

Washington University Journal of Law & Policy

New Directions in Community Lawyering,
Social Entrepreneurship, and Dispute
Resolution

Introduction

Karen Tokarz^{*}
Geetha Rao Sant^{**}

This volume on *New Directions in Community Lawyering, Social Entrepreneurship, and Dispute Resolution* continues a growing tradition of cutting edge scholarship in the field of dispute resolution published by the *Washington University Journal of Law & Policy*, in collaboration with the Washington University School of Law Negotiation & Dispute Resolution Program. In recent years, the *Journal of Law & Policy* has aspired to become a leading publisher of scholarship on Alternative Dispute Resolution (ADR) and has published many important articles by top legal educators and practitioners in the field.¹ This collaboration has produced four, prior

^{*} Charles Nagel Professor of Public Interest Law & Public Service, Director, Negotiation & Dispute Resolution Program, and Director, Civil Rights & Community Lawyering Clinic, Washington University, St. Louis, Missouri.

^{**} Co-Director, Entrepreneurship & Intellectual Property Clinic and Director, Entrepreneurial Business Organizations, Washington University, St. Louis, Missouri.

1. Practitioners and academics whose work addresses dispute resolution published in the *Journal* include Jess Alberts, Marilyn Peterson Amour, Gordon Bazemore, Beryl Blaustone, Brenda Bratton Blom, Susan Brooks, Jennifer Gerarda Brown, Martha Brown, James Cavallaro, Nancy Cook, Charles Craver, Kimberly Emery, Kenneth Feinberg, Kenneth Fox, Jeff Giddings, John Haley, Art Hinshaw, Paul Holland, Carmen Heurtas-Noble, Jonathan Hyman, Carol

groundbreaking volumes on ADR, including *New Directions in ADR and Clinical Legal Education*,² *New Directions in Restorative Justice*,³ *New Directions in Negotiation and ADR*,⁴ and *New Directions in Global Dispute Resolution*,⁵ as well as a series of volumes focused on *Access to Justice*, several of which address negotiation and dispute resolution issues.⁶

In winter 2014, the Negotiation & Dispute Resolution Program joined forces with the *Journal* to host a scholarship roundtable titled *New Directions in Community Lawyering, Social Entrepreneurship, and Dispute Resolution*. The participants explored new and exciting dispute resolution developments in the realm of community lawyering and social enterprise, and this remarkable fifth ADR volume is the product of that roundtable. The authors in this volume are at the forefront of innovative teaching, practice, and scholarship in community lawyering, social entrepreneurship and dispute resolution.

Perhaps now more than at any other time in recent history, the practice of law is changing in unexpected ways in the United States and around the world. New professional roles for lawyers are evolving, litigation is no longer the default dispute resolution method, and transactional legal practice has expanded in innovative directions. Alternative Dispute Resolution—an umbrella term for a range of dispute resolution processes that occur largely outside the courts and include negotiation, conciliation, mediation, dialogue facilitation, consensus-building, and arbitration—has emerged as a principal mode of legal practice in virtually every legal field and in virtually every country in the world.⁷

Izumi, John Lande, Wilma Liebmann, Leslie Levitas, Bobbi McAdoo, Carrie Menkel-Meadow, Mary Anne Noone, Lola Akin Ojelabi, Sharon Press, Jennifer Reynolds, Kathryn Rimpfel, Mara Schiff, Andrea Kupfer Schneider, Sunny Schwartz, Stephen Sonnenberg, S.I. Strong, Karen Tokarz, Mark Umbreit, Lode Walgrave, and Brenda Waugh.

2. See generally 34 WASH. U. J.L. & POL'Y 1 (2010).

3. See generally 36 WASH. U. J.L. & POL'Y 1 (2011).

4. See generally 39 WASH. U. J.L. & POL'Y 1 (2012).

5. See generally 45 WASH. U. J.L. & POL'Y 1 (2014).

6. See generally 1, 4, 7, 10, 12, 16, 19, 22, 25, 31, 37, 38 WASH. U. J.L. & POL'Y 1 (1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2009, 2011, 2012). All of these volumes can be accessed at http://openscholarship.wustl.edu/law_journal_law_policy/.

7. See, e.g., Karen Tokarz & V. Nagaraj, *Advancing Social Justice through ADR and Clinical Legal Education in India, South Africa, and the United States*, in THE GLOBAL

Vast changes in our domestic and global economies are necessarily transforming how communities and lawyers provide services to their constituents. As several of the articles in this volume discuss, innovation and entrepreneurship are driving social change in ways previously limited to commercial endeavors. New social enterprise models encompass unique social impact investing and shared economy models within a myriad of new entity forms such as low-profit limited liability companies (L3Cs), benefit corporations, and social purpose corporations. These new legal and financial social impact models provide an expansive base for organizations in the public sector and require the equal expansion of our legal education and legal practice methodologies. Creative ADR approaches are crucial to the successful development and growth of new social entrepreneurship models.

