

# SNAP DISPUTES

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## I. INTRODUCTION

Imagine you are a dispute resolution expert. You are standing at a bus stop with a crowd of people. Some of these people are talking heatedly about whether football players should kneel during the national anthem. It's getting loud, and others at the bus stop have become aware of the argument and are looking over. Some have pulled out their phones to film the encounter. What do you do?

(a) Say nothing.

(b) Ask the group to quiet down.

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- (c) Walk over and give your own take on the issue.
- (d) Introduce yourself as a dispute resolution expert and offer to facilitate the conversation.

Instead of talking about football players kneeling, imagine that the people are arguing over whether some of the protestors “on both sides” in Charlottesville actually could have been fine people.<sup>1</sup> Does this change your answer? Or maybe instead of people arguing at a bus stop, the people are some of your coworkers chatting about whether saying “Blue Lives Matter” is appropriate given the “Black Lives Matter” movement.<sup>2</sup> Other coworkers passing by overhear the conversation, and some look upset. Do you chime in with advice on taking perspectives? The conversation ends and everyone walks away, including the apparently upset people. Is there something you should be doing now, like following up with everyone individually or scheduling a town hall?<sup>3</sup>

We live in a conflict-saturated moment. First-hand disputes, reports of disputes, and disputes in the making crop up at every turn. Political and personal disagreements are nothing new, of course, but today many of these disagreements feel highly fraught and inescapably public, laden with imminent violence (or the perception of imminent violence) and subject to broad transmission via social media. Times like these present an opportunity to reexamine the roles and responsibilities of those who specialize in dispute resolution. A specialist, after all, is someone who is supposed to have knowledge and proficiency in some area. If a doctor spots a man staggering around red-faced and clutching his chest, not only does the doctor feel some responsibility to intervene, but the doctor hopefully would know exactly what to do.<sup>4</sup> When confronted with the ubiquitous and varied altercations taking place within disputing culture today, should people specializing in law, arbitration, mediation, negotiation, dispute

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1. See, e.g., Ben Jacobs & Oliver Laughland, *Charlottesville: Trump Reverts to Blaming Both Sides Including “Violent Alt-Left,”* THE GUARDIAN (Aug. 16, 2017), <https://www.theguardian.com/us-news/2017/aug/15/donald-trump-press-conference-far-right-defends-charlottesville> [<https://perma.cc/9UVB-6CD8>].

2. See, e.g., David Smith, *The Backlash Against Black Lives Matter Is Just More Evidence of Injustice*, THE CONVERSATION, <https://theconversation.com/the-backlash-against-black-lives-matter-is-just-more-evidence-of-injustice-85587> [[perma.cc/RLR9-DKHB](https://perma.cc/RLR9-DKHB)].

3. All three of these examples may have particular resonance for certain groups of people and not for others. Other contexts and topics present the same questions, however, around what to do and how to do it.

4. I am grateful to Erik Girvan for this example.

systems design, and other fields falling under the umbrella of dispute resolution be springing into action? If so, what exactly should they be doing?

Certainly the answer to this question is easier for some kinds of disputes than others. Conventional dispute resolution methods, such as litigation or mediation, are suitable for many different kinds of disputes, especially in structured environments where the participants have some kind of direct involvement in the dispute at hand. But these methods are difficult to apply when it comes to diffuse, values-intensive, norms-focused, once-removed, media-driven, “scissor algorithm,”<sup>5</sup> in-the-moment disagreements—what this Article terms *snap disputes*. Snap disputes are slippery and corrosive, resisting conventional dispute resolution approaches while tending to erode the groundwork underlying these approaches. They are political or cultural conflicts made personal,<sup>6</sup> refracted through ever-changing contexts and intensified by the amplifications (actual or potential) of media and social media. Snap disputes are about norms, but they are also about something deeper than norms: they implicate a profound sense of self that must be protected at all costs. Snap disputes create new practice challenges for dispute resolution experts—namely, what do we do in these situations?—and they force those working in dispute resolution to reexamine whether and how the terms of civil discourse have changed and what that means for existing theories and practices.

With all this in mind, this paper considers the actual and possible contributions of one particular group of real-life dispute resolution experts, the legal alternative dispute resolution (ADR) community. For decades, ADR proponents have worked on the front lines of theory and practice, inside and outside of law schools, innovating best practices for handling conflict in a variety of contexts. When it comes to snap disputes, however, much of the theory and practice often seems inadequate.<sup>7</sup> To have a meaningful impact on

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5. See Ross Douthat, *The Covington Scissor*, N.Y. TIMES (Jan. 22, 2019), <https://www.nytimes.com/2019/01/22/opinion/covington-catholic-march-for-life.html> [perma.cc/CS3M-FJ88], (discussing the short story “Sort by Controversial,” located at <https://?slatestarcodex.com/2018/10/30/sort-by-controversial/> [perma.cc/KE3P-R75T]).

6. Thanks to Jonathan Cohen for this framing.

7. To be sure, some ADR actors have begun addressing some of the deeper structures and external consequences associated with snap disputes, and these efforts are promising. They are not enough, though. These efforts and their shortcomings are discussed in more detail in Part III.

this new disputing context, the ADR community must take snap disputing seriously and develop new methods, pedagogies, research initiatives, and professional emphases that will support constructive dispute handling in a variety of contexts. As we can already see from what is happening around us today, it will not be sufficient simply to extend existing dispute resolution theories and practices to snap disputes.

Things are getting worse, not better.<sup>8</sup> If we cannot figure out how to have constructive conversations, we will not be able to respond effectively to the pressing social, economic, environmental, and political challenges facing us. The goal of this paper is to conceptualize a new way of thinking about some of the most complex dynamics informing modern disputes, so that it will be easier to see whether and how our current conflict management approaches are still effective and to encourage the development of new theories and tools. With this in mind, Part II sets forth a definition of snap disputes, differentiating these kinds of disputes from normal political disagreements or other kinds of conflict. Part III then examines some of the ways in which ADR professionals have attempted to respond to the phenomenon of snap disputes, while discussing some of the pitfalls that snap disputes present to conventional and well-established dispute resolution approaches. Part IV provides guidance for dispute resolution scholars and practitioners considering how to respond to snap disputes and other challenges of the modern disputing landscape.

## II. WHAT ARE SNAP DISPUTES?

If difficult conversations involve emotions, identity and values concerns, and contested claims of truth,<sup>9</sup> then snap disputes may be defined as *extremely* difficult conversations, made even more difficult by having a public dimension that is exacerbated (and sometimes created) by media and social media. But this definition does not get us

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8. Carrie Menkel-Meadow, one of the most important and influential scholars in alternative dispute resolution, has eloquently expressed the despair many are experiencing today. “Never since I have been on this earth,” she writes, “have I been so discouraged about our current polity.” Carrie Menkel-Meadow, *Why We Can’t “Just All Get Along”*: *Dysfunction in the Polity and Conflict Resolution and What We Might Do About It*, 2018 J. DISP. RESOL. 5, 24 (2018). She is enough of an optimist, however, to offer helpful thoughts in that same article on how we might move forward.

9. See DOUGLAS STONE ET AL., *DIFFICULT CONVERSATIONS: HOW TO DISCUSS WHAT MATTERS MOST* 21–128 (2010) (explaining that difficult conversations often involve disagreements around what is true, feature high levels of emotion, and implicate identity).

far, since many disputes feature high levels of emotion, conflicts around values and identity, and disagreements about the facts. Further, political discussions in a democratic society often involve emotions, identity concerns, and fact debates. What distinguishes snap disputes from other disputes or normal political talk? And do we get anything out of this distinction?

With respect to the latter question, it is useful to differentiate among disputes because doing so helps identify whether a particular dispute may be amenable to an existing dispute resolution method. And indeed, with respect to the former question, what we are calling snap disputes are generally not the kinds of disputes for which most dispute resolution professionals, such as lawyers, prepare themselves. Saying what snap disputes are, therefore, may be easier if we first explain what they are not.

In United States law schools, the major forms of dispute resolution (litigation, arbitration, mediation, negotiation) conceive of disputes as featuring aggrieved parties dealing with identifiable issues generally within their responsibility and control. Although outside third parties may be affected by the content of the dispute and any efforts toward resolution, the disputes themselves are experienced primarily among the actual disputants. Such disputes are amenable to process and are capable to some extent of being resolved, even when they feature high levels of emotion, identity and value questions, and disagreements around the facts.<sup>10</sup>

Everyone has had a dispute like this—an interpersonal or workplace or other type of conflict that was (or ideally could have been) resolved or at least managed by the deployment of a suitable, relatively structured process. The process may have been formal, like going through litigation or attending a mediation with the parties' lawyers present. Or the process may have been less formal, like meeting with a pastor or setting aside time to give each person a chance to speak about a contentious issue. Whether formal or informal, the process hopefully made it possible to deal with emotions,

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10. The most prominent dispute resolution methods take different approaches to dealing with concerns with emotions, truth, and identity and values. Litigation (and in certain cases arbitration) channels these concerns into a formal process that privileges legally relevant matters and can sometimes address emotions and values as they relate to these matters. Mediation and negotiation are more capable of dealing with emotions and values more expansively, insofar as those working within those practices have developed tools and approaches for managing the personal and interpersonal dimensions of conflict.

values, and truth disagreements in a constructive way, and at the very least provided the opportunity for some kind of closure.<sup>11</sup>

Many different kinds of disputes fall into this category. Again, these kinds of disputes are more or less amenable to process, are “owned” by the disputants, and are capable of being meaningfully addressed or even resolved.<sup>12</sup> For the sake of categorizing these extremely varied disputes, we will call them vested disputes. They are vested because we carry them with us—they are ours.

But are vested disputes the most common disputes we experience? Think about the numerous public arguments that surround us every day. It is an understatement to say that we are living in times that feel, and may in some cases actually be, highly polarized.<sup>13</sup> People find themselves at odds not only over NFL kneeling protests and the meaning of Confederate monuments, but also over issues related to pronouns, affirmative action, gender roles, diversity, policing, immigration policy and border management, health care, economic inequality, cultural elitism, and much more.<sup>14</sup> Our differences in these

11. Litigation and arbitration may not be the best for dealing with emotions and values, but both provide closure insofar as they find facts and resolve the case at hand. Mediation and negotiation, by contrast, may not lead to a resolution, but often can provide space for participants to express their emotions and acknowledge one another’s values.

12. Resolution, though part of the term of art “dispute resolution,” is not always possible and, moreover, may not always be the goal. See generally ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: THE TRANSFORMATIVE APPROACH TO CONFLICT* 13–15 (2004), describing an approach to mediation that focuses primarily on the improvement of relationships, not on the reaching of settlements.

13. See, e.g., David A. Dana & Michael Barsa, *Judicial Review in an Age of Hyper-Polarization and Alternative Facts*, 9 SAN DIEGO J. CLIMATE & ENERGY L. 231, 232 (2018) (“We live in an age of hyper-polarization in the United States, in which Democrats and Republicans increasingly lack common ground as to what the government should or should not do.”); Joe Pierre, *Why Has America Become So Divided?*, PSYCHOLOGY TODAY (Sept. 5, 2018), <https://www.psychologytoday.com/us/blog/psych-unseen/201809/why-has-america-become-so-divided> [perma.cc/Q2SP-Q6BY]; Cameron Brick, Sander van der Linden, *How Identity, Not Issues, Explains the Partisan Divide*, SCIENTIFIC AMERICAN (June 19, 2018), <https://www.scientificamerican.com/article/how-identity-not-issues-explains-the-partisan-divide/> [https://perma.cc/VK4K-LTDU] (“U.S. liberals and conservatives not only disagree on policy issues: they are also increasingly unwilling to live near each other, be friends, or get married to members of the other group.”); Steven Levitsky & Daniel Ziblatt, *This Is How Democracies Die*, THE GUARDIAN (Jan. 21, 2018), <https://www.theguardian.com/us-news/commentisfree/2018/jan/21/this-is-how-democracies-die> [perma.cc/23C4-K3KY] (“The weakening of our democratic norms is rooted in extreme partisan polarization – one that extends beyond policy differences into an existential conflict over race and culture.”).

