

I. Konfliktbearbeitung transdisziplinär

Creating a Culture of Conflict Resolution – The Maryland Example

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I. Power of Rule of Law

I want to thank Professor Sascha Ferz and the Institute for the Foundations of Law for inviting me to be with you at this conference about “Changing Perspectives.” I confess that I was worried that you might find it a bit odd that an American law professor is talking about “Creating a Culture of Conflict Resolution.” If you have read anything about life across the Atlantic Ocean right now, you know that the United States is rife with socio-political conflict.¹ As a nation, we have become culturally and politically polarized.² When Americans travel around the world these days, people ask us, “What is going on? Has America lost its mind?”³ Sometimes I think we have.

People remain deeply divided about race, gender, immigration, school safety, education, guns, reproductive rights, religion, and the list goes on.⁴ Nearly every issue promotes deep emotion, blame, demonization of the

1 The author delivered this keynote address at a “Changing Perspectives” conference hosted by the Institute for the Foundations of Law at the University of Graz, Austria, 8th June 2018.

2 See *Pew Research Center*, Political Typology Reveals Deep Fissures on the Right and Left (24th October 2017), <http://www.people-press.org/2017/10/24/political-typology-reveals-deep-fissures-on-the-right-and-left/> (Accessed 18th March 2019); *Pew Research Center*, The Partisan Divide on Political Values Grows Even Wider (5th October 2017), <http://www.people-press.org/2017/10/05/the-partisan-divide-on-political-values-grows-even-wider/> (Accessed 18th March 2019).

3 See, e.g., *P. Dvorak*, Americans Traveling Abroad Find Themselves on Donald Trump Apology Tour (Wash. Post, 11th August 2016).

4 See, e.g., *J. Hook*, Political Divisions in U.S. Are Widening, Long-Lasting, Poll Shows (Wall St. J., 6th September 2017), <https://www.wsj.com/articles/political-divisions-in-u-s-are-widening-long-lasting-poll-shows-1504670461> (Accessed 18th March 2019).

“other side,” legal action, and even violence. The number of hate crimes in the United States has increased dramatically over the past few years, motivated by bias based on religion, race, ethnicity, gender, disability, and sexual orientation.⁵ We have seen an alarming resurgence of extremist hate groups.⁶ In May 2017, Nazis and other white supremacists openly marched with guns and torches at a rally in Charlottesville, Virginia. At one synagogue, congregants had to sneak out of a back door after Shabbat services because they feared an attack.⁷ A young woman named Heather Heyer, who was part of large counter-protest against the Nazis, was killed by one of the hate group members who plowed his car into the protesters.⁸

This hatred hit closer to home for me one morning as I was working on this speech. Four young men vandalized our local high school with swastikas and other anti-Semitic, racist, and homophobic graffiti.⁹ More recently,

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- 5 *U.S. Dep’t of Justice, Federal Bureau of Investigation, Hate Crime Statistics 2016*, <https://ucr.fbi.gov/hate-crime/2016> (Accessed 18th March 2019), reporting nearly 5% overall increase in reported hate crimes over 2015 data. Hate crimes against Muslims had increased by 67% in 2015, and rose by another nearly 20% in 2016. See *G. Lopez, A New FBI Report Says Hate Crimes – Especially against Muslims – Went Up in 2016* (Vox, 13th November 2017), <https://www.vox.com/identities/2017/11/13/16643448/fbi-hate-crimes-2016> (Accessed 18th March 2019). See also *Center for the Study of Hate and Extremism, California State University, San Bernardino, Hate Crimes Rise in U.S. Cities and Counties in Time of Division and Foreign Interference* (May 2018), https://csbs.csusb.edu/sites/csusb_csbs/files/2018%20Hate%20Final%20Report%205-14.pdf (Accessed 18th March 2019).
 - 6 The Southern Poverty Law Center, a non-profit organization that monitors hate group activity, reported that the number of hate groups in the United States rose to 953 in 2017, up from 917 in 2016, with neo-Nazi groups growing by 22%. *Southern Poverty Law Center, Hate Map*, <https://www.splcenter.org/hate-map> (Accessed 17th March 2019).
 - 7 *A. Zimmerman*, In Charlottesville, the Local Jewish Community Presses On (ReformJudaism.org, 14th August 2017), <https://reformjudaism.org/blog/2017/08/14/charlottesville-local-jewish-community-presses> (Accessed 18th March 2019). After I delivered this keynote in June 2018, anti-Semitic incidents in the United States continued, including a horrific mass shooting at a Pittsburgh synagogue during Shabbat services. See *C. Robertson, C. Mele and S. Tavernise, 11 Killed in Synagogue Massacre; Suspect Charged with 29 Counts* (N.Y. Times, 27th October 2018), <https://www.nytimes.com/2018/10/27/us/active-shooter-pittsburgh-synagogue-shooting.html> (Accessed 18th March 2019).
 - 8 *K. Benner and H. Spencer, Charlottesville Car Attack Suspect Indicted on Federal Hate Crime Charges* (N.Y. Times, June 27, 2018), <https://www.nytimes.com/2018/06/27/us/politics/charlottesville-death-hate-crime-charges.html> (Accessed 18th March 2019).
 - 9 *C. Campbell and K. Magill, Four Students Charged after Swastikas, Racial Graffiti Found at Glenelg High School* (Balt. Sun, 24th May 2018), <https://www>

