


The Double Helix of Theory and Practice: Celebrating Stephen J. Goldberg as a Scholar, Practitioner, and Mentor

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Abstract

In this tribute to the 2014 recipient of the International Association for Conflict Management's Rubin Theory-to-Practice Award recipient, we celebrate the multifaceted contributions of Stephen J. Goldberg. The contributors highlight the role that he has played as a mentor inspiring young scholars, as a champion for grievance mediation, a designer of dispute resolution systems including the enduring power-rights-interests framework, and as a scholar. The article closes with reflections from Steve Goldberg about the intertwined nature of theory and practice, the ongoing cycle in which each informs the other and in which each makes the other stronger.

Introduction Mara Olekalns

Stephen J. Goldberg's contributions to the theory and practice of dispute resolution revolve around three focal points. The first focal point is his investigation, in the mid-1970s, of a coal industry beset by grievances and wildcat strikes. This study, and his successful implementation of a grievance mediation process, gave miners a voice that they previously lacked in the arbitration system. The second focal point, and one that is memorable for negotiation and dispute professors, is the articulation of these experiences into the Dispute Resolution System. This system continues to serve as a best practice model for mediation and is also encapsulated in his book *Getting Disputes Resolved* (coauthored with Jeanne Brett and William Ury). *Getting Disputes Resolved* introduces the iconic power-rights-interests framework, which emphasizes the central role of shifting disputes from a focus on the power and the contractual rights of each party to an interest-based, problem solving approach. The third focal point highlights his leading role as an educator and his role in instilling the principles of mediation and dispute resolution in generations of practitioners and scholars. In 1980, he founded the Mediation Research and Education Project, with the combined mission of advocating for the use of grievance mediation and training practitioners in its principles. Continuing his passion for educating the next generations of lawyers and managers, Steve cofounded Northwestern University's

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Dispute Resolution Research Center, and more recently cofounded the not-for-profit Negotiation and Team Resources Institute.

Steves' ability to inspire generations of mediation practitioners and scholars shines through in the tributes written by Donna Shestowsky, Sylvia Skratek and Ann-Sophie de Pauw. Each of these tributes reminds us that, despite the strong association between Steve and the power-rights-interests framework, his contributions to the field of dispute resolution extend far beyond this framework. Nonetheless, this framework is an important vehicle for Steve's message to us: That theory and practice are intertwined, one does not precede the other but instead the two are tightly bound together on a reciprocal relationship. Practice—and failures of practice—contribute to theory, and theory—and failures of theory—contribute to practice. In these tributes, we learn of the lasting impact of his *experience-based framework* on how we educate lawyers (Donna Shestowsky) and managers; of his *missionary zeal* for grievance mediation and his role as a *mentor* (Sylvia Skratek); and his ability to inspire young scholars and to introduce them to the *magic of mediation* (Ann-Sophie de Pauw).

From my point of view, the skills and principles mediation are brought to life by the video *Getting Disputes Resolved*, better known to many professors as the Prosando video. The Prosando video case provides a powerful demonstration of how disputants can—with great patience and skill on the part of a mediator—be turned from a rights and power perspective to an interests-based perspective. The video is an enduring favorite of mine, shown after my students have tied themselves up in their attempts to resolve a dispute, and one that cogently translates the power-rights-interests framework from theory to practice. This case provides a microcosm of Steve Goldberg's career and contributions by encompassing scholarship, pedagogy, and practice (Figure 1).



Figure 1. Steve Goldberg (left) receives the 2014 Rubin Theory-to-Practice Awards from IACM President Ann Lytle (right), Leiden, The Netherlands.

Reflections on (the Many Accomplishments of) Steve Goldberg Donna Shestowsky

Steve Goldberg is a legend. In the area of dispute resolution, he will always be recognized for promoting the growth and improvement of the field both within and outside the law. His impact stems in large part from his use of inventive techniques in real-world settings. In 2014, he was rightfully recognized for his work with the International Association for Conflict Management's Rubin Theory-to-Practice award.

