CHAPTER ONE

Perspectives on Dispute Resolution

An Introduction

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Disputes are a reality of modern life. Each of us has our own perspectives, our own interests, our own resources, our own aspirations, and our own fears. It is no wonder, then, that as we run into each other, we sometimes find ourselves in disagreement about what has happened or about what ought to happen. We each have times when we feel others have hurt us, and we each have times when we are moved to act against real or perceived injustices.

That disputes arise is not remarkable. What is remarkable is the extraordinary variety of ways in which people choose to deal with these differences when they arise. It is this diversity of experiences and approaches that makes the study of dispute resolution so rich, so rewarding, and sometimes so frustrating.

Most people involved in disputes do not enjoy the experience. For many of us, disputes are emotionally draining. Disputes take up time and mental energy. Disputes distract us from the things we would rather be doing. Disputes force us into contact with others—often with others who would not make our list of preferred people with whom to spend time. Dealing with disputes often costs us resources. In short, those caught in a dispute generally view resolution as an attractive goal (assuming the resolution is on some favorable term).

Similarly, society generally treats disputes as costly occurrences—ones that should be avoided if possible, and ones that should be addressed quickly when they cannot be avoided. Society tends to view disputes as threats to the preservation of order. We collectively prefer neighborhoods not to be in strife. We prefer for commerce to flow without the interruptions posed by disputes. We

generally prefer for individuals and for groups to live their lives without having disputes tear at the relationships that bind us as a society.

Yet, not all disputes are necessarily bad. Sociologist Laura Nader has suggested that disputes are a helpful vehicle for casting light onto that which is wrong with the status quo.[1] If all disputes are avoided or suppressed, society might ignore wrongs, might perpetuate injustice, and might leave the aggrieved uncompensated. At the macro level, therefore, in a world in which injustice and the abuse of power still exist, disputes can play a useful function as agents of change.

Still, despite the capacity for disputes to function as vehicles for positive social change, most of us experience disputes as burdensome. After all, apart from the macro level, we live our lives at home, where disputes with our partners are emotionally costly. We live our lives at work, where disagreements with our bosses risk damaging our self-images and our financial well-being. We live our lives in our neighborhoods, where disputes can transform mutually supportive networks into cold and unwelcoming factions. Most of us live lives in which it would be nice to have better ways to resolve disputes.

WHAT WE MEAN BY *DISPUTE RESOLUTION*

In a book explicitly focused on dispute resolution, it is only reasonable to expect some clarity about what is meant by the terms *dispute* and *resolution.* Yet the interdisciplinary nature of this undertaking produces more disagreements (disputes?) than clarity on this question. For purposes of this book, we suggest that readers consider dispute resolution in its broadest, most inclusive sense. It would be a shame to have wisdom from one or more disciplines screened out of our inquiry because of a narrow filter on what is "relevant."

Disputes and Conflicts

Are *disputes* and *conflicts* the same thing? Some scholars use the terms interchangeably,[2] while others see important differences between the two.[3] Part of this derives from disciplinary differences. Social scientists are more likely to study "conflicts," while those with legal training may focus on "disputes."[4] Neither discipline has settled on a single definition of either term, however. In the *Dictionary of Conflict Resolution,* for example, the definition of the term *conflict* occupies more than twenty paragraphs, even without considering its many compound usages.[5]

If there is a difference between popular uses of the terms *dispute* and *conflict,* it might roughly be described as one of magnitude. Most observers would intuitively say that a border war is a conflict, and an argument with a hot dog vendor is a dispute. Conflicts are often seen as broader (involving more people),

deeper (extending beyond surface issues into questions of value, identity, fear, or need), and more systematic (reaching beyond a single interaction or claim). Yet such line drawing in real life is rarely so obvious.

