FROM:

BEYOND CONFRONTATION,
J. VASQUEZ ET AL., EDS.
U. OF MICHIGAN PRESS, 1995.

CHAPTER 1

Dispute Resolution—The Domestic Arena: A Survey of Methods, Applications, and Critical Issues

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The aim of this chapter is to provide some background on the current state of the domestic dispute-resolution field, as a basis for examining the possible connections between that field and the field of global conflict resolution. Therefore, the presentation here is an introductory survey, not an in-depth examination. It includes: (1) a description of the range of dispute-resolution processes currently in use in the domestic arena; (2) a short (modern) history of the dispute-resolution field in the United States, incorporating a survey of the current uses of particular processes in different substantive contexts; (3) a summary of the critical issues presently facing the dispute-resolution field; and (4) some reflections, based on the above, on similarities and differences between the domestic and global fields.

At the outset, a few definitions and qualifications are called for. As referred to herein, the "domestic" field means dispute-resolution practice within the United States, at the state and federal levels, including both private and governmental activities. It also means the study of this phenomenon by scholars in different disciplines. Current usage often employs the term *alternative dispute resolution* (ADR) to describe this field, and that terminology is used here. The discussion that follows omits any reference to the field of labor-management dispute resolution. The modern ADR field, although it has derived much from the labor field both in theory and practice, has always regarded the labor area as a distinct, sui generis field. In short, ADR in practice means ADR *outside* the labor area, and that is what will be discussed here.

The term *alternative dispute resolution* suggests that the processes referred to are often seen as alternatives to the formal court system. One implication of this characterization is that much of the work in domestic dispute resolution can be seen as related in one way or another to the legal system, and this explains the involvement of legal academics in the field. Of course, domestic dispute resolution can be and is analyzed from other, entirely nonlegal perspectives. The legal orientation provides a useful framework, though

like all others it has limitations. This comment is meant to place what follows in perspective for the reader. A social or political scientist might survey the field quite differently.

Processes in Current Use: A Brief Dictionary of Domestic Dispute Resolution

Discussion of "dispute resolution" in the domestic arena usually focuses on a number of fairly well-defined processes that are more or less widely used to resolve disputes at the present time. While most of these probably need no explanation, some brief definitions derived from current practice and scholarship (American Bar Assoc. 1987; Wilkinson 1990, chap. 1) will provide a common vocabulary.

Adjudication refers to the compulsory judicial (or administrative) process, in which the parties present their cases in a formal, adversarial public proceeding to a judicial official, who makes a decision according to substantive legal rules and embodies that decision in a written opinion. The decision is reviewable by a higher court for errors of law, and after final review, it is binding on all parties and has precedental effect.

Arbitration refers to a voluntary process in which the parties present their cases in a quasi-formal, quasi-adversarial private proceeding to a privately selected neutral third party, who makes a final and binding decision on any basis s/he deems appropriate (or which the parties mutually specify). The decision is reviewable only on very limited grounds and has no precedental effect.

Private judging, a voluntary process, is a combination of the above two processes in which a privately selected retired judge conducts a formal, adversarial private proceeding, and makes a decision according to substantive legal rules. The decision is reviewable by a public higher court for legal errors, but has no precedental effect.

Advisory (or "nonbinding") arbitration refers to arbitration in which the arbitrator's decision is, in effect, only a recommendation, not binding on the parties. The decision may be accompanied by findings of fact, and the process is usually intended as a spur to negotiated settlement.

Court-ordered arbitration refers to a form of advisory arbitration ordered by a court (usually under a statutory scheme) and conducted by a court-appointed lawyer-arbitrator applying substantive legal rules to make an "award." Either party may reject the award and return to court for adjudication, but if neither does, the award becomes final and binding.

Mediation refers to a process, either voluntary or court-ordered, in which a neutral third party (court-appointed or privately selected) conducts an informal and nonadversarial meeting to help the parties identify the issues in

dispute and reach a mutually acceptable settlement on their own terms. The mediator has no power to impose a settlement and ordinarily does not even make recommendations.

Med-arb, usually a voluntary process, is a combination of mediation and arbitration in which the neutral third party first attempts to resolve the dispute by mediation; however, if no mediated settlement is possible, the med-arbiter disregards the prior discussions, hears the parties' arguments in a private arbitration hearing, and renders a binding award as an arbitrator.

Negotiation needs no definition here, but several processes should be noted that are essentially add-ons to the negotiation process intended to promote settlement.

Mini-trial is a voluntary process, usually involving corporate parties, in which both parties' lawyers, after an expedited and limited exchange of information, give an adversarial summary presentation of their cases to the managers or corporate officers of both sides. The corporate decision makers then conduct direct negotiations.

Summary jury trial is a court-referred process in which both parties' lawyers, after limited exchange of information, give an adversarial summary presentation of their cases to a sample jury. The jury's verdict is used as the basis for direct negotiations.

Early neutral evaluation is a process, either voluntary or court-referred, in which a mini-trial-like session is conducted by a retired judge or similar "experienced" neutral, who then gives the parties his assessment of the likely outcome if a trial were held. The parties then conduct direct negotiations.

Policy dialogue is a negotiation-based process that involves the convening of sessions where people representing diverse viewpoints on a particular set of issues can both speak and listen to one another, outside of the pressured context of a particular dispute. The dialogue may lead to consensus about how to define issues and problems or how to approach them, or it may simply help the parties to better understand each other's diverse viewpoints and the bases on which they rest.

These processes can be distinguished and characterized on a variety of dimensions, and identifying the most useful framework for comparing processes has interested many scholars. They have suggested distinguishing factors such as whether the process is formal/informal, adversarial/nonadversarial, voluntary/compulsory, binding/nonbinding, public/private, or precedental/nonprecedental; whether the decision is based on legal rules, or other rules, or no rules; the degree of third-party involvement in and control over the proceeding; and so on (Goldberg, Green, and Sander 1985, 7–10). Such distinctions as these all focus on how the processes operate.

Another basis for comparison is impact or outcome. Scholars here have suggested comparing different processes in terms of effects, such as time and

cost (public and private); subjectively defined party satisfaction; preservation/destruction of relationships; dilution/preservation of rights; exacerbation/amelioration of economic and political inequality; promotion/obstruction of self-determination and autonomy; furtherance/obstruction of economic efficiency (aggregate societal welfare); preservation/compromise of public order; and so on (Bush 1984; Bush 1989a, 347–53).

Comparison of effects, naturally enough, has led to analysis of the relative appropriateness or preferability of different processes, whether in specific types of cases or generally. The key question here, which is discussed more fully later, is whether different processes differ in impact in predictable and significant ways, so that disputants and policymakers can rationally choose which process to use by matching predicted impact to desired goals. Comparison of operational features has produced different and somewhat contradictory insights. Some scholars have tried to link operational differences and impact differences, suggesting that different features predictably lead to different impacts, and using that analysis to answer the question of rational process choice just mentioned (Bush 1984, 951–62; Riskin and Westbrook 1987, chap. 7; Sander 1976). Others, however, have questioned whether the operational distinctions described in theory are so clearly found in practice, suggesting that real-world versions of the ADR processes described above are much more ambiguous than theory implies—and therefore more difficult to neatly classify, predict, and choose between (Esser 1989). Suffice it to say for now that on both of these questions—predictability of process impacts and distinguishability of process features—there is much disagreement in the field itself.

However, regardless of the continuing lack of consensus on how to analyze and evaluate ADR processes, their utilization in practice has grown enormously in the last two decades and continues to do so. This growth itself, in a context of considerable informational and analytical unclarity, gives rise to many of the current problem issues. First, however, it is important to picture that growth by describing in a summary way the development and current range of utilization of the processes.

Development and Current Uses of ADR Processes: A Brief History and Overview of the Domestic Arena

Some scholars have traced the development of ADR processes in the United States to the colonial period (Auerbach 1983). However, most of the current interest in ADR in the domestic arena focuses on development over the last 20 years or so, beginning in the late sixties. This chapter focuses on developments in this "modern" era of ADR in three areas: mediation, arbitration, and negotiation variants. This capsule history draws from numerous sources, especially Singer 1990; as well as Folberg and Milne 1988, chap. 1; Goldberg, Green, and Sander 1985; and Tomasic and Feeley 1982.