I have great admiration for Steve based on his stellar reputation as a neutral, the way his work experience has informed his research, and the efforts he has made to disseminate his insights not only to

academics, but also to practitioners and students. While the examples I provide in this tribute are surely not exhaustive, I hope they paint a picture of the way his experience-driven innovation has shaped how those in the field think about, practice, and teach dispute resolution. His work serves as an inspiration for future generations of practitioners and academics alike.

Reputation as a Practitioner

In the early stages of his career, Steve embraced a novel vision for changing the dispute resolution field. He set out to rethink the goals of conflict resolution and create new modalities for resolving disputes. In the 1980s, as the bituminous coal industry faced widespread wildcat strikes, he conducted pioneering research on why arbitration, the style of ADR common in this area, was not effectively resolving these labor disputes. He suggested incorporating what he called “grievance mediation,” which encourages cooperative problem solving between labor and management, prior to arbitration. This approach was avant-garde because it did not conceptualize disputes as occasions for the rigid interpretation and application of existing contract terms, but rather encouraged people to view disputes as opportunities to involve all parties in collaborative discussion in ways that could improve their relationships. While Steve’s research was innovative, his ability to bring theory to practice was even more inspiring. He used his observations from the field to train mediators who then implemented his grievance mediation approach in various labor disputes. He followed these “field experiments” with extensive research into the parties’ perceptions of the process and found that the involved parties favored the problem solving approach over the rigid contract–interpretation modality that was common at the time (Goldberg, 1983). His work in grievance mediation ultimately led to a major shift in how entities resolve labor disputes in the United States and reflects the impact Steve had even early in his career. Through his work with the Mediation Research and Education Project, Inc. (described in more detail by Sylvia Skratek), Steve not only trained a highly professional cadre of mediators who went on to act as neutrals in workplace disputes but also taught American Airlines and its flight attendants how to mediate their own grievances. The fact that the Federal Mediation and Conciliation Service encourages the use of grievance mediation is a testament to Steve’s effect on the way companies and their unions resolve conflict.

Influence as an Academic

As a fellow legal academician, I greatly appreciate the experience-driven research Steve has contributed to the field. Perhaps my favorite example is the work he conducted with Jeanne Brett and William Ury, which led them to introduce the concept of dispute systems design. This concept is thoughtfully explored in the popular book *Getting Disputes Resolved: Designing Systems to Cut the Costs of Conflict* (Ury, Brett, & Goldberg, 1993). In the domain of law, this work was well before its time. In recent years, dispute systems design, which legal scholars now call “DSD,” has become a hot topic for legal scholarship and teaching.

Getting Disputes Resolved, as well as other publications that address the “interests, rights, and power” model, has profoundly affected how I teach dispute resolution. This model, grounded in empirical work conducted by Steve, Jeanne Brett, and William Ury, revealed the concrete ways in which a focus on rights and power during settlement discussions can hinder the resolution of disputes. The authors argued that centering discussions on interests instead, and sometimes using rights and power strategically, is more likely to produce integrative agreements. The fact that this model stems from field research makes it very compelling. The students in my Negotiation Strategy and ADR courses are probably tired of hearing me explain the power of the model for analyzing and conducting negotiations and mediations. In fact, in a recent teaching evaluation, one student wrote: “I think interests, power and rights are forever ingrained in my head, and seep into every pore of my life.” This work prompted me to notice, in my own negotiation training work, that I can predict the creation of integrative agreements based on how long it takes

for lawyers to mention the relevant law. This observation is the basis of one of my teaching mantras: “When you’re trying to settle a case, don’t talk about the law unless you really have to.”

While Steve was introducing grievance mediation into labor–management dispute resolution, he was also writing (with Eric Green and the late Frank Sander) the first casebook designed for law professors to introduce students to ADR. *Dispute Resolution* was originally published in 1985. Currently coauthored with Nancy Rogers and Sara Cole, the book is now in its sixth edition, reflecting the growth of this field in which Steve was a pioneer (Goldberg, Sander, & Rogers, 1992).