Even more important, we are not convinced that the work of precisely differentiating between disputes and conflicts merits the effort. No body of knowledge or advice should hinge on whether the condition being described falls into the category of dispute or conflict. We do not interest ourselves with questions about what labels observers put on the dynamics they study, but instead focus on what insights observers have to offer about the people experiencing the problem, their views of the problem, and the processes by which they are seeking to resolve their differences. Throughout most of this book, we and the contributing authors describe disputants, dispute contexts, and dispute resolution processes. We hope that those readers trained in disciplines that are most accustomed to treating questions of conflict will join us in looking past terminological differences.

Even beyond questions of definitional boundaries, one often sees disagreement about how best to describe a dispute. Disputants may differ in the *timeline* they use to describe a set of circumstances underlying a dispute. Figuring out who has the most legitimate claim or who is at fault can depend on when one begins the story. ("The project is late because you committed us to an unrealistic deadline without consulting me" versus "If you had managed your workload better last month, we would have been done with the project on time.") Disputants may differ in the *character* they would include in the list of relevant participants or decision makers ("This has nothing to do with him; leave him out of this.") Disputants sometimes use different *labels* for each other. The other person may be an opponent, an adversary, a counterpart, or a partner, for example. Disputants may have different visions of the *scope* of the dispute. For example, each may have a different view of which facts, feelings, issues, and concerns are relevant and appropriate to be included in the description of the dispute.

"Resolution" and Other Elusive Notions

In a simple dispute, the concept of resolution may be perfectly clear. I bump into you, causing you some injury. We talk about how I can make amends for having caused you pain, and we agree that I will make a particular payment in exchange for you releasing me from any further responsibility. I pay you, and you release me. Perhaps this resolves all aspects of the dispute. Or perhaps this payment leaves other issues "unresolved," such as emotions or the effects of the injury or the settlement on parties who were not part of our agreement. Still, in a simple dispute such as this, it is possible to imagine that we might address these other issues as well. When the dispute in question becomes more complex, however, so does the concept of resolution.

The language of resolution implies a level of finality that is only occasionally a realistic condition. Sometimes a dispute is so simple that it is possible to describe a dispute as fully and finally resolved in all senses—legal, emotional, financial, relational, logistical, and so on. A consumer has a complaint about a product and wants to return it. After some discussion, the merchant refunds the consumer's purchase price. Perhaps this dispute can be accurately described as resolved.

Particularly in complex circumstances, however, "resolution" is not a single event—assuming resolution is even possible. At what point in a piece of institutional reform litigation (such as that which led to school desegregation) is the dispute "resolved"? Even legal scholars—those who tend to have the narrowest definition of resolution—would agree that such a dispute is not fully resolved at the moment a court enters a consent decree. Years of supervised implementation remain, making the idea of resolution slippery. When is a collective bargaining dispute resolved? In one sense, the dispute is resolved when a new contract is signed. Yet management and labor will continue to work with one another on an ongoing basis for years. Aspects of the dispute that resulted in the current contract will undoubtedly carry forward, coloring the way the two sides interact between the time when this contract is ratified and the next set of bargaining begins.

Resolution is a tricky notion. One of the editors of this book used to work with a nonprofit consulting firm called Conflict Management Group. In the field, particularly outside of the United States, the name of the firm was the cause of such surprise and concern that the editor occasionally used the acronym CMG to ward off uncomfortable conversations. In some contexts, it was the word *conflict* in the name that caused concern among clients. The editor was once told, "We have no conflict here," by a commander of a military unit in a breakaway republic in the former Soviet Union. His statement was perhaps technically accurate, since the area under his command was in a state of fragile ceasefire. His assertion that the circumstances did not constitute "conflict" reflected not only superficial linguistic differences but also deeply held differences in assumptions about the implications of being in a conflict. Other clients seemed to view the idea of "managing" conflict as bizarre. The firm's name reflected an approach to addressing broad-scale problems of public concern. Rather than aim for a single moment of resolution, the theory behind many of CMG's interventions was that it was better to envision an ongoing stream of disagreements to be managed. One does not "resolve" a marriage or a partnership. In any ongoing relationship (between spouses, business partners, neighbors, professional colleagues), people will have differences, and therefore they will have disputes. That no dispute exists today does not ensure that no dispute will exist next year. The sign of a healthy, productive relationship is not necessarily an absence of disputes but rather the skill with which disputes are addressed.

