

## REMEMBRANCE OF THINGS PAST? THE RELATIONSHIP OF PAST TO FUTURE IN PURSUING JUSTICE IN MEDIATION

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*The process [the Truth and Reconciliation Commission in South Africa] was backward-looking in the sense of being expected to document and deal with the gross human rights violations of the past, but it was forward-looking in trying to prevent future tyranny.*

—James L. Gibson, *Truth, Reconciliation,  
and the Creation of a Human Rights  
Culture in South Africa*<sup>1</sup>

*Justice, after all, is the principle of mediation between people who are not necessarily conjoined by bonds of mutual affinity or shared histories, but who yet need to coexist together in the same society, or to negotiate their interests across national borders.*

—Eva Hoffman, *AFTER SUCH KNOWLEDGE:  
MEMORY HISTORY AND THE LEGACY  
OF THE HOLOCAUST*<sup>2</sup>

What must be remembered and acknowledged before we can move forward to create a future together, whether individually or collectively? Or, as Avishai Margalit has recently put it, is there an ethics of memory<sup>3</sup> – must some things be remembered; what can be forgiven or forgotten in a moral sense? I have long been worried about the emphasis in mediation to focus on the future, to seek “solutions” to problems in which the parties are guided to “move

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<sup>1</sup> 38 *LAW & SOC'Y REV.* 5 (2004).

<sup>2</sup> See generally EVA HOFFMAN, *AFTER SUCH KNOWLEDGE: WHERE MEMORY OF THE HOLOCAUST ENDS AND HISTORY BEGINS* [hereinafter “AFTER SUCH KNOWLEDGE”] (2004).

<sup>3</sup> See generally AVISHAI MARGALIT, *THE ETHICS OF MEMORY* (2002).

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forward,” even while “reorienting the parties to each other,”<sup>4</sup> in crafting a more productive relationship. With the growing use and adaptation of meditative-like processes in collective, political, and nation-state conflicts, as well as individualized conflicts in divorce, commercial, employment and criminal matters, this worry has grown into a larger concern about the role of the past in achieving justice in such settings. In this Article I seek to explore, not resolve, some of the issues and tensions in the role of temporality in achieving justice through mediative processes and to suggest some correctives at the practice level, as well as encourage some deeper thinking at the theoretical level. I focus here on issues of expression of temporality (“the past”) in the “justice and mediation” question, not on issues of how the past should be judged – by the rule of law, culture, or universal human rights principles, or even how it can be “managed” when understandings of the past conflict or cannot be “resolved.” I leave those bigger questions for another day or another writer.

There are many descriptions and purposes claimed for the mediation process.<sup>5</sup> Whether mediation is used to solve problems, transform parties, while acknowledging and recognizing their issues with each other, settle lawsuits, facilitate legal rule-making, or create new entities, a large part of the ideology of mediation that informs its *raison d’être* or sensibility is to focus on the future and to “make the world anew.” Mediation is offered in contrast to more traditional legal processes, particularly adjudication, but also arbitration, precisely because it can craft future relationships and does not have to find facts, assign fault and blame, or issue judgments or awards about the past. Structurally and functionally, this is one of mediation’s defining characteristics—*mediation is not required to deal with the past; it asks the parties to look to their futures and remake their duties and responsibilities toward each other.*<sup>6</sup>

In contrast to mediation, adjudication, and to a lesser extent arbitration, require the participants to bring evidence of what happened in the past so that a third party decision-maker can assign

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<sup>4</sup> Lon Fuller, *Mediation – Its Form and Its Functions*, 44 S. CAL. L. REV. 305, 327 (1971).

<sup>5</sup> See generally *MEDIATION: THEORY, POLICY AND PRACTICE* (Carrie Menkel-Meadow ed., 2001).

<sup>6</sup> Of course, this is not the only salient characteristic of mediation. Mediation also promises confidentiality, privacy, creativity, direct communication, no rigid rules of evidence, and facilitative, not authoritative, third party participation and leadership. And relevant to this Article, mediation does not require the application or use of law or any other laid-down principles.

blame and fault, and assess damages and order remediation, in forms of cash payments, punishments, or sometimes injunctions about future behavior (usually, but not always, negative), typically using legal or other laid-down principles such as a collective bargaining agreement. For a long time adjudication has been the process thought to provide “justice.”<sup>7</sup> This is not to say that justice itself is not a much contested concept, as its various forms are endlessly debated by philosophers and jurists – should justice be distributive, restorative, retributive, equitable, or equal?<sup>8</sup> Nevertheless, lawyers in particular, and some political theorists and philosophers, see justice as located in the home of courts. As we here well know, over the years, those who have been disturbed by the growing use of “settlement” processes to decide cases have lamented, most recently “the Vanishing Trial,”<sup>9</sup> “managerial judges,”<sup>10</sup> and the “compromised” or privatized justice<sup>11</sup> that is said to occur outside of courtrooms, where justice is meted out by an authoritative decision-maker, whether judge or jury. Even some within the mediation community have suggested that whether mediation delivers justice or not should be assessed by how closely mediative outcomes track those which would be ordered by courts.<sup>12</sup> I have not been among those, arguing instead that legal justice (as ordered by a court) is not co-extensive with “human” justice, and mediation can often offer a more tailored, particularized, and more “just” outcome (as well as process) for

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<sup>7</sup> In the sense of application of generally agreed to principles to the specific acts of human wrongdoing for the purpose of reallocation of rights, whether civil, personal or property.