14. “The divisions between Republicans and Democrats on fundamental political values—on government, race, immigration, national security, environmental protection, and other areas—reached record levels during Barack Obama’s presidency,” Pew’s report states. “In Donald Trump’s first year as president, these gaps have grown

areas are often magnified by social media, which makes possible an abundance of tweets and Facebook posts and online comments that are oversimplified and can be bombastic and belittling.<sup>15</sup> Partisan news outlets and online filters promote groupthink and ingroup-outgroup dynamics that tend to vilify those with opposing views.<sup>16</sup> Trolls and meddlers, working undetected and often lacking interest

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even larger.” Clare Foran, *America’s Political Divide Intensified During Trump’s First Year as President*, THE ATLANTIC (Oct. 5, 2017), <https://www.theatlantic.com/politics/archive/2017/10/trump-partisan-divide-republicans-democrats/541917/> [perma.cc/C3UL-D3RH].

15. See Alexander Bolano, *Exposure To Opposing Political Opinions Online Can Increase Political Polarization*, SCIENCE TRENDS (2018) (“Social media sites like Facebook are often charged with increasing political polarization by establishing what are called “echo chambers,” places of discourse that prevent people from being exposed to things that contradict their beliefs.”); Andrew Soergel, *Is Social Media to Blame for Political Polarization in America?*, U.S. NEWS (Mar. 20, 2017), <https://www.usnews.com/news/articles/2017-03-20/is-social-media-to-blame-for-political-polarization-in-america> [perma.cc/Z4NC-YKTE].

16. See, e.g., Georgia Wells & Deepa Seetharaman, *Coming Soon to Facebook: Lots of Extreme Political Ads*, WALL STREET J. (Aug. 31, 2018, 5:30 AM), <https://www.wsj.com/articles/coming-soon-to-facebook-lots-of-extreme-political-ads-1535707802> [perma.cc/LG6V-2MKL]; Evan Sigfried, *Media Bias Against Conservatives Is Real and Part of the Reason No One Trusts the News Now*, NBC (July 29, 2018), <https://www.nbcnews.com/think/opinion/media-bias-against-conservatives-real-part-reason-no-one-trusts-ncna895471> [https://perma.cc/VB7X-Z35R]; Margaret Hoover, *America Is Polarized. It’s Why We Have to Start Listening to Each Other*, TIME (Oct. 25, 2018), <http://time.com/5434390/margaret-hoover-polarized-america/> [https://perma.cc/4A9T-6ENS]. But see Andrew Soergel, *Is Social Media to Blame for Political Polarization in America?*, U.S. NEWS (Mar. 20, 2017), <https://www.usnews.com/news/articles/2017-03-20/is-social-media-to-blame-for-political-polarization-in-america> [perma.cc/B6S5-9CUJ] (concluding that social media is only partly to blame for hyper-polarization).

in the actual dispute,<sup>17</sup> intensify our sense of polarization by ratcheting up the rhetoric with highly suggestive memes, posts from fake accounts, and unsubstantiated news reports.<sup>18</sup>

It is no wonder, then, that when we hear about these amplified differences of opinion around what is wrong and what we should do about it, we are left feeling that our communities and institutions are broken beyond repair. Indeed, these differences may feel like disputes we are engaged in, real disputes that are disruptive to our personal sense of justice, safety, and well-being—even though we ourselves are not central to the originating dispute or necessarily engaged with a real-life adversary around the disputed issues. Instead, we locate ourselves around and within the disputing sphere, attempting to align our values and identities with positions in the conflict. This alignment is not always easy because many public controversies implicate our values in ways that are not consistent and may create uncomfortable disconnects in our thinking. At times we may find ourselves changing positions as the story develops in the media and

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17. See, e.g., WHITNEY PHILLIPS, THIS IS WHY WE CAN'T HAVE NICE THINGS: MAPPING THE RELATIONSHIP BETWEEN ONLINE TROLLING AND MAINSTREAM CULTURE 27 (2015) (noting that the motivation of most trolls is getting “lulz,” the plural of LOL (laugh out loud)). See also Joel Stein, *How Trolls Are Ruining the Internet*, TIME (Aug. 18, 2016), <http://time.com/4457110/internet-trolls/> [perma.cc/RQZ7-XAJZ] (“Internet trolls have a manifesto of sorts, which states they are doing it for the ‘lulz,’ or laughs. What trolls do for the lulz ranges from clever pranks to harassment to violent threats.”). Phillips points out that “trolls exercise what can only be described as pure privilege . . . they do what they want, when they want, to whomever they want, with almost perfect impunity.” Phillips, *supra*, at 26. And as the recent Mueller investigation showed, some trolls act with political purposes. See, e.g., LEO G. STEWART ET AL., EXAMINING TROLLS AND POLARIZATION WITH A RETWEET NETWORK 1 (2018), available at <https://faculty.washington.edu/kstarbi/examining-trolls-polarization.pdf> [perma.cc/SRY6-QW6U] (“This analysis shows that these conversations were divided along political lines, and that the examined trolling accounts systematically took advantage of these divisions.”); Conor Friedersdorf, *Trump and Russia Both Seek to Exacerbate the Same Political Divisions*, THE ATLANTIC (Jan. 23, 2018).

18. Leonid Bershidsky, *Politicized Trolling Is Worse Than Fake News*, BLOOMBERG (July 23, 2018), <https://www.bloomberg.com/opinion/articles/2018-07-24/politicized-trolling-on-line-is-more-destructive-than-fake-news> [perma.cc/PHH2-PY9U]; Tom McCarthy, *How Russia Used Social Media to Divide Americans*, THE GUARDIAN (Oct. 14, 2017), <https://www.theguardian.com/us-news/2017/oct/14/russia-us-politics-social-media-facebook> [perma.cc/9938-U825] (“What has now been made clear is that Russian trolls and automated bots not only promoted explicitly pro-Donald Trump messaging, but also used social media to sow social divisions in America by stoking disagreement and division around a plethora of controversial topics such as immigration and Islamophobia.”).

new facts, comments, tweets, memes, posts, and additional materials become available.<sup>19</sup>

These kinds of conflict dynamics can lead to what I am calling snap disputes.<sup>20</sup> Such disputes are not “snap” in the sense of quick and easy but “snap” like the “snap” of “Snapchat”—something that confronts your consciousness, often initially by way of media or social media, in an immediate and highly personal way, and then may disappear or reappear, depending on the circumstances. Indeed, perhaps “snap” could be an acronym (“SNAP”) standing for “social networks amplifying polarization,” which conveys how social media reflects, creates, and intensifies conflict within and between people. Snap disputes may manifest as actual confrontations, but they are foremost virtual experiences, not only in the sense of happening inside one’s own psyche, but also (and primarily) in the sense of being shaped by a disembodied cyberculture sharing opinions and information by way of structured and unstructured networks. Because of this internalized character—an internalization that is both individual and collective, both private and public—snap disputes often contaminate real-life dialogue and disagreement, even if they themselves do not turn into vested disputes.

In some ways, snap disputes are actually more dispute-like than vested disputes, in that the contentious feeling that snap disputes create may outlast the actual originating event itself. Even if the players and owners come to a harmonious agreement around kneeling at NFL games, for example, the conflict around the issue between people outside the NFL may still feel unresolved and even continue to escalate.<sup>21</sup> That said, our own involvement with snap disputes can and often does fluctuate considerably. Snap disputes may seem vitally important in the moment but also are somehow easy to forget, probably because the originating facts leading to the snap dispute are not from our own experience but rather inhabit an abstract disputing

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19. See, e.g., Jane Mayer, *The Case of Al Franken*, NEW YORKER, at 30 (July 22, 2019) (reporting that a number of senators who called for Franken’s resignation regretted doing so, presumably as more information became available); Molly Roberts, *Everyone is Still Wrong About the Covington Kids*, WASH. POST (Jan. 22, 2019), [https://www.washingtonpost.com/opinions/2019/01/22/covington-fracas-is-mess-let-it-be/?no\\_redirect=ON&utm\\_term=.0ab80e9dfb1f](https://www.washingtonpost.com/opinions/2019/01/22/covington-fracas-is-mess-let-it-be/?no_redirect=ON&utm_term=.0ab80e9dfb1f) [perma.cc/RN2H-YJ8K] (“Your opinion on the Covington Catholic fracas depends on the angle you choose to see it from. Literally.”).

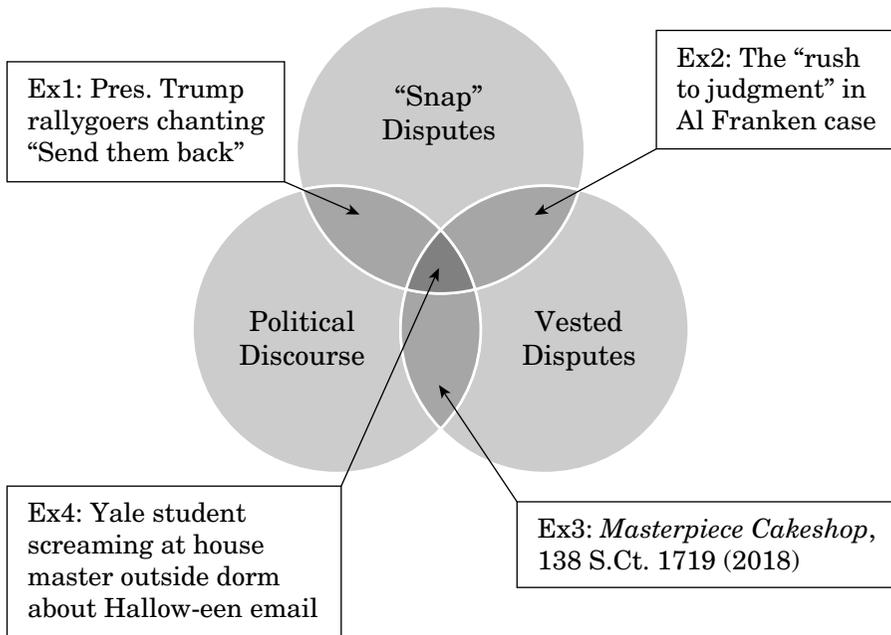
20. A number of descriptive terms have emerged around the dynamic we are describing: culture of outrage, scissor algorithm, special snowflakes, social justice warriors, extreme partisanship.

21. See, e.g., STONE ET AL., *supra* note 9, at 85–90, 111–13 (describing how emotions and “identity quakes” can perpetuate the feeling of conflict beyond resolution).

space, something that exists both internally (individual) and virtually (shared). In such a space, we cannot continuously be present.

Snap disputes are not, therefore, simply extreme vested disputes or intense political disagreements. They can, however, create new vested disputes, compound the conflict within existing vested disputes, or lead to political dysfunction. As the diagram below depicts, snap disputing dynamics inform and overlap with political discourse and vested disputes in ways that promote fear and anger in both arenas. Social media, for all its many benefits, often amplifies polarization and negative emotions, especially fear—fear of speaking, fear of engaging, fear of being harmed, fear of losing, and fear of people who are different. These fears can distort and undermine otherwise normal political discourse, productive conflict, and effective dispute resolution.

FIGURE 1. Social Networks Amplifying Polarization. Snap disputes throw into sharp relief how both the public discourse and vested disputes are affected by the positional, polarizing tendencies of media and social media.<sup>22</sup>



22. Example 1 refers to the "Send them back!" chants at Trump rallies following the President's tweet calling for four Congresswomen (Ilhan Omar, Alexandria Ocasio-Cortez, Ayanna Pressley, and Rashida Tlaib) to "go back" where they came

Snap disputes are tiring, because they seem to be everywhere and they force us to engage along high-stakes vectors (identity, values, norms) without having much ability to effect any real change in the circumstances that inform the originating dispute or situation. Of course, this engagement may be useful insofar as it sensitizes people to issues that may or may not emerge in their own experiences and thus contributes to the overall “wokeness” of society. But it may also be the case that snap disputes are the disputing equivalent of

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from. See, e.g., Jordan Fabian, *Trump Says He Prefers Rally Crowd Not Chant ‘Send Them Back’*, THE HILL (Aug. 1, 2019), available at <https://thehill.com/homenews/administration/455827-trump-says-he-prefers-rally-crowd-not-chant-send-them-back-perma.cc/TGA2-LB4J> (noting that the “president initially repudiated the chants after a rally crowd chanted last month in North Carolina, but later backed away from his condemnation”); Kevin Fitzpatrick, *In Racist Tweet, Trump Tells Congresswomen of Color to “Go Back” to “the Totally Broken and Crime Infested Places From Which They Came,”* VANITY FAIR (July 14, 2019), available at <https://www.vanityfair.com/news/2019/07/trump-congresswomen-go-back-country-perma.cc/4FTQ-L2AA>.

