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Introduction to Symposium on "ADR's Place in Navigating a Polarized Era"

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Ours is not a nation built for harmony. We have three branches in our federal government, each equipped with tools to check (and balance) the other two—and the legislative branch is itself divided into two potentially competing parts. We have a system of federalism that ensures a significant degree of sovereignty for all 50 states' governors, legislatures and courts. We have a population composed of many ethnicities, races, religions, and genders. I could go on, but like Walt Whitman, we contradict ourselves, we are large, we contain multitudes.[1]

Yes, our nation is built for conflict, for friction. That can be painful, excruciatingly so, as amply demonstrated by recent events. And it can be good. In *Democracy: A Case Study*, David Moss presents nineteen case studies, each focused on a key decision point in the history of American democracy.[2] Noting that our system of government has always been a "contact sport" and indeed that conflict is "profoundly American,"[3] Moss explores what has made conflict highly constructive at some points and severely destructive at other times.[4] He concludes that what matters most fundamentally is "whether our common faith in the democracy itself is strong enough to hold us together, to make one out of many, however intense our differences and disagreements."[5]

In other words, when our nation has faced crises—and there have been many more than those recounted in Moss' book—our conflict-ridden system has fostered productive debate and tension and yielded good outcomes, often better than those that would have resulted from an autocracy or a one-party system, *as long as the key actors at some point decided that they cared more about preserving our nation and system of government than winning on a particular issue*.

And so conflict, within a nation—or a family or a workplace or an educational institution—can be good. It can even be *more* than good. Conflict can signal newfound agency, and it can be the catalyst for dialogue,

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[1] Walt Whitman, Song of Myself, 51 ("Do I contradict myself?/Very well then I contradict myself,/I am large, I contain multitudes.").

[2] David A. Moss, Democracy: A Case Study 3 (Harvard University Press, 2017).

[3] *Id.*

[4] *Id.*

[5] *Id.* at 13.

customized and creative solutions, and ultimately progress. Many of us begin our classes on ADR, on negotiation, and on mediation with just this sentiment.

And yet, we seem to be caught in the midst of an extraordinarily polarized time, and the conflict surrounding us every day—on the radio, on television, on social media, in the newspapers—can be so ugly, so searing, so wearying. Many studies affirm our current state of polarization, and further affirm that it is worse than it was before. The Pew Research Center's research indicates that only one third of Americans today hold a mix of conservative and liberal views; in the past, nearly half had mixed political values.[6] Thus, our political center is hollowing out as more Americans gravitate right and left, and this ideological consistency is associated with greater partisanship. Ezra Klein, in *Why We're Polarized*, has highlighted the dangers of stacked, mutually-reinforcing identities: "[t]he crisis emerges when partisan identities fall into alignment with other social identities, stoking our intolerance of each other to levels that are unsupported by our degrees of political disagreement."[7] In other empirical signs of our polarized times, Pew has found that a majority of Republicans and Democrats agree that they *can't agree* on basic facts;[8] that majorities of both Democrats and Republicans say they belong to their party in large part due to the *other* party's harmful policies;[9] that Democrats' and Republicans' top priorities for the U.S. are now further apart than was true in past decades;[10] that while Democrats (and independents who lean Democratic)

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[6] Jocelyn Kiley, *In Polarized Era, Fewer Americans Hold a Mix of Conservative and Liberal Views*, PEW RESEARCH CENTER (2017), https://www.pewresearch.org/fact-tank/2017/10/23/in-polarized-era-fewer-americans-hold-a-mix-of-conservative-and-liberal-views/; *Political Polarization, 1994-2017*, PEW RESEARCH CENTER (2017), https://www.people-press.org/interactives/political-polarization-1994-2017/.