<sup>8</sup> See, e.g., JOHN RAWLS, *A THEORY OF JUSTICE* (rev. ed. 1999); RONALD DWORKIN, *LAW'S EMPIRE* (1986); JURGEN HABERMAS, *BETWEEN FACTS AND NORMS*, (William Rehg, trans., MIT Press 1996).

<sup>9</sup> Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Court*, 2003 A.B.A. SEC. LITIG. SYMP., available at <http://www.abanet.org/media/dec03/120803.html>. (Dec. 8, 2003); Patrick Higginbotham, *Judge Robert A. Ainsworth, Jr. Memorial Lecture, Loyola University School of Law: So Why Do We Call Them Trial Courts?* 55 SMU L. REV. 1405 (2002).

<sup>10</sup> Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 376 (1982).

<sup>11</sup> See Owen M. Fiss, *Against Settlement*, 93 YALE L. J. 1073 (1984).

<sup>12</sup> See Jacqueline Nolan-Haley, *Court Mediation and the Search for Justice Through Law*, 74 WASH. U. L.Q. 47 (1996); David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619 (1995); Nancy A. Welsh, *Making Deals in Court-Connected Mediation: What's Justice Got to Do With It?*, 79 WASH. U. L.Q. 787 (2001); Robert J. Condlin, “Cases on Both Sides”: *Patterns of Argument in Legal Dispute-Negotiation*, 44 MD. L. REV. 65 (1985); Judith Maute, *Public Values and Private Justice: A Case For Mediator Accountability*, 4 GEO. J. LEGAL ETHICS 503 (1991).

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parties that choose to use it.<sup>13</sup> As I have argued extensively elsewhere, mediated solutions are not always compromises; but even if they sometimes are, compromises are often more fair and just than “winner take all” outcomes. Mediation offers the opportunity for participating parties to have more authentic dialogues and make decisions about what is fair and just to them than when an outsider applies rules that have been enacted by a legislature for some generalized mean, rather than for particularized human individuals.<sup>14</sup>

Mediative processes<sup>15</sup> have now affected a growing number of legal and political processes beyond the simple dyadic dispute between two parties. Increasingly, in criminal law (victim-offender and restorative justice),<sup>16</sup> in post-conflict intra-national and civil wars and even in international disputes, processes deploying mediative approaches are being used with the hope of creating different forms of “justice” for the parties, including reconciliation, forgiveness,<sup>17</sup> amnesty, some restitution and acknowledgment of wrongdoing and in some cases, the creation of documented “truth” or records, often in more hybridized forms of mediation when used in mass, not individualized settings. In general, I regard this as a positive development, having recently argued that conventional forms of institutionalized searches for justice, in the form of courts and trial, are diminishing in use for a reason. They are suffering from evolutionary demise because they are failing to satisfy modern requirements for voice, justice, and conflict resolution.<sup>18</sup>

Nevertheless, despite my generally appreciative and productive participation in the mediation movement, both in theory development and in practice, I want to express some concerns in the hopes we might “reorient” our own process to seek more sophisticated and nuanced ways to achieve justice in mediative processes.

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<sup>13</sup> See Carrie Menkel-Meadow, *Whose Dispute Is It Anyway? A Philosophical and Democratic Defense of Settlement (in Some Cases)*, 83 GEO. L.J. 2663 (1995).

<sup>14</sup> See generally DISPUTE PROCESSING AND CONFLICT RESOLUTION: THEORY, PRACTICE AND POLICY (Carrie Menkel-Meadow et al. eds., 2003).

<sup>15</sup> By which I mean, the use of direct party narratives of complaints, grievances, conflicts, disputes or wrongdoing to negotiate for recognition, remediation, restitution, recompense, or some other result, with the assistance or facilitation by some third party “neutral” person or body.

<sup>16</sup> See, e.g., MARK S. UMBREIT, *THE HANDBOOK OF VICTIM OFFENDER MEDIATION* (2000); Susan M. Olson & Albert W. Dzur, *Revisiting Informal Justice: Restorative Justice and Democratic Professionalism*, 38 LAW & SOC’Y REV. 139 (2004).

<sup>17</sup> See, e.g., MARTHA MINOW, *BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE* (1998); *ACCOUNTABILITY FOR ATROCITIES: NATIONAL AND INTERNATIONAL RESPONSES* (Jane E. Stromseth ed., 2003).

<sup>18</sup> See, e.g., STUART HAMPSHIRE, *JUSTICE IS CONFLICT* (2000).