DISPUTE RESOLUTION: A TOPIC FOR ALL

Given the widespread interest in improving the ways in which we handle disputes, it is not surprising that scholars in many different disciplines have examined the question of dispute resolution. From these disciplinary perspectives, we have learned much about the ways in which people fight and about the ways in which people most effectively deal with their fights.

Those whose primary discipline is law have contributed to our understanding of the disputing process. The law provides the backdrop against which much of dispute resolution takes place. Each party to a dispute may view resorting to court as its alternative to voluntary resolution. If two businesses disputing over an alleged breach of contract do not resolve the matter themselves, it is likely that at least one business will call upon the power of the state, through the mechanism of the law, to resolve the dispute. The legal system is, in many ways, society's most heavily subsidized dispute resolution mechanism.[6] It is no surprise, therefore, that those who have spent their careers studying the law have helpful observations about the ways in which people resolve disputes.

Psychology also offers an invaluable lens on the disputing process. To understand fully what occurs in the context of a dispute, one must understand something of what it means to be human. Disputes raise questions of perceptions. Disputes heighten the importance of emotions. Disputes may threaten certain aspects of the disputants' identities. Any effort at resolving disputes necessarily involves a complex pattern of communication and meaning making, about which those trained in psychology are well situated to offer helpful observations.

Ethicists have a unique and important perspective on the processes of disputing and of resolving disputes. Most disputes have some normative component—whether it is explicit or not. An employee argues that he or she should have received a different assignment from his or her boss. The argument might turn entirely on a question of law (Does the contract entitle the employee to the assignment?) or of psychology (What impact does the boss's decision have on the employee's morale and on how future actions by the boss will be interpreted?). Yet one of the important, unspoken aspects of the conversation between the boss and the employee may be an implicit argument about whether the boss's behavior was condemnable. Invoking the normative argument on the micro level (who was right in this context) raises the stakes considerably in a dispute. Ethics may constrain the behavior of disputants at the micro level; ethics may provide guidance on the normative questions of entitlement in a given dispute; and ethics may teach us something about the larger enterprise in which disputants are engaged.

Economists, mathematicians, and game theorists also offer a significant perspective on the disputing process. Formal analytics can provide clarity in contexts of enormous complexity, when multiple parties are involved, when

multiple interests are in play, or when multiple options or issues face the disputants. Even if no individual actor in a dispute behaves in a perfectly rational manner, it is important for those charged with resolving disputes to understand the incentive structures within which disputants operate. The elegance of mathematical models can provide insight not only on the question of whether resolution is possible, but also on the important question of how one can maximize the benefits each of the disputants receives from potential solutions.

This list is not exhaustive. Indeed, a scan of almost any curriculum in any department on a university campus yields disciplinary perspectives with critical insights to offer to those who care about dispute resolution. Sociologists and anthropologists contribute important observations on disputes. A careful examination of different societies' mechanisms for resolving disputes offers us a window not only into societal differences but also into the nature of disputes and that which might be possible. Historians provide invaluable context for understanding the behaviors of those in disputes. Scholars of journalism have long understood the important role(s) of the media in shaping the views of those in disputes. Scientists recognize patterns in the ways in which broad-scale scientific disputes have been resolved in the past. Political scientists have long studied the effects of various structures within which policy disputes are raised and resolved. Theologians offer insight into religious approaches to the management of differences. The history of world religions provides examples of how various faith traditions resolve their disagreements both internally and with other faith traditions that have different or at times even incompatible beliefs. Even literature is filled with vivid and telling stories of the human condition—virtually always accentuated by the introduction (and resolution) of some dispute or conflict.