a gunman opened fire during services at a Pittsburgh synagogue, killing eleven congregants.¹⁰ Fortunately, the perpetrators of these hateful acts were charged and held accountable by the justice system.¹¹

In this high conflict culture, some fear that we no longer can listen to each other or resolve our conflicts peacefully.¹² Even worse, the conflict culture has trickled down into our own homes and personal relationships. After the presidential election of 2016, some of my law students did not want to go home to visit their families for the holidays because they wanted to avoid relatives who espoused different political views. Some people are reluctant to form friendships with people of the opposite political party.¹³ Social media permits us to live in an echo chamber, shutting out alternative perspectives.¹⁴

Does this high conflict culture portend dangerous times ahead for our communities, courts, or democracy itself? Current events have been disheartening, but they also have been a call to action. More people, especially women, are running for office and becoming more engaged in the political process.¹⁵ Indeed, a record number of women won elected offices across the

baltimoresun.com/news/maryland/education/k-12/bs-md-swastika-high-school-20180524-story.html (Accessed 18th March 2019).

- 10 C. Robertson, C. Mele, and S. Tavernise, 11 Killed in Synagogue Massacre; Suspect Charged with 29 Counts (N.Y. Times, 27th October 2018), <https://www.nytimes.com/2018/10/27/us/active-shooter-pittsburgh-synagogue-shooting.html> (Accessed 26th March 2019).
- 11 P. Duggan, James A. Fields Jr. sentenced to life in prison in Charlottesville car attack (Wash. Post, 11th Dec. 2018), https://www.washingtonpost.com/local/public-safety/james-a-fields-jr-sentenced-to-life-in-prison-in-charlottesville-car-attack/2018/12/11/8b205a90-fcc8-11e8-ad40-cdfd0e0dd65a_story.html?noredirect=on&utm_term=.dd32a8df867d (Accessed 17th March 2019).
- 12 See C. Menkel-Meadow, Why We Can't "Just Get Along": Dysfunction in the Polity and Conflict Resolution and What We Might Do About It, *J. Dispute Resol.* 2017; 2067.
- 13 Pew Research Center, Political Polarization in the American Public (2014), <http://www.people-press.org/2014/06/12/political-polarization-in-the-american-public/> (Accessed 18th March 2019).
- 14 C. Sunstein, #Republic: Divided Democracy in the Age of Social Media (2018); A. Boutyline and R. Willer, The Social Structure of Political Echo Chambers: Variations in Ideological Homophily in Online Networks *Pol. Psychol.* 2017 Volume 38; 551, 554.
- 15 H. Caygle, Record-breaking Number of Women Run for Office (Politico, 8th March 2018), <https://www.politico.com/story/2018/03/08/women-rule-midterms-443267> (Accessed 18th March 2019). A record number of women were elected to office as well. See C. Alter, How Women Candidates Changed American Politics in 2018 (Time, 7th November 2018), <http://time.com/5446556/congress-women-pink-wave/> (Accessed 18th March 2019).

