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New Directions in Negotiation and ADR

Introduction

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This volume on *New Directions in Negotiation and ADR* continues a growing tradition of scholarship in the field of dispute resolution published by the *Washington University Journal of Law & Policy* in collaboration with the Negotiation and Dispute Resolution Program. In recent years, the *Journal of Law & Policy* has aspired to become a leading publisher of scholarship on dispute resolution and has published many important articles by top legal educators and practitioners in the field.¹ This collaboration has produced two groundbreaking volumes on *New Directions in ADR and Clinical Legal Education*² and *New Directions in Restorative Justice*,³ as well

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1. Practitioners and academics whose work addresses dispute resolution published in the *Journal* include Marilyn Peterson Amour, Gordon Bazemore, Beryl Blaustone, Brenda Bratton Blom, Susan Brooks, Martha Brown, Nancy Cook, Kimberly Emery, Kenneth Feinberg, Jeff Giddings, John Haley, Paul Holland, Carmen Heurtas-Noble, Jonathan Hyman, Carol Izumi, Wilma Leibman, Leslie Levitas, Carrie Menkel-Meadow, Mara Schiff, Sunny Schwartz, 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).

as a series of *Access to Justice* volumes, several of which address ADR-related issues.⁴

In winter 2011, the Washington University Negotiation and Dispute Resolution Program joined forces with *Journal* to host a scholarship roundtable titled *New Directions in Negotiation and ADR*. The participants explored exciting, cutting edge issues in negotiation and ADR, and this remarkable volume is the product of that roundtable. The authors in this volume are at the forefront of innovative teaching, practice, and scholarship in negotiation and dispute resolution. In spring 2013, the Negotiation and Dispute Resolution Program will again collaborate with *Journal* to host a roundtable titled *New Directions in Global Dispute Resolution* that will generate the fourth volume in this series, to be published in the *Journal* in fall 2013.

Perhaps now more than at any other time in recent history, the practice of law is changing in unexpected ways. New professional roles for lawyers are evolving and legal education is under intense pressure to undertake curricular reforms. Litigation is no longer the default dispute resolution method. ADR—an umbrella term for a range of dispute resolution processes that occur largely outside the courts and includes 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.⁵ Almost all law schools in the United States and elsewhere now offer courses in negotiation and dispute resolution—a generational shift from three decades ago when few if any law schools offered such courses. Several 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, some law schools have

4. See generally volumes 1, 4, 7, 10, 12, 16, 19, 22, 25, 31 WASH. U. J.L. & POL'Y 1 (1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2009). All of these volumes can be accessed at <http://law.wustl.edu/journal/pages.aspx?ID=703>.

5. 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: EDUCATING LAWYERS FOR SOCIAL JUSTICE* 253 (Frank Bloch ed., 2010).

gone one step further—developing dispute resolution clinics or community lawyering clinics that embrace dispute resolution skills and values.⁶

Many legal educators believe that 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 are everyday occurrences. Some argue that legal education needs to incorporate problem solving, negotiation, and dispute resolution perspectives to counteract the risks of acculturation to adversarial modes of thinking that can develop by offering only litigation-focused courses and clinics.⁷ Others suggest that increased efforts are needed to determine how best to teach these skills and how best to incorporate these perspectives into the curriculum.

New and experienced negotiation and dispute resolution teachers, including those who attended the roundtable and those whose work is featured here, are committed to examining the developments of the past three decades in an effort to foster improvements in both the teaching of negotiation and dispute resolution, and the preparation of lawyers for practice. 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 should or should not be taught in negotiation and dispute resolution courses.⁸ In our view, the scholarship in this volume is a superb example of why dispute resolution scholarship is important to both legal education and legal practice, why dispute resolution faculty should publish, and how this work significantly and uniquely benefits the academy and the profession.

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6. 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).

7. 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).