Example 2 refers to the Al Franken case, in which the immediate public outrage that arose around Franken’s past behavior arguably made it difficult to process those revelations in a rational way. See, e.g., Mayer, *supra* note 19, at 32 (“Heidi Heitkamp, the former senator from North Dakota, told me, ‘If there’s one decision I’ve made that I would take back, it’s the decision to call for his resignation. It was made in the heat of the moment, without concern for exactly what this was.’”).

Example 3 is the Supreme Court’s recent decision in *Masterpiece Cakeshop v. Colorado Civil Rights Comm’n*, 138 S.Ct. 1719 (2018), in which an actual vested dispute between a gay couple and a cake maker in Colorado had important resonance for larger political discussions around the tensions between civil rights, freedom of speech, and religion. See, e.g., Eric Segall, *It’s Time for Colorado and the Masterpiece Cakeshop Owner to Reach a Deal*, Slate (Jan. 7, 2019), <https://slate.com/news-and-politics/2019/01/colorado-masterpiece-cakeshop-gay-wedding-cake.html-perma.cc/L8B9-3NUV> (arguing that state nondiscrimination laws “cannot, or at least should not, be used by the government to coerce artists to express messages they disagree with”).

Example 4, which sits at the center of vested and political disputes that have a dysfunctional social media dimension, is the encounter that went viral between a Yale undergraduate and head of her house. See *Yale Students Confront Administrator over Halloween E-mail Response*, Wash. Post (Nov. 9, 2015), [https://www.washingtonpost.com/video/national/yale-students-confront-administrator-over-halloween-email-response/2015/11/09/f45fe516-86fb-11e5-bd91-d385b244482f\\_video.html-perma.cc/4MDK-8PWU](https://www.washingtonpost.com/video/national/yale-students-confront-administrator-over-halloween-email-response/2015/11/09/f45fe516-86fb-11e5-bd91-d385b244482f_video.html-perma.cc/4MDK-8PWU). In this situation, there was an actual vested dispute around the content of an email about Halloween costumes that connected to larger political discourse related to cultural sensitivity and cultural appropriation in connection with the holiday. The original email led to a Facebook post, the viral video, and countless online exchanges, tweets, and posts. Many people not part of the dispute were hooked by the controversy and pulled into positions of being on one “side” or the other. Then, when the president of Yale attempted to apologize, “that . . . simply outraged external observers even more.” See Daniel W. Drezner, *A Clash Between Administrators and Students at Yale Went Viral. Why That Is Unfortunate for All Concerned.*, Wash. Post (Nov. 9, 2015), <https://www.washingtonpost.com/posteverything/wp/2015/11/09/a-clash-between-administrators-and-students-at-yale-went-viral-why-that-is-unfortunate-for-all-concerned-perma.cc/N753-PC2K>.

the worst kind of Twitter activism—a way to become outraged and exhausted within our own bubbles, without progressing toward any real change and in fact possibly making things worse.<sup>23</sup> On this view, our psychological urge to take sides in a charged ideological argument may be working at cross purposes with the goals we hold around democratic participation, an informed polity, civil discourse, and inclusive communities. Just like Snapchat or Instagram or Facebook, snap disputes have the power to draw us into a vortex and leave us immobilized.

Commentators have been describing this problem in different ways for some time. Many have written about the various elements within our disputing culture (trolls, meddlers, politics and identity politics, culture wars, and so on) that have created the conditions for snap disputes.<sup>24</sup> And certainly ADR professionals can explain the dynamics of snap disputes in terms of existing theory. From the perspective of interest-based negotiation, for example, snap disputes lead to positional hard bargaining around values, typically exacerbated by the use of difficult tactics, such as name-calling or refusing to participate in conversation.<sup>25</sup> Leverage analysis, to give another

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23. See, e.g., Laura Seay, *Does Slacktivism Work?*, WASH. POST (Mar. 12, 2014), <https://www.washingtonpost.com/news/monkey-cage/wp/2014/03/12/does-slacktivism-work/> [perma.cc/Z7F7-RLPZ] (arguing that participating in social media campaigns may not lead to active engagement). The late commentator Mark Fisher, who was himself a strong critical voice on the left, memorably described how destructive “woke” Twitter can be. Mark Fisher, *Exiting the Vampire Castle*, OPENDEMOCRACY (Nov. 24, 2013), <https://www.opendemocracy.net/en/opendemocracyuk/exiting-vampire-castle/> [perma.cc/V5SY-BABX] (“‘Left-wing’ Twitter can often be a miserable, dispiriting zone. Earlier this year, there were some high-profile twitterstorms, in which particular left-identifying figures were ‘called out’ and condemned. What these figures had said was sometimes objectionable; but nevertheless, the way in which they were personally vilified and hounded left a horrible residue: the stench of bad conscience and witch-hunting moralism”). *But see* Stacey B. Steinberg, *#Advocacy: Social Media Activism’s Power to Transform Law*, 105 KY. L.J. 413 (2017) (emphasizing “the unique power of online advocacy (often referred to as #activism) to create legal and social reform”).

24. See, e.g., PHILLIPS, *supra* note 17, at 51–69; see also Abby K. Wood & Ann M. Ravel, *Fool Me Once: Regulating “Fake News” and Other Online Advertising*, 91 S. CAL. L. REV. 1223, 1225 (2018) (noting that “the Russians aimed to weaken Hillary Clinton’s candidacy for president, foster division around fraught social issues, and make a spectacle out of the U.S. election. To these ends, the Russians mobilized trolls, bots, and so-called ‘useful idiots,’ along with sophisticated ad-tracking and micro-targeting techniques to strategically distribute and amplify propaganda”); Arthur C. Brooks, *Our Culture of Contempt*, N.Y. TIMES (Mar. 2, 2019) <https://www.nytimes.com/2019/03/02/opinion/sunday/political-polarization.html> [perma.cc/K8AQ-3A4N] (“Millions of people organize their social lives and their news exposure along ideological lines to avoid people with opposing viewpoints.”).

25. For more on dealing with hardball tactics, see generally ROBERT H. MNOOKIN ET AL., *BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES*

example, might focus helpfully on the power contest inherent in many snap disputes. In this way, leverage analysis could highlight the ways in which snap disputants seek the ideological upper hand through a contest between normative positions that may, depending on the situation, devolve into one or both sides employing negative leverage (e.g., online harassment) to gain an advantage.<sup>26</sup> Narrative mediation, as a third example, could usefully expose the characterizations implicit in the snap disputants' conflict stories (hero, villain, victim) along with the tendency for disputants to flatten out complexities and delegitimize the experience of those with whom they disagree.<sup>27</sup> Finally, basic conflict theory says that when people feel threatened, they are more prone to the biases and cognitive shortcuts that can cause disputes to escalate.<sup>28</sup> On this view, one reason snap disputes escalate so quickly may be that disputants feel personally threatened—they may fear being called out, or perhaps they fear missing the chance to call someone else out<sup>29</sup>—and therefore worsen the conflict by doubling down on positions, rationalizing the use of negative leverage, and investing in hardliner narratives that oversimplify the conflict and make it difficult to listen, admit mistakes, or forgive.<sup>30</sup>

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17–42 (2000) and ROGER FISHER AND WILLIAM URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* 129–43 (2d ed. 1991).

26. See generally G. RICHARD SHELL, *BARGAINING FOR ADVANTAGE: NEGOTIATION STRATEGIES FOR REASONABLE PEOPLE* 101–05 (1999) (describing theories and instances of positive, negative, and normative leverage); see also KARLA MANTILLA, *GENDERTROLLING: HOW MISOGYNY WENT VIRAL* 103–15 (2015) (discussing the adverse reactions that women can experience after online harassment, including going into hiding, withdrawing from the internet, and censoring themselves).

27. See generally JOHN WINSLADE & GERALD MONK, *NARRATIVE MEDIATION: A NEW APPROACH TO CONFLICT RESOLUTION* 57–92 (2000); see also SARA COBB, *SPEAKING OF VIOLENCE: THE POLITICS AND POETICS OF NARRATIVE IN CONFLICT RESOLUTION* 44–75 (2013) (explaining how narrative tropes shape how people experience conflict).

28. See DEAN G. PRUITT & SUNG HEE KIM, *SOCIAL CONFLICT: ESCALATION, STALEMATE, AND SETTLEMENT* 87–168 (3d ed. 2004) (setting forth conditions of escalation); see also COBB, *supra* note 27, at 51.

29. See, e.g., David Brooks, *The Cruelty of Call-Out Culture*, N.Y. TIMES (Jan. 14, 2019), <https://www.nytimes.com/2019/01/14/opinion/call-out-social-justice.html> [perma.cc/ZD5B-VBQP].

30. Note that mainstream conflict resolution approaches have not adequately explained how social media exacerbates conflict, other than to observe generally that the more people involved in a conflict, the more difficult the conflict becomes to address. See, e.g., Robert H. Mnookin, *Strategic Barriers to Dispute Resolution: A Comparison of Bilateral and Multilateral Negotiations*, 8 HARV. NEGOT. L. REV. 1, 2 (2003) (stating that “it is safe to assert that a variety of strategic barriers can arise [in multilateral negotiation settings] that do not exist in bilateral negotiation”).

It is one thing to understand snap disputes, however, and quite another to handle them effectively. As described above, snap disputes manifest in multiple ways, unpredictably and at varying intensities for and between people. They are often proxies for ideological struggles that seek to perpetuate or mitigate inequalities. As such, snap disputes may be intertwined with other snap disputes, vested disputes, and political dialogue in ways that can call people into particular positions (or assume others have particular positions) based on political and personal identities.<sup>31</sup> Even on a single issue within a single community, managing the dynamics created by snap disputes presents considerable logistical and substantive challenges.

The next Part takes up the question of whether and how existing dispute resolution methods are suitable for dealing with snap disputes. In the final analysis, the term “snap dispute” remains somewhat problematic because snap disputes are not a new discrete category of dispute, like family disputes or contract disputes.<sup>32</sup> We can (and this paper does) use “snap dispute” as a shorthand for “highly polarized public disagreement often exacerbated by social media,” but this shorthand does not capture the intensely personal and

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31. So-called “tribal” commitments like membership in a political party often tend to indicate one’s position without reference to overall coherence or personal autonomy. *See, e.g.*, Francis Lee, ‘Excommunicate Me from the Church of Social Justice’: An Activist’s Plea for Change, CBC (Sep. 17, 2017), <https://www.cbc.ca/radio/thesundayedition/the-sunday-edition-september-17-2017-1.4291332/excommunicate-me-from-the-church-of-social-justice-an-activist-s-plea-for-change-1.4291383> [<https://perma.cc/RM6A-WSHA>].

32. Understandably, dispute resolution scholars and practitioners want to classify disputes whenever possible. Once classified, it is easier to figure out what dispute resolution or management method is appropriate, famously captured by Frank Sander and Stephen Goldberg as “fitting the forum to the fuss.” Frank E. A. Sander & Stephen B. Goldberg, *Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure*, 10 NEG. J. 49 (1994). Fitting the forum to the fuss is not about treating each dispute as a unique occurrence requiring its own entirely new special process but instead is about assessing a dispute on the basis of certain attributes and then choosing between ADR procedures (mediation, arbitration, etc.), possibly making some small process modifications to the chosen procedure depending on the situation. Because the label “snap dispute” has multiple dimensions and non-exclusive characteristics, it is not an especially useful label for use in dispute processing. In fact, snap disputes tend to demonstrate the limits of fitting the forum to the fuss, as observed by Austin Sarat. Sarat noted that Sander and the field of dispute resolution more generally appeared to be moving toward a “matching” system between disputes and dispute processing systems that smacked of idealistic formalism. Austin Sarat, *The “New Formalism” in Disputing and Dispute Processing*, 21 LAW & SOC’Y REV. 695, 698 (1988) (reviewing GOLDBERG ET AL., DISPUTE RESOLUTION) (arguing that formalist thinking in the field of dispute resolution “holds that given the right match of dispute and dispute processing technique, harmony can be restored and problems can have resolutions that satisfy the disputants and are therefore likely to be final”).

collective imaginary aspects of snap disputing, which together are so important in framing reality and setting baselines for conflict and conflict management.

