# Book Review

## Dispute Intervention: No Easy Recipes

**Hizkias Assefa and Paul Wahrhaftig, Extremist Groups and Conflict Resolution: The MOVE Crisis in Philadelphia (New York: Praeger 1988).**

**Susan L. Carpenter and W.J.D. Kennedy, Managing Public Disputes (San Francisco: Jossey-Bass Publishers 1988).**

**Roger Fisher and Scott Brown, Getting Together: Building a Relationship that Gets to Yes (Boston: Houghton Mifflin Company 1988).**

Reviewed by Joseph B. Stulberg*

Hard cases make bad law, claimed Holmes. The effective rejoinder is that hard cases compel us to display and justify the governing normative principles of our constitutional scheme that are otherwise camouflaged when we routinely handle the "non-hard" case.

Hard cases for mediators perform the same function. They throw into relief those matters regarding case definition and selection, strategic options, and intervenor ethics that any mediation effort must address. They enable judicial administrators and mediation participants alike to gain a sharpened sense of which of these issues are settled, which remain controversial, and which matters are best resolved from the lessons of experience. Given the burgeoning explosion of court-annexed mediation programs to handle all kinds of docketed cases, sharpened insights about these matters must be warmly embraced.

The MOVE crisis was a hard case for mediators. *Extremist Groups and Conflict Resolution: The MOVE Crisis in Philadelphia*[1] [hereinafter *Extremist Groups*] gives us a breathtaking account of this social conflict that bristles with misunderstandings, escalating rhetoric, profound fears, competing legal principles, controversial law enforcement strategies, and wrenching political trade-offs. Well-motivated but unsuccessful efforts by concerned intervenors could not prevent the tangible loss of life, property, and financial resources that citizens of Philadelphia incurred during that 10-year period. As a case study, Extremist Groups should be required reading for all persons involved in matters relating to dispute

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1. H. ASSEFA & P. WAHRHAFTIG, EXTREMIST GROUPS AND CONFLICT RESOLUTION: THE MOVE CRISIS IN PHILADELPHIA (1988).

settlement. *Managing Public Disputes*[2] and *Getting Together*[3] offer prescriptive guidelines to advocates and intervenors that are designed to enable them to engage effectively in voluntary, non-trial settlement discussions; presumably, persons involved in the MOVE situation would have enhanced the possibility of promoting a non-violent settlement had they followed these principles. In Section I, I summarize the dynamics of the MOVE encounters; in Section II, I describe the basic claims of *Managing Public Disputes* and *Getting Together* and examine whether their insights could have been helpful in the MOVE situation. In Section III, I combine what I consider to be unassailable insights of these authors with my critique of some of their basic claims in order to stake out the critical agenda items for the expanded use of court-annexed mediation programs.

## I. THE MOVE CRISIS

There were two major encounters between the MOVE group and the city of Philadelphia; the second received nationwide attention. Each is summarized below.

### A. *Powelton Village, 1978*

MOVE is short for "The Movement." It is a racially mixed counterculture group consisting of no more than seventy-five adherents whose stated purpose was "stopping man's system from imposing on life ... stop[ping] industry from poisoning the air, the water, the soil ... put[ting] an end to enslavement of life—people, animals, any form of life. MOVE's work is to show people how corrupt, rotten, criminally enslaving this system is ..."[4]

MOVE's lifestyle reflected its opposition to what it viewed as modern technology and its consequences. Members minimized their use of machinery or electricity, ate no processed foods, bore children the "natural way" at home, insisted on strong family ties and marital fidelity, required everyone to participate in rigorous physical exercise, and disposed of their refuse by "recycling" it back to nature. The major exceptions to their antipathy towards technology were twofold: the accumulation of weapons, and the use of electrically powered bullhorns.