8. See, e.g., CHRISTOPHER HONEYMAN, JAMES COBEN & GIUSEPPE DE PALO EDS., *RETHINKING NEGOTIATION: INNOVATIONS FOR CONTEXT AND CULTURE* (2009); CHRISTOPHER HONEYMAN, JAMES COBEN & GIUSEPPE DE PALO EDS., *VENTURING BEYOND THE CLASSROOM* (2010).

The first piece in this volume is by Andrea Kupfer Schneider, director of the Dispute Resolution Program at Marquette University Law School. In *Teaching a New Negotiation Skills Paradigm*,⁹ Schneider provides a deft and provocative analysis of problems caused by negotiation teachers relying upon negotiation style labels. She asserts that labels obscure the reality of what negotiators actually do and need to do in order to be effective. She cautions that, while labels might at the outset provide a helpful framework for students, these same labels hamstring teachers later as they try to teach the subtleties of effective negotiating. She argues persuasively for teaching students the weaknesses in labels and the dangers of overreliance on them.

She first explains why teachers rely on labels; next focuses on the problems with labels, including duplication, over- and under-breadth, inaccuracy, and lack of nuance; and concludes with a prescription. In this valuable, latter section, Schneider advocates for increased focus on teaching the role of assertiveness (speaking), empathy (listening and inquiry), creativity (inventing), flexibility, personality, and ethics. For each of these skills, she provides extremely helpful assessment tools for what constitutes minimal skill, average skill, and best practices.

Schneider emphasizes the crucial need to teach negotiators to move among styles, rather than selecting a style in advance, and to recognize and choose the appropriate style given the context, the client, and the counterpart. She concludes that the selection of skills is what matters, not the labels given to them. Her ultimate goals are to provide students with a more sophisticated understanding of the evolved and nuanced process of negotiation, and provide teachers with the tools to get them there.

Bobbi McAdoo and Sharon Press are experienced dispute resolution teachers and practitioners who teach at Hamline University School of Law; Chelsea Griffin is a 2011 Hamline law graduate. McAdoo founded the Hamline Dispute Resolution Institute in 1991; Press, after eighteen years as the Director of the Florida Dispute

9. Andrea Kupfer Schneider, *Teaching a New Negotiation Skills Paradigm*, 39 WASH. U. J.L. & POL'Y 13 (2012).

Resolution Center, became the director of the Hamline Institute in 2009. In their thoughtful article, *It's Time to Get It Right: Problem-Solving in the First Year Curriculum*,¹⁰ they examine the strengths and weaknesses of a newly required first year course at Hamline, entitled Practice, Problem-Solving, and Professionalism, which both of them recently taught. They make a persuasive argument that the problem-solving emphasis of the course and its placement in the first year curriculum enhances legal education law and responds well to the various calls for curricular reform.

The authors note the enormous growth in ADR practice and in ADR courses over the past two decades. However, they question whether the development of separate or “siloed” negotiation and dispute resolution courses (and the concomitant lack of integration of ADR throughout the curriculum) has produced the opposite of what was intended, i.e., fostering the conclusion that ADR is “soft” and divorced from the work of a “real lawyer.” They conclude that the growth of separate ADR classes has been a distraction from the understanding and implementation of the role of “lawyer-as-problem-solver” that motivated many to initiate the development of ADR courses. Indeed, they query whether a stand-alone ADR course is even the best way to introduce ADR to students. In the end, they argue that separate negotiation and dispute resolution courses in law school curricula need to be replaced by first-year courses such as theirs, with “problem-solving” in the title of the course. In their view, this is crucial to conveying the message to law students and professors that ADR is fundamental and integral to the work of “real lawyers,” not different than or less important than other lawyering.

The authors provide a detailed inventory and analysis of their course development and implementation that would be useful to other schools considering such a course. Step by step, they highlight the context, connection to curricular reform, logistics, mode of assessment, student feedback, and future of the assignment for the key stages of their course. They also review the course timing, grading, course focus, and reading assignments. The article is an

10. 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 (2012).

enormously useful framework and syllabus for anyone considering such a course.