I beg the question of whether justice ought to be a concern for mediation, as others have articulated other values, some potentially inconsistent with justice<sup>19</sup> in the uses and practice of mediation. In short, peace and resolution may sometimes be more animating or important to the parties than total or complete justice or recounting of past and painful histories.<sup>20</sup>

#### THE FUTURE ORIENTATION IN MEDIATION THEORY AND PRACTICE

Consider the critique of mediation made so movingly by Trina Grillo in *The Mediation Alternative: Process Dangers for Women*,<sup>21</sup> where she outlines one of mediation's animating principles – prospectivity. Citing some of the early training materials and writings about mediation, Grillo points out that mediators often “police” the acceptability of particular narratives by reminding the parties that “[i]n mediation the past history of the participants is only important in relation to the present or as a basis for predicting future needs, intentions, abilities, and reactions to decisions.”<sup>22</sup> Early ground rules, especially in divorce mediation, suggested that the focus should be on future needs (particularly of children) and not to “fighting and arguing about the past,”<sup>23</sup> which was regarded as unproductive, preventing agreement, and not useful for the parties. For Grillo, writing from her own experiences as a mediator and then as a divorcing parent herself, too much focus on the future and elimination of discourse about the past eliminated the context in which a particular issue, conflict, or dispute was located. Assumptions in mediation of prospectivity, equality of participation and responsibility, “controlling of emotions,” espoused values of self-determinism and contextualism in the face of differential experiences and unequal power<sup>24</sup> all enable, in her view, a process

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<sup>19</sup> Such rationales have included: simple case settlement, docket reduction, termination of harmful relationships, “cooling out” disgruntled customers, employees, and establishing rules and terms for ongoing relationships as in families, employment settings, etc.

<sup>20</sup> See, e.g., Hephzibah Levine, *From a War of Olives and Pines to Agreements About a Park: Consensus-Based Land Use Planning in a Multi-Cultural Setting- Nahal Tzalmon, Israel* (2004) (unpublished case study, on file with author).

<sup>21</sup> 100 YALE L. J. 1545 (1991).

<sup>22</sup> JAY FOLBERG & ALISON TAYLOR, *MEDIATION: A COMPREHENSIVE GUIDE TO CONFLICT RESOLUTION* 14 (1984).

<sup>23</sup> See, e.g., DONALD T. SAPOSNEK, *MEDIATING CHILD CUSTODY DISPUTES* (1983).

<sup>24</sup> Whether social, economic, political, identity-based or role-based.

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intended to do good and empower parties, but that instead does great harm by cutting off experiences of past wrongs and banishing rights-based consciousness of legitimate entitlements.

Grillo's work greatly influenced my own practice of mediation<sup>25</sup> in critically observing how the social control and policing (in Foucauldian terms)<sup>26</sup> of mediation language and practice pushes parties to "put aside the past" and generate "new solutions or relationships" for the future. Even the Bush and Folger model of mediation, focused as it is on mutual understanding and recognition, and not, on its terms, on case settlement, encourages parties to look at how they can achieve "personal growth" and achieve personal and moral "transformation." Although Bush and Folger insist on "transformative" mediation's eschewing of the need to finally resolve or settle a matter, even their form of mediation focuses on the choices and decisions that parties will make in a mediation to empower the self, while still recognizing "the Other."<sup>27</sup> Mediation is still a process in which two parties (or more) in conflict or dispute, relate their stories, complaints or grievances and seek to *do* something about them – create a new family constitution, set up some informal guidelines for the workplace, or develop some new understandings about communication patterns.

Recent treatments of mediation purposes, skills, techniques and processes focus more on party satisfaction while meeting underlying needs and interests, wherever those needs and interests might come from, and also acknowledge the importance of party expressions of emotions as part of the mix of what is "permitted" in the stylized discourse of mediation. I still worry, however, that mediation as a process is too associated with an instrumental need to "move forward," whether it be in the more material aspects of case settlements, agreements, contracts and payments made, or in the more psychological realm of acknowledgment and recognition of the existential reality and intersubjective experience of others. Mediation remains an instrumental tool of propulsion into a better state in the future. I have no real quibble with this as an aspiration, as long as we take full account of and time for what else we might be losing in the process, if for no other reason, than to make room

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<sup>25</sup> See Carrie Menkel-Meadow, *What Trina Taught Me: Reflections on Mediation, Inequality, Teaching and Life*, 81 MINN. L. REV. 1413 (1997).

<sup>26</sup> See generally MICHEL FOUCAULT, *POWER/KNOWLEDGE: SELECTED INTERVIEWS AND OTHER WRITINGS, 1972-1977* (Colin Gordon ed. & trans., 1980).

<sup>27</sup> See generally ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION* (1994).

for other things at the mediation table, such as some appreciation of the importance of the past.

If we want to adapt mediation's methods of: direct narrative; guided communication; facilitated and mutual bargaining; empathy training; understanding; and mutually beneficial, tailored and creative solutions to settings as diverse as family breakdowns and national post-conflict reconciliation, we have a great opportunity to consider what is helpful in traditional mediation methods and what might be altered for different purposes.

