LEARNING FROM PRACTICE: WHAT ADR NEEDS FROM A THEORY OF JUSTICE

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Adding to the impressive body of work that has made her a leading voice in the fields of both alternative dispute resolution and professional responsibility, Carrie Menkel-Meadow's Saltman Lecture connects the theoretical exploration currently occurring on two parallel tracks: (1) theories of justice that investigate the ideal of a deliberative democracy;[1] and (2) theories of alternative dispute resolution arising from its reflective practice.[2] As she notes, theorists on both tracks are grappling with similar questions about the processes or conditions that will best bring together parties with widely divergent viewpoints to engage in consensus-building dialogue around contested issues.

However, while the tracks are parallel and both move in the same direction, they rarely meet. Menkel-Meadow encourages the political theorists, whose abstract models for deliberative democracy have, in her view, fallen into unfortunate ruts of dualism and polarity,[3] to learn from the reflective dispute resolution practitioners, who have experimented with a variety of processes for creative problem-solving with multiple parties, issues, modes of communication, and forms of decision.[4] An integration of theoretical and practical wisdom can pave the way, she suggests, toward a new role for lawyers possessing both legal and process expertise, to serve as neutral facilitators of participatory consensus-building processes around complex and multi-faceted problems.[5] The expertise that they gain in this role can make them architects, not only of process, but of social justice as well.[6]

While Menkel-Meadow focuses on what political theory can learn from the practice of alternative dispute resolution, I explore the related question, latent in Menkel-Meadow's essay, of what alternative dispute resolution theorists need from a theory of justice. For the practice of alternative dispute resolution to provide lessons for political theories of deliberative democracy, the practice needs to be contextualized in a normative vision of justice that addresses the relationship between procedure and justice ideals. In other words, it cannot merely describe what happens in experimental consensus-

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[1] Carrie Menkel-Meadow, *The Lawyer's Role(s) in Deliberative Democracy*, 5 NEV. L.J. 347, 352 (2005).

[2] *Id.* at 360.

[3] *Id.* at 357-58.

[4] *Id.*

[5] *Id.* at 349-50.

[6] *Id.* at 350.

building processes or other alternative dispute resolution settings, but must articulate what should ideally be occurring.

Normatively grounded visions are especially important in the field of alternative dispute resolution as it moves from the experimental and voluntary forums that Menkel-Meadow describes to increasingly becoming institutionalized in court proceedings.[7] I begin by briefly reviewing the relationship between justice and the adversary system on which our traditional legal system is based, in light of two types of critiques that have given impetus to the movement in favor of alternative dispute resolution procedures. I then make explicit three distinct normative conceptions that need to be articulated more fully, if consensus-building processes are to provide a viable alternative to adversary proceedings. Finally, I look at how some of the theories of deliberative democracy discussed by Menkel-Meadow can inform alternative dispute resolution theory in articulating these normative conceptions, as well as identifying some of the specific points at which theory needs to learn from practice.

I. THE ADVERSARY SYSTEM: TWO CRITIQUES

The adversary system of justice is based on a well-defined – albeit flawed – conception of how substantive justice emerges from adversary participation.[8] The ideal of adversary justice supposes that by appointing a zealous advocate to each side of a dispute to investigate facts and integrate them into legal arguments, as well as to challenge the facts and legal arguments presented by the other side, the strongest possible case will be made for each participant. In addition, each side will be able to provide a check against the other, correcting for biases, self-interest and manipulation. An impartial decision-maker, hearing the strongest possible case for each side from an advocate with zealous devotion to the interests of a single party, will be in the best position to determine the truth of the matter and to make a decision that is just under the circumstances.[9] In other words, substantive justice emerges precisely because of the adversary presentation of facts and legal arguments.

There are two types of critiques of this adversary model of justice. One is that the "justice conditions" that define the ideal are rarely, if ever, met. For the adversary system to work according to its ideal, all sides to a dispute must have equally balanced resources, access to zealous representation, and relevant information.[10] The decision maker must also be free of bias and undue influ-

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[7] Menkel-Meadow notes the trend that "new processes have begun to influence traditional legal institutions," citing as examples the emergence of "problem-solving courts" that coordinate agency responses in family law and drug areas as well as business, negotiated rulemaking in administration agencies, and the "collaborative lawyering" movement. *Id.* at 361.