THE BLESSINGS AND CHALLENGES OF INTERDISCIPLINARY INQUIRY INTO DISPUTE RESOLUTION

Having this many different scholars from this many different disciplines working on the question of dispute resolution is enormously helpful. Interdisciplinary work has provided more and better tools, frameworks, and language for describing disputes. Without the capacity to do high-quality observation of that which exists, it is difficult to imagine how we could develop any sort of useful prescriptions. Without these interdisciplinary perspectives, none of us would understand dispute resolution as well as we do.

Furthermore, interdisciplinary work has increased the quantity and quality of prescriptive strategies. A strategy for dealing with disputes that might be immediately obvious to one discipline might not occur to those in another. The psychologist sees an opportunity to heal emotional scars. The economist sees

an opportunity for mutually beneficial trades. The lawyer sees an opportunity for the joint development of norms of behavior. The political scientist sees a way to structure decision making to maximize legitimacy. The communications specialist sees an opportunity to give narrative voice to a perspective that is too often silenced. We who focus on dispute resolution would not be as good at what we do, were it not for the contributions of different disciplines.

Interdisciplinary work also presents important opportunities and tools for assessing how various approaches are working. Not all advice is equally useful, and each discipline has important strengths—and important shortcomings—in its ability to monitor the real-world usefulness of the prescriptions it offers. Interdisciplinary examination of dispute resolution processes strengthens our understandings of those processes.

This interdisciplinary attention to dispute resolution builds on itself. What was perhaps once a spin-off topic of interest for one or more of the disciplines is now beginning to show signs of disciplinary independence. Students can now study the disputing process in programs explicitly aimed at dispute and conflict resolution at both the undergraduate and graduate level at a number of institutions.

Having sung the praises of interdisciplinary work, it is important to acknowledge the limitations and challenges it presents. Any interdisciplinary work, on any topic, is challenging. Each discipline speaks its own language. Practitioners in every field are busy, and most are less reflective than they would prefer to be. Scholars tend to narrow the focus of their work dramatically (in order to say something new and noteworthy to those who are already in the discipline), and as a result, even when they do offer prescriptive advice, they offer it to an increasingly narrow audience. In short, in interdisciplinary fields like dispute resolution, progress—to the extent that one can measure such a thing—often comes in fits and starts, unlike the steady progression of ideas one might see in an exploration captured entirely by a single discipline.

WHAT IS NEEDED

The back and forth between disciplines creates a need simultaneously for at least three important activities: cutting-edge work, interdisciplinary exchanges, and synthesis.

We need cutting-edge work. Typically, cutting-edge work takes place within a single discipline. An advanced experiment sheds light on a relevant psychological phenomenon, previously misunderstood. A mathematical model finds a new application in the analysis of a complex set of incentives. A persuasive new articulation of the philosophical underpinnings of some aspect of the endeavor reaches the community of ethicists. A comparative study reveals important behavioral differences among people acting under various legal constraints. Any

of these would contribute to the understanding of dispute resolution—even though the primary findings or work would likely be meaningful only to those already in the discipline. Such advances are critical to improving how we deal with disputes.

We also need interdisciplinary exchanges. No discipline holds a monopoly on the understanding of dispute resolution. Many different voices have something to offer, and yet most scholars and most practitioners spend most of their time talking only with those who have a similar practice or similar educational training. We need psychologists who are interested in dispute resolution to go to lunch with lawyers who are interested in dispute resolution. We need game theorists and political scientists to teach a joint class on dispute resolution. We need therapists and economists to co-mediate disputes in the field. Cross-fertilization is critical to improving how we deal with disputes.

Finally, we need synthesis. We need opportunities to step back and take account of what we have figured out—or at least hypothesized—so far. Practitioners need to have ways to take stock of their current practices, to compare them with developing theories. Scholars need to have ways to see the larger picture(s) being developed by the body of work in their fields and in others. Policymakers need to have more unified bodies of information on which to base their decisions. None of us, no matter how well-intending, no matter how well-read, no matter how disciplinarily nimble, can keep up with everything happening in all of the relevant fields. Moments of synthesis are, therefore, critical to improving our understanding of dispute resolution.