#### JUSTICE IN MEDIATION? THE PAST OR THE FUTURE?

This is where justice comes in. Among the critiques of mediation processes in the last two decades have been the obvious ones of power imbalances,<sup>28</sup> ethnocentric and culturally specific protocols (mediation is after all a "talking cure"),<sup>29</sup> lawless or "rightsless" outcomes, manipulation of lay disputants by professionalized third parties, conflicts of interests and the absence of true neutrality, diminishment if not elimination of true self-empowerment<sup>30</sup> and the privatization of justice<sup>31</sup> or its opposite – the increase of state control over private disputes.<sup>32</sup> Those outside of the practice of the field have been most critical of how mediation might do right by the parties inside the process, but still harm the rest of us outside of a particular mediation by excluding us from participation in matters that effect the public<sup>33</sup> through failing to elucidate principles or rules for the rest of us to follow or to let us see exactly what is going on inside the black and mysterious box of private conflict resolution. Add to this the use of mediation-like processes in such public matters as mass torts, negotiated rule-making, environmental citings and pollution control and remediation, resource

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<sup>28</sup> See generally Grillo, *supra* note 21; see also Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359 (1985).

<sup>29</sup> See Carrie Menkel-Meadow, *The Many Ways of Mediation: The Transformation of Traditions, Ideologies, Paradigms and Practices*, 11 NEGOT. J. 217 (1995).

<sup>30</sup> See Nancy A. Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?*, 6 HARV. NEGOT. L. REV. 1 (2001).

<sup>31</sup> See, e.g., Fiss, *supra* note 11.

<sup>32</sup> See, e.g., Richard Abel, *The Contradictions of Informal Justice*, in *POLITICS OF INFORMAL JUSTICE: COMPARATIVE STUDIES* (Richard Abel ed., 1981).

<sup>33</sup> See generally Luban, *supra* note 12.

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allocation, municipal finance<sup>34</sup> and those concerned about mediation raise issues at both the process and outcome level. Justice may demand public processes and substantively “just” or fair outcomes. These are all important issues, and I have weighed in on them in other places.<sup>35</sup>

Given the new uses of mediative-like techniques and approaches in new processes and institutions (which I generally applaud as evidence of our evolutionary development in legal and conflict processes),<sup>36</sup> I want to reflect on how these new processes, like Truth and Reconciliation Commissions, with their documentation of the past “truth,” teach us new lessons in the quest for justice in mediation.

First, *the past is an essential part of justice.*

Second, *how the past is treated is an essential part of the justice of any dispute resolution process, including both mediation and the newer forms of “mediation-like” processes.*

Third, *the past is no more knowable or stable than the future, so there are likely to be many “pasts” and “mediation-like” processes have both a special ability and a special disability to deal with this. Mediation permits several realities to “co-exist.” Mediation cannot adjudicate or judge the past or “find a truth.” It can enable relevant parties to “mediate” their own stories and realities of the past.*

Fourth, *the past must be acknowledged and responsibility taken in meditative-like processes if they are to be considered legitimate and “just” processes. The past cannot be banished or proscribed from mediation. Different kinds of outcomes in such processes must be clearly understood – ranging from amnesty, forgiveness, restitution, restoration, recompense, and punishment.*

Fifth, *mediation and various kinds of the “mediation-like” processes must be made more variable and accountable for their different purposes and to their different constituencies, including both those inside and outside of the processes.*

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<sup>34</sup> See, e.g., LAWRENCE SUSSKIND, *THE CONSENSUS BUILDING HANDBOOK* (Jennifer Thomas-Larmer et al. eds., 1999).

<sup>35</sup> See, e.g., *WHAT'S FAIR: ETHICS FOR NEGOTIATORS, INTRODUCTION* (Carrie Menkel-Meadow et al. eds., 2004).

<sup>36</sup> See generally Menkel-Meadow, *supra* note 13.

Consider this thought experiment. *Imagine* if you can, that you are not a mediator, but a person who feels grievously wronged – a terminated employee, an abandoned spouse, a victim of an urban American police beating, a victim of economic, if not physical, discrimination in apartheid South Africa, a released political prisoner from an opposition party in Guatemala, El Salvador, Chile or Argentina, a family member of a murdered Tutsi in Rwanda, a property owner in a formerly Communist regime in Eastern or Central Europe, a displaced resident of East Timor or Kosovo, an aged Korean comfort woman or a survivor of the German Holocaust. In any or all of these cases, whether by virtue of an overwhelming caseload (Rwanda, East Timor, South Africa) or because of an innovative design for forging new governments and new processes (South Africa, American employment or civil rights dispute panels, Rwanda) or because documentation of claims may be stale or unavailable (Eastern and Central Europe and Holocaust victims, comfort women), you are asked to participate in a community dispute and grievance panel, an organizational mediation or dispute resolution program, a Truth and Reconciliation Commission hearing or a traditionally adapted community justice process, like Gacaca in Rwanda.<sup>37</sup> How would you decide if you had been treated justly? All of these processes, recently designed, do things differently than courts. For example, most cannot punish, though some can order remuneration or compensation of some kind. Some offer nothing more than an opportunity to “testify” about wrongs done – what kind of process creates justice?

Assessments of justice invariably involve judgments themselves – about process, about outcomes, and about who gets to make the assessments. In some of the aforementioned cases, justice is an individual matter (within a marriage); in other cases, it is a communal matter in which collective or group issues are implicated (mass and group-based atrocities, formal unjust legal and political systems, competing property claims). In some cases the harm is “over” in the physical sense (relatives have died, property has been confiscated) even if psychic harm remains. In some cases harm is continuing and competition or violence may continue between conflicting groups (whites and blacks and others in South Africa, Serbs and Muslims in Kosovo, political regime differences). Do completed acts call for different processes or outcomes than those that might continue to be engaged or fester? What is the

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<sup>37</sup> See, e.g., Jason Strain & Elizabeth Keyes, *Accountability in the Aftermath of Rwanda's Genocide*, in ACCOUNTABILITY FOR ATROCITIES, *supra* note 17.