[8] For a critique of this vision of adversary justice, see DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY 67-103 (1988).

[9] *See, e.g.*, MONROE H. FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYERS' ETHICS 35-39 (2002) (citing psychological studies that support the hypothesis that adversary testing is the most effective way to force adversaries and fact finders past their initial impressions to investigate and consider a fuller factual picture).

[10] *See* DEBORAH L. RHODE, IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION 53-58 (2000).

ence.[11] However, because resources are not distributed equally among litigants, because lawyers' loyalty and zeal are distorted by self-interested pursuit of profit, and because decision makers are inescapably tainted by bias, the adversary system rarely, if ever, lives up to its ideal.

This first type of critique is essentially practical in nature. It tests the operation of the system against its ideal, showing that the machinery of the adversary system allows – and even encourages – results that are contrary to its goals. Rather than truth and justice, adversary litigation produces obfuscation and strategic manipulation. Lawyers' professional training encourages narrow framing of their clients' interests into "legal issues" that may or may not capture the clients' true wishes, a process that distorts the clients' goals and stunts the lawyers' ability to solve problems creatively.[12] The duty of zealous advocacy deteriorates into excesses of adversarial zeal such as discovery abuse, forum shopping, the filing of frivolous pleadings and motions, and deceptive practices such as witness coaching and manipulative cross-examination that warp the truth.[13] Moreover, lawyers have self-interested reasons for maintaining adversarial excesses, because these excesses require heavy investments of billable hours. However, the existence of poor lawyer-client communication and sharp practices does not necessarily call for the abolishment of the adversary system; it merely suggests avenues for reforming procedures to make them work according to their intended goals, or changing the structures for regulating the behavior of lawyers, or both.

The second type of critique of the adversary model of justice is deeper and more profound, questioning the theoretical efficacy of the adversary system ideal at its core. Drawing on post-modern critiques of objectivity and neutrality, this type of critique suggests that "the truth" and "the facts" are not singular, knowable commodities that can be delivered at the conclusion of any process.[14] Because different people simply view "the facts" differently, there is not a right answer to the question of "what really happened?" that adversary testing can reveal.[15] Because truths are multiple, "truth-finding" is not a viable goal around which to structure the ideal of adversary justice.[16] Under this view, there is no objectively determinable "right result" of dispute resolution proceedings.

This second kind of critique does not merely require a tinkering with the machinery of justice, but an overhaul of its underlying conception and meaning. When we take away the "right result" – or substantive justice – as the goal of legal proceedings, we deprive the adversary system of the ideal against which its processes can be measured. Without an outcome-relative goal, we lose the ability to mount the first type of critique that the adversary system is

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[11] *Id.*

[12] For an elaboration of this argument, see Warren Lehman, *The Pursuit of a Client's Interest*, 77 MICH. L. REV. 1078 (1979).

[13] *See generally* RHODE, *supra* note 10, at 81-115.

[14] Menkel-Meadow advanced this kind of critique in an influential essay. Carrie Menkel-Meadow, *The Trouble with the Adversary System in a Postmodern, Multicultural World*, 38 WM. & MARY L. REV. 5 (1996).

[15] *See id.* at 14-15; *see also* Robert Rubinson, *Client Counseling, Mediation and Alternative Narratives of Dispute Resolution*, 10 CLINICAL L. REV. 833, 851 (2004).

[16] Menkel-Meadow, *supra* note 14, at 30.

failing to live up to its ideal. Responding to this second type of critique requires a new way of conceptualizing dispute resolution, not as a search for "the truth" or for "justice," but as something else.

The question of what ought to replace the search for a unitary truth or justice as the goal of dispute resolution processes is central to the project of developing alternative models for dispute resolution. It is in defining and articulating this alternative that the reflective practice of alternative dispute resolution can help inform political theories of deliberative democracy.

