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New Directions in Global Dispute Resolution

Introduction

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This volume on "New Directions in Global Dispute Resolution" 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 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 three groundbreaking volumes on ADR, including "New Directions in

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1. In addition to the authors in this volume, practitioners and academics whose work addresses dispute resolution published in the *Journal* include Jess Alberts, Marilyn Peterson Armour, Gordon Bazemore, Beryl Blaustone, Brenda Bratton Blom, Susan Brooks, Jennifer Gerarda Brown, Martha Brown, James Cavallaro, Nancy Cook, Kimberly Emery, Kenneth Feinberg, Jeff Giddings, John Haley, Art Hinshaw, Paul Holland, Carmen Huertas-Noble, Jonathan Hyman, Carol Izumi, John Lande, Wilma Liebman, Leslie Levitas, Bobbi McAdoo, Carrie Menkel-Meadow, Sharon Press, Jennifer Reynolds, Mara Schiff, Sunny Schwartz, Stephen Sonnenberg, Karen Tokarz, Mark Umbreit, Lode Walgrave, and Brenda Waugh.

ADR and Clinical Legal Education,"[2] "New Directions in Restorative Justice,"[3] and "New Directions in Negotiation and ADR,"[4] as well as a series of volumes focused on *Access to Justice*, several of which address negotiation and dispute resolution issues.[5]

In winter 2013, the Negotiation & Dispute Resolution Program joined forces with the *Journal* and the Whitney R. Harris World Law Institute to host a scholarship roundtable titled "New Directions in Global Dispute Resolution." The participants explored exciting, cutting-edge issues in international negotiation and dispute resolution, and this remarkable fourth ADR volume is the product of that roundtable. The authors in this volume are at the forefront of innovative teaching, practice, and scholarship in global negotiation and dispute resolution. In the next project in this series, the Negotiation & Dispute Resolution Program will again collaborate with the *Journal* and the Center for the Interdisciplinary Study of Work & Social Capital to host a scholarship roundtable in fall 2014 titled "New Directions in Social Entrepreneurship, Community Lawyering, and Dispute Resolution" that will generate the fifth volume in this series, to be published in the *Journal* in spring 2015.

Perhaps now more than at any other time in recent history, the practice of law is changing in unexpected ways around the world. New professional roles for lawyers are evolving, and litigation is no longer the default dispute resolution method. 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.[6] Almost all law schools in the United States and elsewhere

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* vols. 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://law.wustl.edu/journal/pages.aspx?ID=703.
6. *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).

now offer courses in negotiation and dispute resolution—a generational shift from three 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 Harvard University (Problems and Theories), 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 gone one step further—developing dispute resolution clinics and community lawyering clinics at both the domestic and international levels that embrace dispute resolution issues, skills, and values.[7]

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 are everyday occurrences. Some argue legal education needs to incorporate problem-solving, negotiation, and dispute resolution skill development,[8] as well as international perspectives,[9] throughout the law school curriculum. Others suggest educators need to embrace the teaching of international and comparative law as they address global dispute resolution questions.

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 world of global ADR in an effort to foster improvements in the teaching and practice of negotiation and dispute resolution, the understanding of international law and practice, and the preparation of lawyers for global lawyering.

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

9. Elia Powers, *Harvard Law Alters First-Year Program*, INSIDE HIGHER ED. (Oct. 9, 2006), *available at* http://www.insidehighered.com/news/2006/10/09/harvard#sthash.uK3Udcgp.w9pMcZcj.dpbs (describing Harvard Law School's new first-year requirement that students choose from one of three international/comparative courses dealing with the global legal system: Public International Law, International Economic Law, or Comparative Law).

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 courses.[10] 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 legal profession, all over the world.

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The first piece in this volume is by S.I. Strong, Associate Professor of Law and Senior Fellow at the Center for the Study of Dispute Resolution at the University of Missouri. In *Beyond International Commercial Arbitration? The Promise of International Commercial Mediation*,[11] Strong addresses the questions of whether and to what extent international commercial mediation can serve as an adequate substitute for international commercial arbitration. In particular, she probes whether mediation can live up to the promise of delivering quick, inexpensive, and informal international dispute resolution, and what motivations might cause businesses to select mediation apart from cost, time, and formality concerns.

To answer those questions, Strong provides a deft analysis of the unique characteristics of international commercial disputes to determine whether such matters are amenable to mediation. She discounts suggestions from some scholars and practitioners that international commercial mediation is uniquely distinguishable from domestic mediation or unduly problematic due to potential difficulties associated with mediating across cultural boundaries. Rather, she posits that cross-cultural concerns are relevant to both domestic and international disputes, and that experienced and knowledgeable mediators are capable of overcoming disparities in the

10. *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).