In 1973, six MOVE members moved into a home in Powelton Village, a racially integrated neighborhood in Philadelphia adjacent to two expanding university communities. Life-style differences quickly generated friction. Neighbors complained about garbage and fecal odor, rat infestation, inattention to the health and schooling needs of the children,

2. S. CARPENTER & W.J.D. KENNEDY, MANAGING PUBLIC DISPUTES (1988).
3. R. FISHER & S. BROWN, GETTING TOGETHER (1988).
4. H. ASSEFA & P. WAHRHAFTIG, *supra* note 1, at 11.

and various housing code violations. MOVE members announced, through the use of bullhorns during the late evening hours, that their neighbors' lifestyles offended them. Tensions mounted. MOVE housed approximately fifty dogs at its residence; when it applied for a dog kennel permit, Powelton neighbors appeared at the zoning meeting to oppose MOVE's application. MOVE members allegedly retaliated by picketing their neighbors' houses and threatening physical violence. The MOVE "car wash," a primary source of income, was shut down by the city for failure to obtain a license; neighbors had complained about the traffic congestion and excess water and mud in the streets as a result of this popular operation.

As the months passed, MOVE members expanded their activities to other parts of the city. MOVE members gained public attention when they demonstrated against the Philadelphia Zoo for caging animals; they disrupted rallies, conferences, Board of Education meetings, and neighborhood block parties in their efforts to propagate their philosophy. When arrested by police on such charges as disorderly conduct, failure to disperse, and resisting arrest, MOVE members charged that they were beaten. When they appeared in court, they denounced the judicial proceedings as part of the oppressive system that needed dismantling; they refused to be represented by lawyers, claiming that none would understand them. When their unconventional behavior resulted in receiving steep contempt sentences, MOVE claimed that it was simply being harassed for its political and religious beliefs.

The turning point occurred in March, 1976. MOVE members held a party to celebrate the release from jail of a group of their colleagues. A fight broke out with the police. Bricks were thrown. Several police officers and MOVE members suffered injuries. Three MOVE leaders were convicted and sentenced to prison; freeing their brethren became MOVE's major focus. In July, 1976, the city announced plans for an inspection of the MOVE house by police, health officials, and social workers. MOVE refused entry, building an eight-foot wall to keep the inspectors out. No one entered. In May, 1977, a MOVE member was evicted from a nearby apartment; he resisted, a scuffle ensued, and he was arrested. MOVE members appeared on the porch of their now barricaded house, wearing uniforms and carrying guns. Neighbors called the police. More than 200 police were sent to the area; they established stakeouts in nearby apartment buildings and cleared the streets. After nine hours, the confrontation was defused without violence. Eleven MOVE members were charged with weapons violations; the city vowed to maintain a massive police presence to arrest the MOVE members on these charges when they stepped outside their headquarters. About 100 plainclothes police were deployed around the clock in the area. The siege had begun.

The siege lasted ten months; it cost the city $1.2 million. During the siege, sympathetic groups and individuals brought food and supplies through police lines to sustain MOVE. Several neighborhood groups formed; some wanted the city to forcefully address the situation while others wanted the city to withdraw the police so that neighbors could resolve the matters themselves. When the prolonged presence appeared to be self-defeating and early efforts to negotiate a settlement failed, the city sought an order to cut off utilities and prevent the entry of food, water, and other necessities; its stated purpose was to starve out the occupants and arrest them when they appeared. Sustained efforts by citizens to construct a negotiated agreement met with temporary success in May, 1978: hopes increased. But the agreement broke down. The court approved an order to arrest all persons in the MOVE residence. Three hundred armed police officers and firefighters arrived to enforce the order. A shootout occurred. One police officer died; other police, firefighters, and MOVE members were injured. Within two hours of MOVE's surrender (an event that was televised locally), city bulldozers razed the house.

B. *Osage, 1985*

New players and new sites, but the vestiges of the previous encounter became the seeds of a profound disaster. MOVE members were brought to trial in May, 1979 for charges stemming from the shootout at the Powelton house. The trial, quiet through the first month, became a circus. At a cost of twenty-one months and more than four hundred thousand dollars, nine MOVE members were convicted of third-degree murder; they were sentenced to prison terms of thirty to 100 years. While that trial was in progress, the three police officers who had been charged with beating a MOVE leader as they removed him from the house during the surrender were also being tried; they were acquitted by a trial judge who ordered a directed verdict in their favor prior to counsel's closing arguments.

A few members of MOVE moved into a home on Osage Avenue in 1981. After an initial peaceful period, the lifestyle conflicts that plagued the Powelton relationship began to emerge. Neighbors complained to city officials. A different administration, headed by Mayor Wilson Goode, was elected soon thereafter but chose to deflect the complaints. During 1984-85, tension on Osage Avenue escalated dramatically. MOVE used its loudspeaker incessantly to preach its message for freeing political prisoners; public employees who tried to engage city officials in discussion with MOVE representatives were directed to cease such interaction because the MOVE situation was "in fact a police matter."[5] In early

5. *Id.* at 109.