II. ALTERNATIVE DISPUTE RESOLUTION AND THE NEED FOR A THEORY OF JUSTICE

For the practice of alternative dispute resolution to have the capacity to inform political theory, it needs to be based in normative conceptions, not merely of how alternative dispute resolution works, but of how it ought to work. I suggest that there are three normative conceptions latent in the development of alternative models of dispute resolution, each of which needs to be articulated more fully, for alternative methods to step into the gap opened by the critiques of the adversary system of justice. These three normative conceptions are: (1) a vision of "just harmony" that can serve as a goal against which the dispute resolution procedures can be measured; (2) a vision of "authentic participation" that can distinguish legitimate involvement and engagement in a process from its strategic manipulation; and (3) a vision of "appropriate fit" that can provide an evaluative framework for determining what types of dispute resolution procedures are best matched to resolving different types of conflicts.

First, without recourse to truth or the "right result," alternative dispute resolution needs a vision of how justice would look, in order to serve as a goal against which the operation of dispute resolution procedures can be measured.[17] Menkel-Meadow has invoked Confucian principles at the heart of Chinese mediation, which she characterizes as being "designed to seek 'harmony, not truth,'" as a possible basis for a legal system organized around "problem-solving" rather than "truth-finding."[18] Rob Rubinson has suggested that in rejecting the search for unitary truth, the primary goal of mediation should be to get disputing parties to move beyond their own perspectives of "what happened," and to recognize the perspectives of other disputants.[19] Rather than viewing dispute resolution as a striving to determine which party's story of "what happened" is factually and normatively correct, Rubinson views mediation as a process of motivating the parties to engage in a "collaborative striving to overcome conflict."[20]

However, the goals of harmony and "overcoming conflict" are themselves open to normative challenge. Anthropologist Laura Nader has criticized the alternative dispute resolution movement as a movement to "trade justice for

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[17] For a discussion of the importance of defining the goals of procedural justice, see Jean R. Sternlight, *ADR is Here: Preliminary Reflections on Where it Fits in a System Of Justice*, 3 NEV. L.J. 289 (2003).

[18] Menkel-Meadow, *supra* note 14, at 30-31.

[19] Rubinson, *supra* note 15, at 851.

[20] *Id.* at 857.

harmony."[21] She sees the invocation of "harmony ideology" to pacify the assertion of rights as embodying a reassertion of social control in response to the legal rights and law reform movements of the 1960's and 1970's.[22] Although Nader's view is perhaps overstated, it points to the importance of being able to distinguish normatively between harmony that resolves conflict and harmony that merely suppresses or silences the voices of those without political power. To make the distinction between conflict resolution and conflict suppression – and to defend the vision of justice as harmony – alternative dispute resolution needs a theory of "just harmony."[23]

Second, even with a well-established vision of "just harmony" in place as a goal, alternative dispute resolution needs a theory of justice to help distinguish the "authentic" use of procedure from its "strategic manipulation."[24] Menkel-Meadow's own vision of lawyers as neutral facilitators in consensus-building processes cites the importance of the facilitators' process expertise, precisely so that they can "minimize the strategic gaming and bargaining that may occur when unequal parties come together to deliberate."[25] Some of the most potent criticism of alternative dispute resolution has focused on the "process dangers" of informal proceedings for parties with unequal bargaining power.[26] However, to evaluate whether a procedure is being used authentically or strategically, it must be measured against some normative ideal of what full, true or fair participation would look like.

Finally, alternative dispute resolution needs a theory of "appropriate fit" between types of disputes and procedures for resolving them, to realize its ideal of becoming a field of "appropriate dispute resolution,"[27] symbolized by the

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[21] Laura Nader, *Controlling Processes in the Practice of Law: Hierarchy and Pacification in the Movement to Re-Form Dispute Ideology*, 9 OHIO ST. J. ON DISP. RESOL. 1, 1 (1993).

[22] It should be noted that Nader's critique is directed at "the belief that harmony in the guise of compromise or agreement is ipso facto better than an adversary posture." *Id.* at 3. It is not directed at the more nuanced view of Lon Fuller that "different problems require different solutions" and that "there is nothing inherently humane about one forum or another." *Id.* at 12 (discussing Lon Fuller's unpublished but widely discussed manuscript, *The Forms and Limits of Adjudication* (1961-1962)). Nader notes that a later version of this manuscript was later published in 92 HARV. L. REV. 353 (1978). *Id.* at 12 n.46.

