTER MILITARY INTERVENTION (2006); Tom Ginsburg & Richard McAdams, *Adjudicating in Anarchy: An Expressive Theory of International Dispute Resolution*, 45 WM. & MARY L. REV. 1229 (2004).

76. JOHN JACKSON, SOVEREIGNTY, THE WORLD TRADE ORGANIZATION AND THE CHANGING FUNDAMENTALS OF INTERNATIONAL LAW (2006); Andrea Schneider, *Getting Along: The Evolution of Dispute Resolution Regimes in the International Trade Organizations*, 20 MICH. J. INT'L L. 697 (1999).

77. See Menkel-Meadow, *supra* note 9.

78. See generally Eleanor Holmes Norton, *Bargaining and the Ethics of Process*, 64 NYU L. REV. 494 (1989).

international locuses of dispute resolution fora, compensation, apologies, rights of past (right of return) vs. present (compensation) vs. future (affirmative action, land rights, social welfare, etc.).

In recent years I have been researching and teaching in several countries that have experienced either serious internal conflict (through violent conflicts or military dictatorships), or transitions to democracy and the development of new legal systems. While my work so far is preliminary,<sup>79</sup> it has persuaded me that there is so much variation in what individuals, collectivities at all levels, sub-groups, and nation-states hope to accomplish with dispute resolution that any effort to suggest ethical guidelines, by us in an academic-practitioner community in the United States, for other cultures, nations and groups, is presumptuous and premature. If I had only several “canons of ethics” to suggest they would be:

- 1) be truly sensitive to local conditions and “thick descriptions of cultures”<sup>80</sup> in all their variety;
- 2) Do no harm; and
- 3) Make no assumptions about what people want.

I will illustrate very briefly with some very complex examples. While Desmond Tutu and South Africa get most of the credit for implementing a mostly successful Truth and Reconciliation Commission in post-apartheid South Africa,<sup>81</sup> the first Truth and Reconciliation Commissions actually were formed in South America, first in Bolivia, then Chile and Argentina, followed by Guatemala and El Salvador.<sup>82</sup>

79. The larger project is called “Cultural Variations in Restorative Justice”.

80. See generally CLIFFORD GEERTZ, *THE INTERPRETATION OF CULTURES* (1977).

81. Actually both the academic and practical debate about how successful this TRC actually was is growing larger. See DAVID DYZENHAUS, *JUDGING THE JUDGES: JUDGING OURSELVES: TRUTH RECONCILIATION AND THE APARTHEID LEGAL ORDER* (2003); James Gibson, *OVERCOMING APARTHEID; CAN TRUTH RECONCILE A DIVIDED NATION?* (2004); PENNY ANDREWS & STEPHEN ELLMAN, *THE POST-APARTHEID CONSTITUTION: PERSPECTIVES ON SOUTH AFRICA’S BASIC LAW* (2002); DESMOND TUTU, *NO FUTURE WITHOUT FORGIVENESS* (1999). Some of the criticism suggests that important perpetrators did not participate; that too much amnesty was granted, that a Christian and African tribal culture of “forgiveness” was used as social control to prevent more anger and greater demands for accountability, and that social and economic justice remain very far from being realized. See Kevin Avruch and B. Vejarano, *Truth and Reconciliation Commissions: A Review Essay and Annotated Bibliography*, 2 (1-2) *SOC. JUSTICE, ANTHROPOLOGY, PEACE AND HUMAN RTS.* 47 (2001).

82. See generally PRISCILLA HAYNER, *UNSPEAKABLE TRUTHS: CONFRONTING STATE TERROR AND ATROCITIES* (2001); ERIN DALY, *JEREMY SARKIN, RECONCILIATION IN DIVIDED SOCIETIES: FINDING COMMON GROUND* (2007); MARTHA MINOW, *BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE* (1998).