Ultimately, the term “snap disputes” is perhaps most useful as a kind of workspace, a conceptual framework that enables us to pull together the various context pieces and social dynamics that are contributing to this widespread sense of polarization in modern disputing culture. Collecting all of this under the heading of “snap disputes” allows us to bring dysfunctional patterns of interaction and judgment to the foreground as we examine more carefully how we tend to characterize others, how we experience differences and disagreements, whether we believe positive societal change is possible (and for whom), and what steps we can take to move toward those positive changes.

### III. DEALING WITH SNAP DISPUTES: PROGRESS AND PITFALLS

When it comes to managing large-scale public conflict, one would expect that dispute resolution professions such as law would have considerable impact. The law, after all, provides the framework for democratic engagement (e.g., voting) as well as our system of governance. And certainly many legal procedures exist for preventing disputes and for resolving disputes.<sup>33</sup> In the United States, civil litigation and criminal proceedings play an important role not only in handling disputes between parties but also articulating public values, regulating industry, and guiding the primary behavior of citizens.<sup>34</sup>

#### A. *Traditional Legal Processes*

Although disputes are a central concern of law, traditional legal processes do not necessarily manage or resolve the dynamics associated with snap disputes. This is true even when a high-profile, media-saturated, and polarized vested dispute is handled directly through litigation. Consider, for example, the census citizenship question, which recently was argued in the United States Supreme

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33. See Fed. R. Civ. P. 1 (stating that the Rules governing civil cases “should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding”).

34. See, e.g., ALEXANDRA LAHAV, IN PRAISE OF LITIGATION 32–37 (2017) (describing the importance of litigation in promoting access to justice and regulating conduct); Owen FISS, *Against Settlement*, 93 YALE L.J. 1073 (1984) (arguing that the public resolution of controversies contributes to the overall social welfare in a way that private agreements cannot).

Court.<sup>35</sup> The Justices may have disposed of the legal issues at stake, but other than furnishing the reasons for their opinions, they did not (and do not) address residual societal concerns or work to promote healthy dialogue between individuals who may disagree. In such cases the law provides some degree of closure but cannot reach the cascading, cyber-fueled conflicts that grow out of these kinds of questions.

Similarly, voting does not help much with disputes, snap or otherwise, even though voting may seem more likely than a Supreme Court decision to empower individuals to address their concerns more directly. Some disagreements with snap disputing elements are so peculiar and discrete that they would not rise to the level of a “litmus test” for anyone’s vote, and thus would go unaddressed through a regular political voting process. Other disagreements (like the abortion debate) may have the litmus test quality and therefore may be capable of being addressed through voting, but the snap dispute dimension of the disagreement (the online rancor toward and demonization of those who disagree, say) is not usually affected by one side winning an election.<sup>36</sup> And even if voting could settle both vested disputes and any related snap disputes definitively, voting happens too infrequently to make it an efficient approach to use by itself for regulating disputing culture.

In short, the law is not that helpful when it comes to managing snap disputes that have a legal or political dimension. The law is

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35. See *Dep’t. of Commerce v. N.Y.*, 139 S.Ct. 2551 (2019). Of course, the resolution of this case did not feel very settled, given the snap dispute dynamics inflecting our current national conversation around immigration, citizenship, and identity. See, e.g., Thomas Wolf & Breanna Cea, *How the Supreme Court Messed Up the Census Case*, ATLANTIC (July 1, 2019); Ronn Blitzer & Adam Shaw, *Trump Seeks 2020 Census Delay After Supreme Court Blocks Citizenship Question*, FOX NEWS (June 27, 2019), <https://www.foxnews.com/politics/supreme-court-blocks-citizenship-question-in-2020-census-for-now> [perma.cc/8VFB-JPF6] (reporting on the president’s efforts to work around the Supreme Court’s decision).

36. As the case of Brexit has shown, simple up-or-down voting and majority rule are not good ways to resolve disputes and is especially problematic when issues are complex. See, e.g., David Allen Green, *The Tale of the Brexit Referendum Question*, FIN. TIMES (Aug. 3, 2017), [<https://perma.cc/V3BU-23QN>] (explaining the intrigue and politics behind the phrasing of the Brexit referendum); see also Turkuler Isiksel, *The British People Have Spoken. But What Exactly Did They Say?*, WASH. POST (July 1, 2016), <https://www.washingtonpost.com/news/monkey-cage/wp/2016/07/01/the-british-people-have-spoken-but-what-exactly-did-they-say/> [perma.cc/N3KL-4LWK] (“Most referendums do not allow for specifying alternatives, giving and weighing reasons, or ranking preferences. And they give no indication of what tradeoffs the electorate is willing to tolerate, or guidance on how to proceed with the vast number of decisions that must be made to implement the people’s will.”).

even less helpful when it comes to disputes that do not present significant legal or policy concerns. Take, for example, the conflict that arose after a law professor wore black makeup on her face and hands at a Halloween party held at her house, with students and other faculty in attendance.<sup>37</sup> In the wake of this event, many constituents from the campus and beyond were engaged in emotional, adversarial, and sometimes vituperative conversations around whether and how to respond appropriately.<sup>38</sup> These conversations took place in person, by email, through letters, on blogs, via Twitter, and in the national media.<sup>39</sup> At stake in these personal interactions and cyber-exchanges were extreme emotions, competing values, questions around personal and professional norms, and serious disagreements about what happened—all the hallmarks of a snap dispute.

Can formal legal processes provide any support in this kind of situation? Voting is certainly no help in such a case. Litigation also does not help, because the law will not be able adequately to describe or address the various harms that people experienced in this situation.<sup>40</sup> In fact, because of the First Amendment, the law does not

37. See, e.g., Cameron Walker, *Professor Accused of Wearing Blackface to Halloween Party Under Pressure at Univ. of Oregon*, KVAL (Nov. 3, 2016), <https://kval.com/news/local/professor-under-pressure-at-uo-after-wearing-blackface-to-halloween-party> [<https://perma.cc/8M8R-QSRQ>]. Full disclosure: I was one of the faculty members who signed the open letter calling for the professor's resignation. The professor was ultimately found to have violated the university's anti-harassment policy. See *Provost Issues Statement and Report Regarding Investigation*, AROUND THE O (Dec. 21, 2016), <https://around.uoregon.edu/content/provost-issues-statement-and-report-regarding-investigation> [[perma.cc/46AB-BWKW](https://perma.cc/46AB-BWKW)].

38. See Edwin A. Harnden et al., *University of Oregon Investigative Report* (Nov. 30, 2016) (unpublished report) (on file with author). For additional context on some community reactions, mostly critical of university administration and of the professors who called for Shurtz's resignation, see collected posts at Bill Harbaugh, UOMatters, <http://uomatters.com/tag/blackfaced-professor> [[perma.cc/Y7ZB-TGCM](https://perma.cc/Y7ZB-TGCM)] (last updated Jan. 15, 2020), a private blog run by Bill Harbaugh, an economics professor at the University of Oregon.

39. See, e.g., Joe Patrice, *White Professor Who Wore Blackface Teaching About Race Because There Are No Consequences for Anything Anymore*, ABOVE THE LAW (Apr. 23, 2018), <https://abovethelaw.com/2018/04/white-professor-who-wore-blackface-teaching-about-race-because-there-are-no-consequences-for-anything-anymore/> [[perma.cc/H7RL-SS7C](https://perma.cc/H7RL-SS7C)]; *Oregon Professor Who Wore Blackface at Party Returns to Work*, AP NEWS (Apr. 13, 2018), <https://www.apnews.com/9f8fc3a484144a1f8d82899c3652096c> [[perma.cc/S73E-GQA7](https://perma.cc/S73E-GQA7)]; see also Scott Jaschik, *Oregon: Professor in Blackface Violated Anti-Harassment Policy*, INSIDE HIGHER ED (Jan. 3, 2017) (reporting on some reactions from people and groups outside the Eugene community).

40. For example, after the provost's report, the professor filed her own lawsuit. Although there is no publicly available information about the disposition of this matter, in general such lawsuits do not (perhaps cannot) make a positive difference when it comes to those affected by the conflict more broadly. At most, these lawsuits can only address a narrow aspect of the matter in a highly formalized context that is

have much to offer people who are appalled by or defensive of the professor's behavior, other than the (valuable and important) opportunity to express their own opinions on the matter. Although or perhaps because freedom of speech is a core value shared by many Americans, it is not obvious how to accommodate other important values in addition to freedom of speech, such as promoting an inclusive community, advancing equal treatment, or remediating the effects of pervasive institutionalized racism.

### B. *Alternative Dispute Resolution Processes*

When it comes to snap disputes, therefore, traditional legal mechanisms and processes are generally ineffective. But that does not mean that the law and dispute resolution have nothing to offer when dealing with the effects of the apparently increasing polarization of the polity. Within the legal academy, for example, alternative dispute resolution (ADR) professors and others have sought to develop constructive interventions that address some of the needs of the current moment.<sup>41</sup> The modern ADR movement came about, after all, because of the limits of legal process when dealing with human disputes.<sup>42</sup> Litigation is too emotionally stressful, time-consuming, narrowly construed, and expensive to be an effective approach for all-purpose dispute resolution. Indeed, even people with meritorious legal cases may not have the emotional or financial wherewithal to pursue litigation. And many of the most salient parts of disputes (e.g.

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incapable of capturing not only the realities of experience for the parties but for everyone touched by the situation. Put another way, legal mechanisms cannot reach the aspects of snap disputes inherent in the conflict.

41. The fields of legal writing and clinical work are also deeply engaged in these issues. At our law school, for example, the legal writing faculty has been extraordinarily committed to promoting pedagogical approaches that support diversity and fairness.

42. See, e.g., Sander & Goldberg, *supra* note 32, at 53 (illustrating that not every dispute is properly resolved using litigation). In fact, early proponents of ADR were interested not only in sensible dispute processing but also in larger questions around conflict, peace, access to justice, and self-determination. In their study of the community mediation movement Christine Harrington and Sally Merry observed that early advocates of mediation sought not only the delivery of legal services but also social transformation and personal empowerment. Christine B. Harrington & Sally Engle Merry, *Ideological Production: The Making of Community Mediation*, 22 *LAW & SOC'Y REV.* 709, 714–15 (1988); see also Karen G. Duffy & James Thomson, *Community Mediation Centers: Humanistic Alternatives to the Court System: A Pilot Study*, 32 *J. OF HUMANISTIC PSYCH.* 101, 101–14 (1992) (arguing that when compared to traditional court processes, alternative dispute resolution was not only legitimate but superior for many disputants).

emotions) may not have a legal remedy, and so go unaddressed and potentially exacerbated by the legal system.

ADR improved the situation by offering approaches that are flexible and characterized by openness, collaboration, neutrality (on the part of the outside third-party guiding the process), self-determination, joint problem-solving, and informed consent.<sup>43</sup> Other than arbitration, ADR processes do not impose solutions on disputants, but instead attempt to empower them to speak and to listen, which hopefully will give them the space and the agency to come to their own agreement.<sup>44</sup> Some of the animating ideas behind this vision are the belief that everyone should have an opportunity to talk, that the whole conflict may be more than its legally relevant parts, that blame is toxic and should be avoided, that multiple versions of the truth can be correct, and that people deserve recognition and respect as a default.<sup>45</sup>

Building on these principles, and in response to the rise of political polarization and divisiveness, over the past few years the ADR community has been hosting conferences, putting together panel discussions, and developing research projects devoted to more skillfully addressing the polarization of our times.<sup>46</sup> Additionally, some dispute resolution professors have started speaking with their classes

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43. See, e.g., Jennifer W. Reynolds, *Luck v. Justice: Consent Intervenes, but for Whom?*, 14 PEPP. DISP. RESOL. L.J. 245, 275–77 (2014) (laying out the philosophical foundation of mediation and alternative dispute resolution generally).