[23] *See* Nancy A. Welsh, *Remembering the Role of Justice in Resolution: Insights from Procedural and Social Justice Theories*, 54 J. LEGAL EDUC. 49, 50 (2004) (recalling the slogan "There can be no peace without justice" as having "particular relevance to our field [ADR] today").

[24] Menkel-Meadow, *supra* note 1, at 359 (noting the danger that deliberative democracy may be "manipulated or used strategically, rather than authentically").

[25] *Id.* at 362. Menkel-Meadow has explored the potential for repeat players – the "haves" – to manipulate processes of alternative dispute resolution in earlier work. *See* Carrie Menkel-Meadow, *Do the "Haves" Come Out Ahead in Alternative Judicial Systems?: Repeat Players in ADR*, 15 OHIO ST. J. ON DISP. RESOL. 19 (1999).

[26] Tina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545 (1991); Owen Fiss, *Against Settlement,* 93 YALE L.J. 1073 (1984).

[27] Menkel-Meadow has expressed her preference for the phrase "appropriate dispute resolution" over "alternative dispute resolution" as a more accurate moniker for the acronym ADR. Menkel-Meadow, *supra* note 14, at 37. *See also* Menkel-Meadow, *supra* note 25, at 23-24 (urging the use of the terminology "appropriate dispute resolution" both as a recognition of the reality that "adjudication in a court is now more the alternative than the norm" and as a signal that courts should be providing a "variety of choices about how best to handle particular issues, problems, disputes, conflicts and transactions"). I deviate from her preference

metaphor of the "multi-door courthouse."[28] In this ideal, the full panoply of methods for resolving disputes would be available to resolve contested matters, ranging from formal adjudication to informal mediation, and different kinds of disputes would be routed to their most appropriate venue.[29] Unfortunately, sometimes – perhaps all too often – alternatives to litigation are institutionalized, not because they are the most appropriate, but because courts perceive them as efficient ways to reduce judicial caseloads.[30] Other times they are mandated in contract terms by repeat players to serve their own interests at the expense of one-shot parties who have little bargaining power, forcing a literal trade-off of procedural rights that would otherwise be guaranteed as an option for resolving future disputes.[31] To properly route different kinds of disputes to their appropriate berths, alternative dispute resolution needs a normative theory of what circumstances make particular kinds of dispute resolution procedures appropriate.

These three normative conceptions – a vision of "just harmony," a vision of "authentic participation," and a theory of "appropriate fit" – define what alternative dispute resolution needs from a theory of justice. Hence, as much as theory needs to be informed by practice, practice also needs to be informed by theory. Recently developing theories of deliberative democracy hold out some promise for helping alternative dispute resolution theorists in the project of articulating the normative ideals on which their reflective evaluation of practice is based.

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because the model of adversary litigation is still very much in place as the normative vision of just procedures.

[28] The term "multi-door courthouse" originated with Frank Sander's influential address to the 1976 Pound Conference. Jeffrey Stempel, *Reflections on Judicial ADR and the Multi-Door Courthouse at Twenty: Fait Accompli, Failed Overture, or Fledgling Adulthood?*, 11 OHIO ST. J. ON DISP. RESOL. 297, 324-34 (1996). The Pound Conference is viewed as the "kickoff" event or "turning point" for the modern ADR movement. *Id.* at 309-10; Nader, *supra* note 21, at 5.

[29] For a description and critique of Sander's multi-door courthouse, see Stempel, *supra* note 28, at 324-34. Menkel-Meadow offers a similar vision in Menkel-Meadow, *supra* note 14, at 32-44 (recommending adversarial litigation as a "last resort" and offering a list of possible alternatives). For a recent explication of Menkel-Meadow's thinking about the variety of modes of conflict resolution that might be appropriate to resolving different kinds of issues, see Carrie Menkel-Meadow, *From Legal Disputes to Conflict Resolution and Human Problem-Solving: Legal Dispute Resolution in a Multidisciplinary Context*, 54 J. LEGAL EDUC. 7, 24-29 (2004).