Steve introduced the negotiation, mediation, and ADR curriculum at Northwestern University Law School and represented the law school on the executive committee of the Dispute Resolution Research Center (DRRC) at Northwestern University, which he helped to found in 1986. The DRRC facilitated research on, and the teaching of, dispute resolution in business and law schools through popular training programs and webinars, as well as a simulation database to which Steve contributed many popular exercises. The careers of many dispute resolution scholars—including my own—were forever changed as a result of the outstanding mentorship they received as postdoctoral fellows, certificate program participants, or other types of students at the DRRC. His work creating the learning experiences that DRRC provided paved the way for future generations of researchers and teachers who are eager to promote skillful conflict resolution.

No reflection on Steve’s career would be complete without a nod to his highly popular teaching video, *Mediation in Action* (Northwestern University, 1995), which he developed for CPR (the International Institute for Conflict Prevention & Resolution). Although the video was produced 23 years ago, when I hear law professors discuss which mediation videos to show in the classroom, this video still never fails to make the list.

More recently, Steve, Holly Schroth, and Jeanne Brett formed a nonprofit organization called Negotiation and Team Resources. The group’s purpose is to encourage research into effective conflict resolution techniques. In addition to providing grants for new research, the organization offers a variety of highly vetted training simulations and corresponding teaching notes to support the education of lawyers, business professionals, and others engaged in conflict resolution. These simulations include the highly popular *Texoil*, which Steve authored.

Steve’s publications pursued the same theme of supplying practitioners with innovative dispute resolution techniques. He has regularly translated and published his research on mediation in practitioner-oriented journals such as *Negotiation Journal*. Many of his articles read like practice guides, with titles including “The Life of the Mediator: To Be or Not to Be Accountable” (Goldberg, Green, & Sander, 1985), “Meditations of a Mediator” (Goldberg, 1985), and “Selecting a Mediator: An Alternative (Sometimes) to a Former Judge” (Goldberg & Sander, 2007). His publications often emphasize the importance of addressing the underlying interests of the disputing parties to bring them both satisfaction. One of my personal favorites is “What Difference Does a Robe Make?” (Goldberg, Shaw, & Brett, 2009), which is required reading for my ADR course. I use the article to prompt students to consider what traits they might look for when helping clients choose a mediator and to challenge the “we should hire a former judge” assumption held by many litigators. Most recently, Steve authored the practitioner-oriented book *How Mediation Works* (2017) with Jeanne Brett and Beatrice Brenneuer.

Other articles and publications concern his insights on arbitration. For example, in cleverly titled articles such as “Swing, Bunt, or Take the Pitch?” (Shaw & Goldberg, 2007), Steve highlighted the benefits of using final-offer arbitration (common in the baseball industry) to create incentives to resolve commercial disputes early. He recognized the broader implications of this narrowly used practice and persuasively argued for its use in other arenas. This work highlights Steve’s knack for encouraging practitioners to repurpose existing dispute resolution tools in creative ways.

In sum, Steve serves as an inspiration to those in the dispute resolution field. Practitioners and educators alike often look to his innovative approach as an example for rethinking and reevaluating the practice of conflict resolution. The way in which he drew on his observations in the field to inform his

research and teaching will continue to energize legal academics who strive to make our academic work useful in practice (Figure 2).



Figure 2. Steve Goldberg, Jeanne Brett, and Bill Ury (left to right) at a Kellogg Conference in the 1980s.

A Missionary Zeal for Mediating Grievances **Sylvia P. Skratek**

My introduction to Steve occurred indirectly after several staff members of a state teachers' union attended one of his presentations on the mediation of grievances at the Pacific Coast Labor Law Conference in the 1980s. They enthusiastically returned from his presentation and encouraged me to investigate the grievance mediation process that he had introduced in the coal mining industry. As the Director of Arbitration, I was somewhat underwhelmed by the concept of mediating grievances however once I met Steve and noticed his missionary zeal for the process I understood the interest that had been expressed by the staff members. Given the fact that the process was relatively new, I was reluctant to embrace it wholeheartedly without studying the effect that it might have within an industry that was considerably different than coal mining. Steve gave generously of his time and knowledge as our organization worked to determine whether grievance mediation was a good fit. As part of our effort, I replicated the study that Steve had conducted in the coal mining industry and Steve was an integral part of this research, providing guidance and encouragement through all stages of the research. The research served as the basis for my dissertation and Steve agreed to serve as a member of my doctoral dissertation committee. I could not imagine a greater mentor both academically and professionally.