1985, MOVE boarded up its home and fortified it by building a bunker on the roof. Over its loudspeaker system, MOVE threatened to do physical harm to any person—mayor, police, health inspector, utility employee or neighbor—who would dare come in the MOVE residence. On May 2, 1985, neighbors reported that they saw a five-gallon gasoline can being hoisted to the MOVE rooftop; the next day, the Mayor, concluding that an armed conflict with MOVE was a probability, instructed the District Attorney to reexamine the legal grounds for the city taking action against MOVE. An application for search and arrest warrants on firearm charges was developed. On May 7, the Mayor authorized the police commissioner to prepare and execute a tactical plan to evict MOVE and arrest some members on misdemeanor charges. The Police Commissioner delegated the task to three officers. On May 11, city officials obtained search and arrest warrants. On May 12, the mayor, following a briefing by the police commissioner, approved the eviction plan as developed by the three officers. That day, police evacuated all Osage Avenue residents. On May 13, 1985 at 5:35 a.m., the police commissioner, standing near the MOVE residence, announced over a bullhorn that four people inside MOVE's house were named in arrest warrants and had fifteen minutes to surrender. MOVE used its loudspeaker to announce its refusal. At 5:50 a.m., police fired tear gas and smoke projectiles to enable officers to get into position. In the following ninety minutes, police shot at least 10,000 rounds of ammunition. By 10:40 a.m., the front of the MOVE house had been blown out, but MOVE members had not budged. At 3:45 p.m., Mayor Goode, in a televised news conference, stated his intention to seize control of the house. The fateful steps are described:

> [T]he police commissioner ... instructed the head of the Bomb Disposal Unit to assemble an explosive package to dislodge the bunker that MOVE had constructed on top of their house. It would be dropped from a helicopter. At 5:27 p.m., the bomb was dropped. It failed to dislodge the bunker immediately, but it ignited the gasoline tank and started a fire. The police and fire commissioners let the fire burn. The flames quickly engulfed the house and spread to neighboring homes. At 6:32 p.m., the fire department turned its hoses on the fire for the first time ... [T]he flames ... were not contained until 11:41 p.m. By then nearly two square blocks of residential neighborhood had been burned. Fire destroyed 61 homes, damaged 110 others, and killed 11 occupants of the MOVE home, 5 of them children. Some 250 men, women and children were left homeless. Of those in the MOVE's house, only one woman and one child survived....[6]

## II. Conflict Management Processes and Skills

I start from the proposition that the outcomes in both situations were

6. *Id.* at 113.

not desirable. The question is how they could have been avoided.

*Getting Together* defines a good working relationship as one that is able to "deal well with differences."[7] *Getting Together* separates relationship issues—those that concern the way we deal with people—from the substantive issues that might typically be included in an agreement. It argues that while both sets of issues must be addressed, their analysis and resolution should not be linked to one another; a relationship should not be conditioned upon one's adversary making a concession nor should it be established by trying to "buy" it by unilaterally making an important substantive accommodation. A robust relationship, *Getting Together* claims, should be capable of efficiently producing durable outcomes that satisfy the competing interests as well as possible, with little waste, and in a way that appears legitimate in the eyes of each of the parties *even in the face of differences in values, perceptions, and interests.* That is, a good working relationship is most important in precisely those situations in which the most serious disagreements arise.

*Managing Public Disputes* offers contrary advice. It maintains that conflicts between parties over their ideologies are not amenable to constructive negotiations because two ingredients are absent: it is not possible to reframe the issues into solvable increments and there is not an effective core of moderate people on both sides of the argument to carry on a dialogue. *Extremist Groups* suggests that MOVE leaders were "consciously irrational." One is reminded of the negotiating dilemma created by Schelling's driver who, in playing chicken, creates a quandary for his adversary by making an "Irrevocable commitment." Were the city participants correct to treat the Osage events as conflicts over ideology and thereby discard the use of nonviolent conflict resolution processes in the Osage incident by making it "a police matter"?