[7] EZRA KLEIN, WHY WE'RE POLARIZED 25 (2020) (quoting Lilliana Mason, *"I Disrespectfully Agree": The Differential Effects of Partisan Sorting on Social and Issue Polarization*, 59 AM. J. OF POL. SCI. 128 (2015); LILLIANA MASON, A NEW IDENTITY POLITICS: HOW SOCIO-PARTISAN SORTING AFFECTS AFFECTIVE AND IDEOLOGICAL POLARIZATION IN AMERICAN POLITICS (American Political Science Association conference paper, 2015); LILLIANA MASON, UNCIVIL AGREEMENT: HOW POLITICS BECAME OUR IDENTITY (University of Chicago Press, 2018).

[8] John Laloggia, *Republicans and Democrats Agree: They Can't Agree on Basic Facts*, PEW RESEARCH CENTER (2018), https://www.pewresearch.org/fact-tank/2018/08/23/republicans-and-democrats-agree-they-cant-agree-on-basic-facts/.

[9] Hannah Fingerhut, *Why Do People Belong to a Party? Negative Views of the Opposing Party Are a Major Factor*, PEW RESEARCH CENTER (2018), https://www.pewresearch.org/fact-tank/2018/03/29/why-do-people-belong-to-a-party-negative-views-of-the-opposing-party-are-a-major-factor/.

[10] Bradley Jones, *Republicans and Democrats Have Grown Further Apart on What the Nation's Top Priorities Should Be*, PEW RESEARCH CENTER (2019),

view the most heavily-relied-on news media platforms as credible, Republicans (and independents who lean Republican) do not, and instead view many of those sources as untrustworthy;[11] and that more Americans—particularly Democrats—are likely to say that they find talking about politics with people they disagree with "stressful and frustrating."[12] Pew has even reported that many single people interested in relationships, especially people who are Democrats, do not even want to *date* someone who voted in 2016 for a presidential candidate in the opposing party.[13]

But if we all care enough and work hard enough and can find (or design) an appropriate forum, we can resolve these conflicts of ours—or at least manage them, right? That is part of the creed of the Dispute Resolution Field. It also sounds relatively consistent with David Moss' account of American history.

Some say, though, that we are caught in the midst of larger structural forces that will make it extraordinarily difficult for any of us, as individual actors, to move toward the center. Richard Pildes identifies the passage of the Voting Rights Act as the point in time when the Democratic and Republican parties began "the process of ideologically realigning. . . and purifying. . . so that both parties are far more ideologically coherent, and differentiated from each other, than at any time in many generations."[14] Indeed, he urges that from 1937 to 1965, the U.S. really had a *four*-party system, composed of conservative Southern Democrats, moderate to liberal Democrats from other parts of the country, liberal and moderate Republicans from the Northeast and West Coast, and traditional, old-line conservative Republicans from the Midwest and rural areas. Because none of these four parties had a sufficient majority to legislate on their own, they were *required* to engage in bi-partisan compromise and bargaining. Pildes adds:

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https://www.pewresearch.org/fact-tank/2019/02/05/republicans-and-democrats-have-grown-further-apart-on-what-the-nations-top-priorities-should-be/.

[11] Ark Jurkowitz, Amy Mitchell, Elisa Shearer & Mason Walker, *Deep Partisan Divisions Exist in the News Sources Americans Trust, Distrust, and Rely On*, PEW RESEARCH CENTER (2020) https://www.journalism.org/2020/01/24/u-s-media-polarization-and-the-2020-election-a-nation-divided/.

[12] *More Now Say It's 'Stressful' to Discuss Politics with People They Disagree With*, PEW RESEARCH CENTER (2018) https://www.people-press.org/2018/11/05/more-now-say-its-stressful-to-discuss-politics-with-people-they-disagree-with/.

[13] Anna Brown, *Most Democrats Who Are Looking for a Relationship Would Not Consider Dating a Trump Voter*, PEW RESEARCH CENTER (2020), https://www.pewresearch.org/fact-tank/2020/04/24/most-democrats-who-are-looking-for-a-relationship-would-not-consider-dating-a-trump-voter/.

[14] Richard H. Pildes, *Why the Center Does Not Hold: Hyperpolarized Democracy in America*, 99 CALIF. L. REV. 273, 332 (2011).