The research confirmed that indeed grievance mediation would serve well in an industry that is considerably different than the coal mining industry. It was adopted by the teachers' union and eventually became a regular part of the dispute resolution process. While it was not always referenced specifically within collective bargaining agreements, it was regularly utilized as a step prior to arbitration.

As I worked with Steve on our organization's grievance mediation effort, I became familiar with the broader spectrum of his work. In particular, his efforts in Dispute System Design, described in more detail below, presented an opportunity for organizations to find better ways of resolving their disputes. Steve placed an emphasis upon building trust and respect between the parties, encouraging issue resolution and problem solving and managing conflict in a cost-effective way. In short, enabling the parties to resolve their disputes at the "shop floor" level rather than allowing the dispute to fester until a neutral third party could intervene and render a decision that may not always be the best decision for the workplace. He has worked with organizations to develop a system based upon their needs and then has

worked with them to develop a training program to introduce and maintain the system. With Steve's encouragement and support I established myself as a neutral arbitrator and mediator and became directly involved in several of his Dispute System Design efforts.

One of the most enduring efforts emerged in the early 1990s with a large organization that had just emerged from a difficult labor strike by the union's 21,000 members. The strike had taken its toll on both the employer and the union and the parties had negotiated language for their new agreement that required the establishment of an internal dispute resolution system that was intended to find a better way for the parties to interact with each other. Steve was brought in to assist in the development and introduction of the system and has worked with the parties continuously to enhance and maintain the system.

It has been my privilege to work with Steve since the beginning of the system and I can confirm that the system is still thriving today. The parties are able to talk to each other at the lowest possible level of a dispute and are provided the skills that will enable them to reach a satisfactory resolution. If their face-to-face discussions are not successful, then they are provided with a dispute resolution facilitator from within the organization who has been trained in the skills of facilitating disputes. This system has been well designed to encourage settlement at the lowest level of a dispute with the parties who have the most knowledge of the dispute without the intervention of an outside arbitrator or mediator.

Steve has served as a missionary for the resolution of labor-management disputes through a mediation process that leaves the final decision making with the parties. He has never strayed from his belief that the best solution to a dispute can be achieved when the parties work together toward a common resolution. In 1980, he founded the Mediation Research and Education Project (MREP) at Northwestern University, a not-for-profit corporation to encourage the use of grievance mediation. As President of MREP, Steve has convened conferences, trained mediators and advocates, and conducted research. Some of his research has focused on the level and type of satisfaction obtained through a process. It is not simply procedural satisfaction that is important but also substantive and psychological satisfaction. He has brought theory and practice together and is constantly fine tuning the process. He focuses not only on the skill sets of the mediators but also the skill sets of the advocates. He has been relentless in his efforts to improve the process over the last several decades. Throughout these efforts, Steve never forgets that it is the parties with the dispute who are the most critical part of the dispute resolution process.

Steve's efforts over the years have been central to the development of grievance mediation as a mainstay in labor-management relations. While the process had been utilized in various ways over the years, Steve brought it to the forefront and resuscitated a process that had long been dormant. Not only was there new interest by labor-management practitioners but also State and Federal agencies began to recognize the importance of the process. What was once an afterthought became a newly energized mainstay of the agencies.

Steve has worked continuously to keep the growing interest in mediation and its momentum growing through the publication of texts including *Getting Disputes Resolved*, *Designing Systems to Cut the Costs of Conflict* (1988) and *How Mediation Works, Theory Research and Practice* (2017), as well as articles based upon his research including *The Secrets of Successful Mediators* (2005).

It has also been my privilege to be mentored by Steve over the last thirty plus years. His guidance and encouragement have enabled me to establish a very diverse practice in labor-management dispute resolution. I treasure his effective advice and continuous support. And I have embraced the role of spreading the word about the value and effectiveness of having the parties resolve their own disputes at the lowest possible level. Steve's ability to take a process that had been long dormant and bring it to the forefront as a preferred method of resolving workplace disputes is a testament to his influence within the labor-management community. His ability to design dispute resolution systems that enable the parties on the "shop floor" to resolve their disputes in a satisfactory manner leads to an understanding and acceptance that everyone has the ability to reach a resolution if they embrace the theory of how mediation works and put it into practice on a daily basis.