Mediation. Over the past 20 years, the use of mediation has developed in many types of disputes. However, the major milestones in the development of mediation, from which it spread more broadly, occurred in three main areas: so-called community mediation, divorce mediation, and environmental mediation. A fourth very recent phenomenon is the development of court-ordered mediation for civil cases generally, which reflects the extent to which the earlier developments have taken root and spread. In each of these areas, the impetus for using mediation came from several directions at once, operating from quite different motivations.

In the domestic field, *community mediation* is understood to encompass resolution of both small-scale interpersonal disputes at the neighborhood level and major multiparty disputes involving different groups within a community (such as racial or ethnic conflicts). Shortly after the major urban disorders of 1968, mediation attracted interest as a possible device for addressing the conflicts behind the violence. This interest came from a few different directions. On the one hand, local and national governmental agencies (like the federal Law Enforcement Assistance Agency) joined with major business/civic-oriented nonprofit agencies (like the American Arbitration Association [AAA] and the Ford Foundation) to sponsor programs that would try to resolve major and minor community disputes by mediation. The U.S. Department of Justice's Community Relations Service and the AAA's National Center for Dispute Settlement were major actors in this area. In both, but especially in the AAA's program, the conception of mediation was based squarely on the precedent and model of labor mediation, and many of the early figures in the field were prominent labor mediators. The first efforts focused on mediation of major disputes involving community groups and government agencies, such as school desegregation and public housing conflicts. Soon the notion developed that major conflicts were often triggered by minor disputes left unresolved, so that mediation at the interpersonal level could avoid escalation into major conflict. The result was the development, again under joint government and private sponsorship, of programs for mediation of minor civil/criminal disputes, in cooperation with local courts and prosecutors (Sander 1976; Stulberg 1975). Often, in such programs, mediation was presented as "an alternative to criminal prosecution," since many of the disputes involved would typically surface as complaints to local law-enforcement agencies.

Parallel to this fostering of community mediation by business, civic, and governmental organizations, a separate "track" of interest in mediation developed during the late sixties and early seventies in the then thriving "grass roots" community-organization sector. Spurred by organizations like the

American Friends Service Committee, and by the activist traditions of the *community organizing and neighborhood legal services movements*, the community mediation "movement" was modeled on non-Western traditional dispute-resolution institutions such as African "moots" (Danzig 1973; Wahrhaftig 1982). The resulting projects were usually community-based, with minimal involvement of the official justice system and a strong emphasis on education and involvement of the community itself in the program. Here mediation was presented as a means of developing individual and community self-determination without reference to the formal justice system (Shonholtz 1984).

Over the next decade, both court-connected and community-based "neighborhood mediation" programs spread across the country. In the mid-seventies, the U.S. Justice Department's sponsorship of three model Neighborhood Justice Centers put the official stamp of approval on community mediation, and through the eighties such programs were widely institutionalized at the local and state levels (McGillis 1982). As the field developed, the court-connected and government-sponsored programs—and their approach to mediation—came more and more to predominate over community-based programs. Several hundred government-sponsored programs now exist across the country, and in some states, like New York, Florida, and others, they are organized under statewide programs handling hundreds of thousands of cases annually.[1]

The second major milestone in mediation's history was the development, in the late seventies, of *divorce mediation* (American Bar Assoc. 1982, chap. 1; Folberg and Milne 1988, chap. 1). Several factors led to interest in the use of mediation in divorce cases. First, the broad shift in the substantive law toward nonfault divorce obviated the need for proof or admission of cruelty, desertion, and so on, and signaled a change from a policy favoring preservation of marriages to one favoring facilitation of divorces without undue exacerbation or prolongation of conflict. The shift toward nonadversarial divorce in substantive law led naturally to an interest in the nonadversarial mediation process (Winks 1980). In addition, there was a tradition of mediative processes already extant in the family courts. In the fault era, many family courts used optional or mandatory "conciliation" by in-house staff conciliators (usually social workers), to see whether the marital problem could be overcome and divorce avoided. The end of the fault era closed the conciliation offices, but after the transition to nonfault, the history of conciliation made it easy for family-court judges to see the potential for mediation of the terms of the divorce itself. Starting in the late seventies, family courts began referring contested cases with children to staff mediators (also usually social workers), for mediation of the of the "human" issues of the divorce (i.e., custody and visitation). Further development occurred in the mid-eighties. With studies

showing high rates of party satisfaction and compliance with mediated agreements, several states adopted laws *mandating* mediation of all contested custody cases—the first use of mandatory mediation (Folberg and Milne 1988, chaps. 10, 21). More recently, legislation and court rules have expanded the mediation process to deal with financial and property issues as well, so the entire case is sent to mediation.

Parallel to this development within the courts themselves, the nonfault era saw a development in the private marriage counseling profession to extend counseling services not only to help preserve but to help amicably terminate marriages. The result was the development of *private* divorce mediation, with mediation offered on a fee-for-services basis by both therapists and lawyers to couples seeking help in achieving amicable dissolution (American Bar Assoc. 1982, 173). Where court mediation existed, private mediators offered an alternative; where no court mediation existed, they offered a unique service. In both places, tensions arose for obvious reasons between divorce mediators, especially nonlawyer mediators, and the organized bar. However, after a turbulent decade, by the late eighties private mediation was well established in many states, and steadily growing.

The growth of public and private divorce mediation is especially significant because it represents the first instance, outside of the labor field, of an emerging *profession* of mediation, in which significant numbers of practitioners pursue mediation as a full-time paid occupation. Reflecting this unique situation, divorce mediation was the first field of mediation to see significant attention paid to the development of standards of practice and qualification for mediators (Folberg and Milne 1988, chaps. 18–20). In many ways, divorce mediation may have considerable influence as a precedent in the development of general civil mediation, discussed below.

The third milestone in modern mediation history was the development, beginning in the seventies, of *environmental mediation* (Goldberg, Green, and Sander 1985, chap. 10). The increased consciousness of environmental issues in the seventies, and the corresponding increase in regulation and litigation, gave rise to a whole new class of high-stakes, multiparty conflicts with major public policy dimensions, such as disputes over the siting of hazardous facilities or the undertaking of major development projects. The use of mediation here was probably inspired by its early use in intergroup community conflicts as described above. In any event, the development of environmental mediation has been important not only in itself, but because it highlights the possibilities for using mediation to resolve public policy disputes of other kinds. As such, this use of mediation probably foreshadowed the development of publicly funded dispute-resolution offices at the state level in several states.

A fourth major development in mediation that grew out of the other three is the recent growth in the use of mediation for resolving civil litigation

generally, including complex commercial, corporate, insurance, liability, and other types of civil claims (Singer 1990, chap. 4). Developments include both court-sponsored (voluntary or mandatory) and private mediation. As to the latter, it is closely connected to the growth of private arbitration services described in the next section, and is still in its nascent stages. This new industry, as it were, it still shaking itself out, and the field is far from stable, as several new entrants have found. Court-sponsored mediation is also still in its early stages, but it is developing quite rapidly. In several states, legislation provides for court-referred or court-ordered mediation of specific kinds of civil disputes including, for example, farmer-creditor disputes, medical malpractice cases, personal injury claims, workmen's compensation claims, and so on. A few states, notably Florida and Texas, have authorized courts to order mediation (or other ADR processes) in *any* civil case, and at least in Florida the process is being used extensively for all types of civil claims. Under such legislation, the utilization of mediation is undergoing rapid and major expansion. Like the development of divorce mediation, the rise of civil mediation means a new—and much larger—body of professional mediators, and this development itself will have major economic and political consequences wherever it occurs, as is already the case in Florida.