11. S.I. Strong, *Beyond International Commercial Arbitration? The Promise of International Commercial Mediation*, 45 WASH. U. J.L. & POL'Y 11 (2014).

parties' cultural backgrounds. She examines at greater length whether the complexities of multi-party international disputes constitute a bar or an incentive to mediation.

Acknowledging that mediation of commercial disputes might not mitigate criticisms that arbitration has become too slow, expensive, and legalistic, Strong assesses other incentives to use international commercial mediation. She suggests, for example, that value- or structure-based disputes that involve religious, moral, or political elements might derive particular benefits from mediation. Similarly, she notes that parties involved in ethnic and land-based disputes might gain from transformative mediation over adjudication. In the end, she concludes that businesses might be more likely to choose international commercial mediation over arbitration and litigation if mediation agreements and settlements were as easily enforceable as arbitration agreements and awards. She concludes it may be necessary to adopt an international mediation enforcement regime similar to that of international commercial arbitration, and offers insights on how public international law might be used to support the development of international commercial mediation.

Kenneth H. Fox is a Professor of Business, University Director of Conflict Studies, and Senior Fellow at the School of Law at Hamline University. In his provocative and creative piece, *Mirror as Prism: Reimagining Reflexive Dispute Resolution Practice in a Globalized World*,[12] he posits that the growth of global dispute resolution highlights and precipitates a significant need for conflict resolution practitioners to attune themselves in ways less apparent in domestic and local scenes.

To meet this challenge, Fox endorses the development of greater awareness and understanding of both reflective, modernist ("reflection-on-action") and reflexive, postmodernist ("reflection-in-action") practice, and their interrelationship. He suggests that the evolution toward reflexive practice parallels a growing shift in the conflict literature from a modernist to social constructionist orientation to understanding conflict itself. He highlights prior work

12. Kenneth H. Fox, *Mirror as Prism: Reimagining Reflexive Dispute Resolution Practice in a Globalized World*, 45 WASH. U. J.L. & POL'Y 41 (2014).

by him and others to explore the importance of developing three levels of awareness within conflict work: awareness of self, other, and context. He then cross-references these levels with three dimensions of embodied experience ("knowing"): cognitive, emotional, and physiological.

In the model that emerges, Fox provides a detailed discussion of each of the resulting nine dimensions and presents a holistic picture of reflexive dispute resolution practice. He concludes that this multi-dimensional, dynamic, integrated prism of conflict awareness can help dispute resolution practitioners improve practices that cross legal, economic, cultural, and social worlds. In addition, he notes that the prism will provide useful articulation for classroom use within a broad range of negotiation and dispute resolution courses.

Charles B. Craver is the Freda H. Alverson Professor of Law at George Washington University. In his thoughtful Essay, *How to Conduct Effective Transnational Negotiations between Nations, Nongovernmental Organizations, and Business Firms*,[13] he notes the growth of official inter-government discussions (Type I diplomacy), private citizen and nongovernmental organization involvement in governmental interactions (Type II diplomacy), and private business transnational negotiations, as well as the increase in bilateral and multilateral bargaining interactions.

Craver analyzes in detail the impact of cultural differences and negotiator styles on transnational dealings between and among governments, nongovernmental organizations, and private business entities. He asserts that verbal and nonverbal communications are an indispensable part of all transnational interactions. He warns that written and spoken exchanges may be subject to interpretive difficulties—even when the parties think they are speaking an identical language—and notes that similar nonverbal behavior may have different meanings in different cultures.

In light of the greater complexity of transnational bargaining compared with domestic interactions, Craver recommends parties place greater emphasis on preparation and heighten their focus on

13. Charles B. Craver, *How to Conduct Effective Transnational Negotiations between Nations, Nongovernmental Organizations, and Business Firms*, 45 WASH. U. J.L. & POL'Y 69 (2014).

establishing rapport and positive tones for their interactions. He outlines and explores a framework of multiple stages in transnational negotiations, from the preliminary, initiating stage; through the value-creating, information stage; to the value-claiming, distributive, and closing stages; and to the value-maximizing, cooperative stage. He concludes with a discussion of cell phone and e-mail interactions, an inevitable and increasing aspect of transnational dealings.

