
SPECIAL REPORT

“For whom the bell tolls”¹ in the legal system: Access to justice and conflict engagement

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Abstract Remarks adapted from presentation: *Disrupting Law, Reclaiming Justice*, a Conversation on Gillian Hadfield’s *Rules for a Flat World* on October 8, 2018 at Creighton University. Despite the advancement in the ADR movement, there is much work to be done for justice to be accessible to “All.” The legal profession continues to lack diversity among its members and a uniform way of thinking impedes a transformative change to the legal infrastructure. Conflict as an interdisciplinary field draws upon a more diverse group of professionals and theoretical frameworks. I propose that conflict processes, not the legal system, should be the overarching umbrella under which all conflict resolution/engagement processes fall.

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Introduction

“No man is an island, entire of itself; every man is a piece of the continent, a part of the main; if a clod be washed away by the sea, Europe is the less, as well as if a promontory were, as well as if a manor of thy friend's or of thine own were; any man's death diminishes me, because I am involved in mankind, and therefore never send to know for whom the bell tolls; it tolls for thee” (Donne, 1839, pp. 574-5).

In the 1990s, I returned to school to get my law degree. This was a second profession for me. I had spent many years in the healthcare field as an administrator and had seen my share of inequities and injustices. I had seen how healthcare treatment tended to be more comprehensive and adequate if you belonged to a certain gender or race. And sadly enough, regardless of demographics, the poor were always worse off. As many other soon-to-be lawyers, I thought, “There is no better platform than the legal system to advocate on behalf of the most vulnerable, solve their problems, and secure justice.” It turns out I was profoundly mistaken. The platform was helpful, at times, but something was missing. I set out to seek the what and the why of the justice vacuum.

By whom and for whom?

In *Rules for a Flat World*, Professor Gillian Hadfield (2016) captures clearly how the infrastructure of the law is not responsive to the people it professes to serve. According to Hadfield (2016, pp. 17-18, 20), the historical purpose of the law is to have a set of rules that organize people’s interactions, solves conflicts, and gets them to behave in predictable ways. That is, to make people’s lives better (Hadfield, 2016, p.3). My first reaction when reading these lines was, “Better for whom? Isn’t the legal system already making life better for those it intends to serve?” The legal structure has always served the wealthy, white, and straight

¹ This is the title of a novel published by Ernest Hemingway who borrowed it from a poem authored by John Donne.

males in positions of power. Pause for a second and ask yourself: By whom and for whom are legal rules written?

In the legal system, the bell does not toll for everyone. Some people's voices are more deserving of being heard than others'. Some people's rights count more than others'. Some people's lives are worth more than others'. Ask a woman who has been a victim of sexual abuse if she feels her voice is heard the same as the voice of the male in a position of power who feels entitled to abuse her. Ask immigrants in the United States if they feel their rights count the same as citizens'—who are otherwise fellow human beings. Ask Puerto Ricans, who endured Hurricane María, if they feel that their lives are worth the same as those of US citizens in the continental USA (Font-Guzmán, 2017). I can tell you from lived experience that my rights, my voice, and my life as a Puerto Rican woman are not privileged in the same way than those of others in positions of power, and the current legal infrastructure is not equipped to change that.

The US legal infrastructure has failed in providing justice to all. The statistics regarding access to justice in the USA are staggering. Out of ninety-seven countries, the United States is ranked by the World Justice Project as sixty-seventh in access to justice and affordability of legal services (Rhode 2014, p.1227). More than fourth-fifths of the legal needs of the poor and two- to three-fifths of the legal needs of middle-income Americans in the US are not met (Rhode 2014, p. 1228).

How does the US legal infrastructure deal with conflicts?

The underlying premise of the US legal system is that problem-solving, justice, truth, and fairness will emerge with the adequate due process. This has proven to be incorrect in the current US legal infrastructure. I cannot begin to count, how many cases that I should have won, during my years as a litigator, I lost, and how many cases that I should have lost, I won. To this day I still ponder as to which situation was worse. Once again, that nagging question comes to mind: rules by whom and for whom?

Historically, the main way to solve conflicts in the US legal system has been through the adversarial process of litigation. Adversarial comes from a root that mean, opposing and hostile. To litigate means to carry on strife (Sells, 1994, p. 82). Litigation is dedicated to carrying on strife, not resolving it (Sells, 1994, p. 82). The metaphor that comes to mind when I think of our legal infrastructure is “dueling monologues” (Alda, 2006, p. 161). I first heard this metaphor from Alan Alda, US actor and comedian. He uses it to illustrate how our society is losing the ability to listen, have conversations, and engage in constructive dialogue to solve problems.