WHAT THIS BOOK OFFERS

This book offers examples of all three activities necessary for interdisciplinary progress. Some of the chapters in this book represent cutting-edge work by some of the leaders in the field. Some of the chapters in this book are written as a product of cross-disciplinary fertilization. The entirety of this collection aims to serve the purpose of synthesis.

One of the challenges of talking about dispute resolution is that each practitioner or scholar seems to have a framework of his or her own for describing the phenomena of disputing and dispute resolution. That we cannot even agree on how to organize our observations—much less agree on the substance of those observations or what meaning to make out of them—illustrates some of the challenges of the previously described interdisciplinary work.

Without any illusion that this is the only way one might organize materials on dispute resolution, we offer the following organizing framework for the materials in this book: we seek to understand *disputants*—the actors who engage in the disagreements that form the basis of our study; we seek to understand

disputes and *dispute contexts*—the substantive issues in disputes and the circumstances in which the disputes often arise; we seek to understand the *processes* by which disputants seek to address their circumstances; and we seek to understand the *emerging issues* related to the intersection of these three perspectives.

Understanding Disputants

Disputes involve real people—even when the titular parties are organizations. As a result, the complexities of human existence color (or cloud, perhaps, depending on your perspective) the interactions in any dispute context. Disputants differ in all of the ways that humans differ. To understand dispute resolution, therefore, we must come to understand how disputants view themselves, view the dispute, and view each other.

In Part One of this book, we offer eight chapters aimed at clarifying some aspects of the human experience of dispute resolution. Are there "personality" differences that influence the way disputants act in and understand dispute resolution processes? Are there predictable ways in which disputants deviate from pure rationality in the context of disputes? What roles can emotions play in the context of a dispute? In what ways do the individual identities of disputants affect the way they perceive and are perceived? In what ways does the relationship between the parties hold promise—or peril—for disputants? How do the cultures of the parties affect the bargaining dynamics between them? What might we learn by examining the disputing process through a gender lens? And how is it that two people can witness the same thing and make such significantly different meaning out of it?

In short, Part One invites readers to consider the ways in which the individual disputants shape the prospects for resolution.

Understanding Disputes and Dispute Contexts

Disputants act differently in different contexts and in different disputes. To assess a dispute accurately, therefore, we need an understanding of how the disputants view the issues in contention. Even that, however, is not enough. Disputes virtually never take place in a vacuum or in such isolation that they can be wholly separated from the rest of the disputants' lives. To appreciate the prospects for resolution, therefore, we must also understand the broader conditions in which the disputants view the dispute.

Part Two offers seven chapters aimed at shedding light on the different ways disputants might understand their circumstances. Can disputants recognize the opportunities they have to create value through an innovative settlement? What effects do agents play in the disputing process? How can disputants use the process of quantification to aid their decision making in dispute contexts? What effects does it have on disputants when multiple options are on the table simultaneously? In

what ways does the organizational setting in which the dispute is occurring affect the behavior of the disputants? What ethical questions does the dispute raise? What legal constraints operate on the disputants as they consider various strategies?

In short, Part Two invites readers to consider the myriad ways in which the same person would act differently, depending on the dispute he or she faces.

Understanding Dispute Resolution Processes

How do disputants go from recognizing the parameters of a dispute to resolving it? The answer, of course, depends on the dispute resolution process(es) they employ. To understand fully the choices before a disputant, we must understand not only the disputant and how he or she views the dispute but also the range of different process choices he or she perceives.

Part Three offers seven chapters providing a detailed look at a variety of different dispute resolution processes. What are the dynamics between disputants when they negotiate—and what should those dynamics be? What role(s) can mediators play? In what ways do those roles differ from those of arbitrators? How do consensus-building processes differ from other forms of dispute resolution? Under what circumstances might litigation be a wise and appropriate forum for resolving a dispute? What effects do integrated conflict management systems, now prevalent in many organizational settings, have on disputants? What lessons can organizational leaders derive from the dispute resolution literature as they adopt informal dispute resolution processes? And how can disputants best choose from among the variety of dispute resolution processes available?