John Lande is a senior fellow at the Center for the Study of Dispute Resolution at the University of Missouri School of Law. In his essay, *Teaching Students to Negotiate Like A Lawyer*,¹¹ he anticipates the challenges and asserts his suppositions as he embarks on teaching his first Negotiation course in spring 2012. He draws on his prior ADR teaching experience to project what he views as crucial factors in teaching students to think, act, and become good negotiators as a predicate to teaching them how to be good lawyers.

Lande posits that teachers need to resist “negotiation romanticism” and to distinguish for students the differences between and among different kinds of negotiations, in particular “positional negotiation,” “ordinary legal negotiation,” and “interest-based negotiation.” He argues that instructors should present negotiation as realistically as possible. He highlights the significance of the context of negotiations and asserts that students need to be exposed to multiple contexts, including involvement in protracted negotiations rather than merely parachuting directly into the ultimate stage of the negotiation.

Lande suggests that, in addition to single-stage negotiations, multi-stage simulations are crucial for negotiation courses. In his view, multi-stage simulations develop more robust relationships in role and expose students to the breadth and depth of a conflict from initial client interviews through settlements—in the way that many pretrial practice courses evolve. Although he does not resist the “negotiation” rubric as do McAdoo and Press, his impulse toward exposing students to negotiate in the larger context of lawyers’ problem-solving with and on behalf of their clients actually runs along the same line of their critique.

A collaborative interdisciplinary project by Art Hinshaw and Jess K. Alberts, *Gender and Attorney Negotiation Ethics*,¹² presents the results of an empirical study on gender and ethics in the legal

11. John Lande, *Teaching Students to Negotiate Like A Lawyer*, 39 WASH. U. J.L. & POL’Y 109 (2012).

12. Art Hinshaw & Jess K. Alberts, *Gender and Attorney Negotiation Ethics*, 39 WASH. U. J.L. & POL’Y 145 (2012).

negotiation context. Hinshaw is a clinical professor of law and director of the Lodestar Dispute Resolution Program at Sandra Day O'Connor College of Law, Arizona State University, and Alberts is President's Professor of Human Communication and Director of the Conflict Transformation Project at the Hugh Downs School of Human Communication, Arizona State University. Although Hinshaw and Alberts initially began their work on ethics in negotiation with an intention to include—as merely one part of their analysis—data about gender differences, they quickly realized that their results on gender merited more in-depth and stand-alone treatment, which they provide here.¹³ Their study is based on survey data gathered from hundreds of practitioners with varying degrees of experience, who were asked to read a negotiation scenario and then answer questions about their course of action. The negotiation scenario is based on a potential tort claim; in the instructions, the lawyer learns, immediately prior to the negotiation, that a critical element of the tort claim is not met, in contrast to what he or she had previously been told. Participants in the study are asked a series of questions about their willingness, per their client's request, not to disclose the information or to withhold the new information unless asked a direct question about that particular element.

Although Hinshaw and Alberts explain that both not disclosing the information at all and withholding the information unless asked are clear violations of the ABA Model Rules of Professional Conduct, a substantial number of participants nonetheless said that they would agree to the client's request. Hinshaw and Albert review past research on gender and ethics, noting that it has either found no ethical difference between men and women or that women are more ethical. Hinshaw and Alberts then present their own findings with respect to men, women, and ethics, which surprisingly run counter to much of the common wisdom and previous research on women, men, and ethics. In particular, Hinshaw and Alberts find that men are more likely to behave ethically in the negotiation scenario presented.