Almost all law schools in the United States and elsewhere now offer courses in negotiation and dispute resolution—a generational shift from three or four decades ago when few if any law schools offered such courses. Some law schools now require first-year students to take a problem-solving, negotiation, or dispute resolution course, such as Hamline University (Practice, Problem-Solving, and Professionalism), the University of Missouri (Lawyering: Problem-Solving and Dispute Resolution), and Washington University (Negotiation). And, several law schools have gone a step further—developing dispute resolution clinics,⁸ community lawyering clinics,⁹ and entrepreneurship clinics,¹⁰ at both the domestic and international levels, that embrace dispute resolution issues, skills, and values.

Many legal educators believe dramatic curricular reforms are essential if we are to prepare graduates to practice in a legal world in which negotiation, mediation, and other forms of dispute resolution

CLINICAL MOVEMENT: EDUCATING LAWYERS FOR SOCIAL JUSTICE 253 (Frank Bloch ed., 2010).

8. Matthew Osborne, *Alternative Dispute Resolution and Clinical Legal Education in Australian Law Schools: Convergent, Antagonistic, or Running in Parallel?*, 14 J. PROF. LEGAL EDUC. 97, 101 (1996).

9. Karen Tokarz, Nancy L. Cook, Susan Brooks & Brenda Bratton Blom, *Conversations on “Community Lawyering”: The Newest (Oldest) Wave in Clinical Legal Education*, 28 WASH. U. J.L. & POL’Y 359, 401 (2008).

10. Susan R. Jones & Jacqueline Lainez, *Enriching the Law School Curriculum: The Rise of Transactional Legal Clinics in U.S. Law Schools*, 43 WASH. U. J.L. & POL’Y 85–127 (2013).

are everyday occurrences. Some argue legal education needs to incorporate problem-solving, negotiation,¹¹ dispute resolution, and transactional perspectives and skill development throughout the law school curriculum.

Both new and experienced negotiation, dispute resolution, and transactional teachers, including those who attended the roundtable and those whose work is featured here, are committed to examining the world of emerging legal practice in an effort to foster improvements in the teaching and practice of negotiation and dispute resolution, the understanding of conflict in all sectors of legal practice, and the preparation of lawyers for lawyering in the twenty-first century. Like others across the country and the world, they are reexamining what has been taught for many years, and rethinking what is and is not, what can and cannot be, and what should or should not be taught in negotiation and dispute resolution,¹² community lawyering, and social entrepreneurship courses and clinics. In our view, the scholarship in this volume is a superb example of why dispute resolution, community lawyering, and social entrepreneurship scholarship is important to legal education and legal practice; why faculty in these areas should publish; and how this work significantly and uniquely benefits the academy, the legal profession, and societies all over the world.

* * *

The first article in this volume *Transactional Legal Services, Triage, and Access to Justice*,¹³ by Paul Tremblay, Clinical Professor and Associate Dean of Experiential Learning at Boston College Law School, thoughtfully explores the growing, unmet legal needs of emerging start-ups and small businesses, noting the greater likelihood of their success with legal assistance. He also addresses the growing debate among public interest lawyers about the pros and cons of the

11. Howard E. Katz, *Negotiation as a Foundational Skill*, 12 TENN. J. BUS. L. 168 (2011) (arguing that negotiation should be a required law school course).

12. See, e.g., RETHINKING NEGOTIATION: INNOVATIONS FOR CONTEXT AND CULTURE (Christopher Honeyman, James Coben & Giuseppe De Palo eds., 2009); VENTURING BEYOND THE CLASSROOM (Christopher Honeyman, James Coben & Giuseppe de Palo eds., 2010).

13. Paul R. Tremblay, *Transactional Legal Services, Triage, and Access to Justice*, 48 WASH. U. J.L. & POL'Y 11 (2015).

provision of pro bono transactional legal services for private entrepreneurs and business owners, whether it be via traditional public interest legal services providers, law school clinics, or private law firm pro bono programs.