Using the Theories of Exit, Voice, Loyalty, and Procedural Justice to Reconceptualize Brazil's Rejection of Bilateral Investment Treaties[14] is a collaborative Essay by Nancy A. Welsh, Andrea Kupfer Schneider, and Kathryn Rimpfel. Welsh is the William Trickett Faculty Scholar and Professor of Law at Penn State University Dickinson School of Law; Schneider is Professor of Law at Marquette University; and Rimpfel is a 2014 J.D. candidate at Penn State University Dickinson School of Law. They present a sophisticated exploration of the lessons extractable from Brazil's history with bilateral investment treaties (BITs).

The authors suggest that in the past decade, investor-state arbitration has gained tremendously in credibility and use, noting that nation states have executed more than 2,000 BITs containing arbitration provisions and submitted more than 500 disputes to investor-state arbitration. They examine the case of Brazil, which, according to the authors, does not have a single BIT in force despite boasting the seventh largest economy in the world, $65 billion USD in foreign direct investment, and significant investing opportunities such as the 2014 World Cup and the 2016 Olympic Games. They explore why and how Brazil up to this point has rejected the mainstream system of international dispute resolution in favor of alternative investment protection legislation.

The authors utilize Albert Hirschman's theory of exit, voice, and loyalty, supplemented by theories of procedural justice, to evaluate Brazil's alleged "failure" in choosing not to ratify the BITs that have been negotiated by its diplomats. They conclude that far from representing failure, Brazil's development of alternative, nation-level

14. Nancy A. Welsh, Andrea Kupfer Schneider & Kathryn Rimpfel, *Using the Theories of Exit, Voice, Loyalty, and Procedural Justice to Reconceptualize Brazil's Rejection of Bilateral Investment Treaties*, 45 WASH. U. J.L. & POL'Y 105 (2014).

structures represents a successful means to acknowledge disparate voices, avoid foreign investors' exit, and even enhance loyalty, thereby benefiting Brazil's domestic and foreign stakeholders. However, they recognize some of the limitations of the current model and acknowledege that changing conditions in Brazil may warrant ratification of BITs in the future as another opportunity for success.

The final Article in this volume, *Ethical Challenges for Mediators around the Globe: An Australian Perspective*,[15] is authored by Mary Anne Noone, Professor of Law, and Lola Akin Ojelabi; Senior Lecturer in Law, at LaTrobe University in Australia. Noting that mediation is used extensively to resolve civil disputes in courts and tribunals around the world, and seen by many as an important tool for improving access to justice for ordinary citizens, the authors tackle two critical issues in the mediation context: what justice means and what constitutes ethical practice in mediation. To answer these questions, the authors reviewed the existing research from Australia and elsewhere, and undertook an empirical survey of twenty-one expert and experienced mediators. The survey group included practitioners, practicing academics, lawyers, and non-lawyers—all accredited mediators under the Australian National Mediator Accreditation System.

In interviews, the authors asked participants to identify ethical and practical dilemmas contained in five mediation scenarios; these issues included party awareness of legal rights, confidentiality, cultural sensitivity, conflicts of interest, reporting of systemic misbehavior, and lawyer conduct. By probing what issues the mediators identified in the scenarios and how they responded to the issues, the authors aimed to extract from mediators their views of justice and ethical mediation practice. In this Article, they drew on responses to one scenario based on an employment discrimination dispute.

The authors' research confirms that even among experienced mediators, there is a range of views about what constitutes ethical mediator practice. For example, all participants recognized fairness issues precipitated by power imbalances and expressed a commitment to maintain procedural fairness, yet there was divergence of

15. Mary Anne Noone & Lola Akin Ojelabi, *Ethical Challenges for Mediators around the Globe: An Australian Perspective*, 45 WASH. U. J.L. & POL'Y 145 (2014).

perspectives in relation to mediator intervention. Most participants believed a mediator should not be concerned about substantive fairness or justice. All participants articulated the need for the mediator to remain impartial and neutral, but what that meant differed across the participants. There was consensus that informed decision making is a crucial element of autonomy and self-determination, and reality testing in private sessions was the most significant tool used by parties to ensure informed decisions. The authors conclude that experienced mediators are guided by references to codes of conduct, social norms, and personal values, and take a reflective and contextual approach to ethical challenges—but, have varying moral compasses, which lead to a variety of responses to ethical and practical challenges in mediations. The authors encourage and invite ongoing critical research and reflection on these issues.

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We extend thanks and appreciation to all who contributed to this volume on *New Directions in Global Dispute Resolution*. This volume is the stepping stone for the upcoming, fifth venture between the Negotiation & Dispute Resolution Program and the *Journal of Law & Policy*, this time in partnership with the Center for the Study of Work & Social Capital, with a fall 2014 scholarship roundtable and subsequent volume on *New Directions in Social Entrepreneurship, Community Lawyering, and Dispute Resolution*.