13. See *id.* and text accompanying notes 15–16.

Hinshaw and Alberts found no difference in behavior between the genders when considering the question of whether to agree to the client's request that he or she not disclose the information during negotiation; instead, most of the gender differential came from responses to the question of whether the attorney would agree to the client's request that he or she withhold the information unless asked directly. Self-reported justifications for the participants' choices showed no gender differences. Hinshaw and Alberts also explore the intersection of gender, years of experience, and ethical behavior, and present their results with respect to those considerations. Hinshaw and Alberts conclude by weaving their results into the existing literature on gender, decision-making processes, and ethical reasoning, providing a thought-provoking exploration of the ways in which identity, experience, and conceptions of one's professional role may have significant effects on the behavior of attorneys as agents.

In Jennifer Gerarda Brown's article, *Deeply Contacting the Inner World of Another: Practicing Empathy in Values-Based Negotiation Role Plays*,¹⁴ Brown tackles a critical piece of negotiation pedagogy: developing a sense of core emotional competencies and teaching them. Brown, the Carmen Tortora Professor of Law and Director of the Center on Dispute Resolution at Quinnipiac University School of Law and Senior Research Scholar at Yale Law School, highlights the importance of social, emotional, and moral growth, along with the more traditional set of doctrinal, theoretical, and practical skills associated with negotiation teaching. In particular, Brown focuses on why and how we teach negotiation students to develop empathy, and suggests that a particular type of role-play called a "values-based dispute" ("VBD") is an effective mechanism for helping students build this skill set.

Brown begins her analysis by providing a comprehensive overview of the role of two forms of empathy, cognitive and affective. While previous work in negotiation has largely focused on the importance of perspective-taking and other forms of cognitive empathy, Brown marshals evidence in support of the significance of affective empathy in negotiation training. Brown makes a compelling

14. Jennifer Gerarda Brown, *Deeply Contacting the Inner World of Another: Practicing Empathy in Values-Based Negotiation Role Plays*, 39 WASH. U. J.L. & POL'Y 189 (2012).

case for the necessity of understanding not simply the intellectual form of understanding another's perspective but the emotional underpinnings of the other party's world view. Brown provides a useful discussion of the ways in which role-play and other perspective-taking exercises can help foster empathy among negotiation students, noting the importance of awareness of stereotypes and the ability to go beyond them to imagine another individual's view. She notes some of the challenges in assigning role play exercises—the tension inherent in the decision to assign consistent with or in contrast to type, for instance—and then explores in greater depth the benefits of using VBDs, a unique type of role-play exercise developed by Brown, Lawrence Susskind, David Kovick, and Kate Harvey.

In VBDs, a student plays the role of an individual with deep convictions and a religious faith essential to her core identity, but typically not in line with the student's own beliefs. This student is placed in conflict with an institution that is perceived as hostile to the beliefs of the individual in the role play. Whereas a traditional negotiation role play in tort or contract holds the basic facts constant but allows for the individual student to remain "herself" as she plays the disputant, VBDs are written to foreclose the possibility that the student can merely be herself in a new situation. Instead, because a VBD requires the student to speak as a person with deeply held moral beliefs different from their own, any student who meaningfully participates in the exercise must actually make an effort to engage seriously with those beliefs. Thus, assigning a student to play that part during negotiation typically requires that the student engage in empathy, as Brown notes, "simply by playing the role."¹⁵ Brown's article provides an insightful and nuanced perspective on more effective and deeper use of role-plays, breathing new life into a pedagogical framework used by many professors who teach negotiation skills.

In *On Commitments*,¹⁶ Jennifer Reynolds reflects on some of our most basic negotiation premises from a novel and thought-provoking angle. Reynolds, Assistant Professor at the University of Oregon

15. *Id.* at 223.

16. Jennifer W. Reynolds, *On Commitments*, 39 WASH. U. J.L. & POL'Y 231 (2012).

School of Law, provides a sophisticated exploration of the role that commitments play in negotiation. Although many negotiation scholars can easily trace a straight path by which interests shape negotiations and which negotiations shape commitments, Reynolds exposes the oversimplification of this paradigm, noting the multi-layered ways in which commitments themselves influence interests and negotiations. Reynolds's nuanced analysis of this "complex interrelationship"¹⁷ raises critical questions for negotiation theory and practice.

