

Mediation: Centerpiece of World Recovery

By

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Many observers agree that our world suffers from a high fever of turmoil, polarization, a crisis of growth and **an** unprecedented opportunity for world transformation.

Our climate is careening toward a perfect storm that could lead to massive extinction events, such as the demise of the hemlock rainforest in the Great Smoky Mountains; the world economy is in shambles; there is a proliferation of failed states breeding hotbeds of terrorism. Our communities are increasingly polarized between rich and poor, black, white and brown, north and south, police and civilians. The list goes on. Every department of human and natural life cries out for restructuring and recovery from current strife.

I believe mediators, as a worldwide group, are called to step up, step into the fray and provide leadership in the process of world recovery.

Let's unpack possible elements of this recovery.

The Culture of Guns and Lawyers

The United State in particular needs to embrace recovery from the addiction to excessive litigation. Perhaps because Hollywood is replete with cop shows and law shows, Americans live in a popular culture where the methods of conflict resolution appear on the surface to have devolved into a choice between guns and lawyers.

In the U.S. the crushing costs of litigation are beginning to rival global defense spending.

- In fiscal year 2011, the U.S. Department of Defense budget was \$695.7 Billion—a larger expenditure than the rest of the developed world combined. ⁱ
- In 1996, 18 million lawsuits were filed in the US at a cost of \$300 Billion ²

- The US averages 15 million civil suits per year. ³
- At any given time, 90% of all major U.S. corporations are involved in litigation, with an average cost of \$8 Million per year, per corporation.³
- These figures do not factor in the additional costs of the criminal courts and the burgeoning prison system.
- The Justice Department spends some \$6.4 billion, about one-quarter of its budget, on prisons each year, and that number is growing steadily. ⁴
- "With 2.2 million people currently in the nation's prisons or jails - a 500 percent increase over the past 30 years - the system costs American taxpayers \$80 billion per year. Mass incarceration is not making us safer but is contributing to racial tensions, fracturing communities and growing costs to taxpayers." ⁵

We pick up the tab for these outrageous expenditures. And these figures do not count the cost of wasted human potential and the intergenerational devastation of mass incarceration, especially in communities of color.

The public is beginning to awaken to the fact that the so-called justice system does not really deliver justice, unless one can afford the spiraling costs. And it certainly does not deliver healing. Beyond the byzantine milieu of corporate litigation, most civil litigation is 10% disputed law and 90% an interpersonal shouting match, much better managed by mediators.

As mediators, we need to stand up and lobby for greater use of mediation in our courts, our neighborhoods, our workplaces, our police departments and our schools. The addiction to excessive litigation must end. Human beings do not need lawyers to insert themselves into every single conflict that arises in daily life. This co-dependent reliance on lawyering-up with every kind of dispute is hobbling people's ability to learn the self-empowerment of resolving their own conflicts out of court.

Example

Years ago, I mediated a court-ordered case that had festered in litigation for ten years. The judge, I believe, was becoming dyspeptic every time this case entered his courtroom.

Two grown siblings—brothers -- had developed such rivalry with one another, they became notorious throughout their county. One started a small business; the other opened an identical business to compete with him. They lived side by side on adjacent properties. They began to buy other properties adjacent to their

brother's property and would deny easement to the other. It seemed that half the county was a patchwork of properties owned by these contentious brothers, who sought to strangle each other with surrounding properties. Each was on the verge of bankruptcy when they came to mediation.

The turning point in the mediation was not a matter of disputed law about land titles and easements. It was the question, "What has this cost you and your respective families?" Each brother spoke of the hellish dynamics in their family. Though they lived side by side, their wives did not speak to each other. Their children did not associate with each other. They did not celebrate holidays and birthdays together. Though both brothers had bright, college-bound children, the legal fees had eaten into what would have been college funds. Now, the children were consigned to community college instead of a four-year university. Each family had spent in excess of \$250,000 in legal fees!