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obligation of a process to educate and preserve the knowledge and legacy of wrongdoing for those both inside and outside of the process?

I approach these important questions from inside my own experience as a justice-seeking mediator with her own one-step removed experience of these issues – a second-generation daughter of Holocaust survivors.<sup>38</sup> Some of you may have equivalent experiential bases (experiences of racial or religious discrimination of very profound kinds, loss of marriages, property, crime victims, diasporas of modern history or similar wrongs). To be a “moral witness” in Avishai Margalit’s terms you must actually have experienced some wrong (and not just heard about it or observed it as I have) to get inside this question I have put before you. To consider what is just, or in Margalit’s terms, what can be termed an “ethical memory,” you must be directly affected by what has gone wrong. Grillo, in these terms, was a “moral witness” about the mediation process because she was not only a mediator, but she was a divorcing party in a mediation. I think it crucial in evaluating the “justice” of mediation, that we stand as much “inside” the process as we can, and not explain, justify or defend it from our stances as mediators, law professors, theorists, writers, or trainers in the field.

I suggest that anyone inside any of these grievous wrongs would not be totally comfortable with a process that asked them only to “think of the children” or to “move forward” in the spirit of national peace and reconciliation or world peace. Whether testimony, stories, and narratives to create a “record” of remembering is enough will likely vary from person to person and group to group, and some social science evidence suggests that it is not only degree of injury that affects such judgments. Even among the most scarred by the Holocaust, some were able to lead what others call “productive” lives, expressing what one writer has called a “*carpe diem* energy,”<sup>39</sup> while others become totally disabled by painful memories of experiences.<sup>40</sup> Some will want retribution, some

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<sup>38</sup> See generally EVA HOFFMAN, *LOST IN TRANSLATION: A LIFE IN A NEW LANGUAGE* (1989); see also, e.g., HOFFMAN, *supra* note 2; HELEN EPSTEIN, *CHILDREN OF THE HOLOCAUST: CONVERSATIONS WITH SONS AND DAUGHTERS OF SURVIVORS* (1979).

<sup>39</sup> HOFFMAN, *supra* note 2, at 7.

<sup>40</sup> Such ranges of human behavior exist in all aspects of life. Why are some poor people still so happy and cheerful and some wealthy people constantly depressed? Why do some cancer patients continue to thrive and work during painful and disabling treatments while others collapse, not perfectly correlated with the level of disease? See, e.g., JEROME GROOPMAN, *THE ANATOMY OF HOPE: HOW PEOPLE PREVAIL IN THE FACE OF ILLNESS* (2003).

“payment,” some “righting” of wrongs to mark the losses suffered, both for individual relief and for human legacies to be left. In Margalit’s words again, “[m]ust some things be remembered?”; and if so, what does mediation do to erase or preserve such “ethical memories?”

From a victim’s (or party’s) perspective what is likely most wanted is some sense of restoration (of self, of the moral order, of the *status quo ante* to the extent that is possible) and acknowledgment by someone outside of the self (the “perpetrator” of wrongdoing, a third party neutral, a witness) that injury has been suffered, that wrong has been committed. Consider the abandoning, but truthful, spouse who says, “I admit I did wrong, I had an affair, but I love another person.” This is painful and causes harm to the spouse (and perhaps to children), but it is sadly honest and acknowledges wrongdoing.<sup>41</sup> What should flow from that acknowledgment remains complicated and problematic (especially after the elimination of fault divorce). Acknowledgment may be far easier in such settings of individual harm than in the larger mass or group harms that constitute my other examples. Traditional mediation can be adapted to deal with the past “injustices” of failed familial, commercial, or employment relationships. Mediators and parties can “stay with” the past longer, recounting, restating, and understanding both facts (establishing the “facticity” of wrongs is crucial to any justice process) and the more interpretive and hermeneutic and personal meanings of those facts. Indeed, mediation may be especially appropriate for allowing non-evidence based narratives to be told, heard, repeated, clarified, and understood, if not “agreed to” or formally adjudicated. For many, just being “heard and understood” or having “voice” may be enough. In Margalit’s interesting categorical distinctions between “ethicality” (what we owe those with whom we have “thick” relationships) and “morality” (what we owe more generalized others with whom we have “thin” relationships),<sup>42</sup> ethical discourse and ethical memory keeping in a mediation will probably work better (if more deeply and thickly) than in more public or traditional settings.

The point here is that mediators need to reorient their practices to allow, tolerate, and perhaps “structure” stories of what happened and the meanings of the past, rather than hurrying the

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<sup>41</sup> I reference here the small movement to return to fault-based divorce, not only for financial equity grounds but for a legal acknowledgment for wrongdoing in the legal promise of marriage.

<sup>42</sup> See MARGALIT, *supra* note 3, at 7-8.