In analyzing the trade-offs, Professor Tremblay cites the point made by many, including Professor Rebecca Sharpless: “A central—if not *the* central—challenge for social justice lawyers is how, in a world of scarce resources, they should prioritize their goals and methods to maximize positive social change. We are constantly looking for practice visions to guide our allocation of scarce human capital.”¹⁴ He then explores the policy justifications for allocating scarce pro bono lawyering resources toward enterprises that may not have any direct effect on the day-to-day struggles of low-income families living in disadvantaged communities. He argues that while it is usually not justified for a nonprofit public interest legal services provider to allocate scarce resources to “purely entrepreneurial efforts,” it may be justifiable to allocate those resources to more collective entrepreneurial efforts of underserved communities. In the end, he concludes that the provision of pro bono transactional legal services private entrepreneurs and business owners is more defensible by law school clinics and public interest law firms because of the differing missions of those institutions.

Deborah Burand is Clinical Assistant Professor and Director of the International Transactions Clinic at University of Michigan Law School. In her article, *Resolving Impact Investment Disputes: When Doing Good Goes Bad*,¹⁵ she examines the promise of a new approach to investing called “impact investing.” Per Professor Burand, impact investment assets are under management by individuals and institutions that are determined to make investments that “do good,” while also generating financial returns. She discusses the state of the impact investing market, the trends in the structures and documentation that distinguish impact investments from more

14. Rebecca Sharpless, *More Than One Lane Wide: Against Hierarchies of Helping in Progressive Legal Advocacy*, 19 CLINICAL L. REV. 347, 349 (2012) (italics in the original).

15. Deborah Burand, *Resolving Impact Investment Disputes: When Doing Good Goes Bad*, 48 WASH. U. J.L. & POL'Y 55 (2015).

commercial investments, and the key challenges that arise in disputes concerning a failing or weak impact investment.

Burand queries whether all impact investments can deliver on expectations and what might be the consequences if they don't. She discusses the challenges for the growing impact investment market to make sure that the deals that fail to meet investors' expectations don't erode investor confidence in the impact investment market more generally. To inform this discussion, she considers the responses of socially-oriented investors to problems with investments in troubled microfinance institutions shortly after the 2008 global recession. In the end, she advocates innovative and value-aligned approaches to dispute resolution in disputes arising from impact investments "gone bad" that mirror the innovations and value alignment found in impact investing deal structures. In particular, she considers the appropriateness of using international arbitration as a dispute resolution mechanism in cross-border, impact investment disputes.

In her article, *Social Enterprise as Commitment*,¹⁶ Alicia Plerhoples, Associate Professor of Law and Director of the Social Enterprise & Nonprofit Law Clinic at Georgetown University Law Center, outlines the "commitment" approach for a social enterprise that is organized as a benefit corporation, public benefit corporation, or social purpose corporation. She asserts that entrepreneurs seeking to establish a business for the purpose of pursuing a social mission must seek to institutionalize that social mission from the moment the business is created. Through the use of a social enterprise case study, she discusses five business governance policies and tools available to social entrepreneurs in order for social businesses to commit to pursuing a social mission in a marketplace that lacks enforceable mechanisms to protect against social businesses that deviate from the stated social mission to serve another master.

Professor Plerhoples does not present the commitment approach as a panacea, but rather as a responsible and essential approach given that hybrid corporate laws as they exist now contain weak accountability mechanisms. She presents the commitment framework as an attempt to guide social enterprises in satisfying existing legal

16. Alicia E. Plerhoples, *Social Enterprise as Commitment: A Roadmap*, 48 WASH. U. J.L. & POL'Y 89 (2015).

requirements, while also adopting additional voluntary constraints that internalize, self-regulate, and express a commitment to the amelioration of a specific social or environmental problem. She argues that because hybrid corporate forms are new, such guidance is lacking, placing the entire social enterprise sector at risk of marginalization. In the end, she notes the need for and the hope for future regulatory reform.

Susan L. Brooks, Professor of Law and Associate Dean for Experiential Learning, and Rachel E. Lopez, Assistant Professor of Law and Director of the Community Lawyering Clinic at Drexel University Thomas R. Kline School of Law, begin their essay, *Designing a Clinic Model for a Restorative Community Justice Partnership*,¹⁷ with a quote from bell hooks: “To build community requires vigilant awareness of the work we must continually do to undermine all the socialization that leads us to behave in ways that perpetuate domination.”¹⁸ The authors cite and endorse a definition of community lawyering from earlier scholarship that describes “community lawyering [as] an approach to the practice of law and to clinical legal education that centers on building and sustaining relationships with clients, over time, in context, as a part of and in conjunction with communities.”¹⁹ The authors also reference well-established foundations articulated by pioneers such as Christine Zuni Cruz, who describes community lawyering as: “[l]awyering which respects those who comprise the community as being capable and indispensable to their own representation and which seeks to understand the community yields far different results for the community and the lawyer.”²⁰

In their piece, Professors Brooks and Lopez recount and examine the vigilant efforts they have made at Drexel University to embody and teach community justice and community lawyering. They describe how their commitment to honor and support their clients’ strengths and self-determination led them to adopt two guiding

17. Susan L. Brooks & Rachel E. Lopez, *Designing a Clinic Model for a Restorative Community Justice Partnership*, 48 WASH. U. J.L. & POL’Y 139 (2015).