These Truth and Reconciliation Commissions operated in very different ways. With the transition to democracy in Chile, many of the former military dictatorship members remained in power. Military dictator Augustin Pinochet called an election to test his own legitimacy in office. He was in office from the 1973 *coup d'état* against socialist leader Salvador Allende until the election in 1986 (surprisingly for him) defeated his request for electoral legitimacy. Pinochet, unlike most military dictators, left office relatively peacefully, while much of the military, including Pinochet, remained in power (he as a Life Senator) and amnesty laws were passed to ease the transition with the new democratic regime. As dramatized in Ariel Dorfman's famous play, *Death and the Maiden*,<sup>83</sup> the Chilean TRC focused only on deaths and very serious torture and did not deal with many of the other thousands of serious detentions, beatings and other human rights violations. The Chilean process consisted of semi-private hearings of those who came forward to testify and a well documented set of files kept during the military dictatorship by the Jesuit Order and currently housed in a Human Rights Library at Alberto Hurtado Universidad in Santiago, Chile. The published report of the Commissions findings may be found,<sup>84</sup> with some effort, in a few libraries but is not readily available. In recent years, Chile, like Argentina, has begun to rescind some of the amnesty laws (through court, as well as legislative action) and some military officers (and priests who assisted the regime) are coming to trial. As is well known, Pinochet was indicted in Spain and incarcerated in the United Kingdom,<sup>85</sup> where he was eventually deported back to Chile (on humanitarian grounds for illness,<sup>86</sup>) and died without being tried for his human rights violations. Chile is now heralded as one of the most successful transitions to democracy with a coalition government of the center-left party, *Concertacion*, currently headed by President Michele Bachelet, herself a victim of human rights violations (imprisonment and some torture) during the Pinochet regime (and during which her military

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83. See ARIEL DORFMAN, *DEATH AND THE MAIDEN* 9 (1991); movie version *DEATH AND THE MAIDEN* (Roman Polanski, director, 1994). See also David Luban, *On Dorfman's Death and the Maiden*, 10 *YALE J.L. & HUMAN.* 115, 117-18 (1998).

84. CHILEAN NATIONAL COMMISSION ON TRUTH AND RECONCILIATION, *REPORT OF THE CHILEAN NATIONAL COMMISSION ON TRUTH AND RECONCILIATION* (Phillip E. Berlyman trans., University of Notre Dame Press 1993) (1991).

85. ARIEL DORFMAN, *EXORCISING TERROR: THE INCREDIBLE UNENDING TRIAL OF GENERAL AUGUSTO PINOCHET* 40 (2002).

86. In a great "thumb nose" to the human rights community, Pinochet, though he argued he was too ill to stand trial, proudly walked from the plane, unassisted, when he arrived in Chile to great cheers by his still remaining supporters, see *id.* at 128-29, 131.

officer father was murdered). Pinochet's family is being pursued in the courts for tax crimes. Nevertheless, it was common from those I interviewed (except a few of my most left or progressive friends and informants, including many who had grown up in exile in Europe, the United States or ironically, Argentina because their fathers were in the deposed Allende government<sup>87</sup>) that the Pinochet regime had led to economic success with the reforms of the "Chicago boys" and free market economics.<sup>88</sup> Pinochet's daughter talked of running for office in the Senate to replace her deceased father and many in Chile working on human rights complained of "collective amnesia" in the desire to move forward, through economic success, and "forget the past." Members of the military dictatorship government continued to serve in the government for some years. While transition to democracy has been quite successful in Chile, there has been less abrupt a departure of the old regime in Chile than in many other nations making transitions to new regimes, such as in neighboring Argentina where the military leadership was totally removed from power following the unsuccessful "War of the Malvinas (Falkland Islands)" in 1983. And, it should be pointed out, as horrible as he was,<sup>89</sup> Pinochet left office voluntarily after an election.

In contrast, the shorter lived military dictatorship in Argentina (known as "the Dirty War" which lasted from 1976-1983, ending with the loss of the Falklands-Malvinas War) has produced a "longer memory" in Argentina. Newly elected president Raul Alfonsin asked legal scholar and jurisprudence expert Carlos Santiago Nino<sup>90</sup> to assist in the transition to democracy. The Truth and Reconciliation process in Argentina was designed to be more public and had greater scope than that of Chile's. The Report of the Commission of the Disappeared Persons (CONADEP), *Nunca Mas!* has had over 25 printings, with at

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87. See, e.g., ARIEL DORFMAN, *HEADING SOUTH, LOOKING NORTH: A BILINGUAL JOURNEY* (1998); MATILDE URRUTIA, *MY LIFE WITH PABLO NERUDA* (Alexandria Giardino trans., Stanford General Books, 2004) (1986); MARC COOPER, *PINOCHET AND ME: A CHILEAN ANTI-MEMOIR* (2001).

88. YVES DEZALAY, BRYANT GARTH, *THE INTERNATIONALIZATION OF PALACE WARS: LAWYERS, ECONOMISTS AND THE CONTEST TO TRANSFORM LATIN AMERICAN STATES* 141-42 (2002).