Mediation Magic at First Sight Ann-Sophie De Pauw

It was one of those sunny fall days in Chicago when Prof. Steve Goldberg was teaching the Mediation course at Northwestern University. In 2010, as a PhD student and a visiting scholar at Kellogg School of Management, I was participating in its Certificate Program in Negotiation Teaching and Research, which included this course on mediation. Little did I know about what to expect of the format and the teacher. Meeting for the first time with Steve as one of his students was mediation magic at first sight. The domain of alternative dispute resolution was unfamiliar to me until then but has become a passion, surely instigated by the enthusiasm and expertise of the professor in the classroom. I remember the clock standing still for me and for the other students on those wonderful Friday afternoon classes in Chicago (Figure 3).



Figure 3. Steve Goldberg (6th from left) with 2010 class of Mediation students at Northwestern University, Evanston, IL.

Steve and I have been in touch ever since, meeting on a regular basis in France or the U.S.A., for teaching and research, and at conferences of the International Association of Conflict Management. Steve has always been a great mentor and friend, someone I could bounce ideas off, patient and open-minded, critically constructive and pushing me to go further. In the past years, we have been teaching Mediation courses together and I have been very fortunate to continue learning from the best.

You get no true resolution if you focus on getting the right answer (Steve Goldberg)

Having obtained his degree from Harvard Law School, Steve started teaching in 1965 at the University of Illinois, with courses on labor law and constitutional law. In 1973, he got appointed at Northwestern Law School, where is he now Emeritus Professor. At Northwestern University, he taught courses in law, while focusing on negotiation, deal-making, and dispute resolution at Kellogg School of Management. He found particular satisfaction in teaching to workers in labor-management courses and, in general, to motivated students who were there in their own time, wanting to learn out of intrinsic interest. As a law professor, Steve was heavily in favor of the Socratic dialogue, helping students to come to the best answer by questioning them, learning to analyze and think their way through problems, looking for the right answer. However, when starting to teach negotiation, unstructured back-and-forth dialogues in the classroom were more rule than exception, and this filled him with great joy. The parallels with his work on dispute resolution, where one will not get a true resolution when focusing on “the right answer,” were already present back then (Figure 4).



Figure 4. Steve Goldberg in the eighties at Northwestern Law School, Chicago, IL.

Steve's professional career took a new turn when joining Harvard Law School as a young visiting professor in 1979–80, teaching courses in labor law. By that time, he had become well known as a labor arbitrator, particularly in the coal mining industry, where he started off in 1973. In those days, the coal industry arbitration process did not include hearings before the arbitrator; instead, the parties conducted an informal hearing at the mine site, following which a transcript of the hearing was sent to the arbitrator for decision. When the process was amended by the parties, Steve was one of the first to come on the mine site to conduct a hearing.

In 1976, Steve was appointed to serve as an investigator on President Carter's Commission on Coal. His assignment was to investigate the rash of wildcat strikes ("wildcat" because they were not authorized by the miners' union) plaguing the coal industry. Steve interviewed dozens of coal miners, union leaders, and mine company managers, including the CEOs of all the major coal companies. These interviews began his education in the realities of labor relations in coal and formed the basis of his report to the Commission on Coal, as well as of his future work in coal industry labor relations.

I have never been interested in research just for the research, rather I prefer doing what interests me and what I want to find out. This involved sometimes doing things differently than had been done before, not always in line with peer practices, at the risk of hindering my career progress (Steve Goldberg)

In 1979, Steve's study on Wildcat Strikes came out, coauthored with Jeanne Brett. This paper investigated the causes of the coal mining industry strikes by means of questionnaires, interviews, and related data of 300 underground mines, with the aim to decrease the strike rates and offer a sustainable solution to what became a nationwide problem. Findings revealed that a problem solving relationship and management accessibility reduced the strike rates significantly. Also, arbitration appeared to be running short of exploring the interests of the parties as the same problems kept coming back, even after an arbitrator's decision seemingly resolved the dispute that had led to arbitration. The grievance system was distrusted by the miners, who regarded many of the arbitrators as biased in favor of management.

