

## INTRODUCTION: NEW DIRECTIONS IN DOMESTIC AND INTERNATIONAL DISPUTE RESOLUTION

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This volume, *New Directions in Domestic and International Dispute Resolution*, continues a growing tradition of cutting-edge scholarship in the field of dispute resolution published by the *Washington University Journal of Law and Policy*, in collaboration with the Washington University School of Law Negotiation & Dispute Resolution Program. In recent years, the *Journal* 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.<sup>1</sup>

This volume is the seventh in the *Journal's* series focused on ADR, which includes the prior groundbreaking volumes *New Directions in ADR and Clinical Education*;<sup>2</sup> *New Directions in Restorative Justice*;<sup>3</sup> *New Directions in Negotiation and ADR*;<sup>4</sup> *New Directions in Global Dispute*

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1. Practitioners and academics whose work addresses dispute resolution previously published in the *Journal* include Jess Alberts, Marilyn Peterson Amour, Gordon Bazemore, Beryl Blaustone, Brenda Bratton Blom, Susan Brooks, Jennifer Gerarda Brown, Martha Brown, Deborah Burand, 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 Izumi, Ann Juergens, Peter Joy, Amanda Kool, Heather Kulp, John Lande, Wilma Liebmann, Leslie Levitas, Rachel Lopez, Bobbi McAdoo, Peggy Maisel, Carrie Menkel-Meadow, Mary Anne Noone, Kimberly Jade Norwood, Lola Akin Ojelabi, Alicia Plerhoples, Sharon Press, Jennifer Reynolds, Kathryn Rimpfel, Mara Schiff, Paul Tremblay, Andrea Kupfer Schneider, Zachary Schmook, Sunny Schwartz, Stephen Sonnenberg, S.I. Strong, Karen Tokarz, Mark Umbreit, Lode Walgrave, and Brenda Waugh. See *infra* notes 2-7. All volumes of the *Journal* are freely available at [https://openscholarship.wustl.edu/law\\_journal\\_law\\_policy/](https://openscholarship.wustl.edu/law_journal_law_policy/).

2. Symposium, *New Directions in ADR and Clinical Education*, 34 WASH. U. J.L. & POL'Y 1 (2010).

3. Symposium, *New Directions in Restorative Justice*, 36 WASH. U. J.L. & POL'Y 1 (2011).

4. Symposium, *New Directions in Negotiation and ADR*, 39 WASH. U. J.L. & POL'Y 1 (2012).

*Resolution*,<sup>5</sup> *New Directions in Community Lawyering, Social Entrepreneurship, and Dispute Resolution*,<sup>6</sup> and *New Directions in Public Policy, Clinical Education, and Dispute Resolution*.<sup>7</sup> The Journal also has published a series of volumes entitled *Access to Justice*, several of which address negotiation and dispute resolution issues.

In late 2019 and early 2020, the Negotiation & Dispute Resolution Program joined forces with the *Journal* to generate this volume. The authors in this volume explore new and exciting developments in domestic and international dispute resolution. The authors are at the forefront of innovative teaching, practice, and scholarship in this realm.

Perhaps now more than at any other time in recent history, the practice of law and legal dispute resolution is changing in unexpected ways in the United States and around the world, and new professional roles for lawyers and dispute resolution practitioners are evolving. Lawyers, including public interest lawyers and clinical faculty like those featured in this volume, are increasingly engaged in diverse approaches to social change and public policy development through a myriad of forms of dispute resolution that bolster, and sometimes replace, traditional litigation. Lawyers, dispute resolution practitioners, parties, businesspeople, government officials, and judges now rely upon a growing array of dispute resolution processes, such as dialogue facilitation, situational assessment, conflict management, ombudspersons, multi-party dispute resolution, regulatory negotiation, and consensus building in governmental, non-governmental, and private organizations, and in legislative, regulatory, court, and enforcement arenas. ADR—an umbrella term for a range of dispute resolution mechanisms that occur largely outside the courts (but, increasingly within the courts) that includes negotiation, conciliation, early neutral evaluation, mediation, and arbitration—has become the principal mode of legal dispute resolution in virtually every legal field and in virtually every country in the world.<sup>8</sup>

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5. Symposium, *New Directions in Global Dispute Resolution*, 45 WASH. U. J.L. & POL'Y 1 (2014).