44. See, e.g., Carrie Menkel-Meadow, *The Lawyer as Consensus Builder: Ethics for a New Practice*, 70 TENN. L. REV. 63, 63–119 (2002) (arguing that the modern lawyer must have the normative commitments and practical skills to help parties reach consensus-based agreements).

45. See, e.g., STONE ET AL., *supra* note 9 at 30–38; see also WILLIAM URY, GETTING PAST NO, 31–129 (1991) (describing steps to achieving a “breakthrough” that avoids vilifying the other party).

46. Examples abound. This past February, for instance, the *Negotiation Journal* published a special issue devoted to negotiation and conflict resolution in the age of President Trump. See Joel Cutcher-Gershenfield et al., *Editor’s Note*, WILEY ONLINE LIBRARY, <https://doi.org/10.1111/nej.12274> [<https://perma.cc/F3T9-APSA>] (explaining that “Trump’s approach challenges many of the core precepts that have emerged in the fields of negotiation and conflict resolution over the last fifty years” and therefore responses from experts are necessary). For the most part, the thirty-five experts participating in this special issue observed that such change was indeed noticeable on many fronts; they suggest that while Trump’s actions are expected to have little effect in the domain of business negotiation, its effects on societal decision-making, international diplomacy, extrajudicial resolution processes, interpersonal interaction, negotiation teaching, and other negotiation and conflict resolution domains are deepening and, for the most part, unsettling. *Id.* Additionally, top-ranked dispute resolution programs recently have promoted discussions around constructive responses to the polarized political climate. See Rafael Gely, *Introduction to “Dispute Resolution and Political Polarization,”* 2018 J. DISP. RESOL. 1, 1–4 (2018) (providing an overview of

about current high-profile public conflicts, sometimes using them as opportunities for thinking through the application of established theories and methods.<sup>47</sup> Finally, ADR proponents have held town halls, facilitated conversations, conducted mediations, provided trainings, launched podcasts, written articles, and created other processes designed to provide people with the opportunity to articulate their position in the conflict, to hear what others have to say, and to cultivate the ability to manage disagreements more productively.<sup>48</sup>

Outside the academy, many dispute resolution practitioners have redoubled their efforts in creating interventions for dealing with political disputes and divisions in the community. These interventions are built on processes designed for managing large-scale public

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the goals of a symposium at the University of Missouri and giving brief descriptions of the symposium articles); Jessica DuBois & Sharon Press, *An Intentional Conversation About Public Engagement and Decision-Making: Moving from Dysfunction and Polarization to Dialogue and Understanding*, 42 MITCHELL HAMLINE L. REV. 1439, 1439–1457 (2016) (explaining Mitchell Hamline’s intentional conversation format and then describing the articles included in the intentional conversation issue); OREGON ADR CENTER, *Announcing the Big Question 2016-17: Activism and ADR*, <https://law.uoregon.edu/explore/spring2016-big-question> [perma.cc/G36U-2R3D] (announcing the Oregon ADR Center’s year-long focus on ways in which activism and social justice intersect with the practices and theories of alternative dispute resolution). Outside these special formats, some ADR scholars have begun writing about the current state of disputing, often with emphasis on the kinds of disputes we are calling “snap disputes” here. See, e.g., Jonathan R. Cohen, *Developing Communities of Dialogue*, 20 CARDOZO J. CONFLICT RESOL. 105, 105 (2018) (opening with: “We live in an age where American political discourse has become highly antagonistic.”).

47. See, e.g., Andrea Schneider, *Teaching the Kavanaugh Hearings*, INDISPUTABLY.ORG (Sept. 30, 2018), <http://indisputably.org/2018/09/teaching-the-kavanaugh-hearings/> [perma.cc/BT9Y-LTS8] (laying out a plan for discussing the Kavanaugh hearings in class and asking for suggestions).

48. The website for the Divided Community Project at Ohio State Moritz School of Law, for example, notes that the program “was developed by persons and institutions committed to the belief that dispute resolution practitioners, policy makers and scholars can make a tangible, constructive contribution to helping leaders and citizens in communities seared by tensions, unrest, and civil discord — from Sanford, Baltimore and Ferguson to Dallas and Orlando — to strengthen and expand their capacity and resiliency [to] meet these challenges.” WHO WE ARE, DIVIDED COMMUNITY PROJECT, <https://moritzlaw.osu.edu/dividedcommunityproject/project-designers/who-we-are> [perma.cc/95AF-653G] (last visited Oct. 10, 2019). The Project produces reports, develops tools, and provides support, interventions, and training. In addition, the podcast Thanks for Listening, created by the Harvard Negotiation and Mediation Clinical Program, strives to “spotlight efforts to bridge the political divide in the U.S. through dialogue and collaborative processes.” See also *Civic Engagement Facilitation Training: Moving from Dialogue to Collaborative Action*, ESSENTIAL PARTNERS, (Sept. 6, 2017), <http://hnmcp.law.harvard.edu/hnmcp/podcast/thanks-for-listening-episode-1/> [perma.cc/2C5G-YM76] (offering a training designed to use dialogue for the purpose of collaborative problem-solving).

policy disputes. Such interventions range from small, focused events to larger-scale, ongoing initiatives.

In response to student protests around a campus speaker, for example, a group of Harvard Law students put together an open meeting to allow people to express their reactions and share differences of opinion in a well-managed, facilitated space.<sup>49</sup> This was a focused one-off encounter that provided timely opportunity for discussion. By contrast, consider an intervention from San Leandro, California, where a group of concerned community members called an emergency meeting after racist graffiti began appearing around the city. Developing an appropriate intervention in this situation required a great deal of planning and ongoing work:

The newly formed group considered how to respond to recent hate incidents collectively. They discussed programmatic material, considered how to reach out and work with schools and parents, suggested ideas for facing hate, looking to neighboring communities for ideas (e.g., the City of Hayward posts street signs which state “no room for racism”), and identified opportunities for collaboration with existing non-profits (e.g., with Not In Our Town). [Former City Council member Diane] Souza recalled, “Everyone had the same end game, but different paths were proposed.” The group quickly realized “we had the same priorities from different perspectives.”<sup>50</sup>

The group decided to continue meeting regularly and laid out immediate and long-term goals, including organizing a rally; drafting hate crime legislation; hosting town halls and other community events; and supporting a speaker series.<sup>51</sup> In a similar vein, after the Halloween blackface episode, the University of Oregon School of Law hosted several town halls for the community; sponsored a speaker series on free speech issues; issued a standing invitation to students to bring concerns to the dean of students’ office; and developed a much more robust diversity plan. Both approaches featured interventions that looked forward and backward, in an effort to deal with the after-effects of an incident while developing a framework to reduce future conflict, to address the situational and structural factors at stake in the situation, and to continue managing related disputes productively.

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49. One of my students, Jonathan Rosenbluth, was an organizer of this event.

50. *Community Resiliency Initiative - Case Study 5*, DIVIDED COMMUNITY PROJECT, <https://moritzlaw.osu.edu/dividedcommunityproject/wp-content/uploads/sites/101/2018/10/Case-Study-5-Unity-in-the-Community-San-Leandro.pdf> [perma.cc/2PQW-RVXP].

51. *Id.*

These examples are only three of many stories of responsive interventions in the wake of charged events. Such interventions are often extraordinarily helpful, insofar as they promote positive change, contribute to an understanding of conflict dynamics, and support empathy, dialogue, and improved conflict literacy and management between people who think differently. Indeed, there are many reports of these kinds of interventions being life changing.<sup>52</sup>

### C. *Limitations of Alternative Processes*

As important as these interventions are, however, they are necessarily limited. Traditional ADR-style interventions such as these often take a great deal of preparation and analysis, as in the case of trainings and facilitated conversations, and possibly may need ongoing maintenance and resources. But these interventions are problematic for reasons beyond the need for preparation and support. ADR interventions often require a “captive audience,” as with the town hall or in-class strategies for dealing with difficult moments, and therefore are unable to reach many of those affected by the dispute. ADR interventions often position the person or people who are conducting the intervention outside the exchange, which may be a painful or philosophically difficult role depending on the subject of the dispute. ADR interventions may, depending on how the dispute resolution specialists conduct conflict assessment in advance of designing the intervention, inadvertently reproduce or exacerbate the divisions created by trolls and meddlers.<sup>53</sup> And, most importantly for our purposes here, traditional ADR interventions do not easily carry over to the micro-exchange, local conversation, or social media space. Dispute resolution experts who come across a snap dispute likely will not have time for much conflict assessment and process design. They

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52. See, e.g., Sabrina Tavernise, *They Have Worked on Conflicts Overseas. Now These Americans See ‘Red Flags’ at Home*, N.Y. TIMES (Feb. 4, 2019), <https://www.nytimes.com/2019/02/04/us/conflicting-experts-peacebuilders.html> [perma.cc/G5HE-BVPV] (reporting that one participant in a red-blue discussion group had her doubts about the possibility of overcoming political divides but ultimately found that “the group was able to talk about hard things because of what came before: the feeling that the other side had heard them and that they had become, in a fundamental way, equals”).

53. I attended a panel last year in which the panelists described a community intervention that they performed in the wake of a dispute involving hateful flyers. Part of their conflict assessment included something along the lines of an anonymous online comment box, which received numerous offensive comments. The panelists did not assess these comments critically (like as possibly the work of trolls), but instead accepted them at face value as evidence of deep divisions within the community.

must decide quickly whether to do something or nothing, and if they decide to do something, what that something might be.

This brings us to a deeper concern around snap disputes and ADR, a concern that lies beyond the logistical challenges of gathering disputants and “building a container” or devising an intervention for handling the conflict. Even for an expert in dispute resolution, it is not always clear how to deploy traditional dispute resolution methods in snap disputes. Part of this lack of clarity is forum—many snap disputes happen inside social media, and engaging in a constructive dialogue on Twitter or a discussion board is difficult because it involves asynchronous exchanges among a group of unmanageable size, comprising people who do not know each other (and some of whom may be meddlers or trolls).<sup>54</sup> Part of this lack of clarity is the visibility of the dispute itself—many snap disputes arise in public places, sometimes between people who do not know one another, and any immediate interventions must take into account the presence of those watching the situation unfold, as well as the social media implications of public exchanges. And part of this lack of clarity is dispute resolution skills themselves. Put another way, snap disputes can make us rethink the effectiveness and appropriateness of some of our go-to practices in ADR.<sup>55</sup>

Consider listening. Listening is a bedrock of ADR practice, because it promotes inclusivity, participation, and understanding.<sup>56</sup> When people are heard, when their feelings are acknowledged, they feel valued and are more capable of appreciating the needs and concerns of others.<sup>57</sup> The best listeners listen with genuine curiosity and

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54. And sometimes people start out in online conversations as normal good-faith participants wanting to discuss the issues, but then start exhibiting troll-like behaviors (e.g., flaming) because they become exhausted or angry.

55. Professor Noam Ebner has suggested that negotiation and negotiators have been changing over the course of the past generation owing to society’s immersion in technology. See Noam Ebner, *Negotiation is Changing*, 2017 J. DISP. RESOL. 99, 99–143 (2017). Ebner argues that particular negotiation issues such as trust and objective criteria have been challenged by the attack on institutions and the proliferation of fake news seen in the lead-up to the 2016 elections in the US and since then. *Id.* at 131–35.

56. See, e.g., Jonathan Cohen, *Open-Minded Listening*, 5 CHARLOTTE L. REV. 139, 145–47 (2014) (describing the various modalities of listening as well as the “benefits of empathetic listening” for the person being listened to); see also STONE ET AL., *supra* note 9, at 167–68 (explaining how curiosity on the part of the listener makes the speaker feel heard and acknowledged).