18. BELL HOOKS, *TEACHING COMMUNITY: A PEDAGOGY OF HOPE* (2003).

19. Tokarz et al., *supra* note 9, at 364.

20. Christine Zuni Cruz, *[On the] Road Back In: Community Lawyering in Indigenous Communities*, AM. INDIAN L. REV. 229, 235 (2000).

theoretical pillars for their work: “deliberative democracy” and “beloved community.” The authors describe these two approaches and offer illustrations of how these tenets inform their clinic design choices and their incorporation of advocacy and conflict resolution choices. The authors identify both opportunities and challenges in fostering their articulated goal to create community partnerships that are equal, respectful, empathic, and compassionate through the early stages of the development of the school’s new community lawyering clinic.

Heather Scheiwe Kulp is Lecturer on Law and Clinical Instructor in the Negotiation and Mediation Clinical Program, and Amanda L. Kool is Clinical Instructor and Staff Attorney in the Transactional Law Clinics, where she leads the Clinics’ Community Enterprise Project, at Harvard University Law School. In their article, *You Help Me, He Helps You: Dispute Systems Design in the Sharing Economy*,²¹ Professors Kulp and Kool provide a creative exploration of dispute resolution in the new world of the “sharing economy.” The authors posit that the sharing economy exists at the intersection of rapidly-developing technology that connects people to a plethora of previously inaccessible resources and a growing call for less global, more localized, consumption. They assert that new models at this intersection—Airbnb, Uber, bike-shares, time banking, etc.—help individuals and entities maximize the benefits of ownership by leveraging a valuable good or service into an ongoing resource generator (or at least not a resource waster) while also providing a benefit—typically, easy access to a lower-than-market rate for use, often as an alternative to ownership—to the non-owner.

According to the authors, there are myriad benefits to society from the sharing economy (also sometimes referred to as collaborative consumption), *e.g.*, helping society think more creatively about “expanding the pie” and finding ways to generate value, whether monetary or otherwise, from a seemingly finite object or service. As a result of these newfound opportunities for value creation, they suggest that local communities can thrive, even in the midst of recessions. The authors note that because these sharing economy

21. Heather Scheiwe Kulp & Amanda L. Kool, *You Help Me, He Helps You: Dispute Systems Design in the Sharing Economy*, 48 WASH. U. J.L. & POL’Y 179 (2015).

models take many forms and fall into many categories, not all disputes can be resolved through traditional methods. The authors explore some new scenarios (circular borrowing, simultaneous borrowing) and draw from them common dispute themes. They conclude with a variety of recommendations, advocating that lawyers should play a crucial role in designing new dispute resolution systems. They also suggest that stakeholders be involved in the design of new dispute resolution systems, that conflict engagement be made a regular part of the sharing economy culture, that the capacity of members to manage conflict themselves be increased, and that persons responsible for community engagement and dispute resolution be identified from the outset of the ventures.

In the final essay in this volume, *The Use of Mediation to Resolve Community Disputes*,²² Charles B. Craver, Freda H. Alverson Professor of Law at George Washington University, discusses the proliferation of community disputes, such as those between and among neighbors, landlords, and tenants. He notes that parties resort to litigation when negotiations fail, oftentimes because of the strongly held emotions involved. He suggests that such behavior can cause irreparable harm to existing relationships, cost significant sums of money to everyone involved, and delay appropriate changes for prolonged periods of time.

Not surprisingly, Professor Craver advocates a range of mediation processes, in lieu of litigation, for the resolution of community disputes. He explores in detail the pros and cons of various mediation approaches (facilitative, evaluative, and transformative) and techniques in the community dispute context. He concludes his article with a discussion of the ethical guidelines that should govern dispute resolution in the community dispute context.

* * *

We extend thanks and appreciation to all who contributed to this groundbreaking volume on *New Directions in Community Lawyering, Social Entrepreneurship, and Dispute Resolution*. In the next project

22. Charles B. Craver, *The Use of Mediation to Resolve Community Disputes*, 48 WASH. U. J.L. & POL'Y 231 (2015).

in this series, the Negotiation & Dispute Resolution Program and the *Journal of Law & Policy*, will collaborate again to host a fall 2015 scholarship roundtable and subsequent volume on *New Directions in Community Justice & Dispute Resolution: Ferguson and Beyond*.