One final point is that, in a quite controversial development, the use of mediation is increasingly being urged upon judges themselves, especially in the federal courts, to settle cases pending before them (Menkel-Meadow 1985). Judicial mediation, to be distinguished from judicial *referral* to mediation, is encouraged under the Federal Rules of Civil Procedure as part of the judge's greater role in case conferencing and management of the litigation process. The extent to which federal judges actually do engage in mediation themselves is not yet clear, but it is certainly an important field to note.

Arbitration. As with mediation, the last two decades have seen enormous growth in the use of arbitration in different fields. Three general areas of growth are most notable: private commercial or business arbitration; consumer arbitration in a number of different areas; and statutory or court-ordered arbitration.

Private business arbitration has a long history in the United States, beginning with the arbitration tribunal of the New York Chamber of Commerce, established by the colonial Dutch merchant community in the mid-eighteenth century. The modern era of arbitration began in 1926, with the founding of the American Arbitration Association (AAA), a joint creation of the business community and the bar (Auerbach 1983, chap. 4). Essentially an administrative organization, the AAA (and other newer companies in its image) offers business disputants access to a pool of experienced private arbitrators, as well as administrative services including hearing sites, scheduling, stipulated rules of procedure, and so on, to facilitate the arbitration process. As reflected in the AAA's activities and other developments, the visibility and utilization of private business arbitration greatly increased beginning in the late sixties and early seventies. This development has been tied to a growing perception among business disputants of the ineffectiveness of litigation—both because of its rising costs and, perhaps more so, because of the fear that neither juries nor judges could appreciate the increasingly complex issues (financial, technological, etc.) presented in business disputes and thus render sound decisions (Wilkinson 1990, chap. 1).

From the seventies on, the AAA itself has steadily expanded, as indicated by its establishment of a series of new, specialized arbitration tribunals (each with its own pool of arbitrators and rules) for commercial, construction, insurance, and complex civil cases, among others. Further, a number of competing private arbitration organizations emerged beginning in the early eighties, including firms such as Endispute, Judicial Arbitration and Mediation Services, the Center for Public Resources, and others. While not all have had great success, the growth of the market for arbitration is undeniable. Many of these companies offer mediation and other ADR processes as well as arbitration, and they vary in their rules and the character of the arbitrators in their pools. In certain states, such as California, there has in recent years been a great demand among the business and legal community not only for arbitration but for "private judging," which is conducted by retired judges and is seen as combining the advantages of arbitration and adjudication.

Finally, another major area of business arbitration that has also grown steadily is intraindustry arbitration, in which industry or trade associations use arbitration to resolve disputes between member businesses. The most notable examples of this are the securities and commodities exchanges, whose members agree as a condition of admission to resolve all intermember disputes via arbitration. The same model has been adopted by other industries as well, and it is frequently found in the international business sphere as part of international trade agreements (Wilkinson 1990).

Related to this last phenomenon—intraindustry business arbitration—is the second major area of arbitration's growth. *Consumer arbitration,* despite its label, was really a creation of business in response to increased consumer awareness and the consumer protection movement of the sixties. Like business arbitration, consumer arbitration is found in both generalized and specific industry (or manufacturer) programs (American Bar Assoc. 1983). For example, the Better Business Bureau (BBB), a national retail trade association, has an arbitration program for all kinds of consumer-merchant disputes involving its member merchants (although in recent years they have focused heavily on disputes over newly purchased automobiles). On the other hand, in "AUTOCAP" and "MACAP" (the "CAP" stands for "consumer arbitration program"), associations of auto and appliance manufacturers offer arbitration

to purchasers of those specific products. Such industry programs were given encouragement by federal legislation in the late seventies. In a different area, all the major securities and commodities exchanges now extend their arbitration programs to disputes between exchange members and customers, so securities arbitration now includes a consumer sector. In all of these different areas, the common framework is that the business party agrees in advance (usually as a condition of membership in the association) to submit disputes with consumers to arbitration, while the consumer simply has the *option* of doing so when a dispute actually arises. So consumers are generally free to go to court when disputes arise. If the consumer does agree to arbitration at that time, both parties are bound by the decision.[2]

The third major area of arbitration's growth is the field of *court-ordered arbitration*, as defined earlier. The first court-ordered arbitration program was established in Philadelphia in 1952, and such programs spread across Pennsylvania in the sixties. Beginning in the seventies, many states and federal judicial districts have instituted court-ordered arbitration, and it may be the fastest growing form of ADR (Hensler 1986). It is typically adopted under enabling legislation and judicial rules—to avoid legal and constitutional challenges—and typically provides for mandatory arbitration of all civil claims for monetary damages under a certain dollar amount (today, usually $25–50,000). Most programs make no attempt to screen cases for "suitability" for arbitration, and refer as many cases as the available pool of arbitrators can handle. The result is that a very large number of civil cases, of different kinds, are shifted from the courts into the arbitration process. The process itself is run by lawyer-arbitrators applying legal rules, and the "decisions" can be rejected by either party, in effect making this a form of *advisory arbitration*. Nevertheless, in most cases both parties accept the decision, with rejection rates varying between 15 and 50 percent, depending on how long the program has operated. Beyond its use in general civil cases, court-ordered arbitration is also widely used in small-claims cases, and, under special legislation in some states, in certain kinds of consumer disputes such as no-fault insurance claims and medical malpractice cases.

Negotiation variants. As noted earlier, ADR processes in current use include a number of variants of the negotiation process, such as mini-trial, summary jury trial, and several others (Wilkinson 1990). All of these processes are essentially used to spur negotiations by giving the parties a clear idea of what the outcome of a litigation is likely to be, in the absence of a negotiated settlement. The mini-trial is used primarily in complex intercorporate civil litigation, especially as an antidote to problems of massive and extended pretrial discovery and motions in court. "Early neutral evaluation" (ENE) is used in both corporate and noncorporate civil litigation, including personal injury cases. Both of these are services offered by the various private

dispute-resolution companies mentioned earlier. ENE is also used in certain state and federal courts as a court-referred ADR technique. Summary jury trial is also used as a court-referred process, primarily in personal injury cases but also in some commercial litigation.

There are a few other important areas where negotiation-based ADR processes have been suggested and used, which are somewhat controversial. One is called "regulatory negotiation," or reg-neg. It is a process in which regulatory agencies like the Environmental Protection Agency, instead of simply promulgating regulations and then conducting hearings to elicit comments and objections, *begin* the promulgation process by convening a meeting of interested and potentially affected parties to collaborate in "negotiating" a set of proposed regulations acceptable to all. Public hearings still follow, but with fewer objections anticipated because of the initial negotiations. A second area is land-use or zoning cases, in which local boards, instead of flatly applying zoning and land-use restrictions, increasingly engage in "negotiated zoning." That is, they negotiate with developers and others seeking variances, extracting various promises and commitments for public amenities in exchange for permission to build at variance from local codes. Both of these examples illustrate ADR processes as alternatives, not to the judicial process, but to the administrative and political processes. They have raised difficult questions, as has public-sector labor arbitration, regarding whether ADR involves an inappropriate (or even unlawful) abdication of responsibility by elected or appointed public officials.

A final development that deserves mention is the proactive use of negotiation-based, consensus processes to help parties address potentially contentious issues *before* specific disputes arise. These processes have been called by different names, including "collaborative problem-solving," "policy facilitation," and, most recently, "policy dialogue." Whichever name is used, these processes generally involve the convening of group sessions, at which people representing diverse viewpoints on a particular set of issues can both speak and listen to one another, outside of the pressured context of a particular dispute. The exchange of views is usually moderated by one or more professional group facilitators, so the process falls somewhere between mediation and negotiation on the ADR continuum. The dialogue may lead to common understandings or consensus about how to define issues and problems or how to approach them, or it may simply help the parties to better understand each other's diverse viewpoints and the bases on which they rest. If specific disputes arise at later points, the foundation laid by the dialogue process may make other ADR processes more productive.