In short, Part Three examines the range of processes generally available to disputants in their efforts at resolution—recognizing that not all processes are created equal.

Emerging Issues in Dispute Resolution

Part Four offers seven chapters exploring some of the emerging issues and new directions for dispute resolution. How will the still-emerging world of cyberspace affect disputants in the future? How will the sweep toward globalization affect the legal regimes and processes we employ to resolve transborder disputes? What opportunities exist to introduce principles of reconciliation and forgiveness into existing systems of dispute resolution? What opportunities and challenges face those who seek to educate youth about dispute resolution? What changes should we expect as dispute resolution becomes more institutionalized and as dispute resolution practitioners face the prospect of professionalization? And with the increase in human knowledge and the growing demand for better, more efficient dispute resolution processes, what are the challenges and opportunities that dispute resolution faces as a field in the years ahead?

In short, Part Four examines the broad trends in dispute resolution, with an eye toward some of the issues that are likely to be central to disputants, practitioners, and scholars.

OUR PERSPECTIVE ON DISPUTE RESOLUTION

As the editors of this book, we are committed to the idea that dispute resolution is a fascinating and critically important area of study and practice.

Some in the field, including some of this volume's contributors, advocate for particular dispute resolution processes over all others. We are modestly more agnostic, believing that there is no particular method of resolving disputes that is consistently superior to any other. Disputants, disputes, and dispute contexts are too complex to permit any universal declarations. Some disputes would best be settled one way. Others should be resolved by another method. Perhaps some ought to be left unresolved—at least initially. We are persuaded, however, that in all but the rarest of circumstances, the use of force is ill advised—a blunt, inelegant, and all-too-often-tragic way to address disputes. Almost without exception, the use of force represents some combination of a failure of skill, a failure of will, or a dearth of creativity on the part of one or more of the disputants.

Without being imperialists of any particular approach to dispute resolution, therefore, we are imperialists about the study of dispute resolution. Whatever approach one concludes is best, whatever perspective one holds about the matter in dispute, whatever role one might play in the context of a dispute, learning more about dispute resolution is useful. This book aims to help in that process.

Notes

1. For a concise articulation of Nader's concerns, see her description of the rise of a "harmony ideology" in L. Nader, "Controlling Processes in the Practice of Law: Hierarchy and Pacification in the Movement to Re-Form Dispute Ideology," *Ohio State Journal on Dispute Resolution,* 1993, *9,* 1–25.
2. "In its more common use, *conflict* refers narrowly to a disagreement, the expression or manifestation of a state of incompatibility. . . . When used in this manner, conflict is synonymous with dispute" (Yarn, D. H. [ed.]. *Dictionary of Conflict Resolution.* San Francisco: Jossey-Bass, 1999, p. 114).
3. For example, John Burton suggests that "'Disputes' involve negotiable interests, while 'conflicts' are concerned with issues that are not negotiable, issues that relate to ontological human needs that cannot be compromised" (Burton, J. W. "Conflict Resolution as a Political Philosophy." In D. Sandole and

H. van der Merwe [eds.], *Conflict Resolution Theory and Practice: Integration and Application.* Manchester and New York: Manchester University Press, 1993). We understand Burton's suggestion that conflicts may involve more deeply held beliefs, though we do not share his characterization that conflicts, by definition, include nonnegotiable issues.

4. For more on the evolution of various disciplines' understandings of dispute resolution, see Menkel-Meadow, Chapter Two, this volume.
5. See Yarn, *Dictionary of Conflict Resolution,* 1999, pp. 113–117.
6. We acknowledge that one might view the military as the most expensive dispute resolution mechanism underwritten by society. For the reasons we describe later in the chapter, we are so convinced that resort to force deserves separate treatment from all other dispute resolution processes that we largely omit its mention throughout this book.