[30] Nancy A. Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?*, 6 HARV. NEGOT. L. REV. 1, 21-22 (2001); *see also* Carrie Menkel-Meadow, *For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference*, 33 UCLA L. REV. 485, 486-90 (1985) (outlining disputes arising from the different values that judicial settlement conferences are thought to promote, including but not limited to efficiency); Marc Galanter & Mia Cahill, *"Most Cases Settle": Judicial Promotion and Regulation of Settlement*, 46 STAN. L. REV. 1339, 1388 (1994) (concluding, after evaluating settlement against a variety of different evaluative measures, including efficiency, that the task is to "have a sense of which qualities we consider important in a particular settlement arena" and to "encourage settlements that display desirable qualities").

[31] *See* Jean R. Sternlight, *Mandatory Binding Arbitration and the Demise of the Seventh Amendment Right to a Jury Trial*, 16 OHIO ST. J. ON DISP. RESOL. 669 (2001).

III. THE PROMISE OF DELIBERATIVE DEMOCRACY

Like alternative dispute resolution theorists, the political theorists of deliberative democracy are struggling to fill the gap that has opened in the wake of the loss of faith in substantive definitions of justice. What they offer is a procedurally-based vision, anchored by principles of inclusive and participatory deliberation that measure justice, not by the outcome of processes, but by their participatory character.[32] Like alternative dispute resolution, in these theories, the goal is not deliberation for the sake of reaching the "right result," but deliberation for the sake of allowing all to hear and be heard – to transform the views of others and to allow one's own views to be transformed – in the process of coming to a decision over a contested matter.[33] Although it is claimed that inclusive processes will create better results because they permit more facets or perspectives of a problem to be examined,[34] the real benefit is that outcomes will be perceived as more legitimate by all stakeholders because the stakeholders have been included in the deliberation process.[35]

Theories of deliberative democracy can help inform the normative conceptions that alternative dispute resolution theorists need to develop and articulate, just as reflections on the practice of mediation and consensus-building processes can help inform the theories of deliberative democracy. For example, the first normative conception that alternative dispute resolution needs – a theory of "just harmony" – can be informed by the theoretical debate occurring in philosophical scholarship about justice. The loss of faith in the yardstick of substantive justice has arisen in part from the recognition that modern democratic societies lack moral consensus at a very deep level that makes moral conflict a persistent and permanent feature, defying transcendence or mediation into a harmonious resolution.[36]

In light of this deep and persistent moral pluralism, it can be asked whether "harmony" is a realistic goal – or a desirable one – in modern societies.[37] Discussions of the benefits of harmonious alternative dispute resolution

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[32] *See generally* JAMES BOHMAN, PUBLIC DELIBERATION: PLURALISM, COMPLEXITY AND DEMOCRACY (1996); AMY GUTMANN & DENNIS THOMPSON, DEMOCRACY AND DISAGREEMENT (1996).

[33] For an overview of the different definitions of deliberation, see Jon Elster, *Introduction*, *in* DELIBERATIVE DEMOCRACY 1-3 (Jon Elster ed., 1998).

[34] This is what James Bohman has called the "epistemic" benefit of deliberation, that it "improves outcomes insofar as it helps citizens construct an interpretation of the decision and its consequence in light of what all those affected think about the matter at hand." BOHMAN, *supra* note 32, at 6.

[35] *See* GUTMANN & THOMPSON, *supra* note 32, at 41-42 (arguing that deliberative democracy "contributes to the legitimacy of decisions made under conditions of scarcity" because it "brings previously excluded voices into politics").

[36] *Id.* at 18-26 (discussing the sources of persistent moral disagreement); *see also* JOHN RAWLS, POLITICAL LIBERALISM 54-58 (1993) (discussing the factors that contribute to fundamental moral disagreement).