89. It is estimated that 3,000 died at the hands of the Pinochet military government and thousands more were detained and tortured, SAMUEL TOTTEN ET AL., *DICTIONARY OF GENOCIDE* 331 (2008).

90. Who spent part of the Dirty War years teaching at Yale Law School and was (he is now deceased) still writing significant works of jurisprudence, see, e.g., CARLOS SANTIAGO NINO, *THE CONSTITUTION OF DELIBERATIVE DEMOCRACY* (1996); CARLOS SANTIAGO NINO, *RADICAL EVIL ON TRIAL* (1996); Carlos Santiago Nino, *The Duty to Punish Past Abuses of Human Rights Put Into Context: The Case of Argentina*, 100 *YALE L.J.* 2619 (1991).

least 300,000 copies sold as of the time of this writing. It is available in any bookstore and in most street-side news kiosks in Buenos Aires. Like Ariel Dorfman's powerful play, *Death and the Maiden* (which is not set in Chile but in a nameless South American country that could be Chile, Argentina, Brazil, Paraguay, or Uruguay, all of which had military dictatorships in the 1970s), powerful memoirs,<sup>91</sup> films,<sup>92</sup> literature,<sup>93</sup> and continuing political action by a group of human rights NGOs that developed to fight the human rights abuses, serve to keep the memory more or less fresh in Argentina so that, it will not happen again. Most distinctively, in Argentina, the *Madres de Plaza de Mayo* (mostly grandmothers of the disappeared) began a march to protest their children and grandchildren's forced disappearances during the dictatorship, and they continue to march to the present time (every Thursday in the Plaza de Mayo). They have founded a human rights organization that supports various activities to commemorate and protest human rights violations.<sup>94</sup> In Argentina, a movement and legal action to learn the truth of the birth of about 500 children (now in their 30's or more) who were stolen from their detained and murdered mothers and given to military families is currently active.<sup>95</sup> Argentina has repealed many of its amnesty laws, and prosecutions in about 15 cases are currently ongoing with both public and private prosecutors. (In many civil law systems, including Argentina, victims have their own representatives who assist in the prosecution). Wherever I go in Argentina (I have taught there regularly and once in Chile) the military dictatorship comes up in conversation very quickly. Argentineans do not have "collective amnesia." Although certainly there are many conservatives who approved of the military regimes (at the time when many supported military regimes' promises of order against the perceived violence of communist revolutions),<sup>96</sup>

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91. See e.g., JACOBO TIMERMAN, PRISONER WITHOUT A NAME, CELL WITHOUT A NUMBER (Toby Talbot trans., University of Wisconsin Press, 2002) (1980).

92. See e.g., THE OFFICIAL STORY (Luis Puenzo, director, 1986).

93. See, e.g., the powerful novel based on real events, NATHAN ENGLANDER, THE MINISTRY OF SPECIAL CASES (2007).

94. See JO FISHER, MOTHERS OF THE DISAPPEARED xi, xiii, 95 (1989).

95. See among other sources the films, *The Official Story*, *supra* note 92 and *Our Disappeared* (Juan Mandelbaum, 2008) dramatizing this situation, and the public service film *Identidad Perdida* (2007) (illustrating the process of rediscovering one's real parents).

96. Che Guevara is now a world wide symbol of liberation and socialist revolution. His face is everywhere in Argentina. But it is important to remember that even though he was many people's hero (including mine, in my more activist youth), he believed in violence to overthrow capitalist governments and many, especially those with land and money, feared violent and confiscatory political movements. Commentators suggest that most of South America has now found a "third way" with coalition

the break with military government was much sharper in Argentina than Chile.

There is much more detail to both of these important stories which I have simplified and very briefly recounted here. My point is that Chile and Argentina, speaking the same language, separated by a mountain range, have widely different cultures. Argentina, like the United States, is a nation constituted by European immigration. It is stunningly white, with small metizo populations, and still looks to the past to its glory days of having the ninth largest economy in the world (1920s) and to European notions of justice and law. Though both share a civil law system and a Spanish and Catholic colonial history, these nations have approached their somewhat similar political experience of military dictatorships differently.