*Getting Together* seems on better grounds here. Consider the difficulties: who decides what an "extremist" group — or "extremist" position — is? Is MOVE's refusal to register the births of their children with the Health Department an extreme position? Citizen negotiators Palmer and Gaskins spent nine months working on behalf of MOVE to establish a dialogue with various city officials and develop viable settlement options. One of Gaskins' imaginative proposals allowed the city not to make an exception to ordinary legal procedures in dealing with MOVE prisoners but allowed MOVE members not to remain incarcerated; would the absence of such imagination be identified as just that—lack of vision—or would we be inclined to label MOVE's proposal to "let the prisoners off" as "extremist"? The danger of characterizing negotiating groups—or their proposals—as extremist is that it gives conceptual support to the notion that their proposals require "all or nothing"

7. R. FISHER & S. BROWN, *supra* note 3, at 14.

responses, thereby aborting the possibility of dialogue. Rarely are we in such situations.

But how, and with whom, does one try to establish these "working relationships"? *Getting Together* addresses the first concern but ignores the second; *Managing Public Disputes* offers valuable insights about both. The premise of *Getting Together* is that while two or more parties are required for having a relationship, it takes only one to change its quality. It sets out a series of guidelines that are characterized as "unconditionally constructive;" they are designed to improve one's ability to work together with another person or group and simultaneously advance one's substantive interest. The recipe consists of six ingredients: (1) balance emotions with reason; (2) try to understand them; (3) consult them before deciding on matters that affect them; (4) be reliable; (5) be open to persuasion and try to persuade them; and (6) accept them as worthy of our consideration, care about them, and be open to learning from them.

How far do these guidelines take us? At first glance, these rules appear to be nothing more than an admonition to act intelligently. But there is more to it. For instance, *Getting Together*'s discussion of reliability contains thoughtful insights regarding the differences between trustworthiness, reliability, and risks. But the tone of "do-goodism" remains. *Getting Together*'s authors repeatedly - and defensively - defend their comments from the anticipated charge of being "unrealistic" or "too altruistic". They assert: "These guidelines are not advice on how to be 'good', but rather on how to be effective. They derive from a selfish, hard-headed concern with what each of us can do, in practical terms, to make a relationship work better. The high moral content of the guidelines is a bonus."[8] But *Getting Together* cannot have it both ways.

What gives these guidelines their apparent "high moral content" is what the authors refer to as their reciprocal character. That is, they claim that these guidelines substantively do not give an advantage to any particular party; in Rawlsian terms, they are fair procedures arrived at in the original position.[9] What *Getting Together* asserts is that if all parties to a dispute abide by them, no one's self-interest need be compromised; going even further, *Getting Together* claims that acting on these guidelines even when the other parties violate them is not contrary to one's self-interest. But these arguments fail at both the conceptual and practical level.

The *Getting Together* principles gain their "high moral content" not from the authors' notion of reciprocity (which they take to be a rather

8. *Id.* at 38.
9. J. RAWLS, A THEORY OF JUSTICE 17 (1971).

simplistic interpretation of the Golden Rule) but from the related philosophical principle of universilizability. In trying to be "realistic," *Getting Together* argues that "[r]eliance on reciprocal good is not a sound foundation on which to build a working relationship."[10] "To pursue a comprehensive approach resting on the premise that others will follow our example is highly risky and unwise."[11] Yet, the authors claim that what makes their prescriptions plausible is that they pass requirements for a successful strategy that themselves are non-biased. How can these two strands mesh?

*Getting Together* confuses the roles that the "unconditionally constructive" principles play. The universalizability principle helps us to determine what constitutes the morally right course of action; *Getting Together*'s warning about reciprocity is based on predicting whether the other parties will *in fact* act in a way that we believe is justifiably universalizable. These are consistent claims, but the next step is debatable. All *Getting Together*'s prescriptions are, to use lawyer's jargon, procedural; they are formal requirements for conduct. But are there no substantive (material) principles that should be part of the building blocks for determining what is the right thing to do when building a relationship? For instance, should substantive principles of equality be a part of an "unconditionally constructive strategy"? That is, can two parties, one of whom is extremely wealthy and the other desperately poor, establish a robust working relationship without having to address the question of restoring some material equity to the situation? While the answer might be arguable, *Getting Together* cannot blithely ignore the challenge, for either answer undercuts its thesis at a practical level.