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parties on to “future-oriented” creative problem-solving when it is too premature. We must not be fearful of the past, even if some conflicts, disagreements and arguments arise from its retelling. I fear that too often conflict-averse mediators suggest the parties move on; “talk about the future,” “talk about your plans. . . .” and, “what would you like to see happen” are often used as a way of managing what they fear will be contests about the past. With skillful communication and facilitation, mediation may be just the most appropriate place for telling narratives about the past meanings and hurts. Further, mediation, at least in such “thick” settings, usually, though not always, permits negotiation of restorative, restitutionary, or compensatory, if not “punitive” outcomes.

The social, political, and juridical experiments that have developed to deal with modernity’s horrific mass atrocities, such as using some of the learning from mediation and criminal victim-offender processes, provide us with special opportunities for learning about different forms and varieties of justice. As structured to require acknowledgment of wrongdoing and guilt (and thus avoiding lengthy and sometimes inconclusive trials for fact-finding purposes) as a condition for either full amnesty or lesser punishments or restitution, the modern Truth and Reconciliation Commissions, first in South Africa and now used in various forms in Central and South America, are exploring a more public form of “mediated” justice. How successful they have been in fulfilling their promise is beginning to be a highly contested matter,<sup>43</sup> with some suggesting that with all the “truth,” not enough justice has been served (punishments and exemptions). More recent efforts at creating such alternative institutions have seen them as working parallel to more traditional prosecutorial processes with classifications and stratifications, based on severity of cases.<sup>44</sup>

Some recently reported empirical data suggests that the processes of Truth and Reconciliation Commissions have important public functions, as well as private ones. Political scientist James Gibson found that attitudes toward the rule of law and fairness of governmental institutions retain a strong racialized element. Blacks and coloreds (primarily ethnic Asian Indians in

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<sup>43</sup> See, e.g., TRUTH VS. JUSTICE: THE MORALITY OF THE TRUTH COMMISSIONS (Robert I. Rotberg et al. eds., 2000); Ruti Teitel, TRANSITIONAL JUSTICE (2000); Minow, *supra* note 17.

<sup>44</sup> See, e.g., Laura Dickinson, *The Dance of Complementarity: Relationships Among Domestic, International and Transnational Accountability Mechanisms in East Timor and Indonesia*, in ACCOUNTABILITY FOR ATROCITIES, *supra* note 17.

South Africa) have less of a commitment to the rule of law than whites, but that *participation in the Truth and Reconciliation Commission, participation in the creation of the country's new collective memory, had a positive effect on the positions that individuals held about both the rule of law and the creation of a "human rights" culture in South Africa.*<sup>45</sup> Gibson's findings, soon to be elaborated in a book, *Overcoming Apartheid: Can Truth Reconcile a Divided Nation?*<sup>46</sup> suggest that exposure of the past abuses of human rights and law under the apartheid regime and the application of a seemingly "universal" application of human rights principles, if not law, to these past abuses in a somewhat public setting fostered some attitude change to occur among those who participated in the process. All elements of the process are important: exposure of past acts and wrongs, acknowledgment of wrongdoing, public settings, and participation in the process. Thus, while even some worry that many "offenders" did not participate<sup>47</sup> and that many were inadequately punished, the very act of publicly, individually, and collectively acknowledging guilt had a salutary effect on how citizens conceived of their new political order. Even if the kind of individualized and bargained for agreements in mediation or rule-based court convictions do not occur, airing of and confrontation of the past can have some positive effects on the creation of a future order.

In Truth and Reconciliation Commissions, individual agreements are not "mediated" as in conventional mediations. Further, neither are claims adjudicated, but recitation of victims' stories of the past harms and injuries they suffered are documented, told and the national "truth" recorded. In some of the South and Central American Truth and Reconciliation processes families who do not know what happened to their "disappeared" relatives learn both individualized and more collective truths about the political regimes that tortured and killed their family members. Repair may be impossible but some responsibility and "closure" may be possible and "facts" that would not emerge in a court of law may be exposed. Thus, more public and collectivized modifications of mediative processes may indeed assist in the development of new national and political cultures. Many have suggested that mediated

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<sup>45</sup> See Gibson, *supra* note 1, at 21-25.

<sup>46</sup> JAMES L. GIBSON, *OVERCOMING APARTHEID: CAN TRUTH RECONCILE A DIVIDED NATION* (2004).

<sup>47</sup> Such as judges of the apartheid regime. See, e.g., DAVID DYZENHAUS, *JUDGING THE JUDGES, JUDGING OURSELVES: TRUTH, RECONCILIATION AND THE APARTHEID LEGAL ORDERS* (2003).

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dialogues about the past, such as facilitated meetings of second generation Germans and Jews<sup>48</sup> (with no issues between them except the past, as so many of the children of survivors have been repatriated through the diaspora of the World War II), will be essential for any possibility of peaceful co-existence in the Middle East.<sup>49</sup> Without a full airing of our past sufferings, we cannot move on. To suffer is human – so is to share and seek acknowledgment of our pain so we *can* move on. The pessimistic story of humankind is that we will destroy each other; the more optimistic story is the one that recognizes our resiliency and lets some, if not all of us, build again.<sup>50</sup> If we have learned anything from the mass violence

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<sup>48</sup> See HOFFMAN, *supra* note 2, at 268.

