

Washington University Journal of Law & Policy

New Directions in Public Policy, Clinical Education, and Dispute Resolution

Introduction

Karen Tokarz^{*}

This volume on *New Directions in Public Policy, Clinical Education, 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 five, 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.

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

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 *New Directions in Global Dispute Resolution*,⁵ and *New Directions in Community Lawyering, Social Entrepreneurship, and Dispute Resolution*⁶ as well as a series of volumes focused on *Access to Justice*, several of which address negotiation and dispute resolution issues.⁷

In late 2015 and early 2016, the Negotiation & Dispute Resolution Program joined forces with the *Journal of Law & Policy* to generate this volume. The authors in this volume explore new and exciting developments in the realm of public policy, clinical education, and dispute resolution. The authors are at the forefront of innovative teaching, practice, and scholarship in public policy, clinical education, 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 and new professional roles for lawyers 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 investigative research, community education, legislative advocacy, administrative advocacy, and media advocacy that bolster, and sometimes replace, traditional litigation. Lawyers now rely upon a growing array of dispute resolution processes, such as dialogue facilitation, situational assessment, conflict management, multi-party negotiation, regulatory negotiation, and consensus building in governmental, non-governmental, and private organizations, and in legislative, regulatory, and enforcement arenas. ADR—an umbrella term for a range of dispute resolution mechanisms that occur largely outside the courts and includes negotiation, conciliation, early neutral

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 48 WASH. U. J.L. & POL'Y 1 (2015).

7. 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/.

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.⁸

Almost all law schools in the United States and elsewhere now offer multiple courses in clinical education, public policy, and dispute resolution—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 Hamline University (Practice, Problem-Solving, and Professionalism), the University of Missouri (Lawyering: Problem-Solving and Dispute Resolution), and Washington University (Negotiation). Some schools offer advanced dispute resolution courses such as Harvard University (Dispute Systems Design) and Washington University (Multi-Party and Public Policy Dispute Resolution). And, several law schools have gone a step further—developing dispute resolution,⁹ community lawyering,¹⁰ and public policy clinics¹¹ in both the domestic and international contexts.

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 influence law and public policy both inside and outside of the courtroom. Both new and experienced law faculty, including those whose work is featured here, are committed to the teaching and practice of social change and public policy development; the understanding of conflict and conflict resolution in all sectors of legal practice; 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

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

9. 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).

10. 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).

11. See generally Symposium: *Rebellious Lawyering* at 25, 23 *CLIN. L. REV.* (2016).

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 public policy and dispute resolution.¹²

This volume contains essays and articles addressing pressing public policy concerns authored by six law faculty with connections to clinical education and dispute resolution, including three senior clinical faculty (Peter Joy, Ann Juergens, and Brenda Smith), two junior clinical faculty (Norrinda Brown Hayat and Erika Wilson), and one former clinician (Kimberly Norwood). Each draws upon her or his experiences with clients, client communities, and the public at large in advocating for public policy reforms in clinical teaching, legal education, the legal profession, the courts, public housing, and public education.

In our view, the scholarship in this volume is a superb example of why this kind of scholarship is important to improvements in both 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 essay in this volume, *Stories of Teaching Race, Gender, and Class: A Narrative*,¹³ is authored by Brenda Smith, Professor of Law at American University, Washington College of Law, where she teaches in the Community Economic Development Law Clinic. In her essay, she thoughtfully explores the ways that race, gender, class, and other identities are salient for clients in law school clinics and for the communities served by these clinics. She also poignantly examines the ways that she and other women faculty—black women especially—keep quiet in academic settings, “hiding our rage, pain, and the injury that we experience on a daily basis.”¹⁴

In the heart of her essay, Professor Smith posits that stories of self are empowering because they tell us not just who we are, but also

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. Brenda V. Smith, *Stories of Teaching Race, Gender, and Class: A Narrative*, 51 *WASH. U. J.L. & POL'Y* 11 (2016)

14. *Id.* at 12.

why we are who we are. She challenges us to create our own “justice stories” and to teach our students to hear and tell complicated stories of race, gender, class, and self. She suggests that these origin stories impact our advocacy; the classes we teach; how we address conflict; and our sensitivity to injustice, hate, misogyny, and bigotry. In sharing her own personal narrative, Professor Smith highlights the power of self narratives for both authors and readers.

Peter Joy is Henry Hitchcock Professor of Law and Director of the Criminal Justice Clinic at Washington University School of Law in St. Louis. In his article, *Lawyers Serving as Judges, Prosecutors, and Defense Lawyers at the Same Time: Legal Ethics and Municipal Courts*,¹⁵ he explores possible conflicts of interest for part-time municipal prosecutors, judges, and defense attorneys who serve multiple roles, as well as the possible appearance of impropriety for such practices. The proliferation and troubling nature of these part-time municipal court arrangements was highlighted vividly in the aftermath of the death of Michael Brown in Ferguson, Missouri in August 2014 through the Arch City Defenders White Paper, the Department of Justice Ferguson Consent Decree, the Ferguson Commission Report, the Missouri Council for a Better Economy reports, the National Center on State Courts Missouri Municipal Courts report, and numerous news sources.¹⁶ Since that time, similar concerns have been highlighted across the country.