In recent years, certain organizations and projects, such as Common Ground, the Listening Project, and the Public Conversations Project, among others, have concentrated on facilitating broad-ranging dialogues on contro-

versial public issues including abortion, gun control, and race relations. (Public Conversations Project 1992) The dialogue process has also been used in situations involving particular policies, such as policies on urban and regional planning, or environmental protection and economic development (Susskind and Cruikshank 1987, chap. 6; Bingham 1985; Moore and Carlson 1984). Indeed, reg-neg, mentioned just above, can be seen as a form of policy dialogue. The growth of policy dialogue has been closely connected with the growth of public policy and environmental mediation. However, policy dialogue generally deals proactively with issues before specific disputes arise, while policy mediation is normally employed to deal with concrete disputes that have arisen over specific issues or actions. Some have suggested that, like processes such as reg-neg, policy dialogue can be seen not simply as an element of the ADR field, but as a means of enhancing the democratic process. This suggestion has some interesting implications for the global conflict-resolution field.

Structural Incentives and Constraints: Some Comparisons between the Domestic and Global Arenas

The foregoing history and overview suggest, at least implicitly, several important structural or contextual factors in the domestic arena that have worked either to encourage or to constrain the development of ADR processes. It is useful to identify these factors explicitly in order to offer some comparisons with structural factors in the global context.[3]

One strong force behind the development of ADR processes in the domestic arena has been disappointment and dissatisfaction with the formal adversary process offered by courts of law. This force works both negatively and positively. ADR offers a way to avoid the negatives of litigation—delay, expense, constrained win/lose outcomes, and unpleasantness. At the same time, ADR offers a way to secure goods that disputants consider important per se—the power to retain control over outcome, the opportunity to treat others and be treated with respect and concern, and the chance to have one's needs met as fully as possible in a given situation. Offering parties the option both to avoid more of what they dislike and to get more of what they prefer, by comparison to the dominant or primary system, constitutes a powerful incentive for the use of ADR. In the global arena, disappointment with the "system" or regime of power politics, including the use of war or violence, is seen by some as providing a similar incentive to explore conflict-resolution processes, at least as a way of avoiding the negative (Vasquez, in this volume).

In other respects, the domestic and global arenas seem to present contrasting structures—but it is important not to overstate the contrasts. Thus, it

is suggested that the difference of "scale" between domestic and global conflict makes the two incomparable. This view portrays domestic conflict as involving relatively small-stakes, two-party disputes between individuals, and global conflict as involving very high-stakes, multiparty conflicts between institutions. In reality, the contrast is less sharp. Many disputes in which domestic ADR is used, such as environmental and public policy cases, involve high-stakes, multiparty institutional conflict; at the same time, many believe that global conflicts can be segmented in conflict resolution so that they can be seen and handled in a two-party, interpersonal framework (e.g., Pruitt, in this volume). Another suggested contrast is that the domestic arena represents a highly ordered environment, especially because of the pervasiveness of law and legal institutions, while the global arena is an essentially anarchic context lacking any strong ordering principles or agencies. Here too, in reality the contrast is not so sharp. Law and legal institutions have far less penetration in the domestic arena than generally assumed (Galanter 1983). At the same time, as Johnson (in this volume) suggests, the structure of international law and organizations has brought considerable order to the global arena (see also Vasquez, chap. 7, herein).

Nevertheless, if framed a bit differently, the order/anarchy distinction does help to identify significant differences in how domestic and global structures create incentives for and constraints on dispute/conflict resolution. Specifically, a distinction can be drawn between "directive" institutions that operate on a formal, authoritative, coercive basis and "connective" institutions that operate on an informal, relative, persuasive basis. While both arenas certainly contain both kinds, directive institutions play a larger role in the domestic than the global arena, and vice versa. The impact of this on dispute and conflict resolution is significant.

In the domestic arena, the greater presence of directive agencies provides a greater capacity to pressure or compel the use of ADR; and this has in fact served as a great spur to ADR's expansion, as shown in the historical survey above. However, the same factor can operate to block access to ADR, or to routinize or formalize it and limit its flexibility and creativity, and this has been and continues to be a serious constraint on the development of ADR as a real alternative to existing processes, as will be discussed shortly (see also Kolb, in this volume; Kolb 1989). On the other hand, in the global arena, the greater presence of connective institutions allows for continued and relatively unconstrained experimentation with conflict resolution, both within and without recognized international agencies (Vasquez, chap. 7, herein). However, the same factor can and often does result in real problems in finding an authoritative and effective convenor to get conflict resolution going in the first place. The contrasting pattern is: in the domestic arena, there is more direction toward ADR, but there are also more constraints on its creative

development; in the global arena, there are fewer constraints on the creativity of conflict resolution, but also less direction toward using it.

The challenge to both fields suggested by the comparison is how to develop structures that can effectively encourage dispute and conflict resolution without unduly constraining and limiting the flexibility and creativity of these processes. As yet, neither arena seems to possess such structures. Perhaps comparative exploration will help both to move in this direction.

In this connection, one insight suggested by the historical discussion is that, despite the constraints of directive institutions, the domestic field has been enriched and expanded by the regular emergence of new forms and processes from *outside* existing institutional structures. In the development of processes such as community mediation, divorce mediation, mini-trial, public policy mediation, and policy dialogue, a major part of the original impetus was "from the bottom up," or "demand-driven." Parties sought new ways to address disputes and issues, and individual practitioners and organizations tried new forms of dispute resolution in response. Although directive institutions, like the courts, have tended to move in and routinize these processes once they are introduced, the emergent nature of the field has kept pushing practice one step beyond the institutional bounds, so that new approaches and processes continue to develop. In the global field, one can see a similar phenomenon at work—or at least the potential for it—in the new environment created in Eastern Europe and the former Soviet Republics by the political changes of the last few years. The weakening or collapse of old institutions has created an environment in which new methods of addressing issues, solving problems, and resolving conflict are demanded. Indeed, one response to this has been a growing flow of information and consultants from the domestic ADR field into Eastern Europe and the former Soviet Republics, where consensus and ADR processes are seen as ways of enhancing and building more democratic institutions.

The point is that, in both the domestic and global arenas, crises in existing or failed institutions have driven a demand for new ways of addressing and resolving conflict, and the ADR field has continued to be creative in responding to this demand. In a sense, the pressures of crises have accomplished what we have not been able to achieve through intentionally designed structures—to encourage dispute-resolution efforts without constraining their flexibility by rigid routinization. Nevertheless, how to do this *intentionally* remains a real challenge, in both the domestic and global fields.

To return the focus now to the domestic arena itself, the challenge just described is one of the most important issues facing the field—the issue of how to institutionalize the use of ADR. However, there are actually several critical issues confronting the domestic ADR field. The next section summarizes these issues, in order to provide a foundation for further comparative discussion.

Current Issues and Questions in Domestic Dispute Resolution: A Selective Sampling

A number of important theoretical and policy questions have been raised by the use of ADR processes in the domestic arena in recent years. Some of these questions have been suggested already. The aim of this section is to highlight several of the most important of these issues—issues that are still being vigorously debated in the field. What follows is by no means a complete survey of current issues; it is a selective sampling. However, it is not a random sampling. The issues selected go to the heart of the domestic ADR enterprise as it now stands. Pointing to them here can help pose a larger question relevant to the theme of this volume: Can these central issues in domestic dispute resolution be related to important issues in the global conflict-resolution field? Are the pressing issues at all similar in the two fields, so that each might learn from the other? Consider these larger questions in connection with the following issues, each of which is summarized as a series of open questions that are currently the subject of study and debate in the domestic arena.