To generalize, one culture continues to mine their memory and to seek justice;<sup>97</sup> the other seeks to move forward with economic growth and plans for the future. I do not sit in judgment of these different approaches. As a student of restorative justice (from my own history as a child of Holocaust refugees) I know there are many ways to process the past.<sup>98</sup> Some are obsessed by it; some draw a dark curtain and choose to forget. Some seek punishment, incarceration, and permanent memorials; others “turn the other cheek,” grant forgiveness, and move to create a new political system, culture or society. Some demand reparations and “rights of return” for lives, land and other losses. Others emigrate and seek to build new lives in new places. In a stunning and, similarly overly simplistic cultural sweep, travel journalist Colin Thubron recently wrote the following after traveling through China and Russia:

The Gulag commissars had retired long ago, with medals and pensions. Not one had been arraigned. Russia had turned its

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governments and mixes of socialist, capitalist, and hybrid political regimes (consider the wide berth of Peronism). See generally MICHAEL REID, *THE FORGOTTEN CONTINENT: THE BATTLE FOR LATIN AMERICA'S SOUL* 264-92 (2007) (discussing Latin American countries as “flawed democracies” influenced by a variety of political systems).

97. There are many forms of justice, of course. I refer here to the argument that justice can only be served by formal court proceedings, prosecutions and punishments, see, e.g., Diane Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 *YALE L.J.* 2537, 2542-44 (1991) (in dialogue with Nino, *supra* note 90),

98. See generally AVISHAI MARGALIT, *THE ETHICS OF MEMORY* (2002); EVA HOFFMAN, *AFTER SUCH KNOWLEDGE, MEMORY, HISTORY, AND THE LEGACY OF THE HOLOCAUST* (2004); Carrie Menkel-Meadow, *Remembrance of Things Past? The Relationship of Past to Future in Pursuing Justice in Mediation*, 5 *CARDOZO J. CONFLICT RESOL.* 97 (2004).

back on the past. And I, how could I understand? Since the Holocaust, my world had made a *duty* of remembrance. Russia, like China, had chosen forgetfulness. That, said the writer Shalamov, was how people survived. A nation was not built on truth.<sup>99</sup>

In time we may learn that the greatest human rights violations of the twentieth century were not those of the Nazis in Europe, or the Pol Pot regime in Cambodia, or Stalin's purges, or the South American dictatorships. It is just possible that we may learn that tens of millions perished during the Great Leap Forward and the Cultural Revolution<sup>100</sup> without the bureaucratic efficiency and accountability of names and numbers of the Germans or South American dictators. Yet, so far, China appears to be following a strategy closer to Chile's—some individual rehabilitations when the need for educated comrades returned<sup>101</sup>—but mostly a focus on economic growth, westernization and modernization, where economic success is supposed to make up for or dull the senses to human rights violations.<sup>102</sup>

Many of the political regimes that created the worst atrocities in the twentieth century have created some of the best new processes in the twenty first. While I was in Chile, I observed native Mapuche land claims (disputes within Mapuche communities) mediated by a government agency (CONADI<sup>103</sup>) in the field, on the land, that sensitively and with full community participation negotiated land and disputed family claims.<sup>104</sup> In Argentina, I observed one of the most progressive forms of prisoner rehabilitation—contained at a maximum security prison within the city limits of Buenos Aires, a fully

99. COLIN THUBRON, *THE SHADOW OF THE SILK ROAD* 204-05 (2007).

100. Evidence to support this claim exists, see the memoir of Mao's doctor, LI ZHI-SUL, *THE PRIVATE LIFE OF CHAIRMAN MAO* (1994) AND JUNG CHANG & JON HALLIDAY, *MAO: THE UNKNOWN STORY* (2006).

101. See, e.g., JUNG CHANG, *WILD SWANS: THREE DAUGHTERS OF CHINA* (1991).

102. PHILIP PAN, *OUT OF MAO'S SHADOW: THE STRUGGLE FOR THE SOUL OF A NEW CHINA* (2008).

103. Corporación Nacional de Desarrollo Indígena.

104. This will be the subject of a separate article, but I should mention that this excellent mediation program, run by government lawyers committed to indigenous people is necessitated by Pinochet's land policies. Unlike U.S. treatment of indigenous populations with land removal to reservations, Pinochet "privatized" Mapuche land, granting many Mapuche families a limited number of hectares of land for them to "produce" with economic individualism (not joint ownership). Now in their third generation, heirs of the original beneficiaries have disputes about their shares of land. The government-run mediation program settles land claims with consent, and actually goes further in "deep, facilitative" mediation to help the parties mediate their internal family issues. That, however, is a story for another day. The hero of that story is Lohengrin Ascensio, a lawyer-mediator with CONADI who has mediated thousands of these cases.

operational branch of the prestigious Universidad de Buenos Aires grants five degrees to self-governing prisoners—in law,<sup>105</sup> economics, sociology, psychology and humanities, all taught in the prison by regular UBA professors. Can you imagine such programs in the United States?