<sup>49</sup> See PROMISES (Cowboy Booking International 2001) (demonstrating the powerful effort to create such a “mediated” dialogue and relationship in a documentary film). The film raises the same issues for filmmakers as mediators – when do we actively “intervene” to help shape the reality we are facilitating or filming? When is “neutrality” not morally appropriate in our roles or justifiably violated? See *id.*

<sup>50</sup> In the words of Nobel Poet Laureate, Wislawa Szymborska:

After every war  
Someone has to clean up.  
Things won't  
Straighten themselves up, after all.  
Someone has to push the rubble  
To the side of the road,  
So the corpse-filled wagons  
Can pass.

Someone has to get mired  
In scum and ashes,  
Sofa springs,  
Splintered glass,  
And bloody rags.

Someone has to drag in a girder  
To prop up the wall,  
Someone has to glaze a window,  
Rehang the door.

Photogenic it's not,  
And takes years.  
All the cameras have left  
For another war.

We'll need the bridges back,  
And new railway stations.  
Sleeves will go ragged  
From rolling them up.

Someone, broom in hand,  
Still recalls the way it was.  
Someone else listens  
And nods with unsevered head.

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of the twentieth century it is that we must find new ways to seek understanding across differences. Mediation is one such way, but as a process, it cannot abjure the past. Even the most conventional mediation process must focus more on the experience of the past, as suffered by the parties, if they are to go forward and find new relationships or agreements.

*Lessons for Mediation: Recognizing the Past, Taking and Making Responsibility and Changing our Practices*

These new justice institutions raise important issues with respect to both individual and collective harms and injuries— issues that philosophers have grappled with for years, but which I think need revisiting in light of all kinds of mediative efforts at conflict management, resolution, prevention and yes, containment. What is the relationship of acknowledgment and responsibility for harms caused to forgiving and forgetting? While philosophers and theologians discuss the differences between “forgiving and forgetting” and “remembering and forgiving” or as Margalit puts it, the differences between “covering up” and “blotting out,”<sup>51</sup> we, who participate in mediation, both as parties and as mediators, need to be

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But already there are those nearby  
Starting to mill about  
Who will find it dull.

From out of the bushes  
Sometimes someone still unearths  
Rusted out arguments  
And carries them to the garbage pile.

Those who knew  
What was going on here  
Must make way for  
Those who know little.  
And less than little.  
And finally as little as nothing.

In the grass that has overgrown  
Causes and effects,  
Someone must be stretched out  
Blade of grass in his mouth  
Gazing at the clouds.

Wisława Szymborska, *The End and the Beginning*, in WISŁAWA SZYMBORSKA, MIRACLE FAIR: SELECTED POEMS OF WISŁAWA SZYMBORSKA (Joanna Trzeciak trans., 2001).

<sup>51</sup> MARGALIT, *supra* note 3, at 191-92. “There are four different pictures of forgiveness in the Bible: as carrying a burden, as covering up, as blotting out, and canceling a debt. . . . Forgiveness means overcoming anger and vengefulness.” *Id.*

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more mindful of what we ask parties and ourselves to do and say. To say such things as “we don’t need to decide who is right or wrong to move on to a solution,” or “this is not a court to assign blame,” or “you don’t have to admit anything to participate in this process” may contribute to the widespread perception that mediative processes are ones which do not provide justice, but only traded preferences or instrumental bargaining. To expand on what I think the more controversial obligations of mediation could be, recognition and responsibility are not just about apprehending the intersubjective reality of another person in interpersonal terms, but recognition and taking responsibility for harms caused or injuries delivered, whether intentionally or not.<sup>52</sup>

When mediation is conducted in the same spirit as Truth and Reconciliation Commissions—seeking “truth” as well as reconciliation, we can learn to forgive without forgetting; for the hurts, harms, and injuries we bring to mediation are real and often are constitutive of who we are, both as individuals and in our affiliations, chosen or given, in particular identities or groups. Mediators’ desires to remain neutral, never to assess blame or to call into account the responsibility of parties (which can of course be both or more than one)<sup>53</sup> preserve several elements of classic mediation – its detached, neutral and facilitative forms. But, if the mediator is too passive, if the mediator excludes “past” testimony, if the mediator encourages the parties to “just get over it” and tries to resolve the problem without proper respect for their relative histories, then I fear mediation will continue to have a mixed reputation, as well as fail to perform some of its most valuable functions of encouraging authentic encounters of human beings who seek to make better what has gone wrong.

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<sup>52</sup> Without getting into it at great length here, it is useful to point out that people often do not want to take responsibility for harms they have “inflicted” on others. “I didn’t intend to hurt you and I am sorry you feel hurt” is a common refrain. Unlike formal court proceedings, mediation actually allows exploration of non-intentional hurts and harms and lets the injurer know how the injury felt to the person injured. A skillful mediator can often help the injurer see his “responsibility” or the mutual responsibility for pain incurred (especially of the non-compensable psychological kind).