6. Symposium, *New Directions in Community Lawyering, Social Entrepreneurship, and Dispute Resolution*, 48 WASH. U. J.L. & POL'Y 1 (2015).

7. Symposium, *New Directions in Public Policy, Clinical Education, and Dispute Resolution*, 51 WASH. U. J.L. & POL'Y 1 (2016).

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

Numerous law schools in the United States and elsewhere now offer multiple courses in dispute resolution and public policy, as well as clinical education—a generational shift from four or five decades ago when few 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 Mitchell Hamline University (Practice, Problem-Solving, and Professionalism),<sup>9</sup> the University of Missouri (Lawyering: Problem-Solving and Dispute Resolution),<sup>10</sup> Texas A&M University (ADR Survey),<sup>11</sup> and Washington University (Negotiation).<sup>12</sup>

Many, if not most, law schools offer basic upper-level courses in arbitration, mediation, and negotiation. An increasing number of schools offer advanced domestic and international dispute resolution courses, such as Pepperdine University (Cross-Cultural Conflict and Dispute Resolution),<sup>13</sup> University of Nevada, Las Vegas (Public Policy and Environmental Dispute Resolution),<sup>14</sup> and Washington University (International Commercial and Investor-State Arbitration).<sup>15</sup> Several law schools have gone a step further—developing dispute resolution, community lawyering, and public policy clinics and externships<sup>16</sup> in both

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9. Bobbi McAdoo, Sharon Press & Chelsea Griffin, *It's Time to Get it Right: Problem-Solving in the First-Year Curriculum*, 39 WASH U. J.L. & POL'Y 39, 39 (2012).

10. *Juris Doctor (JD) Curriculum*, U. MO., <http://catalog.missouri.edu/professional/law/jurisdoctor/#curriculumtext> [https://perma.cc/B6UH-DG3Q].

11. TEX. A&M UNIV. SCH. OF LAW, FALL 2020 COURSE SCHEDULE 11 (2020), [https://law.tamu.edu/docs/default-source/registrar-documents/fall\\_2020\\_course\\_schedule-14apr.pdf?sfvrsn=12](https://law.tamu.edu/docs/default-source/registrar-documents/fall_2020_course_schedule-14apr.pdf?sfvrsn=12) [https://perma.cc/446E-B4VU].

12. *JD Requirements*, WASH. U. IN ST. LOUIS SCH. L., <https://law.wustl.edu/academics/jd-requirements/#first-year-courses> [https://perma.cc/Y6BS-XKH8].

13. *Cross-Cultural Conflict and Dispute Resolution*, PEPP. CARUSO SCH. L., <https://onlinelaw.pepperdine.edu/curriculum/cross-cultural-conflict-and-dispute-resolution/> [https://perma.cc/WBF3-QF5U].

14. *Law 790—Section 1001—Summer 2014—Special Topics: Public Policy & Environmental Dispute Resolution*, UNLV WILLIAM S. BOYD SCH. L., <https://portal.law.unlv.edu/content/law-790-section-1001-summer-2014-special-topics-public-policy-environmental-dispute> [https://perma.cc/5TES-7DYE].

15. *Negotiation & Dispute Resolution*, WASH. U. IN ST. LOUIS SCH. L., <https://law.wustl.edu/academics/negotiation-dispute-resolution/> [https://perma.cc/7MVM-A82J].

16. See, e.g., 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); 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); GERALD P. LOPEZ, *REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF*

the domestic and international contexts. And, several schools now offer LL.M. degrees and certificate programs in dispute resolution.

Many legal educators believe dramatic curricular reforms are essential if we are to prepare graduates to practice in a legal world in which lawyers are equipped to resolve disputes more fairly and efficiently, and to influence law and public policy inside and outside the courtroom. Both new and experienced law faculty, including those whose work is featured here, are committed to a better understanding of conflict and conflict resolution in all sectors of legal practice; the teaching and practice of dispute resolution, social change, and public policy development; and the preparation of creative, competent, ethical lawyers for 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 about dispute resolution and public policy.<sup>17</sup>

This volume contains essays and articles addressing pressing public policy and process concerns authored by prominent faculty engaged in domestic and international dispute resolution theory and practice. Each piece draws upon the authors' experiences with individuals, communities, and the public at large in advocating for dispute resolution and public policy reforms.