Realizing what their sibling rivalry had done to their spouses and children, both grown men broke down in tears; they were filled with remorse at what they had done. Both the legal and interpersonal details of resolution fell quickly into place after that moment.

In four hours, the mediation process resolved a ten-year stint in Hell, demonstrating several of the pillars of mediation:

- Self-determination of the parties
- Costs less, with less stress
- Takes less time than litigation

As a field of endeavor, mediation needs to be released into action, released from the ivory towers of universities and law schools, into our communities in real time, with real people, and onto the world scene.

Reduce the Use of Binding Arbitration

I'm going to go way out on a limb here and declare that the exponential growth of binding arbitration over the last two decades is a creeping threat to our democracy and self-determination. Binding arbitration, or "forced arbitration," as Robert Reich refers to it (see <https://www.youtube.com/watch?v=tgC3N802Sjk>) now undermines both the field of mediation *and* our judicial system. Most credit card companies, investment brokerages, real estate contracts and a growing number of employment contracts now require that disputes be resolved via

binding arbitration, with an arbitrator of the company's choosing. The outcomes are seldom fair to the complainant.

As an example, the Supreme Court ruled on March 21, 2001, that employers *may* require employees to sign a binding arbitration agreement as a condition of employment. [Circuit City Stores, Inc. v. Adams (99-1379)]. If employers exercise this option, cases involving hostile work environment, sexual, racial, religious, age or other discrimination or harassment will rarely see the inside of a court room or a mediation room in the future. With the stroke of one ruling, the high court made an end run around the EEOC and Title VII. One of the first companies to make use of this new ruling in their employment contracts was Halliburton/KBR. A few years later, when female employees of KBR were deployed to the war zone in Iraq, they were raped in large numbers by their managers and co-workers. When these women sought justice and damages, they were ferried through a very rigged arbitration process, which found for the company, not the complainants. Meanwhile, the arbitration agreement prevented them from seeking any other form of redress.

Investors, cell phone customers and credit card holders rarely have a better outcome. The game is rigged! Binding arbitration is also a key component of all our major trade agreements, such as NAFTA and CAFTA and the pending TPP, in which investors enjoy Most Favored Nation (MFN) status. They have been empowered to sue sovereign governments in a secret court of arbitration for "non-conforming behavior" (a particularly Orwellian phrase!) on the grounds that labor and environmental laws have the effect of expropriating the investor's assets, or of being a disguised restriction on trade and investment.

Seeing these trends back in 2002, I had a meeting with the chief judge of the First Judicial District Court here in Santa Fe, to entreat him to make greater use of mediation in his court. I described the rampant growth of binding arbitration and said, "If mediators and courts do not realize greater collaboration with one another, we will both be out of a job in the future." He immediately referred five cases to me, several of which had malingered in court for five to ten years. All five cases settled in mediation!

Educate the Next Generation

The concepts and skills of mediation and constructive communication belong in the curriculum of all our schools. Empathy, active listening, mindfulness and

creative problem solving could be part of a core curriculum that follows children from pre-school clear through the 12th grade and beyond. These are fundamental life skills that can be incorporated into language arts, social studies and health. Many school systems throughout the world are using these skills to great benefit. Children are learning circle processes, peer mediation and restorative justice. The net effect is a reduction of campus violence, an increase in academic performance and a ripple effect in which children bring these skills home to their families. The school-to-prison pipeline erodes very quickly with the introduction of conflict resolution curricula.

Make Greater Use of Restorative Justice

The US lags far behind other countries in the use of restorative justice. Canada, Mexico, the UK, Australia and New Zealand now reap the benefits of the restorative justice revolution. Several of these countries have revised their constitutions and penal codes, replacing the meme of bitter punishment and incarceration with restorative justice.