United States in 2018.¹⁶ We should not panic – at least not yet – because conflict is an inevitable part of democracy. As one legal commentator argued: “Conflict is not a flaw in our system; it’s a feature of it.”¹⁷ Similarly, historian *David Moss* reassures us that democracy “has always been a contact sport.”¹⁸ *Professor Moss* writes:

“Words like ‘cooperation’ and ‘consensus’ may sound appealing and even comforting, but American democracy has survived and thrived from one generation to the next on the basis not principally of harmony but of conflict – sometimes intense conflict – mediated, generally, by shared ideals.”¹⁹”

In other words, without conflict, we have no democracy and no social progress. Through conflict, we clarify our values, assert our rights, fight for justice, and create new opportunities. In this high conflict culture, lawyers and the courts are especially important. Law schools train attorneys to be masters of conflict. People entrust us to protect their rights and help them resolve their most intimate and serious personal and professional crises.

The French aristocrat and lawyer *Alexis de Tocqueville* studied American culture and politics and published *Democracy in America* in 1835 – considered to be among the best books ever written about American democracy.²⁰ *De Tocqueville* believed that lawyers and judges play a critical counterbalancing role in our society. He wrote that lawyers create “[a] form of public responsibility and accountability that would help preserve the blessings of democracy without allowing its untrammelled vices.”²¹ *De Tocqueville* observed that nearly every important political conflict in the United States eventually finds its way into the courts.

In other words, *de Tocqueville* saw lawyers and judges as guardians of democratic values, applying the rule of law to challenge tyrannical leaders and control the harmful whims of the majority. When our democracy encounters crisis, the legal profession and the judiciary often step in to enforce

16 *M. Salam*, A Record 117 Women Won Office, Reshaping America’s Leadership (N.Y. Times, 7th November 2018), <https://www.nytimes.com/2018/11/07/us/elections/women-elected-midterm-elections.html> (Accessed 18th March 2019).

17 *J. Toobin*, Opinion, Conflict Is a Feature of Democracy, Not a Flaw (CNN, 3rd October 2011), <https://www.cnn.com/2011/09/30/opinion/toobin-government-not-broken/index.html> (Accessed 18th March 2019).

18 *D. A. Moss*, *Democracy: A Case Study* (2017) 3.

19 *Id.*

20 See *G. S. Wood*, *Tocqueville’s Lesson* (The New York Rev., 17th May 2001), <https://www.nybooks.com/articles/2001/05/17/tocquevilles-lesson/> (Accessed 18th March 2019).

21 *A. de Tocqueville*, *Democracy in America* (1834).

our constitutional values and protect the most vulnerable.²² We are seeing the heightened importance of lawyers in U.S. democracy in these polarized times. Even oral arguments before federal courts of appeals (which certainly are not as exciting to the average person as television courtroom scenes) have been livestreamed on the internet and broadcast by major news networks to a massive audience.²³

As you know, the conception of lawyer as the protector of civil society comes from Shakespeare’s play “Henry VI.” A character plotting to become king, says “The first thing we do, let’s kill all the lawyers.”²⁴ He thought that if he could get rid of the lawyers, who are the protectors of societal law and order, he could get away with his treacherous plan.

Although disparaging lawyer jokes certainly abound, society also idolizes lawyers as superheroes who fight for justice and uphold the rule of law. Recent examples include Supreme Court Justice Ruth Bader Ginsburg, who has become a celebrated pop icon who represents female strength and courage.²⁵ Other women lawyers in top government positions have been depicted as modern-day “Wonder Women” or “she-ros,”²⁶ including former Deputy Attorney General Sally Yates, who refused to enforce an executive order she believed to be unconstitutional. A comedian portrayed Special Counsel Robert Mueller and his team of lawyers, who investigated Russian interference in U.S. elections, as the “Obstruction of Justice League,” similar to the D.C. Comics Justice League.²⁷

It is no surprise that in this time of increased social conflict, more people want to become lawyers. After many years of a sharp decline in law school

22 See *K. M. Sullivan*, *The Good that Lawyers Do* Wash. J. Law and Pol’y 2000 Volume 4; 7, 12–13 (discussing De Tocqueville’s observations about the role of lawyers in American democracy).

23 See *M. Pearce*, *Appellate Hearing Over Trump’s Travel Ban Gets Massive Online and TV Audience* (L.A. Times, 7th February 2017) <https://www.latimes.com/politics/la-live-updates-9th-circuit-arguments-appellate-hearing-over-trump-s-travel-1486513547-htmlstory.html> (Accessed 18th March 2019).