[37] *See generally* STUART HAMPSHIRE, JUSTICE IS CONFLICT (2000) (arguing against the pathologizing of conflict as a moral vice); Isaiah Berlin, *The Pursuit of the Ideal*, *in* ISAIAH BERLIN, THE CROOKED TIMBER OF HUMANITY 1, 19 (1990) (arguing that a more appropriate ideal for a modern morally pluralistic society is a vision of "promoting and preserving an uneasy equilibrium, which is constantly threatened and constantly in need of repair").

are often based on paradigm cases in which underlying interests converge, if only the parties could hear each other over the barriers created by the intractable positions in which their interests have become embedded.[38]

Attention to the theoretical work addressing the causes and sources of moral conflict, and the nature of justice in light of moral pluralism, can help alternative dispute resolution theorists develop richer and more nuanced understandings of the goals of dispute resolution in the absence of the convergence of interests paradigm.[39] Bohman, for example, has suggested that in light of the depth of disagreement over fundamental matters, the goal of deliberation is not necessarily consensus, but "continued cooperation in public deliberation, even with persistent disagreement."[40] Gutmann and Thompson, similarly, do not suppose that deliberation will resolve moral disagreement, but argue that with deliberation "citizens stand a better chance of . . . living with those [moral disagreements] that will inevitably persist."[41] These qualifications of the goal of harmony recognize that in a pluralistic society, the features of fluidity and openness to continued challenge may be just as important as the quelling of disputes.

Theories of justice in a deliberative democracy can also help shed light on the normative concept of "authentic participation" that differentiates the proper use of alternative dispute resolution processes from their strategic manipulation. Because these theories focus on participation as the keystone of justice, there is a vibrant theoretical discourse around the conditions that define participation. Some theories focus on the giving of "public reasons,"[42] or on offering reasons in a "spirit of reciprocity"[43] as the earmarks of authentic participation. Others are less cognitively constrained, and attempt to make room for empathic perspective-shifting and personal storytelling as legitimate deliberative mechanisms.[44] Theorists also explore the ways in which deliberation can be strategi-

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[38] Welsh, *supra* note 23, at 50-51 (discussing the gap between the "iconic images" of resolvable conflict that are used to teach dispute resolution and the "small and increasingly isolated segments of the current practice of mediation and arbitration" that they represent). One classic example that I have used in teaching is the Ugli Orange Case from ROGER FISHER & WILLIAM URY, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN 59 (Bruce Patton ed., 1981).

[39] Menkel-Meadow's example of facilitating "structured conversations" of affirmative action and abortion are examples that defy the paradigm of convergent interests and require re-evaluation of goals. Menkel-Meadow, *supra* note 1, at 364. *See also* Marc Howard Ross & Jay Rothman, *Issues of Theory and Practice in Ethnic Conflict Management, in* MARC HOWARD ROSS & JAY ROTHMAN, THEORY AND PRACTICE IN ETHNIC CONFLICT MANAGEMENT 1 (1999) (arguing for the importance of articulating theories of "success" and "failure" in ethnic conflict resolution projects other than achieving consensus, and allowing the goals of the projects to be set collaboratively by the stakeholders and to be open to change over time).

[40] *See* BOHMAN, *supra* note 32, at 89.

[41] GUTMANN & THOMPSON, *supra* note 32 at 51.

[42] *See* RAWLS, *supra* note 36, at 212-30 (arguing that in debating fundamental questions, citizens must conduct their discussions "based on values that the others can reasonably be expected to endorse").

[43] *See* GUTMANN & THOMPSON, *supra* note 32, at 52-94 (arguing that in deliberating, citizens and officials must appeal to "mutually acceptable" moral reasons and empirical claims).

[44] Bohman, for example, includes in his "dialogical mechanisms" of public deliberation: "back-and-forth exchanges around differences in biographical and collective historical

cally manipulated, examining the "pathologies of deliberation" caused by the ability to induce preferences, or create "false beliefs."[45]

This theoretical identification of conditions for both authentic participation and strategic manipulation can be especially helpful in providing evaluative frameworks that go beyond reliance on participant satisfaction in dispute resolution processes. Nancy Welsh, for example, has studied the justice of court-connected mediation in the context of procedural justice literature, which focuses on whether participants "feel like justice is being done."[46] This focus on participant satisfaction is consistent with the aims of deliberative democracy to define justice according to participation rather than outcome, and is central to the larger justice goals of legitimacy.[47] However, a reliance on participant satisfaction should also be understood within the theoretical context of the "pathologies of deliberation" and its potentials for manipulation.