In the first part of her essay, Reynolds uses a dispute systems design case study to provide a rich example of the ways in which interests may initially drive commitments, but then the commitments themselves may develop over time into an additional set of interests. By looking at a complex situation and analyzing it as it unfolds over time—presenting a longitudinal case study—Reynolds illuminates the many ways that interests and commitments are interwoven with another, and highlights the ways in which negotiation scholarship and pedagogy that focus only on one "slice in time" of a negotiation may miss meaningful implications and insights. In her second section, Reynolds skillfully weaves the case study into a deeply thoughtful and challenging critique of "interests" in interest-based negotiation.

Next, Reynolds explores how management expert Donald Sull's groundbreaking work about different types of commitments—strategic frames, resources, processes, relationship, and values—plays out in the context of the temporal interplay between commitments and interests in the present and the future, and carefully considers the ways in which Sull's work has implications for negotiation theory and practice. Reynolds revisits her case study through the lens of Sull's commitment categories, demonstrating how the framework adds depth and complexity to our understanding of the situation and at the same time illuminates critical and previously unexamined features of the intersection between interests and commitment.

17. *Id.* at 232.

The final article in this volume, *Name, Shame, and Then Build Consensus? Bringing Conflict Resolution Strategies to Human Rights Clinics*,¹⁸ is authored by Stephen Sonnenberg and James L. Cavallaro, the founding staff attorney and founding director of the International Human Rights and Conflict Resolution Clinic at Stanford Law School, respectively. This innovative clinic attempts to marry international human rights and dispute resolution clinical legal education, and to bridge international human rights and dispute resolution practice. It is a hefty burden undertaken by two thoughtful teachers well-versed in human rights and conflict resolution practice, theory, and teaching.

The authors note (and bemoan) the separate development of law school human rights clinics and dispute resolution clinics. They suggest that, while both independently respond to the deficiencies of litigation-centered law school clinics and both address means of engagement outside the traditional litigation context, there are few if any clinics that combine the two. This discussion harkens back to the separateness critique by McAdoo, Press, and Griffin. The authors attribute the divide in human rights and conflict resolution practice, and the concomitant divide in law school clinics, to the tensions between the fields of human rights and conflict resolution—what some allude to as the “peace versus justice” debate or the debate between “dispute resolution romanticism” and “rights-based romanticism.” They examine the reasons behind these tensions and interrogate the status quo in law school clinics.

In the end, the authors endorse a more hybridized human rights and conflict resolution methodology for human rights practice in and outside of law school clinics. The authors explore three representative case studies from the authors’ personal experiences working in past human rights and conflict resolution clinics to illuminate their analyses. They optimistically cite recent signs that the rhetoric of protecting human rights has penetrated the field of dispute resolution and, to a lesser degree, vice versa. They conclude with four goals and criteria by which they plan to evaluate the success of their new

18. Stephen Sonnenberg & James L. Cavallaro, *Name, Shame, and Then Build Consensus? Bringing Conflict Resolution Skills to Human Rights*, 39 WASH. U. J.L. & POL’Y 257 (2012).

venture: they hope to train more sophisticated practitioners; they expect to be judged by how well they help their clients and stakeholders find sustainable solutions; they aim to improve the relationships among the parties; and they envision their clinic as a laboratory for other progressive human rights practitioners and academics.

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We extend thanks and appreciation to all who participated in this project on New Directions in Negotiation and Dispute Resolution, and look forward to future projects. This last article is the perfect stepping stone for the next venture between the Washington University Law School Negotiation and Dispute Resolution Program and the *Journal of Law and Policy*—the upcoming scholarship roundtable and volume on New Directions on Global Dispute Resolution.