In our view, the scholarship in this volume is a superb example of why ADR scholarship is important to improvements in law and justice; why faculty in this area should publish; and how this work significantly and uniquely benefits the academy, the legal profession, and societies all over the world.

We extend thanks and appreciation to all who contributed to this important, groundbreaking volume—*New Directions in Domestic and International Dispute Resolution*.

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PROGRESSIVE LAW PRACTICE (1992); Symposium, *Rebellious Lawyering*, 23 CLINICAL L. REV. 25 (2016-17).

17. 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).

The first article in this volume, *Creating a Framework for Examining Federal Agency Rules Impacting Arbitration*,<sup>18</sup> is authored by Kristen M. Blankley, associate professor of law at University of Nebraska College of Law. In her piece, she highlights that no U.S. court has created an analytical framework to consider how to address federal regulatory actions (by rule or adjudication) prohibiting enforcement of pre-dispute arbitration agreements. She attempts to fill that gap with two frameworks under which agency actions prohibiting enforcement of arbitration agreements might be considered—either a “contrary congressional command” rule focused on the enabling legislation, or a “contrary regulatory command” rule focused on the regulation itself. She concludes with concrete examples of how the different frameworks would lead to different results depending on the statutory language at issue, the agency action, and the conceptual framework chosen to analyze the case.

In *Strengthening Online Dispute Resolution Justice*,<sup>19</sup> Noam Ebner, professor of negotiation and conflict resolution at Creighton University, and Elayne E. Greenberg, professor of legal practice at St. John’s University, examine the introduction of online dispute resolution (ODR) programs into the American court system. They suggest that this movement was precipitated by litigants, lawyers, judges, and the courts to provide a more responsive justice system, as well as a more efficient, cost-effective dispute resolution procedure. The authors propose changes necessary to ensure that justice is strengthened, rather than weakened, by incorporating ODR into the courts. In particular, they advocate using a systems-design approach to focus on the involvement of lawyers in the development and implementation of court-annexed online dispute resolution programs to strengthen their justice outcomes.

*Like A Prayer? Applying Conflicts with Religious Dimensions Theory to the “Muezzin Law” Conflict*,<sup>20</sup> is a collaborative article by Yael Efron, senior lecturer at Zefat Academic College School of Law; Michelle LeBaron, professor of law at University of British Columbia; Maged

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18. Kristen M. Blankley, *Creating a Framework for Examining Federal Agency Rules Impacting Arbitration*, 63 WASH. U. J.L. & POL’Y 9 (2020).

19. Noam Ebner & Elayne E. Greenberg, *Strengthening Online Dispute Resolution Justice*, 63 WASH. U. J.L. & POL’Y 65 (2020).

20. Yael Efron, Michelle LeBaron, Maged Senbel & Mohammed S. Wattad, *Like A Prayer? Applying Conflicts with Religious Dimensions Theory to the “Muezzin Law” Conflict*, 63 WASH. U. J.L. & POL’Y 119 (2020).

Senbel, associate professor of community and regional planning at University of British Columbia; and Mohammed S. Wattad, dean and associate professor at Zefat Academic College School of Law. In their article, the authors posit a theory differentiating conflicts with religious dimensions (CRDs) from other types of conflicts. They argue that the importance of this distinction stems from and highlights the unique role that religion plays in conflicts, which, they assert, liberal, rational, and individualistic orientations to conflict management fail to address. They apply their innovative theoretical framework to a legislative effort to amend an Israeli environmental law limiting the use of public address systems to amplify the muezzins' calls for prayer, which triggered a public outcry and a sharp societal dispute in Israel. According to the authors, the real conflict over the proposed amendment imposing restrictions on how Muslim followers are called for prayer is a CRD, rather than what seemed on its face to be an environmental-regulation conflict. The authors elaborate on the combined effects of the conflict's intensity, its duration, and the proximity of its subject to the core values of a religion. They conclude that identifying and addressing the unique amalgam of these aspects in a CRD such as this is crucial to its effective resolution.