Why would lawyers be different than the rest of society? Especially given the way they are socialized into the law profession. Law professors teach students doctrinal law, how to think like lawyers, how to follow the rule of law, and how to zealously advocate for their clients. And thus, as the legal education journey begins, law professors steadily “redirect your gaze from what's fair to what the law says you can do or can't do” (Mertz, 2007, p. 10). Mertz's (2007) empirical data show how through the communication exchanges between faculty and students in first year law school classrooms, moral overtones and social context are excised from discourse in detriment to the profession and the public it is supposed to serve.

Law students learn to use the legal process, not to solve conflict and find justice, but as a way to avoid conflict stories. If you focus on rules and facts, you ignore the messiness of human conflict. You ignore clients' pain and the human experience is reduced to a statute. For example, the violence against a woman brutally abused by her partner is reduced to the violation of a statute; her broken ribs are reduced to a fact; and her story is suppressed by rules of evidence that dictate what she can say. The law then further objectifies the woman by

using labels such as “victim” or “plaintiff”, rather than a mother with a unique story and context.

The legal infrastructure is not designed to solve conflict. Although many lawyers pride themselves on how through the adversarial process and litigation conflict is solved, anyone that has experienced the legal system knows that even in those rare occasions when the conflict is solved, there is a high price (financially and emotionally) to pay.

Is ADR the answer?

Alternative Dispute Resolution (ADR) emerged as a result of the dissatisfaction with the legal system’s capability to solve conflict. Professor Frank Sander considered the pioneer of ADR in the legal profession, gave a speech at the 1976 Pound Conference titled “The Causes of Popular Dissatisfaction with the Administration of Justice” that is seen as the “big bang moment” of ADR (Moffitt, 2006, p. 437). Sander later shared that he felt the invitation to the conference had been intended to make up for the talk that Roscoe Pound delivered in 1906 addressing the same topic; Pound’s speech had not been well received (Sander & Hernandez-Crespo, 2008, p. 669).

Pound was a young “unassuming Nebraska law professor” when he spoke at what was the first Pound Conference in 1906 (Traum & Farkas, 2017, pp.679-680). Although he later became Dean of Harvard Law School, at the time of the speech he was not prominent in the legal community. Pound (1906, p. 400) argued that the legal process was “archaic” and “behind the times.” Among the many reasons he raised for the public’s dissatisfaction with the legal system, he planted two seeds that influenced the ADR movement: 1) human conflicts take a back seat in legal proceedings because the focus is on process; 2) litigation is viewed as a ‘game’ in which winning is the main goal, not necessarily justice (Traum & Farkas, 2017, pp.679-680; Pound, 1906).

By focusing on uniformity and drafting laws as general rules, the human and material elements of particular controversies become immaterial and “when we eliminate immaterial factors to reach a general rule, we can never entirely avoid eliminating factors which will be more or less material in some particular controversy” (Pound, 1906, p. 398). Since all controversies are not the same, by applying the rule of law in a particular case you may be complying with the law, but you could be enforcing an injustice. Furthermore, since litigation is seen as a game to be won, the rule of law prevails over justice.

At the 1976 Pound Conference, inspired by Pound, Sander proposed a legal system that offered alternatives to litigation. He envisioned a system in which disputants could choose from an array of options to solve their conflict which would include litigation and also mediation, conciliation, and arbitration, among other processes (Kessler & Finkelstein, 1988, p. 577). Sander’s vision for the legal system became known as the “multi-door courthouse” (Sander & Hernandez-Crespo, 2008, p. 668). With the support and advocacy of Chief Justice Burger and the American Bar Association, Sander’s vision of the legal system offering more than litigation became a reality (Traum & Farkas, 2017, pp. 685-686). Currently, ADR processes are offered as part of the legal system in many parts of the US, many of them with some success; although inequities and limited access to justice persist (Font-Guzmán, p. 2011).