Professor Joy argues that the practice of the same lawyers serving as judges, prosecutors, and defense lawyers with overlapping and blurred roles and responsibilities, in conjunction with municipalities that are dependent on fines and court costs and view municipal judges and courts as revenue generators for the municipality, fosters public distrust in municipal courts and may be unethical. He proffers two concrete recommendations for changes drawn from the practices in other states such as Colorado and New York that would be helpful for Missouri and other states with part-time limited jurisdiction courts. First, he recommends amending the Missouri Code of Judicial Conduct to impose a restriction on a part-time municipal judge’s

15. Peter A. Joy, *Lawyers Serving as Judges, Prosecutors, and Defense Lawyers at the Same Time: Legal Ethics and Municipal Courts*, 51 WASH. U. J.L. & POL’Y 23 (2016).

16. *Id.* at 29–34.

private law practice that would prohibit a judge from practicing law in any municipal court located in the same county in which the judge's court is located. Second, he recommends a change to the Missouri Supreme Court Rules that would prohibit a municipal prosecutor from representing a defendant in any municipal court in the same county in which he or she is a prosecutor. He concludes that placing these reasonable restrictions on the outside law practice of municipal judges and prosecutors would promote public trust and ensure that municipal judges and prosecutors avoid the appearance of impropriety and possible conflicts of interest.

Norrinda Brown Hyatt is assistant professor at the District of Columbia David A. Clarke School of Law, where she directs the Housing & Consumer Law Clinic. In her article, *Section 8 Is the New N-Word: Policing Integration in the New Age of Black Mobility*,¹⁷ she argues that while overtly racist conduct designed to intimidate black newcomers in historically all-white suburbs became illegal with the passage of the Fair Housing Act (FHA), in its place, facially neutral terms and policies have come into use, including Section 8, that serve the same purpose to thwart black mobility. She highlights that while Section 8 voucher holders are diverse, the targets of municipal Section 8 enforcement schemes tend to be African-American, whether they are on Section 8 or not. "Simply put," she asserts, "Section 8 is the new n-word."¹⁸

Professor Hyatt examines the rhetoric of opponents to modern housing integration and municipal responses that serve to block newcomers, such as zoning restrictions, denial of water services, freeze outs, and intimidation by law enforcement. She asserts that race, and not opposition to welfare, is the underlying driving force behind these actions. She suggests that the trend toward criminalization of poverty affects our collective bias and blinds us to the discriminatory purposes that motivate many Section 8 schemes. She chides welfare and housing rights organizations for being slow to describe these schemes as racially discriminatory and fair housing litigators for being reluctant to plead FHA claims against

17. Norrinda Brown Hyatt, *Section 8 Is the New N-Word: Policing Integration in the New Age of Black Mobility*, 51 WASH. U. J.L. & POL'Y 61 (2016).

18. *Id.* at 64.

municipalities, in part, because the statute does not have a “source of income” protection. She concludes with a plea that advocates and allies examine Section 8 enforcement schemes more closely under an intersectional lens to illuminate new ways to frame challenges to modern-day discrimination that will open housing communities to black mobility.

In their essay, *A Call to Cultivate the Public Interest: Beyond Pro Bono*,¹⁹ Ann Juergens, Professor of Law and Co-Director of Clinics at Mitchell/Hamline School of Law, and her student, Diane Galatowitsch, J.D. Candidate, Mitchell/Hamline School of Law, assert that lawyers are public citizens and that the incorporation of the public’s interests in the daily lives of all lawyers is an essential responsibility of the profession. The authors analyze the evolution of how the legal profession came to equate public service with *pro bono* work and the unintentional narrowing of the definition of public interest work. They suggest that this constricted view of public service has fostered an unintended justification for decreases in public funding of Legal Services and contributed to a polarization of private practice from forms of public interest lawyering that seek systemic change.

The authors posit that the legal profession and legal education have overlooked the potential of private practitioners to meet the need for justice among working people, and tended to forget those private practitioners when creating public interest programs—other than *pro bono* volunteer programs—to address injustice. They urge law schools and the legal profession “to pick up the tools used to create a robust *pro bono* culture—enhanced professional standards, institutions serving as connectors of clients with lawyers, mobilization of law students, awards, and methods for measuring and ranking public interest contributions—and cultivate the public interest back into private practice law work.”²⁰ In particular, they suggest the creation of loan forgiveness eligibility for those in for-profit settings who can meet a new definition of public interest practice; the possibility of social benefit entity status for small law

19. Ann Juergens & Diane Galatowitsch, *A Call to Cultivate the Public Interest: Beyond Pro Bono*, 51 WASH. U. J.L. & POL’Y 95 (2016).