In South Africa, unlike most of the Central and South American Truth and Reconciliation Commissions, testimony and proceedings were publicly televised. Political scientist James Gibson's work documents that those who watched the programming developed a heightened sense of "human rights consciousness" and a belief that citizens were entitled to justice, even though reactions to the "justness" of the South African TRC in particular were still largely correlated with race, color and class.<sup>106</sup>

These progressive and varied processes of dispute resolution or restorative justice each present specific ethical issues of their own. Can a well designed and executed mediation program be considered just when it is operated by a successor government to the government that created great injustice (by allocating land unfairly to begin with)? How does a progressive rehabilitative prison program allocate its limited places which promise a possibly successful new life? Should a TRC promise amnesty for confession? What should be done when perpetrators do not participate?

There is an ever expanding set of possible conflicts and disputes in the international arena; some internal to a wide variety of countries, others crossing boundaries, whether intentionally or unintentionally (as when refugee situations are created by those fleeing genocides or other abuses). Some of these I have personally witnessed, others are more remote, but equally challenging – all are different. I have recently spent time teaching conflict resolution in Israel and working on and thinking about the next process stages for a "new" peace process among, for and with Israelis and Palestinians and other Arabs.<sup>107</sup> In the United States, we have many major past

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105. Lawyers are qualified to practice after receiving a degree and performing an internship. There is no bar exam or morals committee. So successful graduates have undertaken their internships on day release from the prison and can become fully qualified attorneys. As of this writing, the program has produced about 60 law graduates. In the sociology department (within the prison) pictures of Mao, Che, Durkheim and Marx were hung in the self-governing classroom office. I was given a newsletter, written by prison students, on Foucauldian cultural analysis, worthy of any graduate student in a prestigious sociology department in Europe or the United States.

106. GIBSON, *supra* note 81.

107. See Carrie Menkel-Meadow & Irena Nutenko, *The Next Generation: A New Peace Process in the Middle East by Those Who Live There* (forthcoming NEG. J., October, 2009).

disputes to reconcile – reparations for slavery, and “conquest” of indigenous peoples, internment of Japanese-Americans in WW II,<sup>108</sup> and more recently, unlawful detention and torture of terror war detainees, not to mention more mass torts and aggregate injuries of various sorts.

Countries like Sierra Leone, Liberia, Uganda, Rwanda, Kosovo, Bosnia, Serbia, East Timor and Cambodia are struggling with transitions to new, and hopefully more democratic and better regimes for their peoples. Some have opted for prosecutions (some of which are international as with the International Criminal Tribunal for the Former Yugoslavia,<sup>109</sup> others of which are both national and local, such as in Rwanda and Cambodia, and others of which are mixed jurisdictionally, such as in East Timor),<sup>110</sup> while others have chosen Truth and Reconciliation processes or local healing processes, like Rwanda’s *inkiko-gacaca*.<sup>111</sup>

#### IV. CONCLUSION?

What emerges, for me, from these great variations in human wrongdoing and right-seeking, is that clearly one size or one process does not and cannot fit all. As dispute resolution process professionals, we know a lot about dispute processing and we have structured a variety of forms and processes such as “multi-door courthouses,” hybrids like med-arb or arb-med, negotiated rule-making, reg-neg and multi-party consensus building fora. If we have learned anything it is that modern process is plural and varied. The “appropriateness” of the process depends on the numbers of parties, whether they are in continuing or one-shot or ending relationships, whether they are disputing scarce or divisible or sharable resources, whether they want to resolve their disputes privately among themselves or to educate the public, change the rules or begin a new relationship or society. Some disputes are private; others involve the government or important public policy issues. Some disputes are very serious and affect life

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108. One of the few groups to actually receive reparations so far, by act of Congress.

109. See e.g., JOHN HAGAN, *JUSTICE IN THE BALKANS: PROSECUTING WAR CRIMES IN THE HAGUE TRIBUNAL* (2003).

110. See JANE STROMSETH ET AL., *supra* note 75.

111. Catherine Honeyman et al., *Establishing Collective Norms: Potentials for Participatory Justice in Rwanda*, 10 *Peace & Conflict: J. of the Amer. Psychological Ass’n.* 1, 13 (2004); Jessica Raper, *The Gacaca Experiment: Rwanda’s Restorative Justice Dispute Resolution Response to the 1994 Genocide*, 5 *PEPP. DISP. RESOL. L.J.* 1 (2005); Maya Goldstein-Bolocan, *Rwandan Gacaca: An Experiment in Transitional Justice*, *J. DISP. RESOL.* 355, 364 (2004).

and death; others are purely monetary or may seem more “minor.” These variations in process have been formed, matured, and varied in the last 30 years and we are still creating new forms of process as new disputes and conflicts present themselves.