Restorative justice does not categorically eliminate the need for prisons. But offenders in even the worst categories of crime, such as murder and armed assault, can often be brought to a sober realization of the depth of harm they have caused; they can learn empathy and true accountability. With victim impact panels, family group conferencing and other restorative practices, offenders take responsibility and gain the skills to make better choices in the future. And victims of crime can gain answers to vitally important questions, such as, “Why did you hurt me and my family? How did we ever hurt you?” Each party can participate in a process that takes valuable steps to repair the harm and to heal the wrongdoing. (See <https://www.youtube.com/watch?v=8UgabsOQCa0>). As one offender declared after participating in restorative justice, “I am *better than* the worst thing I have ever done.” His life now follows the path of his Better Angels. He discovered this path in a restorative justice process!

Launch Community Dialogues

In 2003, as the U.S. invaded Iraq, protests broke out all over the country—protests that often devolved into violence between protestors and police. At the outset of this wave of protest, I helped spearhead community dialogues between police and activists, under the auspices of the New Mexico Department of Peace Initiative. As a community, we carried on the dialogue process for three

consecutive years. All dialogue circles were facilitated by highly trained mediators.

Protestors and police found common ground; they learned that their motives for playing their respective roles were grounded in a vision of what the community of Santa Fe could be. We moved together to a consensus about what each group needed to accommodate peaceful protest. Organizers and police worked together to map a plan for effective and lawful protest. During that time, there were no caged “Free Speech Zones” in Santa Fe. And both groups weeded out *agents provocateur*. There was no violence whatsoever. And police felt a new sense of respect and understanding for the issues motivating protestors. Both groups embraced the experience that, in the last analysis, they were neighbors.

We moved on together to address other hot-button issues boiling over in this city. We organized dialogues together with law enforcement around issues of immigration, hate crimes, voting rights and LGBT issues. We worked together seamlessly to dig deeper into the problems facing our community.

At length, our Chief of Police, Beverly Lennen, wrote a proposal on this model to the National Conference of Mayors, stating, “Unlike other area agencies, it has not been necessary to make ANY arrests since the dialogue process began. Event organizers now run interference with any participants who do not abide by the preset agreements. The frame in which activists view police has shifted from being seen as the enemy to being seen as the protectors. Most importantly, a fundamental goodwill has been permanently established between the police force and the activist community in Santa Fe. The walls of mutual suspicion and demonization were broken down during the dialogue process and a new structure of mutual respect and cooperation supervened.”

This model of community dialogues can be equally successful in Ferguson, New York City or in any city where there is discord between citizens and police—if the mediation community is willing to jump into the fray, take risks, and make it happen.

Address Historical Trauma

Profound research is cropping up like daffodils through winter snow around the subject of historical trauma.

(See <http://www.santaferadiocafe.org/sradiocafe/2014/09/03/thom-allena/>;
<http://www.vamikvolkan.com/About-Vam%FDk-D--Volkan.php>;
<http://www.healingcollectivetrauma.com/dr-maria-yellow-horse-brave-heart-historical-trauma-in-native-communities.html>)

Both Vamik Volkan at the University of Virginia and Maria Yellow Horse Braveheart, now at the University of New Mexico, describe how trauma is transmitted intergenerationally, especially when the original subjects of trauma do not talk to the younger generation about traumatic events.

Volkan studied survivors of Nazi death camps and the next two generations of their offspring. These survivors did not want to talk about their experiences, perhaps to protect themselves or their offspring. However, by their reluctance to talk about their experiences, somehow, the intrusive nightmares and mental images of their victimization-- the symptomology of the survivor—was transmitted *undiluted* to their children, often times with more potency than their parents experienced. The trauma and PTSD became *more potent and cumulative* as the generations passed. Maria Yellowhorse Braveheart reached the same conclusions researching historical trauma in Native American communities.

How many of our current community and global conflicts are embedded in historical and collective trauma? I would venture to speculate that the Israeli-Palestinian conflict is rooted in these dynamics. Perhaps racial tension in the U.S. harks back to the unresolved trauma of the Civil War and slavery. Certainly, historical trauma is ever-present in the Native American population. How well did we process and heal the trauma of 9/11? Did going to war really heal those wounds?