Despite the advancement in the ADR movement, there is much work to be done for justice to be accessible to “All.” The legal profession continues to lack diversity among its members and a uniform way of thinking impedes a transformative change to the legal infrastructure. As Hadfield (2016, pp. 229-230) observes,

“Swimming in that pool of potential problem-solvers, it’s lawyers, lawyers everywhere. The people serving client are lawyers. The law professors are lawyers. The regulators of lawyers are lawyers. The drafters of most legislations are lawyers. [...] They have all been

trained to think like lawyers, to organize information like lawyers, to solve problems like lawyers, to talk and write like lawyers.”

Lawyers also hang on tightly to the illusion (or delusion) of holding a monopoly of problem-solving in our society. Even Pound’s idea of a legal system for ‘All’ was reduced to an “alternative” to resolving disputes through litigation and Sander’s original label for his vision, a “comprehensive justice center,” was changed to “multi-door courthouse” (Sander & Hernandez-Crespo, 2008, p.670). Through this reframing, the legal profession, not the people, stayed at the center of resolving conflict.

In my practice as a lawyer, I learned that I best served my clients when I chose to be humble, was willing to be flexible, and share power with my clients and other participants in the legal system (e.g., social workers, colleagues, expert witnesses, prison guards). For the legal system to be more just, lawyers need to see themselves as part of an interprofessional and interdisciplinary team; lawyers need to learn that it is alright to have less power and less control.

What is the legal system missing?

After many years of legal practice and experiences outside the legal system, I discovered what I felt was missing in the legal system. The legal system was soulless and uncreative. The law is soulless because lawyers have dehumanized it and have taken people’s conflict stories out of the conversation. It is uncreative because it is incapable of producing new ideas. New solutions do not surface because there are no diverse perspectives within the law, so the legal profession continues to rely on the same type of solutions (Hadfield, 2016, p.223). In 1994 Thomas Moore—former Catholic Monk, writer, lecturer, and psychotherapist— wrote,

“We are living in a time when soul is being drained from the very social institutions that are supposed to be preserving life and values. [...] But soul cannot be regained through clever insights and muscled projects of improvement. It returns only when deep vision has been restored, when imagination revivifies, and when we allow ourselves to feel the soul’s complaints so that we can find our way back to necessary sensitivities” (Sells, 1994, p. 9).

Could it be that we have been looking at the legal system the wrong way? What if the way to find “our way back” and have justice reclaim its soul is through conflict? Through conflict, stories of human drama can be grappled with rather than suppressed.

Conflict can also be a creative stimulus to address complex problems. Conflict as an interdisciplinary field draws upon a more diverse group of professionals and theoretical frameworks. What if we stop seeing the legal infrastructure as the overarching umbrella under which all other conflict resolution processes fall? What if conflict processes become the overarching umbrella under which all conflict resolution/engagement processes fall, including law and the legal system?² The legal system then takes the place it should have always taken. That is, the legal system becomes one of many places to engage with conflict, particularly through the litigation process, but law is not the main place or the main process.

Let us not forget that real and meaningful change rarely emanates from the law and the legal infrastructure. Real change happens when people raise and engage with conflict at the margins of the legal system. It is then that conflict leads to the disruption necessary to create counter-narratives which eventually enter and transform the legal system (Font-Guzmán, 2015, pp. 83-113; Strand, 2011). It is through conflict that a justice and equal access narrative emerges, not through the legal system. Pound (1906, p. 400) knew this a century ago,

“The law does not respond quickly to new conditions. It does not change until ill effects are felt; often not until they are felt acutely. The moral or intellectual or economic change must come first. While it is coming, and until it is so complete as to affect the law and formulate itself therein, friction must ensue.”

² I am indebted to Professors Palma J. Strand and Paul McGreal on this idea which surfaced as part of the many thought-provoking discussions we had as part of the planning process for this conference.

The legal system needs to expand its vision and support for solving disputes beyond ADR. Why should dispute resolution processes, other than litigation, be the alternative? Why should lawyers have the monopoly of working with solving conflicts in our society? Why is the role of paralegals and mediators, to name just two conflict professionals, not expanded to increase access to justice through a broader provision of legal services?

Even more important, if we want to provide everyone equal access to justice, conflict practitioners and lawyers practicing ADR should be less concerned with being neutral agents and become disruptive agents of social change at the margins of the law by organizing and educating people as to other processes and places available to engage and resolve conflicts (Mayer, 2004; Font-Guzmán, 2014). The push for the change in the legal system needs to come from the people at the margins of the law. Only then can the bell toll for all.

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