If the only material requirement supporting the "unconditionally constructive strategy" is to advance selfish interests (or, more charitably put, self-interest), then the practical relevance of *Getting Together*'s advice becomes questionable. For instance, what is a negotiator supposed to do if his negotiating counterpart does not understand him? Surely the Powelton residents would be justified in believing that MOVE members did not try to understand their concerns, fears, and aspirations. Assume that they had made a good faith effort at understanding the MOVE philosophy. What were they then supposed to do? This is where *Getting to Yes*,[12] the precursor to *Getting Together*, enters. Presuming that one negotiates on a principled basis, *Getting Together*'s advice to Powelton residents would be that they should develop their best alternative to a negotiated agreement (BATNA). Given that the driving substantive principle of that negotiating method is also that of promoting

10. *Id.* at 33.
11. *Id.*
12. R. FISHER & W. URY, GETTING TO YES (1981).

one's self-interest, it is not implausible to argue that the actual outcome of the first MOVE encounter was in fact the Powelton residents' BATNA. But this consequence does not comport with our intuitions about what a desirable outcome in this situation would have been.

*Managing Public Disputes* is more helpful to us in determining with whom to establish a working relationship and how to achieve it practically. Who should have been a party to the discussions in the Powelton MOVE encounter? A variety of entities emerge. Neighbors formed three different groups: Powelton United Neighbors (anti-police); Powelton Emergency Human Rights Committee (anti-MOVE); and the Tuesday Night Group (a 'good neighbor' group trying to reconcile competing claims). The "City" could readily be subdivided into the Mayor's office, the police, the District Attorney's office, and the judge. The intervenor's challenge is to construct a meeting format that enables the various discussions to proceed compatibly. *Managing Public Disputes*'s bias would be to have representatives of all these constituent entities convene together, using sub-groups to deal with more focused concerns. Such an arrangement might strike the average reader as unwieldy and unworkable, but *Managing Public Disputes* offers detailed suggestions for managing such a dialogue. The skeptic need only be reminded that the heroic efforts of Palmer and Gaskins that led to the agreement on the fifth of May systematically excluded participation by the neighborhood residents; had they been included even in an advisory or consulting capacity, the collective support and understanding of the terms of the agreement might have generated less tension and apprehension regarding the compliance problems that later plagued and ultimately destroyed that document.

Even if discussions occurred bilaterally among the various parties rather than all parties meeting together in one encompassing forum, *Managing Public Disputes* provides helpful suggestions for strategically tracking everyone's interests, positions, and concerns so that those who assume responsibility for managing the discussions gain maximum leverage for generating flexibility and movement by the negotiating parties; *Managing Public Disputes*'s discussion of and suggestions for analyzing a conflict situation constitute an extremely valuable contribution to the literature and practice of nonviolent conflict resolution. The specific components for producing constructive dialogue become critical. Developing ground rules for discussion, integrating the decision-making procedures of the various parties into the negotiating timetable, defining issues in non-partisan terms, selecting discussion strategies that enable parties to continually build upon developing settlement components, dealing with the media in a manner that enhances public comprehension, protecting constructive discussions from being sabotaged by unpredictable developments, and creating mechanisms for gaining compliance

with negotiated outcomes are just some of the guideposts around which effective negotiations pivot. There is no longer any excuse for intervenors, however well-intentioned, to feel or be at a loss for how to proceed. But neither are there any shortcuts or "quick fixes". The job of building agreements frequently is a time-consuming, exhaustive undertaking that tries the collective patience, imagination, and resourcefulness of all participants. No one can guarantee successful outcomes if they follow procedures and analyses such as those offered by *Managing Public Disputes*, but it is certainly true that the "do whatever works" philosophy for intervenors is as false as it is unhelpful.

## III. Design and Implementation of Dispute Settlement Programs

What relevance do the above comments have for those persons professionally involved in dispute resolution and those legislators, court administrators and judges who establish or monitor court-annexed mediation programs?