> This is the era being looked back upon
> nostalgically by those who exalt the prior
> generation's political leaders as those who
> were able to forge "compromises" and
> transcend party divisions. Such figures
> existed not as a matter of individual
> personality in isolation, but because the
> structural environment of parties and politics
> then meant that compromises existed to be
> had--and that compromise was recognized by
> all to be essential to legislate.[15]

Pildes could be talking to us, members of the dispute resolution community. We regularly proselytize regarding the value of "ADR thinking and skills"—encouraging dialogue and mutual consideration, asking open-ended questions, using reflective listening, trying to be relatively open-minded (and even neutral), identifying underlying interests, using those interests to develop mutually-beneficial solutions, etc. We have now trained many people in mediation and conflict resolution skills. A multitude of organizations have arisen to encourage or model deliberative democracy and respectful discourse. So why haven't we had more effect? Perhaps as Pildes suggests, it is just not realistic for us to expect people to behave differently when the surrounding structure, the balance of power, actively works against such discourse. Perhaps as Moss suggests, a state of conflict is "profoundly American."

And even within the dispute resolution community, there is discord. I am not writing here about disagreements over the meaning of "mediation" or whether med-arb is an ethical exercise. I am talking about disagreement over matters as basic as whether we should be willing to listen to someone we disagree with. During the divisive hearings over the Supreme Court nomination of Brett Kavanaugh, dispute resolution educators exchanged listserv messages regarding the potential value of using the hearings for class discussion and exercises, to help our students learn how to be curious about each other's views on very difficult topics and truly listen and learn from each other, without any intent or need to arrive at agreement. Some educators strongly supported such use of the Kavanaugh hearings. Others expressed equally strong fears of triggering students who had suffered some form of sexual abuse. Still other educators objected to any exercise that would encourage and enable the expression and tolerance of hateful views, thus indirectly affirming them despite their basic immorality.

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[15] *Id.* at 289.

All of the evidence of our nation's polarization, coupled with apparent polarization even within the dispute resolution community, inspired plans for the March 20, 2020 annual dispute resolution symposium to be hosted by Texas A&M University Law School's Aggie Dispute Resolution Program. We titled the symposium "ADR's Place in Navigating a Polarized Era," and debated whether the title should end with a question mark. We wanted our symposium to consider when the use of "ADR thinking and skills" are and are not appropriate (or sufficient) in dealing with current, divisive issues. We also wanted to provide faculty (teaching ADR courses and non-ADR courses) with approaches and tools for modeling and teaching students whether, when and how to use ADR skills in responding to polarized situations.

We eagerly awaited the arrival of March 20, 2020 to discuss these issues. And then COVID-19 struck. We postponed the in-person symposium, but most of our presenters and moderators were able to rearrange their plans and meet by Zoom on March 20, 2020 to make their planned presentations and offer feedback on each other's draft articles. (Many thanks to all of the presenters and moderators for their willingness to participate in that day-long video meeting. Zoom has now become a major part of all our lives, but on March 20, 2020, we were in a steep learning curve regarding sharing screens, co-hosting, muting, and sustaining our internet connection.) Most of our presenters' articles are in this issue of the *Ohio State Journal on Dispute Resolution.* A companion article by Jennifer Reynolds has been published in the *Texas A&M Law Review*.

So let's return to the questions posed by the symposium and the responses contained in this symposium issue. When is the use of "ADR thinking and skills" appropriate (or sufficient) in dealing with current, divisive issues? What approaches and tools are available to model and teach students whether, when and how to use ADR skills in responding to polarized situations?