Steve's work subsequent to 1979 focused on the use of mediation, rather than arbitration, in resolving disputes arising under a collective bargaining agreement. His 1983 field experiment in the coal industry with Jeanne Brett described around 150 grievance mediations during two-six-month periods in four districts of the United Mine Workers of America. The study involved operators, unions, management, trained mediators, and investigated for the first time the effect of mediation on short-term outcomes other than the settlement rates and the efficacy of mediation in resolving grievances. Results showed that although various settlements for resolution were possible, mediation was capable of resolving 75–100 percent of all grievances, regardless of the issue, without recourse to arbitration. This paper was a groundbreaking contribution to the field of alternative dispute resolution and put mediation definitively on the map. Together with the Wildcat Strikes study of 1979 and the mediation work done by Steve, Bill Ury, and Jeanne Brett, it offered the input for the book *Getting Disputes Resolved: Designing Systems to Cut the Costs of Conflict*, coauthored with Ury and Brett in 1988. The book introduced the widely used Power–Rights–Interests model for resolving disputes and offered concrete guidelines for designing a dispute resolution system to help handle conflicts effectively. The book also contains a case study to illustrate the effective dispute resolution system that put an end to a long labor–management conflict (Figure 5).



Figure 5. Jeanne Brett and Steve Goldberg at home in Venasque (France), 2018.

Steve's book *Dispute Resolution: Negotiation, Mediation, and other Processes*, coauthored with Eric Green and Frank Sander provided a complement to *Getting Disputes Resolved*. The book was the first law school teaching book on dispute resolution, adopted by more than 60 different law schools, and won an award from the Center for Public Resources for the outstanding book on dispute resolution published in that year. The sixth edition, coauthored with Frank Sander, Nancy Rogers, and Sarah Cole, was published in 2012 and it is still widely used as a teaching and reference book in law schools throughout the United States. He further contributed to the education of lawyers and managers through Kellogg's Dispute Resolution Research Center (DRRC), a widely recognized international hub for research and education on conflict, dispute resolution, and negotiation. The DRRC also sponsored the Certificate Program in Negotiation Teaching and Research and supported students by providing grants and hosting numerous international visiting scholars.

I was one of these certificate students on whom Steve's teaching and mentoring had a strong influence, on my professional development and the career path I have taken afterward. It stands without saying that Steve's work has had an enormous impact on the academic community and most importantly on the dispute resolution practice at large. The legacy he leaves in the studies he conducted, the books he wrote for

teaching, research, and practice, the numerous students he has inspired, the dispute resolution projects he is still conducting to date. On a personal level, I got to know Steve as a calm and respectful person, persistent and disciplined with a focus on impact and relevance, a colleague and dear friend, a modest mediation giant. Thank you, Steve, for sparking the mediation light in my eyes.

Reflections on a Practice-to-Theory-to-Practice Award—Steve Goldberg

I am both humbled and pleased by the comments on my work as a dispute resolution teacher, practitioner, researcher, and writer. It is particularly gratifying that these comments come from friends who have been touched by my work in their different capacities—Ann-Sophie DePauw, as a student who experienced “mediation magic at first sight”; Sylvia Skratek, as a Union Director of Arbitration, whose initial skepticism about the virtues of grievance mediation was diminished by “Steve and . . . his missionary zeal for the process,” as well as her own research; and Donna Shestowsky, a law school professor of negotiation and dispute resolution, who wrote that “while Steve’s research was innovative, his ability to bring theory to practice was even more inspiring.”

Donna’s comment was particularly appropriate since it echoes the title of the award that I received in 2014, which was the stimulus for this outpouring of praise—the Jeffrey Z. Rubin Theory-to-Practice Award. Although I am grateful for the praise, and have the fondest of memories of Jeff Rubin, a good friend and impressive scholar, I should like to explain why, from my perspective, bringing theory to practice does not fully describe the work I have done in the dispute resolution field.