24 *W. Shakespeare*, *The Second Part of King Henry the Sixth* act 4, sc. 2.

25 See *S. Rossman*, *Girl Dresses Up Like Ruth Bader Ginsburg for Superhero Day, RBG Sends Letter*, (USA Today, 11th January 2017), <https://www.usatoday.com/story/news/nation-now/2017/01/11/girl-dresses-up-like-ruth-bader-ginsburg-superhero-day-rbg-sends-letter/96453258/> (Accessed 18th March 2019).

26 *L. Bogart*, *The Rise of the Political She-ro*, (The Week, 13th July 2017), <https://theweek.com/articles/709496/rise-political-shero> (Accessed 18th March 2019).

27 *J. Lovett*, *Stephen Colbert Compares Russia Investigation’s Special Counsel Team to Justice League*, (ComicBook.com, 19th June 2017), <https://comicbook.com/dc/2017/06/19/stephen-colbert-robert-mueller-justice-league/> (Accessed 18th March 2019).

enrollment, the number of law school applicants jumped up by ten percent in the past year, and the number of people taking the Law School Admissions Test increased nearly thirty percent.²⁸ This is a hopeful sign. We need more legal superheroes who have the power to fight for justice and resolve our society's most critical conflicts.²⁹

Like many American lawyers, that is why I went to law school. I was inspired by the book *To Kill a Mockingbird*, which tells the story of a lawyer named Atticus Finch who successfully defends a black man wrongfully accused of rape during the “Jim Crow” era in the American South.³⁰ I became a public interest lawyer and enjoyed taking on big companies who cheated workers out of hard-earned pay, government entities that violated civil rights, and other powerful interests who broke the law.

Yet, after fifteen years of litigation practice and more than a decade of law teaching, I have learned that if lawyers and courts truly want to transform a culture of conflict into a culture of conflict resolution, we need strategies beyond the power of litigation. Litigation is an important power, especially when fundamental equal rights and constitutional values are at stake. But lawsuits cannot, and should not, resolve every problem. Lawsuits often come too late in the life of the conflict, and the remedies available under the law do not always address the underlying root cause of the problem. Lawsuits typically do not change perspectives or strengthen human relationships – they tend to make them worse. The Program of Psychiatry and the Law at the Harvard Medical School Mental Health Center has even coined the special term “critogenic,” or law-caused harm, to capture the negative impact on individuals from the litigation process.³¹

If you indulge me with the comic book superhero metaphor, you know that every superhero has a special power – the ability to fly, climb walls like a spider, run faster than a black panther, lift and break heavy things. Nevertheless, each hero also has weaknesses. When the world is under siege by especially pernicious evil, all of the superheroes must combine their powers

28 *I. Kowarski*, Law School Applications Increased This Year, (U.S. News, 29th January 2018), <https://www.usnews.com/education/best-graduate-schools/top-law-schools/articles/2018-01-29/law-school-applications-increased-during-president-trumps-first-year> (Accessed 18th March 2019).

29 See *N. W. Allard*, An Unexpected Trump Effect: Lawyer as Hero, (The Hill, 24th February 2017).

30 *H. Lee*, *To Kill a Mockingbird* (1960).

31 *T. Gutheil, H. Bursztajn, A. Brodsky & L. Strasburger*, Preventing “critogenic” harms: minimizing emotional injury from civil litigation, <http://www.forensicpsych.com/articles/artPreventingCritogenicHarms.php#top> (Accessed 26th March 2019).

and work together as a team.³² Likewise, to transform a culture of conflict into a culture of conflict resolution, we need superpowers to supplement the power of traditional litigation and the rule of law. These include: the power of alternative dispute resolution (ADR); the power of community; and the power of education.