Can qualified mediators and dialogue facilitators begin to create safe and thoughtful spaces to have these kinds of restorative conversations? I think the answer is an unqualified “Yes!”

One of the most creative approaches to healing historical trauma I have ever seen is depicted in the documentary film, *Dakota 38*.

(See <https://www.youtube.com/watch?v=1pX6FBSUyQI>)

To avoid the necessity for a “spoiler alert,” I will only say that the participants in this adventure made use of circle processes to great benefit along their journey.

Embrace Truth and Reconciliation

The current South African government emerged from the womb of conflict resolution, when thousands of mediator-midwives sprang up across the country to ensure the viability of that emerging infant democracy. (See *Watching the Wind: Conflict Resolution During South Africa's Transition to Democracy*, by Susan Collin Marks, United States Institute of Peace Press). And the Truth and Reconciliation Commission bound even the most severe wounds to allow South Africa to stand as an inspiration to the world. South Africa leapfrogged over what may have been decades of devastating civil war with this simple, raw and honest restorative process.

Nations and communities have invaded, oppressed and damaged one another from time immemorial. These wounds continue to fester. Can we find creative and bold new ways to address them? Can we invoke Truth and Reconciliation between black, white and brown, north and south, rich and poor, liberals and conservatives? I believe this is the way of the future and mediators can be in the vanguard of this effort.

Create a Department of Peace

Dennis Kucinich served as a congressman from Ohio from 1997 to 2013. One of his most ambitious legislative efforts was an attempt to establish a cabinet level federal Department of Peace, which would have a similar standing and effect as the Department of Defense. While his bill never got the attention it deserved during the Bush administration, perhaps this is an idea whose time has come.

If I were to design a Department of Peace, it would not be an academic ivory tower, but a pro-active engine driving the use of conflict resolution on every level, from inter-personal and community crises to national and international hotspots. Such a department would channel grants to states and municipalities so that underserved populations would benefit from conflict resolution resources. Such a department would put mediation on the map in every state in the same manner that military bases currently blanket this country.

Is this a pipedream? Only if we mediators say it is.

Baby steps toward this goal might include effective lobbying by local and national mediation associations under a 501 (C) 4 framework. Such associations (and maybe even Mediate.com!) could also establish a 501 (C) (3) arm that could provide a non-profit umbrella and fiscal agency to its members for grant writing purposes. Fiscal agency fees could then be funneled into national marketing of

conflict resolution processes. If dental associations and veterinary associations can blanket the airwaves about the benefits of their services, why not mediation associations, such as ACR? Does membership in these organizations result in promoting the profession as much as possible? Do these membership fees benefit members as much as they could?

Why Call Mediation a Centerpiece?

Most of our world problems are *human* problems, not *legal* problems. In the current culture of Twitter and Facebook, we are quickly forgetting how to speak and listen to one another patiently and deeply. I believe that most of the challenges that confront us can be resolved with deeper dialogue and restorative practices. But these disciplines take patience, courage and “long thoughts.” A 140-character limit to communication will not fill that bill!

The field of ADR is diverse enough and fluid enough to bring resources tailored to the myriad needs at hand. Few other professions can make that claim. Hence, my hypothesis that mediation *can* be a centerpiece of world recovery. In the words of Howard Zehr, we can “...explore the meanings and implications not just of a restorative approach to justice, but a restorative world view.”

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¹ http://www.huffingtonpost.com/2012/08/06/defense-spending-fact-of-the-day_n_1746685.html

² *Getting to Resolution* by Stewart Levine, Berrett Koehler, 1998

³ *Fulbright & Jaworski Survey on Trends in Litigation*: <http://www.fulbright.com/mediaroom/files/FJ0536-US-V13.pdf>

⁴ *Associated Press* article “Push for sentencing changes underway in Congress” by Henry C. Jackson

⁵ <http://thinkprogress.org/justice/2014/09/17/3568232/the-united-states-had-even-more-prisoners-in-2013/>