The MOVE incident provides a dramatic challenge to the alleged distinction between process and substance that *Getting Together, Managing Public Disputes*, and others routinely advance. While no one contests the proposition that some matters relate to concerns of procedure and others to substance, what frequently creeps into the discussion is the claim that intervenors need to be primarily "process" rather than "substantive" experts. Indeed, one frequent criticism of lawyers serving as mediators is that they do not, as a group, pay sufficient attention to process concerns. But part of the "process" is being perceived as credible by the disputants. Establishing that credibility in the MOVE scenario required Palmer and Gaskins to ". . .literally almost live in MOVE's compound six to nine months, day and night."[13] All, of course, without pay. Would members of the Society of Professionals in Dispute Resolution, for example, be willing to make a similar commitment of time and energy? The notable absence of any trained mediators in recent explosive racial, religious, and ethnic controversies in the major cities of New York, Miami, and Chicago suggest that the professional dispute resolvers have chosen to ignore commentator James Laue's perceptive counsel that since good crisis intervention consumes much political capital, "that capital should be built between the third party and other parties in non-crisis situations."[14] That insight, of course, is at odds with the professional's claim that he or she can serve in any kind of dispute

13. H. Assefa & P. Wahrhaftig, *supra* note 1, at 81.

14. *Id.* at 135, *quoting* Laue, *Third Party Roles in Community Conflict: The MOVE Experience*, 2 Conflict Res. Notes 4, 14 (1986).

because of his or her expertise in "process." Effective mediation for certain situations is not consistent with the image of a jet-set mediator.

But intervenor credibility also stems from the fact that he or she adds something constructive to the discussion; a knowledge of some aspects of the matters in dispute is essential in order for one to appreciate real-world constraints and to be creative in developing options to honor them. Gaskins' knowledge of the criminal law process was critical to breaking the impasse that had developed in the Powelton crisis. But if credibility is established by parties having confidence in both the person and his or her knowledge, then it seems difficult to object to legislators who impose academic and professional qualifications on mediators serving in court-annexed programs in the probably justified belief that parties and their counsel would have confidence in such individuals. Yet, much ink has been spilled lately claiming that imposing such qualifications for mediator service arbitrarily excludes competent persons from serving in the fastest growing sectors of mediation practice. While I share the concern that such qualifying guidelines will generate panels of mediators serving in court-based programs that have a disproportionately fewer number of minority and female persons who are otherwise competent to mediate, I am not convinced that the way in which to guard against that development is to deny the relevance of professional credentials.

The MOVE experience also presses us to examine the mediator's standard rhetoric regarding neutrality. One can justifiably criticize the intervenor's behavior in the first MOVE crisis as being nonneutral in an essential sense when, in the guise of a mediator's settlement proposal, he regurgitated terms that were practically identical to all of those being advanced by the city.[15] But how far does the concept of neutrality properly extend? Anyone raised in a conventional environment must certainly be able to empathize with the exasperation that Powelton residents, city officials, and various intervenors experienced in dealing with the MOVE members. But there is an underlying sense pervading the attitude of the various players, including the intervenors, that "in the end, you (MOVE) should do what everyone else believes is reasonable." Is that consistent with a posture of neutrality?

The same attitude is displayed by court-designated mediators who admonish the stubborn party that it had better change its tune or the court will dictate an outcome. If *Getting Together* is correct in asserting that it is just in those situations when differences are most dramatic that we must redouble our efforts to sustain a working relationship, then perhaps it is not misplaced to demand that our mediators resist natural inclinations borne of training and experience to conclude what things are possible and what are not. But there surely are limits to this

15. *Id.* at 53.

posture that are grounded in normative political commitments, not simply fatigue or lack of imagination; articulating what they are, or at least a framework for putting the question, remains a challenging agenda item for dispute intervenors.