IV. LEARNING FROM PRACTICE

Despite what theory can offer, the process of articulating the conditions for authentic participation is a two-way street in which theory must also learn from practice.[48] As Menkel-Meadow notes, abstract theorizing about the conditions that define participatory deliberation is often carried out in the shadow of experience with the dualistic adversary models, and often seems trapped within the idea of a "back-and-forth" exchange between two sides of a question.[49] Those who study and practice alternative dispute resolution "on the ground" see the limitations of these assumptions against which – and within which – theory is developed. Reflective practitioners need to contextualize their experiences within theory, but they can also use their experiences to test the presumptions on which theory is based, expanding and enriching the possibilities for further theoretical exploration.[50]

The contributions of practice to theory are highlighted in the last area in need of normative articulation: the conception of "appropriate fit" between conflicts and dispute resolution processes. There is a tendency in theory to provide final, sweeping answers that systematize experience. This tendency, at its best, creates vocabularies for categorizing and explaining experience, and allows for normative evaluation of experience.[51] At its worst, it constructs one-

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experiences," BOHMAN, *supra* note 32, at 60; and the "shifting and exchanging perspectives" that occur in the course of speaking and listening in dialogue. *Id.* at 63.

[45] *See, e.g.*, Susan C. Stokes, *Pathologies of Deliberation*, *in* DELIBERATIVE DEMOCRACY, *supra* note 33, at 123; Adam Przeworski, *Deliberation and Ideological Domination*, *in* DELIBERATIVE DEMOCRACY, *supra* note 33, at 140.

[46] Nancy A. Welsh, *Making Deals In Court-Connected Mediation: What's Justice Got To Do With It?*, 79 WASH. U. L.Q. 787, 791 (2001).

[47] *See supra* notes 32-35 and accompanying text.

[48] Or perhaps, to avoid the duality embedded in even that metaphor, it is a rotary or "roundabout" in which several roads converge in a circle that leads all into one another.

[49] Menkel-Meadow, *supra* note 1, at 358.

[50] Jean Sternlight has referred to a similar vision of the interaction between theory and practice as a "symbiotic integration" of theory and practice. *See generally* Jean R. Sternlight, *Symbiotic Legal Theory and Legal Practice: Advocating a Common Sense Jurisprudence of Law and Practical Applications*, 50 U. MIAMI L. REV. 707 (1996).

[51] *See id.* at 736-41.

size-fits-all boxes that constrain the development of new practices based on untested theoretical assumptions, and homogenizes practice based on what we think we know about what will work best.[52]

The need to think "outside the boxes" of theory is particularly important in the project of developing normative conceptions of "appropriate fit" between different kinds of disputes and methods for resolving them. The theoretical exploration of the goals ("just harmony") and methods ("authentic participation") of dispute resolution processes can help define broad frameworks within which the normative questions about "appropriate fit" can be posed. For example, one might draw on theories of justice to determine that the goals of certain kinds of disputes should be different: harmony in some types of cases in which parties will have continuing needs to interact; settlement according to certain substantively or procedurally defined parameters in others; or merely providing a forum for different parties to hear one another where the conflicts are particularly emotionally charged or intractably opposed. Or it might be theorized that different methods of participation – private versus public, with or without lawyers, mediation or bargaining – may be appropriate to different types of disputes.[53] However, it is only by testing the assumptions upon which those frameworks are built against the experience of those who implement the new processes, that the questions will be answered.

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[52] For example, Craig McEwen has used the experience of lawyer participation in mediation in Maine to challenge the prevailing notion that the presence of lawyers disrupts the objectives of mediation. Craig McEwen, Nancy H. Rogers & Richard J. Maiman, *Bring in the Lawyers: Challenging the Dominant Approaches to Ensuring Fairness in Divorce Mediation*, 79 MINN. L. REV. 1317 (1995).

[53] The posing and theorizing of these kinds of questions with reference to theories of justice is at the core of Menkel-Meadow's current work. *See generally* Menkel-Meadow, *supra* note 1.