“Theory-to-practice” conveys, at least to me, that the theory is first developed intellectually, then, typically after experimentation, applied to introduce a new or revised dispute resolution practice. That is a quite different progression from that which has characterized my work. For me, the impetus for theory development has not been intellectual, but experiential—typically the experience of having participated in an unsatisfactory dispute resolution practice. That experience has then led me to theorize about why the practice was unsatisfactory, and how the unsatisfactory practice might be revised or replaced to ameliorate the elements that I theorized were the problem, and then to formally experiment with the revised or new practice before proposing that it be adopted. My approach, therefore, has been practice-to-theory-to-practice, with the first crucial step being my dissatisfaction with an existing practice, that dissatisfaction informing the theory.

For example, my work in developing grievance mediation as an alternative to grievance arbitration was not the product of intellectual theorizing about the advantages and disadvantages of mediation compared to arbitration, but of my years of experience as a coal industry arbitrator. That experience was the first step in leading me to believe that arbitration was not a satisfactory method of resolving coal industry grievance disputes, primarily because it often failed to unearth, much less resolve, the underlying reason for the grievance. This is best shown by my experience at one mine, at which, in my capacity as an arbitrator, I was called on to decide whether, in one case after another, as the grieving miner complained, a foreman had performed work that should have been assigned to a miner. The grieving miner prevailed in some of these cases, but not all, and the filing of similar grievances continued. It was apparent that my decisions were of little long-term value and that there was something that was missing, probably because neither party wanted to raise it at arbitration.¹

¹I eventually discovered that the real cause of all the grievances asserting that foremen were performing miners’ work was the miners’ belief that the foremen were assigning undesirable work to those miners whom they disliked. Because, however, foremen have considerable discretion in assigning work, prevailing in a grievance alleging discriminatory assignment of work would have been difficult. Hence, the miners decided instead of filing discriminatory assignment of work grievances, they would harass the foremen by constantly filing grievances charging them with doing miners’ work. Hence, the long string of such grievances, regardless of their outcome.

Further evidence that arbitration was not a satisfactory method of resolving coal industry grievances came from the research I conducted with Jeanne Brett on wildcat strikes in the coal industry.² Among the findings from that research was that many miners lacked confidence in arbitration, partly because they believed the arbitrators did not understand the realities of coal mining, and partly because they believed that the arbitrators were unfair and/or biased in favor of the coal companies. Together, the research results and my own experience as an arbitrator led me to the theoretical conclusion that a dispute resolution method that relied less on outside arbitrators to issue decisions, and more on resolutions that were the product of discussion among the parties, would be worth trying. Hence, grievance mediation, rather than grievance arbitration.

The last steps in this chain of events which led to the introduction of grievance mediation in the coal industry, and subsequently in many other industries,³ are indeed theory to practice, but to describe the entire chain in that fashion fails to give adequate weight to the initial practical experience and research that generated the theory.

Perhaps the best, or at least most interesting example of “practice to theory to practice” in my work began one day in 1980, when I received a phone call from union and management at Caney Creek, a coal mine in Eastern Kentucky.⁴ The dispute resolution practices at Caney Creek can only be described as dysfunctional. Strikes were constant, over 100 miners had been jailed for defying court orders not to strike, and the mine, which had been open only a few years, was on the brink of closing. Union and management blamed each other for the situation, and jointly asked me to come to the mine, investigate, and tell them who was right.

I mentioned this invitation to Bill Ury, who was a graduate student in anthropology at Harvard, where I was, at the time, a visiting law professor. Bill advised me not to accept the invitation to tell the parties which of them was “right,” since my decision in favor of one party or the other would not be binding, hence would serve only as a bargaining chip in their ongoing conflict. I was persuaded by Bill’s reasoning, so I declined the invitation to tell the parties who was “right,” offering instead to put together a team that would try to help them improve the dysfunctional dispute resolution practices⁵

The parties agreed, and every week or two for the next three months, Bill and I went to Caney Creek and talked to everyone we could . . . miners, union officers, company managers, corporate officers . . . in order to get a handle on the root causes of all the conflict. We shared what we had learned with Jeanne Brett, and the three of us developed a multipronged plan to improve the parties’ dispute resolution practices and bring peace to the mine. The plan was accepted by both the Company and the Union, and it worked sufficiently well to resolve disputes peacefully and improve the parties relationship that Caney Creek was able to remain open.⁶

Then, Jeanne, Bill, and I decided that we should write a book about what we had done and what we had learned. The first problem, however, was that we did not know how to describe the role we had played. We had not been mediators, because we had not worked on individual disputes, but on a dispute-filled relationship. And, although we had made various action suggestions, we had followed no explicit intervention model.