Many of the articles in this issue suggest that "ADR thinking and skills" are appropriate in dealing with current, divisive issues—but they are not sufficient in and of themselves. Noam Ebner draws our attention to Bernie Mayer's prescription that we should move from thinking in terms of "neutrals resolving conflicts" to "improv[ing] conflict engagement through encompassing a broader range of conflict roles, with system and ally roles complementing neutral roles."[16] Hearkening back to the Legal Process school, Deborah Eisenberg very provocatively observes that we should no longer be

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[16] *See* Noam Ebner, *Teaching the World: Educational Pivots for the Second Half of the ADR Century*, 35 OHIO ST. J. ON DISP. RESOL. 825, 834 (2020) (citing BERNARD MAYER, BEYOND NEUTRALITY: CONFRONTING THE CRISIS IN CONFLICT RESOLUTION (2004)).

thinking in terms of "ADR" (a term "so popular in name, fractured in practice, and jumbled in theory that it risks a metaphorical 'genericide'"[17]) but instead "dispute process theory and strategy."[18] Nancy Rogers, Bill Froelich and Josh Stulberg emphasize the importance of translating dispute resolution concepts to make them useful and accessible for the deliberation and decision-making required of public officials and other local leaders. Besides providing very concrete and helpful advice to enable other dispute resolution programs to enter this arena, they make it clear that dispute resolution proponents need to be ready to work with local leaders on their—not our—terms.[19] Sharon Press focuses on her experience with the collaboration of dispute resolution professionals and leaders in one community—Falcon Heights, Minnesota— following the shooting of Philando Castile. Press and her colleagues had planned to work with a couple of local communities to help them develop the relationships and conflict handling capacity that would enhance their resilience and ability to respond appropriately to future crises. But once this real crisis erupted in Falcon Heights, Press and her colleagues convened and conducted a series of Community Conversations to inform and support the work of the city's Inclusion and Policing Task Force. Her article describes how the process unfolded and what they learned from it.[20] It is notable that none of these authors support limiting ourselves to *resolving* conflicts. Instead, we are encouraged to engage, respond, and learn resilience in handling conflict.

Jonathan Cohen, Jennifer Reynolds, Robert Baruch Bush, and Peter Miller, meanwhile, take on particular pillars of dispute resolution practice— empathy, understanding, listening, self-determination—to examine their relevance and usefulness today. Cohen urges that empathy, often a key to conflict resolution, is likely to be particularly difficult in situations involving "negative identity"—i.e., defining oneself through contrast to another. From the Pew research described earlier, we know that negative identity plays a significant part in our current polarized era. Cohen notes that when a person has defined himself as definitely "not you," then trying to understand how the world looks from your perspective is likely to be difficult, if not destabilizing

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[17] Deborah Thompson Eisenberg, *Beyond Settlement: Reconceptualizing ADR as "Conflict Process Strategy"*, 35 Ohio St. J. on Disp. Resol. 705, 707 (2020).

[18] *Id.*

[19] William Froehlich, Nancy H. Rogers & Joseph B. Stulberg, *Sharing Dispute Resolution Practices for Leading a Divided Community or Campus: A Crucial Conversation about Crucial Conversations*, 35 Ohio St. J. on Disp. Resol. 781 (2020).

[20] Sharon Press, *Using Dispute Resolution Skills to Heal a Community*, 35 Ohio St. J. on Disp. Resol. 643 (2020).

to that person's very sense of self.[21] Cohen evokes the wisdom of the Biblical tale of Jacob and Esau to illustrate the rewards of wrestling down one's anti-self. He also offers several means of diminishing the power or salience of negative identity, including using a neutral to ask questions designed to enable each person to recognize their own and others' multiple identities.[22] Jennifer Reynolds[23] introduces the "listening dilemma" which like the well-known "negotiator's dilemma," requires a person to make a difficult choice—i.e., whether to listen when listening has the potential to be beneficially transformative and terribly destructive. Using the emotional abortion debate as an illustrative public controversy, Reynolds urges us to recognize that neither a current controversy like this one nor the act of listening is monolithic. Very different sorts of conversations and interactions, involving very different people, contexts and relationships, occur within the abortion debate. Listening will be appropriate in some of these interactions and not in others. And even when listening is appropriate, how we listen and what we listen for should depend upon our intentional strategic goals. Robert Baruch Bush and Peter Miller focus on transformative mediation principles to argue that enabling human agency—a concept very similar to self-determination and evocative of voice—should be understood as mediation's primary purpose, an end in and of itself. Bush and Miller certainly express sympathy for many mediators' desire to promote understanding, empathy and connection to overcome conflicts large and small, but they suggest that our current degree of polarization can be traced to elites' and experts' over-reach, with resulting deficits in many people's ability to truly exercise agency. Dispute resolution neutrals should focus on remedying this deficit by offering forums for party empowerment, with recognition and settlement relegated to the status of desirable by-products.