Within each conflict or dispute setting, will be victims, survivors, or other injured who may differ among themselves about what they want. Any choice of any one process may advantage or disadvantage both particular collectivities and certainly, particular individuals. Not to make any choice at all advantages the guilty or those who have committed some wrong. Ethical issues in international DSD are legion, at both macro and micro levels.

Ethics standards, guidelines, and even rules for professional discipline and sanction have now been promulgated for mediators, arbitrators, and even negotiators by private professional associations, courts and international organizations.<sup>112</sup> I suspect that it would be possible to adapt some of these standards for the deliverers of these services for those who design systems of dispute resolution, but as an ethicist and as a practitioner in this field, I think it is simply too early to inductively collect our cases, with the vividness of the few examples we have of ethical difficulties, as illustrated here. And, in my view, our contexts, locations, and types of dispute design are, in my opinion, too varied to permit the generation of usable specific deductive ethical principles. If I had to craft a few general rules of thumb for the well-meaning process designer, they would be simply:

1. Do no harm—do not make the parties worse off than they were before you were hired. Don't make waste (Cost and expenses without benefits).
2. Do not become a “tool” of a client or organization or government that wants to use process design to achieve inappropriate or illegitimate ends (detering rightful complaints, manipulating workers or customers, “cooling” out or ignoring claims).
3. Be sure that the end users of any dispute system have had input into the design. (This suggests full participation and bottom-up sensitivity, rather than control by “top-down” officials of organizations, institutions and governments).

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112. Not only the International Mediation Institute which seeks to credential international mediators, but the International Bar Association has developed a very sophisticated set of Guidelines for Conflicts of Interests in International Commercial Arbitration. See <http://www.ibanet.org/Document/Default.aspx?DocumentUId=e2fe5e72-eb14-4bba-b10d-d33dafee8918> (last visited May 20, 2009).

4. Attempt to ensure that any process you design can actually accomplish what it was designed to do. Take some responsibility for implementation and evaluation.
5. Know what participants' legal rights are (and what they might be giving up or waiving to participate in a particular system).
6. Be sure, as much as you can, that a system of dispute resolution does not systematically discriminate against or harm particular individuals.
7. Be prepared and be competent. Learn about particular organizations, cultures, groups, and histories before embarking on a design project.
8. Consider whether processes should include multiple choices, menus, gateways or tiers. One size does not fit all, even within the same organization, nation-state, and culture. Individuals will have different preferences even within affinity or other groups.
9. Ensure that any process designed can be adequately explained to and understood by its users.
10. Suggest that any system designed should be evaluated and revised as conditions change.

And that's about it for my 10 commandments of DSD. Pre-publication readers have suggested that these canons are either too vague or too aspirational and impossible to achieve and enforce. There is concern that overly vague and platitudinous ethical canons which cannot be enforced will undermine the entire enterprise of designing good processes with clear standards of practice and evaluative criteria. Yet, I think the elaboration of very specific guidelines or ethical standards is unlikely to be much better. Casuistic reasoners will be able to distinguish their specific contexts and situations and argue (as do lawyers and politicians) that particular rules just don't apply in this or that particular setting.

In my view, the limits of good or best practices and ethics (and these may be different things) in this new field are still being framed and developing. I leave to the next generation of DSDers to flesh these out and add others as our experiences grow and we are able to learn from each other. What we do or advise others to do now in the liminal or transitional state we are in now is a difficult question.<sup>113</sup> However, we went many years with no clear standards for mediation

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113. I thank Bob Bordone for raising it.

as that field developed, short of a few general ideas about what constituted fairness (such as my overly broad and vague standards above).

Make no mistake, however, I do think there are ethical issues, dilemmas and limits in this new professional field, as there are in any profession. We can only learn to be better at what we do when we design processes for our own deliberation and learn about what those ethical limits are or should be. I hope new examples and cases will help us induce or deduce some clearer ethical standards, hopefully with little or no harm to those we serve with our designs.