57. *Id.*; see also Sara J. Cobb, *Narrative “Braiding” and the Role of Public Officials in Transforming the Public’s Conflicts*, 1 NARRATIVE AND CONFL. 4, 10 (2013) (noting that “speech is not just speaking, it is also being heard; being heard is, in turn,

the desire to understand when others are espousing their views.<sup>58</sup> Listening with an open mind not only makes the speaker feel heard, which is vital to successful conflict management, but makes it possible for the listener to see the situation more fully and may help bring both sides closer together.<sup>59</sup> That said, listening is not the same as agreeing, and indeed the listener and speaker may never agree. Listening is nonetheless absolutely essential when it comes to managing conflict, because it provides insight into what is important to the other party and helps ameliorate the pain and frustration of not being heard or taken seriously.<sup>60</sup> Knowing what someone wants and being able to reduce the tension in the exchange make interest-based dispute resolution and decision-making possible, which is why listening is such an important skill for negotiators and dispute professionals.<sup>61</sup>

Given the importance of listening to dispute resolution, many ADR instructors teach listening skills (paraphrasing, asking questions, acknowledging emotions) as part of negotiation, mediation, and other ADR courses. Because listening is most difficult when people disagree, instructors often put students into “hot topic” scenarios in which one student plays the Speaker and the other plays the Listener. Speakers are asked to begin speaking on a subject that the Listeners disagree with, and they are often encouraged to take hardline views that are the opposite of the Listeners’ views. For example, imagine the Listener is a keen advocate of gun control. In a listening skills exercise, the Speaker might speak at length about the importance of Second Amendment freedoms, the joys of hunting, the

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a function of how we are positioned in discourse , and whether we are positioned by others as moral agents, or not”) (citations omitted).

58. See STONE ET AL., *supra* note 9, at 167.

59. As Professor Richard Shell argues, for the negotiator who wants more power and leverage in a situation, listening provides that leverage. SHELL, *supra* note 26, at 102. (“Every time the other party says, ‘I want’ in a negotiation, you should hear the pleasant sound of a weight dropping on your side of the leverage scales.”)

60. See COBB, *supra* note 27, at 57. (defining the “differend” as “the suffering that results from the victimization related to not being heard”). In Cobb’s narrative approach to conflict analysis, people in conflict tend to see those who disagree as caricatures, which makes it hard for true listening to occur. “The flattening of the Other is a narrative form of dehumanization, for indeed, to be human is to be constructed as having intentions and emotions. This, in turn, contributes to create the differend, the suffering that accompanies not being heard, and the dynamic that is then set in motion is all too familiar—speakers speak but there is no evidence, no trace, of conversation in that speech, and it is as though they did not speak at all.” *Id.* at 59.

61. See FISHER & URY, *supra* note 25, at 40–55 (explaining the importance of seeking interests under positions and being “hard on the problem, soft on the people” to negotiated agreements).

necessity of stockpiling weapons to protect oneself against the government, and so on. As the Speaker speaks, the Listener is expected to listen without baiting or arguing with the Speaker, clearing the mind of judgment and engaging in active listening skills like paraphrasing, asking questions, and acknowledging emotions. In this way, students learn how to disengage themselves from an adversarial default setting in difficult conversations and how to promote greater understanding and fruitful dialogue by listening effectively and carefully.

The conventional wisdom around listening seems uncontroversial until we try to apply it to the worst and most difficult snap disputes. Imagine, for example, coming across an anti-Semitic person defending his or her views in front of observers. You decide that you will attempt to listen, in an effort to promote sensible dispute management and high-functioning political discourse. How is this going to go? First, unless you are also anti-Semitic, it is highly unlikely that you will be able to keep an open mind<sup>62</sup> or listen without judgment.<sup>63</sup> Additionally, you will likely feel concerned about the impacts of your listening on the speaker, who may feel inappropriately bolstered by your attention, and on any observers to the exchange, who may experience a range of possible reactions to the scene. Your concern will be that the simple act of listening—not arguing, not agreeing, just listening to understand—may provide some unintended measure of legitimacy to the speaker’s position, despite the conventional wisdom that listening does not mean agreeing. You will worry that listening may suggest that anti-Semitism is just one of many possible different views, all equally respectable and deserving of an audience.<sup>64</sup> You will be unable to explain fully your reasons for listening to either the speaker or the observers because it will sound

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62. As Professor Cohen points out, open-minded listening creates the possibility of listeners may change their minds. See COHEN, *supra* note 56, at 146 (“Truly listening to the other side might mean having to face the possibility that, on some points at least, the other side is right.”).

63. Thanks to Deborah Hensler for this insight.

64. In other words, you would be concerned that you were creating a false equivalency in the minds of the speaker and observers. Note that this concern does not only arise in the context of discussions in which one side is espousing hateful views. Even among otherwise like-minded people, some issues have become quite difficult to talk about in public settings, because some of the various positions at stake may be (or feel like they are) associated with extremist views. For example, trying to air differences around immigration policy or debating whether Kevin Spacey is a good actor can create the same pressures and concerns on the part of the listener as the anti-Semitic example given above, because the positions available in these discussions may seem linked to objectionable positions in related public controversies (the border wall, #metoo).

like you are keeping an open mind with regard to the issue (and if it doesn't sound like this, then it will sound like you aren't really listening). Later, you may find your efforts to listen memorialized in a picture on an Instagram post or YouTube video, in which you appear to be listening earnestly to an anti-Semitic fanatic.

The irony is that it is not even clear that listening in these kinds of situations is actually helpful. In all fields under the conflict umbrella, it is chapter and verse that listening to people and making them feel heard tend to deescalate conflict. This view holds sway with many in the broader community, who often assume, for example, that those who commit horrific acts of public violence are alienated loners who fell through the cracks of society and would have benefitted from more attention and listening from others.<sup>65</sup> But is it not possible that listening to certain types of people on certain kinds of issues actually may escalate conflict? Many people who hold repugnant views, after all, participate in online communities and are regularly "listened to" by others in their network.<sup>66</sup> Far from deescalating tensions and conflict, this supportive listening appears to embolden them toward more hardline views and even the use of violence.<sup>67</sup> Moreover, listening that happens in a public place may exacerbate the conflict beyond just its effect on the speaker. How people witness the exchange (either in person or through social media) and

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65. Of course, it is also possible that for some people this assumption is politically motivated. Those who oppose gun control, for example, often raise issues of mental health and social support in the wake of mass shootings, possibly because they believe those issues are relevant and possibly because they do not want the political response to be new gun regulations. See, e.g., Rob Waters, *Gun Control Vs. Mental Health Care: Debate After Mass Shootings Obscures Murky Reality*, KAISER HEALTH NEWS (Nov. 10, 2019), <https://khn.org/news/gun-control-vs-mental-health-care-debate-after-mass-shootings-obscur-es-murky-reality/view/republish/> [perma.cc/A8KA-TZSU]. Of course, couldn't it be both?

66. For example, the person responsible for driving into and killing ten people in Toronto was not someone with no outside contacts but instead was "linked to an online community of trolls and violent misogynists." Lulu Garcia-Navarro, *What's an "Incel"? The Online Community Behind the Toronto Van Attack*, NPR (Apr. 29, 2018, 08:10 AM), <https://www.npr.org/2018/04/29/606773813/whats-an-ince-l-the-online-community-behind-the-toronto-van-attack> [perma.cc/T4YA-GR5H].

67. The person responsible for killing eleven people at the Tree of Life Congregation in Pittsburgh regularly posted anti-Semitic messages on Gab, a social media site with little moderation, creating "relative lawlessness [that] has made it a gathering spot for white supremacists and other members of the extreme alt-right." Louise Matsakis, *Pittsburgh Synagogue Shooting Suspect's Gab Posts Are Part of a Pattern*, WIRED (Oct. 27, 2018), <https://www.wired.com/story/pittsburgh-synagogue-shooting-gab-tree-of-life/> [perma.cc/T9ME-M9RP].

react is not predictable, even if you are able to explain your intentions more fully in the moment or afterward. Accordingly, attempting to handle the conflict through listening may actually lead to greater divisiveness.

Perhaps the answer is that there are exceptions to listening. Some people may be listened to on some issues, others not. But making exceptions creates its own set of difficulties, however, when it comes to something previously considered universally applicable. We would first have to develop a theory of exceptions—what they are, when they are warranted—and develop criteria around how we know not to listen. We would need to recognize and deal with the interpretive problems that inevitably will arise around the scope and nature of these exceptions (e.g., does talking about abortion count?). Then we would need to map out the possible alternative approaches to take after making an exception to listening. This also would require us to consider what impacts listening exceptions may have on other conflict resolution methods, such as mediation, and adjust those models accordingly. Throughout all this, debates would rage around whether listening should even have exceptions, not to mention what those exceptions are, when they kick in, and how they should manifest in dialogue.<sup>68</sup> In these ways, snap disputes can undermine one of the animating ideas of an entire field of practice.<sup>69</sup>

Other examples of foundational ADR principles that appear to be at risk in light of snap disputing culture include neutrality; self-determination and consent; participation; objective criteria;<sup>70</sup> the focus on relationships; and the idea that we should always negotiate over interests instead of positions. Each of these principles has a substantive and/or moral grounding that, when considered in the context of snap disputing, may be turned upside down.

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68. These debates would rage in part because the virtues of listening are embedded in the moral and normative dimensions of much ADR practice and teaching. Making exceptions in such a context is bound to be deeply problematic for many alternative dispute theorists and practitioners.

69. Note that the same problems emerge if instead of exceptions, we attempt to impose preconditions on listening. We would still need a theory of what preconditions were appropriate, and hardline dispute resolution purists would still maintain that it is wrong to refuse to listen under any situation, and perhaps especially in situations that do not adhere to preconditions for civil conversation.

70. See, e.g., EBNER, *supra* note 55, at 135; see also, Noam Ebner, *Begun, The Trust War Has: Teaching Negotiation when Trust Isn't Trust*, 35 NEGOT. J. 207 (2019).

TABLE 1. Problems that snap disputes pose for traditional principles of dispute resolution.

<b>ADR principle</b>	<b>Reason for the principle</b>	<b>Why the principle may not work in snap disputes</b>
Neutrality	Fairness; person guiding dispute resolution process should not be biased toward one party or a particular outcome	Neutral approaches may preserve status quo and institutionalized inequality, and they may also legitimize and provide platforms for hateful speech
Self-determination and consent	Autonomy, dignity; disputants should have control over how their dispute is resolved	Self-determination and consent assume agency and relatively equal status/power, an assumption that may obscure socioeconomic inequalities and power disparities
Participation	Dignity, value creation; disputants suffer when they are not acknowledged or heard; additionally, their input will help shape a better outcome	Participation presents the same problems as listening (e.g., creating false equivalencies) and is difficult to cultivate in highly diffuse, public conflicts
Objective criteria	Fairness; turning to objective criteria helps disputants assess proposals against a non-biased standard	Objective criteria are not as helpful in the post-truth world, as parties exist in news bubbles and are suspicious of sources outside those bubbles (“fake news”)
Relationships	Individual and community well-being; processes that maintain or improve relationships are considered superior	Focusing too closely on maintaining relationships and reducing outward signs of conflict may indicate dysfunctional preference for peace over justice
Interests, not positions	Durable agreements, value creation; uncovering interests (concerns, hopes, fears, etc.) beneath positions makes it easier to find common ground and to propose solutions	When we zero in on individual disputants’ interests, we localize the dispute to an exchange between individuals instead of thinking about and managing the dispute more collectively and system-wide

Note that many of these are not new concerns about ADR. Since the beginning of the modern ADR movement, critics have argued that these foundational pieces too often work to the advantage of powerful parties and subvert the ends of justice.<sup>71</sup> What's new here is the way in which snap disputes bring these criticisms into sharper relief in immediate, personal ways. It is not as easy to romanticize inclusive processes or take a high-minded view of the legitimacy of everyone's truth when we must deal with people (who, let's not forget, may be bots or meddlers with an agenda) whose worldviews are intolerable. Today, when engaging on highly charged issues, we experience or can easily imagine the dangers that these kinds of inclusive, non-judgmental stances may invite when interacting in public, informal settings.<sup>72</sup>

So ADR precepts and values, which may previously have been seen as generally applicable to anyone in conflict, may in fact have limits.<sup>73</sup> Without knowing where these limits are, and without having alternative approaches on hand for when we reach the limits, the prospect of intervening seems fraught and difficult.