20. *Id.* at 118.

practices that wish to be explicit about their commitment to social justice, even as they are “for-profit;” and changes to ethical rules regarding client counseling that value more nuance about the common good in attorney-client conversations and allow attorney fee awards to assist the survival of practitioners who enforce rights that enhance public good. The authors conclude that these steps will better cultivate the ideal of lawyer as public citizen into client-centered private practice of law.

Kimberly Jade Norwood, Henry H. Oberschelp Professor of Law at Washington University School of Law in St. Louis, begins her article, *Recalibrating the Scales of Municipal Court Justice in Missouri: A Dissenter’s View*,²¹ with a quote from a law review article from 50 years ago in which the author asserts

The municipal court in this state (Missouri) is today too much an anomaly, too backward in its procedures, too arbitrary in its administration, to gain for it the respect by the public which a court must have. The attitudes of many of our citizens toward the courts and the law are shaped by unhappy experience in these courts. But more important still, we cannot tolerate a court system which is anything less than the finest which man can devise. For it is through these courts that the ideal of justice under the law must be sought.²²

In her view, the municipal courts have gotten worse over the decades and recalibration of the scales of justice in Missouri’s municipal courts is long overdue. She frames her analysis, in large part, on her experience as a member of the Missouri Supreme Court Municipal Division Work Group, appointed in the aftermath of the killing of Michael Brown in Ferguson, Missouri in August 2014. She shares and expands on her separate dissenting opinion to that committee’s majority report. In support of her perspective, she cites reports by the Arch City Defenders, the Ferguson Commission, the Missouri Council for a Better Economy (Better Together), and the National

21. Kimberly Jade Norwood, *Recalibrating the Scales of Municipal Court Justice in Missouri: A Dissenter’s View*, 51 WASH. U. J.L. & POL’Y 121 (2016).

22. T. E. Lauer, Prolegomenon to Municipal Court Reform in Missouri, 31 MO. L. REV. 69, 97 (1966).

Center on State Courts; the Department of Justice Ferguson Consent Decree, and numerous news sources.²³

In her article, Professor Norwood asserts that the Missouri Supreme Court has the power and the duty to consolidate some of the municipal courts into larger, more efficient, and more just courts. She argues that nothing in the Missouri Constitution forbids the Court from consolidating inferior courts under its jurisdiction. She references considerable data, some developed by the Better Together organization and some acquired through Sunshine Act requests, that illuminate the costs of operating multiple municipal courts and the pressure on small municipalities to generate revenue through their municipal courts, leading to overly aggressive ticketing and constitutional violations. She also addresses the practice illuminated in Professor Joy's article of part-time municipal judges also serving as prosecutors and/or defense attorneys in the same circuit. And, she highlights the inadequacy of municipal courtrooms and jail facilities, and the practice of jailing individuals who cannot afford to pay their fines and fees. In her conclusion, she criticizes the Missouri Supreme Court "Minimum Operating Standards for Missouri Courts: Municipal Divisions," promulgated in September 2016, for their failure to consolidate the municipal courts and failure to provide sanctions for courts, judges, or prosecutors who violate the standards.

In the final article in this volume, Erika K. Wilson, assistant professor of law at the University of North Carolina School of Law, *Blurred Lines: Public School Reforms and the Privatization of Public Education*,²⁴ discusses the shift in public school reforms from collectively-based judicial reforms aimed at desegregating schools and increasing financing to improve educational opportunities for poor and minority students to free-market based reforms, such as charter schools, vouchers, and district-wide school choice programs. She posits that this shift results largely from the arduous causation standard imposed by the U.S. Supreme Court requiring school desegregation orders show a connection between past *de jure* segregation policies and current school segregation. She also suggests

23. Norwood, *supra* note 21, at 112–16.

24. Erika K. Wilson, *Blurred Lines: Public School Reforms and the Privatization of Public Education*, 51 WASH. U. J.L. & POL'Y 189 (2016).

that the shift demonstrates a structural change in our understanding of the purpose of public education away from democratic, collective values.

Professor Wilson chronicles and critically examines the rise of market-based reforms and argues they result in a normative conceptualization that quality public education is what economists call a private rather than public good and a monopoly of more affluent and typically white students on higher quality public education. She asserts that market-based reforms incentivize parents and students with financial ability to move away from failing schools, and do nothing to address the state of public education more broadly. Rather, she advocates reforms that allow for more inter-district mobility, citing the high levels of racial and economic segregation between and among school districts, and the harms associated with racially and economically segregated schools. In her conclusion, she urges that these alternative non-market based education reform models will benefit both individual students and the collective good.

* * *

We extend thanks and appreciation to all who contributed to this important, groundbreaking volume on *New Directions in Public Policy, Clinical Education, and Dispute Resolution*. In the next project in this series, the Negotiation & Dispute Resolution Program and the *Journal of Law & Policy* will collaborate again to host a spring 2017 scholarship roundtable and subsequent volume on *New Directions in Community Justice & Dispute Resolution*.