The next article in the volume, *Formalizing the Informal: Development and its Impacts on Traditional Dispute Resolution in Bhutan*,<sup>21</sup> is authored by Stephan Sonnenberg, associate professor at Seoul National University School of Law in South Korea, and former assistant professor at Jigme Singye Wangchuck School of Law in Bhutan, a small landlocked country with fewer than a million residents, situated between two of the most populous nations on earth, India and China. He argues that, beyond its beautiful scenery and national development philosophy of pursuing "Gross National Happiness," Bhutan should be known for its strong and distinct heritage of traditional dispute resolution. He asserts that this system has kept peace in villages for centuries, but now faces extinction due to modernization. He explores in depth the interplay between reforms to the formal justice system and the informal dispute resolution practices that operate at the local level, as well as the way these changes impact rural communities. He raises important ethical questions about development

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21. Stephan Sonnenberg, *Formalizing the Informal: Development and its Impacts on Traditional Dispute Resolution in Bhutan*, 63 WASH. U. J.L. & POL'Y 143 (2020)

initiatives that are aimed at promoting the rule of law, especially when it comes to informal or so-called “alternative” dispute resolution processes in pluralistic legal systems such as Bhutan’s.

Jeff Trueman, LL.M. candidate at Pepperdine School of Law, draws on his considerable experience as a mediator in his article, *Mediation in the World of Commercial Dispute Litigation: An Inside Look at the Challenges for Counsel, Mediators, and Insurance Claims Professionals*.<sup>22</sup> He examines closely the professional roles of all parties in the mediation of litigated commercial disputes. Through a qualitative research project, he examines in detail the challenges, frustrations, and concerns faced by counsel, mediators, and insurance claims professionals in these types of disputes. As a result of these qualitative surveys, the author identifies similar challenges and frustrations as they emerge in the mediation process. He presents a study in contrasts, similar to the paradox between competition and cooperation, which he suggests exists with all parties to the mediation process.

The final article in the volume, *Addressing the Eviction Crisis and Housing Instability Through Housing Court Mediation*,<sup>23</sup> is a collaborative piece by Karen Tokarz, Charles Nagel Professor of Public Interest Law and Policy, and director of the Negotiation & Dispute Resolution Program at Washington University School of Law; Wolf Smith, Hon. Richard B. Teitelman Economic Justice Fellow at Washington University School of Law; Samuel Hoff Stragand, staff attorney at St. Louis Metropolitan Equal Housing & Opportunity Council; and Michael Geigerman, managing director at United States Arbitration and Mediation. All of the authors have participated in the St. Louis Mediation Project, which was developed to bring the benefits of mediation to the eviction crisis in the United States while rebuilding tenants’ and landlords’ trust in the courts. The project has provided free mediation services on a weekly basis for the pro se dockets in the St. Louis housing courts (where neither landlords nor tenants have attorneys) for over ten years. The project relies upon clinical law students and volunteer mediators. Based on an analysis of settlement rates and case

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22. Jeff Trueman, *Mediation in the World of Commercial Dispute Litigation: An Inside Look at the Challenges for Counsel, Mediators, and Insurance Claims Professionals*, 63 WASH U. J.L. & POL’Y 207 (2020).

23. Karen Tokarz, Wolf Smith, Samuel Hoff Stragand & Michael Gigerman, *Addressing the Eviction Crisis and Housing Instability Through Mediation*, 63 WASH. U. J.L. & POL’Y 243 (2020).

outcomes of mediated cases versus court-tried cases in the St. Louis courts, the authors demonstrate that many aspects of mediation make it a more just and effective dispute resolution approach than court evictions. The authors cite the need for further research into the expansion of the Project into other avenues, such as pre-filing mediation; mediation of landlord-represented cases, which dominate most eviction court dockets; and on-line mediation, an increase in which seems inevitable with the COVID-19 pandemic.