²Brett, J.M. and Goldberg, S.B. “Wildcat Strikes in Bituminous Coal Mining”. *Industrial and Labor Relations Review*, 1979, 2, 465–483.

³The Federal Mediation and Conciliation Service, which in the 1970s mediated only a handful of grievances, has recently been providing grievance mediation in approximately 1,700 cases per year. See FMCS 2016 Annual Report, page 23.

⁴I have elsewhere referred to this mine by the fictitious name of “Caney Creek,” and shall continue to do so here.

⁵Two factors that lent weight to Bill’s reasoning were (1) Bill was working at the time with Roger Fisher on *Getting to Yes* (1981), so he knew far more than I did about negotiation and dispute resolution, and (2) Bill was willing to be part of my dispute resolution team.

⁶There were some substantial bumps on the road to implementation of the plan, but they were eventually resolved. See Ury, Brett, and Goldberg, *Getting Disputes Resolved: Designing Systems to Cut the Costs of Conflict*, pp. 120–130 (1988).

Hence, we had three questions: (a) What had we learned from our study of the parties' dispute resolution practices that had guided our analysis and recommendations for action at Caney Creek? (b) Based on what we had learned, could we build a general theory that could be used to intervene in any long-term relationship threatened by the parties' inability to deal successfully with recurring disputes? and (c) What should we call our role and the process that we developed?

Initially, it was clear from our study that the parties' efforts to resolve the numerous disputes that had plagued their relationship had relied on rights and power procedures, whether structured (the contractual grievance arbitration procedure, court procedures) or nonstructured (strikes, threats to close the mine). It was equally clear that although there were informal discussions aimed at determining the causes of some of the disputes, those discussions were fruitless, often degenerating into accusations of bad faith and threats of reprisal. There was no established practice, procedure, or forum in which the parties were committed to focus on the interests (concerns, needs, fears) underlying the positions each took in dealing with their disputes. The failure of rights and power-based procedures in this relationship convinced us that a dispute resolution procedure that focused on interests had a markedly better chance of success than did rights and power-based procedures.

Based on what we had observed and not observed (the unavailability of interest-based procedures that might head off resort to costly rights and power procedures), we concluded that the primary focus of dispute resolution efforts at Caney Creek should be on the parties' interests, with rights and power procedures available only as backups in the event that interest-based procedures had difficulty in resolving the dispute or could not do so. We also concluded that a general theory that could be used to intervene in any long-term relationship threatened by the parties' inability to deal successfully with recurring disputes was that the focus of dispute resolution efforts should be changed from one that focused primarily on power and rights (strikes, courts, and arbitration) to one that focused primarily on interests.

We labeled what we had done "dispute systems design," and recognized that it encompassed several distinct steps that were not limited to interventions into labor-management conflict: (a) diagnosis of the reasons why unresolved disputes were destroying the parties' relationship; (b) design of a better system for resolving disputes; (c) implementation of that system; and (d) evaluation of the system. The appropriate title for an intervenor who works with the parties to design a better dispute resolution system seemed to us to be "dispute systems designer," so we assigned that title to such an intervenor.

As is evident, these theoretical constructs—dispute systems design and interests, rights, and power as distinct foci for resolving disputes—came after our experience at Caney Creek and were thoroughly informed by that experience. These theoretical constructs have since passed into general ADR practice, completing the transition from unsatisfactory practice to theory, and back into a better practice.⁷

The moral of all this is that "theory to practice," at least as applied to dispute resolution practice, may be better understood, or at least more likely to lead to better practice, if the initial theory development is a product of a thorough understanding, based on experience and/or research, of the unsatisfactory practice that one seeks to replace or reform. With that caveat to the theme of the Rubin Award, I am proud to have received the 2014 Rubin "Theory to Practice" Award.

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⁷Donna Shestowsky noted in her comments for this Tribute, "The fact that [the "interests, rights, power" model] stems from field research makes it very compelling."

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