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71. See, e.g., Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359, 1392–1399 (1985) (setting out “the left critique of ADR.”); see also Jennifer W. Reynolds, *Games, Dystopia, and ADR*, 27 OHIO ST. J. ON DISP. RESOL. 477 (2012); Nancy A. Welsh, *Musings on Mediation, Kleenex, and (Smudged) White Hats*, 33 U. LA VERNE L. REV. 5 (2011); Stephan Landsman, *ADR and the Cost of Compulsion*, 57 STAN. L. REV. 1593 (2005); Susan Silbey, *The Emperor's New Clothes: Mediation Mythology and Markets*, 2002 J. DISP. RESOL. 171 (2002); Eric Yamamoto, *ADR: Where Have All the Critics Gone?*, 36 SANTA CLARA L. REV. 1055 (1996); Laura Nader, *Controlling Processes in the Practice of Law: Hierarchy and Pacification in the Movement To Reform Dispute Ideology*, 9 OHIO ST. J. ON DISP. RESOL. 1 (1993); Penelope E. Bryan, *Killing Us Softly: Divorce Mediation and the Politics of Power*, 40 BUFF. L. REV. 441 (1992); Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L. J. 1545 (1991); Owen Fiss, *Against Settlement*, 93 YALE L. J. 1073 (1984).

72. These actual or imminent dangers are the subject of a recent Saturday Night Live sketch around friends attempting to talk about Aziz Ansari, a comedian accused of sexual misconduct by an anonymous woman. See, e.g., Avi Selk, *In a Very Dark Sketch, SNL Points Out We Still Don't Know How to Talk About Aziz Ansari*, WASH. POST (Jan. 28, 2018) (linking to SNL's “Dinner Discussion” sketch). For the interview, see Katie Way, *I Went on a Date with Aziz Ansari. It Turned into the Worst Night of my Life*, BABE (Jan. 13, 2018), <https://babe.net/2018/01/13/aziz-ansari-28355> [perma.cc/L2JG-Z9HM].

73. Some scholars are beginning to talk about this challenge in light of changing technologies and culture. See, e.g., Ebner, *supra* note 55, at 139 (“Negotiation theory has developed around a certain set of assumptions about people: how they live, how they interact, how they think, what motivates them, and more. Since the first foundational writing in the field, people have been changing regarding all those assumptions. . . . By continuing to build theory around these assumptions, we have overlooked change processes we have been undergoing. If these change processes are found to be as significant as research in other fields currently indicates, negotiation

## IV. GOING FORWARD: REORIENTING DISPUTE RESOLUTION

People in a pluralistic society need flexible, differentiated subject positions to occupy in public and private, beyond binary party affiliation or special interest group, so that they can participate authentically in social and political life without being pulled into tribal values and caricatures of identities.<sup>74</sup> Additionally, and in support of these diverse subject positions, people need new skills for handling conflicts and disputes, including snap disputes, that help them navigate the complexities of disagreements in the modern world.

With this in mind, those who have been working on difficult conversations and public controversies should continue their important work.<sup>75</sup> Their efforts are a crucial part of not only handling disputes and the aftermath, but also developing greater awareness in the broader culture around constructive methods for conflict management and the existence of multiple opportunities for intervention and change.

But this work is not enough. Those working in dispute resolution must consider more carefully the implications of snap disputes for theory and practice and develop new models and methods that take snap disputing into account.

The emergence of snap disputes has created many opportunities for reexamining existing structures and innovating new ones. Some of these opportunities are in the areas of pedagogy, practice, crowd management (in person and online), and ethics. What follows are some thoughts and suggestions around building out these areas.

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theory, or elements of it, must be adjusted, or significantly revised.”); see also Lauren A. Newell, *Redefining Attention (and Revamping the Legal Profession?) for the Digital Generation*, 15 NEV. L.J. 754, 756 (2015) (examining the impact of information and communication technologies on students, professionals, and processes like mediation).

74. “A human being has roots by virtue of [her or his] real, active and natural participation in the life of a community which preserves in living shape certain particular treasures of the past and certain particular expectations of the future. This participation is a natural one, in the sense that it is automatically brought about by place, conditions of birth, profession and social surroundings. Every human being needs to have multiple roots. It is necessary for [every human being] to draw well nigh the whole of [her or his] moral, intellectual and spiritual life by way of the environment of which [she or he] forms a natural part.” Jonathan Crowe, *Two Models of Mediation Ethics*, 39 SYDNEY L. REV. 147, 156 (2017) (quoting SIMONE WEIL, *THE NEED FOR ROOTS: PRELUDE TO A DECLARATION OF DUTIES TOWARDS MANKIND* 40 (Arthur Wills trans., Routledge, 2002) (1949)) (arguing that mediation in Australia should develop as a community of practice rather than as a regulated profession).

75. See, e.g., *supra* notes 44–47 and accompanying text.

### A. *Broadening Dispute Resolution Pedagogy*

A comprehensive pedagogy of dispute resolution would provide theoretically rich and historically informed understandings of modern conflict; robust choices around how to respond in conflict situations; opportunities to develop and practice skills relevant to conflict management and decision-making; and coherent theory and ethics for making choices and exercising skills in conflict.

We have a version of this pedagogy today, but it could be much better. Right now, the primary ADR courses are negotiation and mediation.<sup>76</sup> In these courses, students learn some of the dichotomies in the field (e.g., litigation versus negotiation/mediation, awards versus settlement, facilitative versus evaluative, integrative versus distributive), some mechanics of practice (e.g., structured preparation, leverage analysis, and communication skills), and some conflict management styles.<sup>77</sup> Over the course of the semester, students practice preparing for and conducting negotiations and mediations, drawing on their study of these mechanisms and styles and formulating strategies for dealing with the conflict at hand. Through reflection exercises and debriefing, students begin to identify their own tendencies when it comes to conflict management and deal-making, so that they can harness the strengths of their approaches while managing their weaknesses as effectively as possible.<sup>78</sup>

We need to build on this existing structure. Students should approach conflict with a wide analytical lens and a range of possible responses, depending on the situation. They should not be limited to defaults around collaborative, facilitative, or interest-based processes, but instead should be able to consider the merits of other

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76. Arbitration is also one of the core ADR courses but is too formal and litigation-like to be included in this particular description of new pedagogies of ADR. That said, a new pedagogy of ADR may include different approaches to arbitration.

77. These may include the Thomas-Kilmann Instrument. Thomas-Kilmann Instrument (Oct. 1, 2019), <https://takethetki.com/> [perma.cc/YDY9-MN6U]; see also Andrea Kupfer Schneider & Jennifer Gerarda Brown, *Dynamic Negotiating Approach Diagnostic (DYNAD)* (2013). The Dynamic Negotiating Approach Diagnostic, a conflict style assessment developed by Andrea Schneider and Jennifer Brown that uses the same categories of competing, accommodating, avoiding, compromising, and collaborating, but allows test-takers to explore those categories and how they might change in light of the disputing context (that is, when things are calm and when things are stormy).

78. "In the form of broadly accessible self-help manuals and training materials—which I suspect many negotiation proponents would describe among the field's greatest analytical and practical assets—negotiation literature offers to remake citizens into problem solvers by imparting the skills of self-reflexivity and self-management and an ethic of enlightened self-interest." Amy J. Cohen, *Negotiation, Meet New Governance: Interests, Skills, and Selves*, 33 LAW & SOC. INQUIRY 503, 505 (2008).

approaches, including activism and advocacy, given the situation.<sup>79</sup> Students should learn that value creation is not always possible or maybe even always desirable; compromises may be, especially in the political context, the best outcomes given competing priorities.<sup>80</sup> Students should still learn how to identify the issues, interests, alternatives, options, and so on when analyzing disputes and deals, but they should also become sensitive to context<sup>81</sup> and learn how to recognize the broader situational factors at play, such as social media effects; the possibility of contamination from fake news, trolls, and meddlers; political incentives and partisanship; and other distortions and impacts stemming from the public dimensions of the conflict.

Moving the dispute resolution curriculum in the direction described above will encourage professors and students to think more critically about the ways in which ADR processes can perpetuate injustice and inequality. Right now, many ADR courses are framed as offering a holistic, enlightened corrective to litigation's shortcomings around efficiency, dignity, participation, and conflict management generally. As such, these courses typically do not spend a great deal of time working through the critiques of alternative approaches or exploring the potential dangers that extralegal processes may create. To be effective in snap disputes, however, it is crucial to understand the benefits and the limitations of possible interventions, formal and informal.

Likewise, when it comes to developing strategies to address conflict, professors and students should think beyond the presenting dispute and look at the exacerbating conditions, path dependencies, historical positioning, and structural causes of the conflict whenever possible.<sup>82</sup> They may not be able to do anything about these structural causes, but talking about possible strategies and campaigns

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79. As I have argued elsewhere, the study of activism is highly relevant to the study of negotiation and alternative dispute resolution. See Jennifer W. Reynolds, *The A is for Activism*, in *THE NEGOTIATOR'S FIELDBOOK: THE DESK REFERENCE FOR THE EXPERIENCED NEGOTIATOR* (Chris Honeyman & Andrea Kupfer Schneider eds., 2017).

80. See generally AMY GUTMANN & DENNIS THOMPSON, *THE SPIRIT OF COMPROMISE: WHY GOVERNING DEMANDS IT AND CAMPAIGNING UNDERMINES IT* 14–16, 21–22 (2012) (arguing that a win-win mentality in political contexts not only may increase government debt for future generations, but also fails to acknowledge the substantive and symbolic importance of compromise).

81. See, e.g., Jennifer Gerarda Brown, *Four Questions About Free Speech and Campus Conflict*, 2018 J. DISP. RESOL. 45, 46 (2018) (emphasizing the importance of context in assessing campus free-speech conflicts).

82. For example, if the dispute has been exacerbated by tweets, as many snap disputes are, is there something Twitter could be doing differently in terms of dispute resolution systems, moderation, policies, user management, and so on? Is the law a potential ally in managing these kinds of disputes?

that may address systemic problems at play—and not just preparing for and working through the dispute between the parties—is good practice not only for lawyers, but for anyone who works and lives under a democratic form of government.

### B. *Leveraging Connections to Practice*

Although dispute resolution is part of the program of legal education in many U.S. law schools<sup>83</sup> and has a fairly well-established curriculum, dispute resolution professors tend to have one foot outside the law school. The national ADR instructor pool is a mix of tenured, pre-tenure, non-tenured, and adjunct faculty members; many of these faculty are also practitioners or at least have close ties to practice. Because few law schools have a large number of ADR faculty, the national organizations for ADR professors have become relatively close-knit and supportive communities.<sup>84</sup> Having the advantage of professional networks and connections to practice, being located on campuses (hotbeds of snap disputes), and working with students who will one day become lawyers and leaders—all of these factors situate ADR researchers and professors in an excellent position to make meaningful positive impacts on snap disputing culture.

One benefit of this outward-facing orientation is a proliferation of new research and practice contexts, especially in recent years. Junior scholars in particular have begun to identify new conflict settings that may or may not be amenable to existing theories and methods. Some working in plea bargaining and criminal-side ADR processes, for example, have found that integrative bargaining models are insufficient to explain or to prescribe behaviors in plea negotiations.<sup>85</sup> Similarly, some working in legislative contexts have discovered that the ways in which legislatures adopt alternative processes are often at odds with core principles associated with those

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83. See generally Michael Moffitt, *Islands, Vitamins, Salt, Germs: Four Visions of the Future of ADR in Law Schools (and A Data-Driven Snapshot of the Field Today)*, 25 OHIO ST. J. ON DISP. RESOL. 25, 26 (2010) (outlining four models for how law schools structure their ADR curriculum).

84. The primary ones for ADR professors located in law schools are the American Bar Association (ABA) Dispute Resolution Section and the Association of American Law Schools (AALS) Section on Dispute Resolution.

85. Cynthia Alkon, who has written extensively about plea bargaining and negotiation, argues that the power disparity between the prosecutor and the defender makes coercive behavior and hard bargaining much easier than it would be in most civil negotiation contexts. See Cynthia Alkon, *Hard Bargaining in Plea Bargaining: When Do Prosecutors Cross the Line?*, 17 NEV. L.J. 401 (2017).

processes, leading to interpretive, practical, and philosophical difficulties.<sup>86</sup>

How does this new work help with snap disputes? By diversifying ADR practice settings and developing different theories and tools as necessary for these settings, we develop more proficiency with re-tooling and innovating depending on the context. Willingness to reassess and pivot is essential to dealing with snap disputes.