The critique of ADR. The expansion in the use of ADR processes, and scholarly support for ADR, has provoked a body of very trenchant criticism of ADR theory and practice (Abel 1982; Tomasic and Feeley 1982; Auerbach 1983; Harrington 1985). Although the arguments of the critics are manifold, they cluster into two major and powerful objections to ADR. The objections are that all ADR processes work (in varying degrees) either to *privatize* justice or to *deny* justice, or both. The argument behind the first objection is that, by removing cases from a public forum where public officials decide cases according to public norms, ADR processes allow and encourage outcomes that satisfy the private interests of the parties but injure or compromise the public interest (Fiss 1984; Nader 1979). Thus ADR, the institutional child of the age, exalts private interests over the public good and risks the despoilation of important societal resources. The argument behind the second objection is that, by abandoning (in varying degrees) the framework of rights and protections that has gradually been built into formal legal procedures and substantive law, in favor of ad hoc bargaining, compromise, and discretion, ADR processes allow and encourage outcomes that satisfy the powerful at the expense of the weak (Abel 1982, chaps. 6, 8, 10; Tomasic and Feeley 1982, chap. 12; Harrington 1985). Thus ADR takes from the poor to give to the rich, turning the justice system into injustice and contributing to an oppressive

society. It is no answer, say the critics, to speak of peacemaking and conflict resolution as values in themselves. For peace may hide injustice, and conflict may be a positive force for justice. ADR, they say, offers peace without justice (Fiss 1984, 1085).

These critical arguments are probably somewhat overstated here, as they sometimes are in the critique itself. Even the critics allow that ADR does not *always* facilitate greed and oppression. However, they argue that it almost always carries substantial *risks* of these twin evils, and that in view of these risks it is a bad bargain indeed.

ADR scholars and practitioners have offered responses to the arguments of the critique (Goldberg, Green, and Sander 1986; Menkel-Meadow 1985; Bush 1989c). However, the point here is not to review and judge this debate, but to signal the issues and questions it presents. The questions raised by the critique are important, and they are far from being definitively answered. The important open questions include the following: Is it true that ADR processes tend to produce the twin evils of compromising the public good and oppressing the weak, and if so, to what degree? Is this equally true of all ADR processes, in all situations? Is it true, as the critique implies, that using formal legal procedures and substantive legal rules poses much lower risk, if any, of these evils? Is there some enormous good that ADR processes serve that simply outweighs the stated evils, even assuming their existence and severity? Is there any way to modify ADR processes to preserve some of their value but lessen the risks of the stated evils? All of these questions are implicit in the argument over the ADR critique. None have yet been answered satisfactorily. Indeed, much of the current theoretical and empirical work is directed to these very questions (see, e.g., Bush 1989c; Silbey and Merry 1986).

ADR "science" and ADR ideology. The earlier discussion referred to scholars' attempts to devise a framework for rationally choosing which dispute resolution process to use in a given case. This interest in constructing what could be called a "scientific" approach to comparing and choosing between dispute-resolution processes has its origins in early ADR scholarship, especially the work of Lon Fuller and Frank Sander in the seventies (Fuller 1971, 1978; Sander 1976). While some supported this approach in the early eighties (Bush 1984), there was little serious interest in it at that time. Today, however, the notion of a rational and principled system for assigning cases to different dispute-resolution processes, and thus scientifically "designing" dispute-resolution "systems," is extremely popular in the ADR field (Goldberg, Green, and Sander 1985, 545; Ury, Brett, and Goldberg 1989).

This growing popularity of ADR "science" is in part a result of the pressure of the ADR critique as described above. That is, it grows out of the desire to find a sensible middle ground that acknowledges that ADR is indeed inappropriate in some cases (because of the kinds of risks the critics suggest)

but maintains that ADR is entirely appropriate in other cases (where these risks are minimal or other values much more important). Such a middle ground would not dismiss the critique, but neither would it abandon ADR. It would allow that both have their place, in different cases. However, the crucial condition for attaining this middle ground is the ability to tell which cases (and processes) are which.

This is the current issue: the practical feasibility of such a "scientific" approach to ADR utilization. The key questions here are: Can cases be identified in which no significant public interest is at stake and no potential for oppression is present, so that ADR is unobjectionable? Or, can certain ADR processes be distinguished from others by their greater capacity for preserving the public interest and preventing oppression, so that at least these processes are unobjectionable? Or, can cases be identified in which other values, furthered by ADR, clearly outweigh any concerns for the public interest or protection of the weak, so that ADR is clearly preferable despite its "twin evils"? If these kinds of distinctions can be made in practice, then a "pluralistic" approach to ADR utilization can be taken, employing different processes in different cases to serve different values—sometimes court, sometimes ADR; sometimes one ADR process, sometimes another (Sander 1976; Menkel-Meadow 1985). However, if such lines cannot be rationally drawn in concrete terms, then the scientific approach to ADR, however appealing in theory, is no more than a dream (Esser 1989; Bush 1989a, 370–79).

Furthermore, the possibility that a scientific approach to ADR use is *not* feasible gives rise to another major issue: the *philosophical or ideological* basis of ADR. That is, if scientific sorting of cases to processes is impossible, then ADR must be justified (or the critique accepted and ADR rejected) across the board. Such a justification would have to rest on ideological—i.e., philosophical or moral—grounds. For example, one might argue that self-determination—often stressed by proponents of ADR—is a supreme value that ADR processes further and that adjudication undermines, and therefore ADR processes are always preferable to the courts in the first instance (Bush 1989c). The argument might also rest on some other comparably important value (Bush 1989c; Riskin 1984; McThenia and Shaffer 1985; Menkel-Meadow 1984). The key question here is: Can one articulate a general ideological justification for ADR processes as preferable to adjudication in all cases, and could any such justification be powerful enough to defeat the critique?

In short, questions regarding the feasibility of ADR "science" remain unanswered, and new questions regarding possible ideological justifications for ADR processes have emerged as another central issue of ADR theory.

The ambiguous character of ADR. Related to the previous issue is another major point of concern. As ADR scholars have begun to explore possible ideological justifications for the use of ADR, it has become clear that

ADR is, and long has been, a phenomenon of highly ambiguous character. ADR processes have been advocated on very different grounds by different interests (Tomasic and Feeley 1982, chap. 9). Government, civic, and business leaders sponsoring community mediation were clearly interested in mediation as an instrument for preserving public order (i.e., the status quo). Community groups and organizers, on the other hand, saw mediation as a means of individual and group empowerment, leading to personal growth and social change or transformation. Businessmen today see both mediation and arbitration as ways to maximize gain at minimum cost, and courts see both as ways to cut costs and reduce backlogs—both essentially utilitarian perspectives. In short, ADR has been supported on all three of these very different grounds—social control, private satisfaction/court efficiency, and citizen/community empowerment and transformation—and on others as well. ADR processes can in theory serve all of these values, though probably not all at the same time. However, all three are not equally powerful as *justifications* for ADR in the face of the ADR critique. Private satisfaction and court efficiency, for example, are unlikely to stand up as justifications against concerns for protecting public interests and preventing oppression. Thus, ADR in theory has different faces, and not all of them are equally attractive (Bush 1989a, 370–79).

If, despite this ambiguity in the sources or motivations for ADR, it was evident that ADR *in practice* was fairly uniform in approach—if practice was generally directed to just one of the goals cited by theory—then we could focus on the justification underlying that single approach. If, however, the different views of the purpose and goals of ADR have translated into differences in the way ADR operates in practice, the matter is far more complex. That is, if there are different *versions* of mediation, arbitration, and so on, being practiced—for example, an empowering or transformative version, a controlling version, and a utilitarian version—then *no* general justification of ADR can be found that would apply equally to all of them. Indeed, it is unlikely that all are equally justifiable or defensible vis-à-vis the ADR critique. Thus, if the ambiguity of ADR exists at the operational level, the question of which process to use applies not only to different processes but to the different versions of each process that probably exist in practice. This is also true for both the scientific and the ideological modes of analysis.

The questions raised by the issue of ambiguity are just beginning to be articulated in ADR scholarship (Bush and Folger 1994; Folger and Bush 1994; Bush 1989b; Silbey and Merry 1986; Kolb, in this volume). Some of the important ones are: Do processes like mediation and arbitration operate in practice according to different "versions," emphasizing different goals and producing different impacts? If so, what determines which version is used by a given mediator or arbitrator—for example, does one version usually

predominate in a given context (i.e., is environmental mediation usually empowering, community mediation usually controlling, business arbitration usually utilitarian, etc.)? Are all the different versions equally justifiable vis-à-vis the ADR critique? If not, is there any effective way to ensure that the "best version" is the one employed in practice? These questions reflect the increased depth that ADR study has begun to reach.