<sup>53</sup> I do not mean to suggest here all harm, blame, or responsibility rests on one side only of any dispute. The South African Truth and Reconciliation Commission explored the human rights violations committed by the ANC in the years leading up to the abolition of apartheid, and some Holocaust scholars and historians are exploring some of the acts Jews perpetrated on other camp victims. Obviously, in familial, commercial, and employment mediation settings, wrongful, problematic, or conflicting acts as well as breaches of contract, relationships, and expectations can easily happen on “both” or “all” sides.

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Sometimes “righting a wrong” means it cannot go unacknowledged or dealt with by impunity or compromise. Whether the state or some other public entity has to be the sole judge of wrongdoing, or whether those injured should have a right to determine what would make them whole, is precisely the question raised by such dispute innovations as victim-offender mediation and truth and reconciliation commissions. Whether communities, and other stakeholders, need to be invited into some mediations (children in divorce?) to participate in or bear witness to particular agreements, is a question we should be exploring in particular contexts as the mediation model is employed in increasingly diverse and complicated settings. Whether a “record” of some mediations (contrary to our basic values of confidentiality) might be necessary to preserve certain stories and to create important legacies for the prevention of future harms is another question we should explore. Adaptations of the mediation process to such fora as consensus-building meetings and negotiated rulemaking have already borrowed from mediation methods, adapted for use in public settings for transparency, accountability, and publicity in both the process used and the outputs produced. Confidentiality has been modified, for example, when mediation-like processes are used in public settings (consensus-building fora) requiring transparency and the use of joint fact-finding and substantive experts has sometimes modified conceptions of neutrality or truth-finding in “mediative-like” processes. In short, the processes themselves must be adapted for particular purposes. We can no more say “never the past” than we should say “never evaluate.”

If patterns of retribution, revenge, and vengefulness have any hope of being averted, there will likely have to be some public shaming, as well as public forgiving. Reparations, recompense, apology, and acknowledgment, all sometimes part of private justice, may have to be public in some cases for purposes of deterrence, prevention of future harms, and for individual accountability. Consider the tensions in promising confidentiality to sexual harassers in mediation sessions and victims’ desires to have perpetrators publicly labeled simply to give notice to other possible victims in the workplace.

The search for justice in some mediation settings may seem misplaced. Mediation is about confidential, usually individualized, bargained for solutions to interpersonal, contractual, or relational conflicts. Mediation, until recently was conceived of as primarily a “civil,” not criminal process, with no power to punish or order. Yet

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the power of direct dialogue between those engaged in conflicts of all kinds, from individual to dyadic to now even mass atrocities, seeking to find points of reconciliation, ways to create new relationships, as well as new governments and states, has encouraged the use of “mediation-like” processes in many different settings. As traditional mediation has served as a model for some of these new forms of conflict resolution, we should now look at what these new forms might teach us about how we should or could reconceive the mediation process to meet some of the basic needs of parties to feel they have been justly, as well as fairly, treated. In the international arena, where justice must often be defined as broadly and non-specifically as possible, justice is often described as requiring the development of accurate factual records, acknowledgment that basic human (or legal) standards have been violated, individual and governmental accountability, granting of appropriate compensation, restoration of rights and property and the giving of apologies or creation of reconciliative acts or rituals to “repair” as much of the harm as possible.<sup>54</sup> Not all mediations implicate the grave issues of human harm and injury that inspired the Truth and Reconciliation Commissions or the Nuremberg Trials, but the recent engagement of the human rights movement with the conflict resolution movement offers much food for thought and adaptation of our practices at all levels.

In my career, I have most often defended mediation against attacks made by the litigation romanticists who tend to see conventional adjudicative processes and the “rule of law” as the only measure of justice. Mediation offers an often better process, by providing direct party engagement, open dialogue unrestricted by rigid rules of evidence and the possibilities that parties can craft their own solutions. To the extent that this process has all too often restricted discussion of the past in its promise to “move forward constructively,” I now think it is time for us to reconsider some of our dogmas and doctrines to see whether mediation is as adaptive and fair as we have claimed. My hope in suggesting that we look at constructive ways to bring the past and future together in mediation, both in ideology and conception and in our practices, is that we might then create a truly sacred place<sup>55</sup> in mediation for

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<sup>54</sup> See Jane Stromseth, *Introduction: Goals and Challenges in the Pursuit of Accountability*, in *ACCOUNTABILITY FOR ATROCITIES*, *supra* note 17.

<sup>55</sup> See Sara Cobb, *Creating Sacred Space: Toward a Second Generation Dispute Resolution Practice*, 28 *FORDHAM URB. L.J.* 1017 (2001) (suggesting that mediators should take an active role in shaping and crafting moral dialogues and responsibility in mediation, with reference to community values, as well as the values the parties bring to the mediation);

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truth, human understanding, and justice to co-exist. As they say, without peace there will be no justice, but with no justice, there will be no peace.

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Carrie Menkel-Meadow, *And Now a Word About Secular Humanism, Spirituality and the Practice of Justice and Conflict Resolution*, 28 *FORDHAM URB. L.J.* 1073 (2001); Carrie Menkel-Meadow, *Practicing "In the Interests of Justice" in the Twenty-First Century: Pursuing Peace as Justice*, 70 *FORDHAM L. REV.* 1761 (2002).