Many of the symposium articles address the approaches and tools available to us in the classroom as we model and teach law and other students whether, when and how to use ADR skills—like asking the sorts of questions recommended by Cohen—in responding to polarized situations. Using her own experience in teaching a Ph.D. core seminar, Jill DeTemple demonstrates the value of using Reflective Structured Dialogue to plan, create appropriate questions, build in time for reflection, and even enter into communication agreements. The results of these interventions in her and others' classrooms are striking: greater student engagement, an increased sense of belonging and

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[21] Jonathan R. Cohen, *Negative Identity and Conflict,* 35 OHIO ST. J. ON DISP. RESOL. 737, 744 (2020).

[22] *Id.*

[23] Jennifer W. Reynolds, *Talking About Abortion (Listening Optional)*, 8 TEX. A&M L. REV. 141 (2020).

willingness to speak and listen, and even more thoughtful papers. The potential results outside the classroom are even more exciting to consider. Her students have the opportunity to see that they do not need to accept their environments as they traditionally are, but can undertake concrete initiatives to restructure such environments to enhance connections, create a sense of safety, encourage vulnerability and curiosity, and increase the likelihood of productive dialogue and exploration.[24] In his contribution to this issue, Noam Ebner similarly urges restructuring of the curriculum but he goes well beyond the individual classroom. He discusses flipping the law school curriculum so that students understand that all of it—Civil Procedure, Contracts, Torts, Criminal Law, etc.—comes within *our* frame, the frame of dispute resolution. He also proposes thinking of our students, not in terms of who they are today, but in terms of who they will be in the future—lawyers, leaders, and our emissaries in spreading the philosophy, and practices of dispute resolution—and using the resources now available to us (e.g., MOOCs, Zoom, online games) to teach "ADR thinking and skills" to the entire world.[25] Deborah Eisenberg joins Ebner in ambitiously envisioning a recasting of the place of dispute processing and private ordering in the substantive law curriculum, but she also observes that we need "to examine, in Fullerian style, not only the uses, limits, and effectiveness of various processes but also the underlying morality and quality of the processes."[26]

I hope that you find the articles produced by this symposium to be as provocative, inspiring and ultimately useful as I do. In the days, weeks and months since March 20, 2020—as we have dealt with the continued onslaught of COVID-19, the challenges of long-term social isolation, the deaths of George Floyd, Breonna Taylor and too many others, the peaceful protests and deaths that have followed them, the twists and turns of the presidential election season, the attack on the Capitol—our need for the insights, critiques and proposals contained in these articles has become even more pressing.

Before closing, I also want to acknowledge the contributions of Deborah Hensler, Sarah Cole, and Howard Gadlin in making the symposium and this symposium issue happen. Professor Hensler played a key role in the early development of the goals for this symposium. Professor Cole wonderfully facilitated the discussions that led to the collaborative publication of symposium articles in the *Ohio State Journal on Dispute Resolution* and the *Texas A&M Law Review*. Retired Ombudsman and Director of the Center for Cooperative Resolution at the National Institutes of Health Howard Gadlin

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[24] Jill DeTemple, *The Spaces We Make: Dialogic Classrooms and Social Transformation*, 35 OHIO ST. J. ON DISP. RESOL. 753 (2020).

[25] Ebner, *supra* note 16.

[26] Eisenberg, *supra* note 17 at 735.

participated in our March 20, 2020 Zoom conference, including presenting and providing feedback to others. My thanks as well to the editorial boards and staff of the two law journals for their work and cooperation in publishing these articles, particularly under the trying circumstances occasioned by COVID-19.