Institutionalization and professionalization. A final major issue is presented by the increasing pressures in the field to "institutionalize and professionalize" ADR processes and practice. This development was mentioned in the historical discussion of ADR. For example, the development of court-annexed ADR, both mediation and arbitration, fixes ADR in a particular and powerful context, one effect of which may be to constrain and even distort the development of the processes. The emergence of a significant population of full-time paid mediators is another sort of solidification of ADR. The significance of these and other developments is that they give some permanence and status to the use of ADR generally, and perhaps also to the use of particular *versions* of processes. The issue presented is whether such permanence and status is really deserved, given the many unanswered questions detailed above.

This issue is made sharper if it is true that institutionalization tends to establish certain versions or forms of ADR, and to place certain groups in control of them, to the comparative exclusion of others. For example, institutionalization in community mediation may mean starvation of community-based programs and extension of court-based programs (Wahrhaftig 1982; Silbey and Merry 1986). It may also mean exclusion of volunteers in favor of paraprofessionals. In other areas, like divorce and civil mediation, it may mean exclusion of all but lawyers and therapists from the ranks of mediators, and the subsequent domination of professional education and discipline by these groups alone. Therefore, the push for institutionalization raises important questions, such as: Does institutionalization tend to favor particular versions of mediation, arbitration, and other ADR processes, and if so, which ones? Are the favored versions the ones that have the soundest underlying justifications? Does institutionalization tend to vest control of ADR processes and practice in certain groups to the exclusion of others, and if so, which ones? Does institutionalization weaken the "disfavored" versions and the excluded practitioners, or does it simply create parallel "tracks" of ADR?

Some Tentative Propositions on the Critical Issues in Domestic Dispute Resolution

Regarding the questions identified in the previous section, no definite conclusions are offered here, because none of these questions have easy answers.

However, based on current theory and practice, some tentative propositions can be suggested regarding each of the critical issues in the domestic arena. A full justification of these propositions is beyond the scope of the present chapter, though the author has offered such justifications elsewhere, as indicated in the references given below. Instead, the propositions are offered here without extended argument, as a preamble to the final section's discussion of the overall theme of this volume: the possible connections between the central issues of domestic dispute resolution and those of global conflict resolution. The propositions suggested reflect the general view that the domestic dispute-resolution field faces serious questions at present, despite its steady expansion, and that the prospects for the future depend on realistically facing and answering the kinds of questions described above, debating the issues honestly and hard, and making choices with clear heads—and high ideals. The same may be true in the global arena. Consider the following propositions about each of the critical issues in the domestic dispute-resolution arena, as a preface to some final thoughts on the connections between the two fields studied in this volume.

Propositions regarding the critique of ADR. ADR processes probably do pose risks of compromising the public interest and/or oppressing the weak—not in all cases, but in a significant number. Of course, it should not be forgotten that such risks are very real in court as well (Goldberg, Green, and Sander 1986; Menkel-Meadow 1985). Nevertheless, these kinds of risks may often be larger in ADR than in the courts; and modification of ADR processes to reduce the risks, if it were possible, would probably undermine ADR's capacity to serve other valued goals (Bush 1989b). In short, the critique has some real validity, as far as it goes, that cannot and should not be ignored. However, the possibility remains open that the risks can be minimized by "scientific" use of ADR, that other values justify ADR despite its risks, or that certain versions of ADR processes are relatively risk-free.

Propositions regarding ADR science and ADR ideology. The distinctions that have to be drawn to make the scientific approach feasible probably cannot be drawn with any confidence in practice—either at the process or the version level. Scientific ADR, despite its great appeal, is most likely a pipe dream, attractive primarily because of its capacity for avoiding the underlying and difficult ideological issues (Esser 1989; Bush 1989a, 370–79). That leaves philosophy or ideology—political and moral. My view is that, on ideological grounds, a basis *can* be articulated to justify ADR generally, by reference to the "relational"[4] values of self-determination and consideration for others (or compassion), which many hold superior to the largely individualist values underlying the ADR critique (Bush and Folger 1994; Bush 1989c). Indeed, the likelihood is that many long-time advocates of ADR support it precisely because of their commitment to these relational values, and their belief that

ADR processes further them while the formal adversary system subverts them. That is, many if not most ADR supporters probably do have a (largely unstated) value orientation that underlies and explains their interest in ADR. This orientation can—and should—be made explicit and justified (Bush 1989c). However, this possibility of an ideological justification for ADR in *general* opens the question of whether different *versions* of ADR may exist, and if so whether the general justification covers them all equally.

ADR ambiguity. ADR appears to be as ambiguous in practice as it is in theory, and different versions of mediation and arbitration probably do exist in practice (Kolb, in this volume; Bush and Folger 1994; Silbey and Merry 1986). The most important of these are the three suggested above: the controlling, the empowering/transformative, and the utilitarian versions of ADR. Of the three versions, only the empowering/transformative version can overcome the ADR critique, because only this version of ADR rests on the relational value bases mentioned above (Bush 1989b), and it is largely free of the risks cited in the critique. However, ensuring that this approach to ADR processes is used may prove difficult, because of the institutional interests, structures, and incentives surrounding the use of ADR. It is therefore important to clarify the unique value of the empowering/transformative version of ADR and to support it wherever possible (Bush and Folger 1994).

Institutionalization. Institutionalization as currently operating probably favors certain versions of ADR processes and certain groups of practitioners and gives more permanence and status to these than they deserve. The versions favored are probably the utilitarian and controlling versions. However, both are ideologically indefensible. In short, institutionalization is probably no great help to the productive development of the field at this point. Continued diversity and openness are necessary to preserve the possibility of continued survival of the ideologically defensible versions of ADR. In this respect, the continuing expansion of the field into areas such as policy mediation and policy dialogue, which may be less susceptible to "capture" by institutional interests and values, is a positive and welcome phenomenon.

Concluding Thoughts: Are the Issues Similar in the Domestic and Global Fields?

There are some striking similarities, but also some important differences, between the key issues in domestic dispute resolution and global conflict resolution. This chapter concludes by pointing to some of these comparisons, with an emphasis on the issues identified above as key issues.

The critical view. Proponents of conflict resolution in the global arena are vulnerable to a critique very similar to that leveled against domestic dispute resolution. First, they present an implicit view of war and violence

as undesirable per se that, it could be argued, tends to exalt peace over justice and to delegitimate altogether a tool that may sometimes be the best means available for the have-nots to challenge the haves. Wars of national liberation and political terrorism, for example, are justified by some as the only effective means for oppressed peoples to gain recognition and justice. Second, they seem to ignore or at lest deemphasize international law, instead of insisting on making it a more effective and powerful tool for protecting the weak and oppressed, for example in the human rights area.

What is interesting, by comparison to the domestic arena, is that despite a similar potential for critique, one does not seem to have arisen so forcefully in the global field. There is some acknowledgment in this volume of both the peace/justice element (Kriesberg, in this volume) and the loss-of-law element (Johnson, in this volume) of the critique. However, by comparison to the intensity and centrality of the critique in the domestic field, it seems to occupy a much less important place at present in the global conflict resolution discourse. There seems to be more of a consensus that global conflict is so dangerous that peaceful conflict resolution is a clear, if not totally unmitigated, good. Of course, there may be a well-known body of critical thought that this author, as an outsider to the international field, simply has not seen. If not, however, then the difference is striking indeed.

"Science" and ideology. As great as the difference between the fields on the previous issue is the similarity between them on this issue. First, "the matching, coordinating, and sequencing of different but complementary third-party interventions" (Fisher, in this volume), to meet the contingencies of the situation, is an important theme for a number of global conflict-resolution scholars. Some see the question as how to match the "stage" of the conflict with the appropriate kind of intervention (Fisher, in this volume). Others suggest allocating different types of situations to different processes—disputes over interests should go to negotiation or mediation, conflicts over needs to facilitation and resolution (Burton, in this volume). The common thread is the notion of rationally sorting and matching situations to methods of intervention, the very same "scientific" notion that domestic ADR scholars are pursuing in their field.