### C. *Dealing with Crowds*

Cyberspace has created more opportunities for people to meet, interact, transact business, develop relationships, and be in conflict. Again, the “snap” of snap disputes could stand for Social Networks Amplifying Polarization, an acronym that acknowledges how online interactions can be fraught and destructive. This is true both because of how people tend to behave online (often less considerate, to put it mildly, than they would behave in person) and because of the contributions of trolls and meddlers.

To counter these negative tendencies, the modern dispute resolution professional needs an understanding of how online communities and relationships operate, along with a set of tools to intervene productively in disputes that occur in cyberspace. Right now, many law-school-based dispute resolution curriculums teach some form of multilateral practice, so that students can learn to facilitate the complexities of negotiated agreements that involve more than two sides. These skills are useful in the context of snap disputes insofar as they create opportunities for public interventions (such as group discussions and town halls). But as noted above, most multilateral techniques do not translate well to the online environment.

To this end, two ADR subspecialties, online dispute resolution (ODR) and dispute systems design (DSD), are promising. It's true that neither of these areas has been particularly influential as of yet when it comes to things like managing public controversies and flame wars, but both could be. Up until now, ODR has been concerned primarily with transactional disputes (such as buyer-selling disputes on eBay) and the technological transformations happening in courtrooms.<sup>87</sup> DSD, for its part, has emphasized organizational systems

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86. See, e.g., Lydia Nussbaum, *Trial and Error: Legislating ADR for Medical Malpractice Reform*, 76 MD. L. REV. 247 (2017) (arguing that legislative codification of mediation processes often subvert the foundational underpinnings of those processes).

87. See, e.g., Elayne E. Greenberg & Noam Ebner, *What Dinosaurs Can Teach Lawyers About How to Avoid Extinction in the ODR Evolution* (2013), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3317567](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3317567) [<https://perma.cc/FDC5-GYWN>]

(e.g., grievance processes) and large-scale disaster responses (e.g., the 9/11 Victims Compensation Fund). But as more and more people get into disputes online—people who will never meet one another—the demand for more theories and tools will only increase. Going forward, if researchers and teachers in ODR and DSD turn their focus to snap disputes and the impacts of online contexts on disputing culture, they can help cultivate the technological literacy and process nimbleness that the modern dispute resolution specialist requires.

Making this happen will require those in ODR and DSD to pay greater attention to the skills needed to evaluate conflict situations accurately given the realities of social media.<sup>88</sup> As noted above, more practical tools and strategies are needed for identifying and challenging fake news, for recognizing trollish behavior, and for participating in online exchanges constructively.<sup>89</sup> Beyond this, ODR and DSD theorists could innovate micro-approaches or perhaps “pop-up” processes

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(describing ways in which technology is transforming how courts operate and setting forth six skills that all lawyers will need to keep up with this transformation).

88. The Divided Community Project has information for community leaders on navigating social media. See *Divided Communities and Social Media* (Oct. 1, 2019, 7:14 PM), <https://moritzlaw.osu.edu/dividedcommunityproject/social-media/> [<https://perma.cc/4W3V-8EZV>]; see, e.g., International Federation of Library Associations, *How To Spot Fake News*, IFLA, <https://www.ifla.org/publications/node/11174> [<https://perma.cc/7F4G-UY2Q>]; see also, Emily Stewart, *Russian Election Interference Is Far from Over. I Asked 9 Experts How to Stop It*, Vox (Feb. 19, 2018), <https://www.vox.com/policy-and-politics/2018/2/19/17023240/election-2018-russia-interference-stop-prevent> [[perma.cc/BN8M-3R2G](https://perma.cc/BN8M-3R2G)]; See also, Scott Shane, *These Are the Ads Russia Bought on Facebook in 2016*, N.Y. TIMES (Nov. 1, 2017), <https://www.nytimes.com/2017/11/01/us/politics/russia-2016-election-facebook.html> [[perma.cc/A6MP-R6WU](https://perma.cc/A6MP-R6WU)] (showing readers fake and real messages and seeing if readers can distinguish between them).

89. One proposal for such an online system, which has not yet materialized, conceived of the “Deliberation Engine,” designed to facilitate discussion of broad social issues based on agreed-upon sets of facts. See Chris Honeyman et al., *A Game of Negotiation: The Deliberation Engine*, in *EDUCATING NEGOTIATORS FOR A CONNECTED WORLD: VOL. 4 IN THE RETHINKING NEGOTIATION TEACHING SERIES* (C. Honeyman, J. Coben & A. Wei-Min Lee eds. 2013). While the internet offers many types of discussion areas, fact-checkers, and efforts to create troll-free zones, it is hard to identify platforms in wide use that incorporate all of these; rather, people seem to continue to gravitate back to those platforms offering low levels of protection for people or truth for the purpose of expounding and conflicting, all the while bemoaning the nature of those platforms. For an example of a platform that tries to break this mold by offering users the opportunity to take on hot topics, debate and explore them, and seek consensus, see [www.kialo.com](http://www.kialo.com). Their public debate platform has allowed thousands of participants to participate in discussions of some of the most controversial issues in US society, including whether Confederate statues should be taken down, abortion policy should be changed, and *The Last Jedi* declared the weakest Star Wars film to date.

that people can deploy online or in person when confronted with disputes or snap disputes.<sup>90</sup> Some snap disputes happen in a momentary exchange and thus may require a mini-design to address them. ODR and DSD people could also set forth larger proposals around social media platforms and automated dispute management tools that can shape the context in which people interact online and, hopefully, prevent destructive disputing patterns from taking hold.<sup>91</sup>

In all of these efforts, students will be invaluable resources, given their deep knowledge and familiarity with online culture. Enlisting them as co-creators and not just passive receptors of ADR curriculum will be an important strategy for improving dispute resolution pedagogy and devising the best approaches for dealing with online crowds.<sup>92</sup>

#### D. *Reexamining Ethics*

As described above, preparing law students, lawyers, and dispute resolution professionals for snap disputes will require an expansion of pedagogy, the addition of new areas of study and practice, and more technological literacy and skills around managing multiple disputants, online and in person.

Part of what will make this challenging is that the more choices we provide in dispute resolution, the greater ethical and philosophical incoherence we create. Right now, most ADR professors are deeply committed to the principles of the field—listening, dialogue, inclusivity, respect, neutrality, and self-determination—and are invested in interest-based processes as the default. As we expand the slate of options for students and teach them to choose between them,

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90. See, e.g., Timothy Conbere, *A Wretched Hive of Scum and Villainy: How Twitter Encourages Harassment (And How To Fix It)* (Sept. 18, 2019) (master's report 2019, on file with the University of Oregon Scholar's Bank).

91. The good people at Facebook are hard at work figuring out the best way to design a system for moderating content and resolving disputes more effectively. See, e.g., Kate Klonick & Thomas Kadri, *How To Make Facebook's 'Supreme Court' Work*, N.Y. TIMES (Nov. 17, 2018), <https://www.nytimes.com/2018/11/17/opinion/facebook-supreme-court-speech.html> [perma.cc/9LZK-WRMQ]. While the work itself will be carried out online, it is not so much about ODR as it is about fundamentally altering the dispute system design, together with broad corporate policy, all at once.

92. See Ebner, *supra* note 55, at 140 (recommending teachers engage with and listen to students with a new appreciation for the technological generation gap, to gain insight into negotiation and conflict in the new era). This approach is also in line with the recommendation to engage negotiation students as active partners in designing the course curriculum. See, e.g., Melissa Nelken et al., *Negotiating Learning Environments*, in EDUCATING NEGOTIATORS FOR A CONNECTED WORLD: VOL. 4 IN THE RETHINKING NEGOTIATION TEACHING SERIES (C. Honeyman, J. Coben & A. Wei-Min Lee eds., 2013).

we risk losing the moral force and clarity around these principles and processes.

Accordingly, continued work in ADR ethics is needed. Dealing with snap disputes effectively will raise difficult questions about ADR theory and practice. How do we devise and implement preconditions and exceptions to foundational practices like listening? What are the moral obligations of “neutral third parties” in disputes? How do we remain trustworthy and ethical in environments that permit unethical, corrupt behavior (online communities, political settings)? Can we reconcile the sometimes-competing concerns of self-determination on the one hand and correcting power imbalances on the other, in non-mandatory non-binding processes? Is there such a thing as self-interested empathy? Within the context of snap disputes, these ethical questions are more pressing than ever before.

Pushing forward new research agendas around ethics in dispute resolution may provide an opportunity for theorists to collaborate with others in the legal academy and beyond. Recent calls for a return to civility may be evidence that snap disputes (even if they are not called that) are pressing concerns for many in the law, regardless of specialty.<sup>93</sup> As we in dispute resolution adapt our pedagogy and research to current demands, perhaps we can recontextualize our work within broader conversations around civic values and democratic participation. Doing so will help position snap disputes as a principal concern of law schools and the legal profession, not just a project of dispute resolution scholars and practitioners.

## V. CONCLUSION

Central to much of dispute resolution mythology is the idea of process, often featuring a neutral third party who endeavors to assist

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93. Wendy Collins Perdue delivered her 2018 Presidential Address on the theme of building bridges. “Lawyers are not social workers,” she said, “but they are, as Lon Fuller put it, architects of social structure. And in that role as architects, they can be—we can be—enormously helpful in reconnecting a fractured world. That is to say, in building bridges.” Perdue went on to encourage law schools to be “leaders of civil discourse, reasoned debate, and productive dispute resolution.” Wendy Collins Perdue, 2018 Presidential Address, Association of American Law Schools (Jan. 5, 2018). Additionally, some recent scholarship has called for a return to civility and civic values. See, e.g., David A. Grenardo, *A Lesson in Civility*, 32 GEO. J. LEGAL ETHICS 135, 137 (2019) (arguing that “law schools need to prepare students in more than the traditional ways (e.g., legal research and writing). In particular, law schools must ensure that students are aware of the key role of civility in the legal profession”); Nancy H. Rogers, *One Idea for Ameliorating Polarization: Reviving Conversations About an American Spirit*, 2018 J. DISP. RESOL. 27, 28 (2018) (suggesting that developing an “American spirit” could “operate to ameliorate polarization”).

the disputants in jointly reaching resolution or at least a better understanding of each other's perspectives. Snap disputes challenge this mythology because the affected parties are diffuse and global (in the sense of not local or present) and the intensity and timing of their involvement with the disputed issue varies. Social media and media generally amplify the dispute, resulting in legions of people (or the impression of legions of people) exposed to half-truths, lies, interpretations, and nefarious agendas. Under these conditions, it is difficult to engage with disputants in a substantively meaningful and logistically workable way. Furthermore, snap disputes can create a quandary for dispute resolution specialists who feel substantively implicated by their own stakes in the matter. For these people, figuring out how to balance competing concerns around professional roles and personal integrity can be difficult. Finally, snap disputes often involve situations where dialogue and listening—arguably the most important and crucial dispute resolution tools—seem dangerous and potentially destructive. Those experiencing the effects of snap disputes may conclude that the Other is irredeemable, that dialogue is pointless, and that change is unworkable. Such limiting beliefs make it very, very hard to manage conflicts and engage in civic responsibilities and democratic discourse.

The field of dispute resolution is at a turning point, as experts consider how professional responsibilities and personal commitments implicate them in the “culture of outrage” that some say exists in the United States today. The weaknesses of traditional dispute resolution approaches are more apparent than ever in a sociopolitical environment experienced largely through media and marked by inequality, racism, disrespect, and greed. Those working in the law and in dispute resolution have the responsibility to push research, pedagogy, and practice toward the hardest problems in our communities, which includes the problem of engaging in dialogue and disagreement in ways that promote both peace and justice. Reorienting the work of these theorists and practitioners toward snap disputes will help us diagnose conflict more effectively in the current moment. Moreover, thinking about dispute resolution and snap disputes will encourage the development of a broader range of possible responses beyond staying silent, reacting emotionally, or engaging in problem-solving methods not suited to the situation.