II. Power of ADR Process Options

Former *U.S. Attorney General Janet Reno* once said that the lawyer should “be the problem solver, the peacemaker, the sword, and the shield.”³³ In other words, lawyers should be equipped not only to use the “sword and shield” of litigation to protect and defend people in court. We need to know how to anticipate and prevent problems from arising in the first place and how to resolve conflicts most efficiently and effectively. Lawyers should help their clients choose the best dispute resolution process for their particular problem, and adapt their strategy to fit that process. Sometimes that may be litigation, but it also could be dialogue, negotiation, mediation, arbitration, collaborative law, or some other creative problem-solving process.³⁴ In the ADR field, we call this “appropriate dispute resolution”³⁵ or “matching the forum to the fuss.”³⁶

The ADR movement in the United States began in 1976 at the “Pound Conference.”³⁷ Convened by the Chief Justice of the U.S. Supreme Court, this event brought together about two hundred of the most prominent legal minds to address various issues in the judicial system, including increasing docket backlogs, expense and delay in litigation, and lack of access to justice for the poor. At the Pound Conference, Harvard Law School Professor

32 This is the premise of various comic book series and movies, such as *The Avengers* and *Guardians of the Galaxy*. I thank my teenage daughters for teaching me the intricacies of Marvel and D.C. Comics superhero lore.

33 *J. Reno*, Lawyers as Problem-Solvers: Keynote Address to the AALS J. Legal Educ. 1999 Volume 49; 5.

34 See, e.g., *J. M. Lande and J. R. Sternlight*, The Potential Contribution of ADR to an Integrated Curriculum: Preparing Law Students for Real World Lawyering, *Ohio St. J. on Disp. Resol.* 2010 Volume 25; 247; *S. J. Schmitz*, Giving Meaning to the Second Generation of ADR Education: Attorneys’ Duty to Learn about ADR and What They Must Learn, *J. Dispute Resol.* 1999; 29.

35 See *C. Menkel-Meadow*, Ethics and Professionalism in Non-Adversarial Lawyering, *Fla. St. U. L. Rev.* 1999 Volume 27; 153, 167–68.

36 See *F. E.A. Sander and S. B. Goldberg*, Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure Negot. *J.* 1994 Volume 10; 49.

37 See Addresses Delivered at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, *F.R.D.*, 1976 Volume 70; 79.

Frank Sander delivered a now famous speech in which he criticized the single-minded assumption that “courts are the natural and obvious dispute resolvers.”³⁸ He challenged us to think beyond litigation as a way to resolve all of society’s conflicts.³⁹ His speech was a “big bang” movement for ADR, giving birth to the concept of the “multi-door courthouse.”

In *Sander’s* view, the courthouse should be a comprehensive justice center that offers a variety of ADR processes in different rooms – through one door would be litigation or adjudication; another door would offer mediation; another door, fact-finding or neutral evaluation, and so on. A screening clerk would assign the parties to the most appropriate process based on five criteria: 1) the nature of the dispute; 2) the relationship between the disputants; 3) the amount in dispute; 4) cost; and 5) speed.⁴⁰

After the Pound Conference, the United States Department of Justice funded a Neighborhood Justice Center pilot program to provide mediation in communities.⁴¹ About a decade later, a law called the Alternative Dispute Resolution Act of 1998⁴² required every federal court to offer some type of ADR. State courts also started to add mediation and formal ADR programs. The dominant mode of legal dispute resolution in U.S. courts has completely flip-flopped since 1976. Today, trials are rare,⁴³ with only one percent of federal civil cases reaching trial in 2017.⁴⁴

The Maryland Judiciary in particular has become a model for the integration of ADR in the courts. *Robert Bell*, the former Chief Judge of Maryland’s highest court, believed that the judiciary’s “effectiveness is directly dependent on public trust, confidence and respect.”⁴⁵ Judge *Bell* paraphrased the words of one of our founding fathers, *Alexander Hamilton*, stating, “the Judicial branch of government is the weakest and least dangerous branch of government because it has neither the power of the purse

38 *F. E.A. Sander*, Professor of Law, Varieties in Dispute Processing, Address at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice F.R.D. 1976 Volume 70) 111, 112.

39 *Id.* at 130-31.

40 *Id.*

41 See *L. A. Levin and R. R. Wheeler*, *The Pound Conference: Perspectives on Justice in the Future* (1979).

42 28 U.S.C. § 651 (2012).

43 See *M. Galanter*, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts* J. Empirical Legal Stud. 2004 Volume 1; 459.

44 Federal Judicial Caseload Statistics, U.S. District Courts – Civil Cases Terminated by Nature of Suit and Action Taken (Table C-4) (31st March 2017), <http://www.uscourts.gov/file/22613/download> (Accessed 18th March 2019).

45 State of the Judiciary Address by Chief Judge Robert M. Bell before the General Assembly of Maryland (29th January 1997).