Second, despite this pursuit of a rational conflict-resolution "science," the strong impression given by the chapters of this volume is that in the global field, as in the domestic arena, there is an ideological dimension underlying the interest in peaceful processes of resolution. Thus, when discussing models for choosing among methods of intervention, global scholars tend to place these methods in a defined ordering that implicitly or explicitly views some methods, and the results they achieve, as preferred or superior to others. For example, Burton (in this volume) presents resolution of underlying human needs as superior to settlement of interests. While, according to Fisher (in this

volume), even in contingent or stage models, the goal is always to move from more impositional to more empowering interventions, and from more immediate and superficial to longer range and profounder outcomes (e.g., interests to needs or relationships). This is not to criticize these views; on the contrary, they are highly defensible. The point here is that this whole framework of choice or sequencing implies a hierarchy of interventions, and that the hierarchy rests on a set of values or ideology that defines what is higher and lower. As in the domestic arena, ideology underlies the preference for certain methods of resolution over others.

Moreover—and this point is even more striking—the values underlying interest in global conflict resolution seem very similar to those underlying support for informal and nonadversarial resolution of domestic disputes. Some advocates of domestic ADR support it because of their commitment to the values of self-determination, compassion, and community (Bush 1989c; Riskin 1984; McThenia and Shaffer 1985), values served better by ADR than by formal adversary justice. In addition, some seem to prefer ADR because they place a high value on meeting "human needs," and believe that ADR processes do this much better than the adversary system (Menkel-Meadow 1984; Ury, Brett, and Goldberg 1989). Turning to the global field, we find implicit and explicit reflections of strikingly similar values.

Fisher's strong emphasis (in this volume) on fostering mutual understanding and strengthening relationships through "third-party consultation" suggests an underlying commitment not just to world peace, but to the value of understanding and relationship per se. Doran's (in this volume) theory of the "power cycle," and the need for "great understanding" by declining powers to make adjustments for rising powers, also reflects something beyond realpolitik—the moral dimension of a state's decision to abnegate its own interest and yield to another for the sake of the whole. In some cases, the value basis is more explicit. Burton (in this volume) ties the importance of conflict resolution, as an alternative to power politics, to the value of meeting "inherent and universal human needs," and others use similar language. In all of these contributions from the conflict-resolution field, there are remarkably strong similarities to the value orientations of domestic ADR supporters—toward either relational or human-needs values or both.

If it is true that values—and certain values in particular—underlie both the domestic and global conflict-resolution fields, then it is all the more important that those values be articulated with honesty and clarity. If "conflict resolutionaries," as James Laue calls those of us in both the domestic and global fields, are really following a certain ideology, then that ideology should be clearly identified. Doing so is important in order to build support for the use of dispute and conflict resolution and justify them against possible critiques. Doing so is also important in order to understand, for ourselves,

precisely why we are involved in the enterprise altogether, and how to pursue it more effectively. A final similarity between both fields on this issue is that neither has seen sufficient exploration of the significance or character of the underlying ideological dimension, and both could benefit from more work in this direction.

Ambiguity of processes. This is another issue on which similarity is evident. For example, Fisher (in this volume) discusses mediation, "mediation with muscle," and third-party consultation. However, while he presents the three as distinct processes, others suggest that the difference may really derive from the choice of third party—that is, who is conducting the process (Kolb and Babbitt, in this volume). This raises the same kinds of concerns presented by the ambiguity or malleability of processes in the domestic arena. The pervasiveness of this issue suggests the importance, in both fields, of developing greater sophistication in describing—and monitoring—what individual "neutrals" do; because (for example) "mediation" may often simply be arbitration by another name, and this may lead to misunderstanding and even abuse of resolution processes. In this area, there is considerable progress and continuing work in the domestic arena (see Kolb and Babbitt, in this volume), from which scholars in the global field might gain good ideas of how to pursue the inquiry in their domain.

Institutionalization. On this final issue, there is significant contrast, as discussed earlier, between the two fields in terms of the structural context in which they operate. One important practical consequence of that structural contrast is that the domestic field is, at present, much farther along in the direction of institutionalization than the global arena. However, there is a real concern on the part of many that progress in institutionalization has brought with it a change in the character of the "alternative" processes themselves. That is, as their use is routinized, they display less of the informal, nonadversarial, creative character that engendered interest in them to begin with, and begin, as Kolb (1989) has put it, to look more and more like the processes they were supposed to replace. Whether, and how, this tendency can be avoided—or reversed—is an important and troubling question for many in the domestic arena today. Here, the contrasting structure of the global arena may be a distinct advantage, since it may contain fewer structures with enough gravitational pull to "capture" or co-opt the initiatives of conflict-resolution practitioners, and ongoing freedom to experiment and develop independently is more likely.

In this connection, it is possible to see parallels in some of the recent developments in both the domestic and global fields that suggest ways of avoiding the constraining effects of institutionalization. In both fields, there

have been efforts recently to focus on dealing with conflict proactively rather than reactively, both by earlier timing of interventions, and by expansion of activities from resolution per se to education. As to the first, processes like policy dialogue in the domestic arena and consultation in the global arena (Fisher, in this volume), both involve moving intervention to an earlier point in the time line of a conflict cycle, to the predispute stage. Doing so removes certain kinds of barriers to communication between parties; it also avoids institutional pressures that are much stronger when an actual crisis exists. In effect, when interventions occur earlier, conflict-resolution efforts have more latitude and flexibility, and institutional constraints are less powerful. Regarding the second kind of proactive effort, student mediation programs and policy dialogue in the domestic arena, and processes like consultation in the global arena, often involve education as much as or more than conflict resolution. That is, they allow and help parties to learn about both substantive issues and problem-solving skills, even where there is no immediate need to resolve a particular conflict. Again, the effect is to allow more latitude and flexibility, and to avoid institutional pressures and constraints. It is also worth noting that these kinds of educational, preconflict interventions strongly express values of empowerment and transformation that, as noted earlier, underlie efforts in both the domestic and global fields. Seen in the broadest context, these kinds of proactive efforts help strengthen civic participation and enhance democratic processes, and it seems clear that these are considered important goals at both the domestic and global levels today.

There is one final pattern to note that is somewhat disturbing from the perspective of the domestic arena: that is what might be called the "emigration" of practitioners and scholars from the domestic to the global arena. A number of the early and very influential leaders of the domestic field have, in recent years, begun to spend more of their time and effort in the global arena. This may be simply a matter of natural growth and expansion, but it may also be that these "charismatic" early figures are beginning to be disenchanted with the effects of institutionalization on the domestic field. For those deeply interested in the continued vitality of the domestic field, it must be hoped that this is not the case. James Laue has suggested that the only thing that counteracts routinization is a continuing focus on the values of the enterprise. This is one area where the two fields appear to have much in common; indeed, the global field is somewhat more explicit about values than the domestic. Joint work such as that undertaken for this volume may, by connecting our efforts and redirecting attention to such basic questions as the values of the enterprise, help to maintain the clarity, vitality—and idealism—of both domestic and global conflict resolution.

NOTES

1. Several other major areas of mediation developed out of the community field, directly or indirectly. In effect, as mediation caught on in the community field, funders and project innovators sought new applications. Often, the same individuals have spearheaded developments in a succession of areas. Mediation of *prison disputes*—including major conflicts and individual grievances—and the development of inmate grievance systems featuring mediation as a central element, was one such development (Cole, Hanson, and Silbert 1985). This field grew rapidly in the seventies, but has been less visible recently. *Landlord-tenant* mediation, for both private and public residential housing, is a second area that grew out of community mediation and continues to spread. A third is the mediation of *disputes involving juveniles*—specifically, mediation of disputes between students in elementary and secondary schools (American Bar Assoc. 1988), and mediation of intrafamily disputes between parents and children in family court cases (American Bar Assoc. 1982, chap. 3). Mediation continues to grow in both these areas.