The image suggested by *Getting Together, Managing Public Disputes*, and others, is that since neutral intervenors are "process experts" only, no behavior or principles serve to offend or restrict them from serving in a dispute. Our experience suggests the contrary. Every intervenor in the MOVE crisis was committed to developing settlement terms that would avoid acts of violence; others were deterred from serving for fear that their agency's budget would be decimated by disgruntled city officials. What other substantive positions shape the mediator's role? Frequent candidates are that the mediator of a divorce proceeding has an affirmative duty to protect the interests of the children, or the lawyer/mediator has an ethical duty to prevent a pro se party from agreeing to settlement terms that the lawyer/mediator knows are substantially less generous than those accorded to that party by law. The challenge of the meaning of a mediator's neutrality is put in its starkest terms when dealing with an "extremist group" such as MOVE because that group claims to reject as legitimate the fundamental institutions and values of the society of which the mediator is a part. How can the mediator be "neutral" and simultaneously remain committed to the very institutions that one party is explicitly rejecting? In court-annexed mediation programs, the dilemma arises when someone is mediating a dispute involving laws whose application one party is trying to escape because it believes them to be oppressive, unfair, wicked, or self-destructive. Can the mediator ignore those laws or escape their influence if the opponent is intent upon having them apply? Developing a conceptual account of the role of the court-appointed mediator who is someone other than a compliance officer remains an urgent task.

If claims of "situational mediator ethics and neutrality" lose their luster upon closer examination, we certainly are inclined to believe that mediator tactics and procedures vary according to context. *Managing Public Disputes* portrays in illuminating detail the methods that intervenors of multi-party public controversies dealing with land use, water resources, or garbage disposal should deploy in gathering initial information, identifying appropriate negotiating parties, and gaining commitments from all to a detailed set of groundrules that shall govern the discussions. Most do not believe that such a panoply of arrangements are required for a straightforward mediation of a marital dissolution or a small claims court matter; most mediator training programs reflect this bias. But perhaps we are being shortsighted in this regard. Structuring the discussion of interested grandparents in a marital dissolution mediation immediately takes on the characteristics of intervening in

multi-party disputes. Guiding settlement discussions as a court-appointed Special Master for the Agent Orange litigation, the RICO charges against the Long Island Lighting Company that are tied to legislative approval of a negotiated agreement to close a nuclear power plant, or the conflicting claims of twenty-seven parties to litigation arising from the collapse of a bridge demand just the kind of meticulous care, concern, and process that a MOVE intervention would require. We must honestly examine whether our reluctance to be open to such considerations in court-annexed mediation systems stem from institutional concerns regarding efficient case processing, limited economic resources, and a general impatience for seemingly protracted settlement discussions rather than from the allegedly inherent differences between case types.

Perhaps most fundamentally, we do not know what constitutes a case. At one level, of course, the answer is obvious: it is a matter defined by the legal claims being pressed. In court-annexed mediation programs, it is that legally defined matter that is typically referred to mediation. That notion of a case is useful but not dispositive. Some matters involving neighbors, for instance, are referred to mediation prior to formal legal charges being filed, so the agenda of claims eligible for mediation is not firmly established. But many mediation advocates claim that part of the value of a mediated negotiation process is that parties can address and resolve matters of fundamental concern to them whether or not such concerns constitute legal causes of action; defendants in employment discrimination cases, for example, are arguably more amenable to considering settlement options if they can also candidly discuss and develop measures to handle morale problems that might stem from such a resolution, even though morale consequences are irrelevant to the legal claims at issue. But if those matters can be negotiated, what else is eligible? Surely lines must be drawn so that every mediation session is not converted into a long-term psychological counseling session or a searching seminar on one's philosophy of life; at the same time, however, court-referred mediation conferences should be something more than an intervenor's assessment of the strengths of the competing legal cases. Drawing that line is a constant challenge. Imagine the surprise a mediator would have experienced had some of the Powelton residents filed misdemeanor claims against the MOVE members for harassment and the matter was referred to mediation. What would have been the parameters of the "case" she would have addressed?

There are, of course, answers to these questions. The value of examining the hard case for mediators is that it exposes our fundamental beliefs regarding the goals and value of mediated negotiation and its appropriate context of application. It helps illuminate the tension felt between those who advocate its use as a vehicle of democratic decision-making and those who value it as an efficient tool of court administration;

it reveals the trade-offs we inevitably make when deciding which matters should be referred to mediation, the extent of the resources allocated to serve that caseload, and the qualifications of the persons authorized to serve as mediators. As the authors of each of these books remind us, we must combine confidence in what we have learned works well in dispute resolution activity with a healthy dose of humility based on how little we know about the "laws" of human behavior. There is no magic in dispute resolution. In the best tradition of the American Pragmatism with which Holmes is frequently identified, we must proceed to explore the possibilities and limits of varying dispute settlement processes with that experimental frame of mind that enables the life of the process to be not dogma but experience.