2. The reason for this consumer-option framework lies: (*a*) in the legal rule that contracts (including agreements to arbitrate) may be unenforceable if the parties have vastly unequal bargaining power; and (*b*) in the constitutional right to trial by jury absent a clear and knowing waiver. In short, consumer agreements to arbitrate made as a condition of purchase are highly vulnerable to legal challenge. A final area of consumer arbitration—medical malpractice arbitration—illustrates this problem sharply (American Bar Assoc. 1983). In that area, hospitals, health-care providers, and medical associations introduced arbitration agreements into patient services contracts, but found it almost impossible to persuade courts to compel patients to arbitrate, no matter how clearly and evenly the agreements were drafted. As a result—and sometimes following legislatively imposed guidelines—such agreements now generally give patients a period after signing within which they can unilaterally rescind the agreement to arbitrate. However, despite this generally accepted legal framework, recent developments have seen the introduction of consumer contract arbitration clauses by banks and brokerages that would require consumers to use arbitration only. These developments have yet to be tested in court.

3. Comparisons here and in the following sections are based on the other chapters in this volume.

4. The term is taken from moral and political philosophy, but has begun to gain currency in law and dispute-resolution literature (Bush and Folger 1994; Bush 1989a, 1989c).

REFERENCES

Abel, Richard L., ed. 1982. *The Politics of Informal Justice.* Vol. 1, *The American Experience.* New York: Academic Press.

American Bar Assoc. 1982. *Alternative Means of Family Dispute Resolution.* Washington, D.C.: ABA.

———. 1983. *Consumer Dispute Resolution: Exploring the Alternatives.* Washington, D.C.: ABA.

———. 1987. *Alternative Dispute Resolution: An ADR Primer.* Washington, D.C.: ABA.

———. 1988. *Education and Mediation: Exploring the Alternatives.* Washington, D.C.: ABA.

Auerbach, Jerold S. 1983. *Justice Without Law?* New York: Oxford University Press.

Bingham, Gail. 1985. *Resolving Environmental Disputes: A Decade of Experience.* Washington, D.C.: Conservation Foundation.

Bush, Robert A. Baruch. 1984. "Dispute Resolution Alternatives and the Goals of Civil Justice: Jurisdictional Principles for Process Choice." *Wisconsin Law Review,* 893–1034.

———. 1989a. "Defining Quality in Dispute Resolution: Taxonomies and Anti-Taxonomies of Quality Arguments." *Denver Law Review* 66:335–80.

———. 1989b. "Efficiency and Protection, or Empowerment and Recognition?: The Mediator's Role and Ethical Standards in Mediation." *Florida Law Review* 41:253–86.

———. 1989c. "Mediation and Adjudication, Dispute Resolution and Ideology: An Imaginary Conversation." *Journal of Contemporary Legal Issues* 3:1–33.

Bush, Robert A. Baruch, and Joseph P. Folger. 1994. *The Promise of Mediation: Responding to Conflict Through Empowerment and Recognition.* San Francisco: Jossey-Bass.

Cole, George; Roger A. Hanson; and Jonathan E. Silbert. 1985. *Alternative Dispute Resolution Mechanisms for Prisoner Grievances.* Washington, D.C.: National Institute of Corrections.

Danzig, Richard. 1973. "Toward the Creation of a Complementary, Decentralized System of Criminal Justice." *Stanford Law Review* 26:1–54.

Esser, John P. 1989. "Evaluations of Dispute Processing: We Do Not Know What We Think and We Do Not Think What We Know." *Denver Law Review* 66:499–562.

Fiss, Owen M. 1984. "Against Settlement." *Yale Law Journal* 93:1073–90.

Folberg, Jay, and Ann Milne. 1988. *Divorce Mediation: Theory and Practice.* New York: Guilford Press.

Folger, Joseph P., and Robert A. Baruch Bush. 1994. "Ideology, Orientations to Conflict, and Mediation Discourse." In Joseph P. Folger and Tricia S. Jones, eds., *New Directions in Mediation: Communication Research and Perspectives,* 3–25. Thousand Oaks, Calif.: Sage Publications.

Fuller, Lon F. 1971. "Mediation—Its Forms and Functions." *Southern California Law Review* 44:305–39.

———. 1978. "The Forms and Limits of Adjudication." *Harvard Law Review* 92:353–409.

Galanter, Marc. 1983. "Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) about Our Allegedly Contentious and Litigious Society." *UCLA Law Review* 31:4–71.

Goldberg, Stephen B.; Eric D. Green; and Frank E. A. Sander. 1985. *Dispute Resolution.* Boston: Little, Brown.

———. 1986. "ADR Problems and Prospects: Looking to the Future." *Judicature* 69:291–99.

Harrington, Christine B. 1985. *Shadow Justice: The Ideology and Institutionalization of Alternatives to Court.* Westport, Conn.: Greenwood Press.

Hensler, Deborah R. 1986. "What We Know and Don't Know about Court-Administered Arbitration." *Judicature* 69:270–78.

Kolb, Deborah M. 1989. "How Existing Procedures Shape Alternatives: The Case of Grievance Mediation." *Journal of Dispute Resolution,* 59–87.

McGillis, Daniel. 1982. "Minor Dispute Processing: A Review of Recent Developments. In Roman Tomasic and Malcolm M. Feeley, eds., *Neighborhood Justice: Assessment of an Emerging Idea,* 60–76. New York: Longman.

McThenia, Andrew W., and Thomas L. Shaffer. 1985. "For Reconciliation." *Yale Law Journal* 94:1660–68.

Menkel-Meadow, Carrie. 1984. "Toward Another View of Legal Negotiation: The Structure of Problem Solving." *UCLA Law Review* 31:754–842.

———. 1985. "For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference." *UCLA Law Review* 33:485–514.

Moore, Carl, and Chris Carlson. 1984. *Public Investment: Using the Negotiated Investment Strategy.* Dayton, Ohio: Kettering Foundation.

Nader, Laura. 1979. "Disputing without the Force of Law." *Yale Law Journal* 88:998–1021.

Public Conversations Project. 1992. "American Psychological Association Presentation." Cambridge, Mass.: Family Institute of Cambridge.

Riskin, Leonard L. 1984. "Toward New Standards for the Neutral Lawyer in Mediation." *Arizona Law Review* 26:329–62.

Riskin, Leonard L., and James E. Westbrook. 1987. *Dispute Resolution and Lawyers.* St. Paul, Minn.: West Publishing.

Sander, Frank E. A. 1976. "The Varieties of Dispute Processing." *Federal Rules Decisions* 70:111–33.

Shonholtz, Raymond. 1984. "Neighborhood Justice Systems: Work, Structure and Guiding Principles." *Mediation Quarterly* 5:3–16.

Silbey, Susan S., and Sally E. Merry. 1986. "Mediator Settlement Strategies." *Law & Policy* 8:7–32.

Singer, Linda R. 1990. *Settling Disputes: Conflict Resolution in Business, Families and the Legal System.* San Francisco: Westview Press.

Stulberg, Joseph B. 1975. "A Civil Alternative to Criminal Prosecution." *Albany Law Review* 39:359–76.

Susskind, Lawrence, and Jeffrey Cruikshank. 1987. *Breaking the Impasse: Consensual Approaches to Resolving Public Disputes.* New York: Basic Books.

Tomasic, Roman, and Malcom M. Feeley, eds. 1982. *Neighborhood Justice: Assessment of an Emerging Idea.* New York: Longman.

Ury, William L.; Jeanne Brett; and Stephen B. Goldberg. 1989. *Getting Disputes Resolved: Designing Systems to Cut the Costs of Conflict.* San Francisco: Jossey-Bass.

Wahrhaftig, Paul. 1982. "An Overview of Community-Oriented Citizen Dispute Resolution Programs in the United States." In Richard L. Abel, ed., *The Politics of Informal Justice.* Vol. 1, *The American Experience,* 75–98. New York: Academic Press.

Wilkinson, John H., ed. 1990. *Donovan Leisure Newton & Irvine ADR Practice Book.* New York: John Wiley & Sons.

Winks, Patricia L. 1980. "Divorce Mediation: A Nonadversary Procedure for the No-Fault Divorce." *Journal of Family Law* 19:615–53.