2021

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CONNECTICUT
LAW REVIEW

VOLUME 52 FEBRUARY 2021 NUMBER 3

Article

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Partisanship can make policy discussion and civil debate difficult. Partisan differences in how facts and policies are understood contribute to the escalation of conflict and a lack of cooperation. Lawyers are not immune from these human tendencies. But good lawyers have, and good law schools teach, values, knowledge, and skills that can aid in fostering and modeling more productive debate and resolution of conflict.

Lawyers are trained and socialized to internalize and safeguard the foundational tenets of our constitutional democracy, to uphold the law even when it does not reflect their own individual preferences. The professional rules of conduct encourage lawyers to separate the professional from the personal, and expect that vigorous debate, dissent, and zealous advocacy will be done in a professional manner. Lawyers are taught to think about issues, cases, or arguments from multiple sides and to value rational argument, the primacy of evidence and facts, and neutral processes in which cases are decided on their merits. The nuanced approaches to conflict that are required of lawyers—distinguishing productive and unproductive conflict, both creating and claiming value, and acting as both advisors and advocates—equip lawyers with abilities that help them generate and manage more productive debate.

Law schools, then, should strive to provide even better grounding in these values, knowledge, and skills. Lawyers should endeavor to highlight for themselves, their clients and colleagues, and their opponents nuanced approaches to conflict and debate. And law schools and lawyers should work to educate the broader citizenry about the values of our constitutional democracy and to model effective and civil dispute resolution strategies.

The Role of Lawyers and Law Schools in Fostering Civil Public Debate

JENNIFER K. ROBBENNOLT [*] & VIKRAM D. AMAR [**]

We are in a time in which political polarization is frequently in the headlines,[1] public opinion polls reveal a pervasive sense of division[2] and a sense that political discussions have become less grounded in facts,[3] and many are concerned about the civility (or lack thereof) with which we treat each other across political differences.[4] Partisanship can, indeed, make policy discussion and civil debate difficult. And there are many aspects of human psychology that can contribute to the hurdles. Take a prominent example: people interpret policies and information differently depending

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[1] *See, e.g.*, Jaclyn Gallucci, *When It Comes to Politics, Americans Are Divided. Can Data Change That?*, FORTUNE (July 17, 2019, 1:18 PM), https://fortune.com/2019/07/17/political-polarization-in-america-define/ (discussing "polarization unity" and how polarized voters and campaign donor influence furthers political division); Natalie Pattillo, *As Shutdown Pauses, Coverage Focuses on Partisan Polarization*, COLUM. JOURNALISM REV. (Jan. 25, 2019), https://www.cjr.org/politics/shutdown-partisan-coverage.php (describing focus of news coverage on polarization). *See also* Shanto Iyengar et al., *The Origins and Consequences of Affective Polarization in the United States*, 22 ANN. REV. POL. SCI. 129, 130–31 (2019) (describing affective polarization and how to mitigate it); Samara Klar et al., Opinion, *Is America Hopelessly Polarized, or Just Allergic to Politics?*, N.Y. TIMES (Apr. 12, 2019), https://www.nytimes.com/2019/04/12/opinion/polarization-politics-democrats-republicans.html (suggesting that we are less polarized than we think). *See generally* JOSHUA GREENE, MORAL TRIBES: EMOTION, REASON, AND THE GAP BETWEEN US AND THEM 5, 14–16 (2014) (describing "us v. them" conflicts and the role they play in moral decision making); JONATHAN HAIDT, THE RIGHTEOUS MIND: WHY GOOD PEOPLE ARE DIVIDED BY POLITICS AND RELIGION, at xi–xii (2012) (describing how a "righteous" mind enables both cooperation and moralistic conflict).

[2] *See, e.g.*, ROBERT P. JONES & MAXINE NAJLE, PRRI, AMERICAN DEMOCRACY IN CRISIS: THE FATE OF PLURALISM IN A DIVIDED NATION 28 (2019), https://www.prri.org/research/american-democracy-in-crisis-the-fate-of-pluralism-in-a-divided-nation/ (finding that "Americans are nearly unanimous in their belief that the country is divided over politics (91%), with 74% of Americans saying that the country is *very* divided").

[3] *Most Americans Say Political Debate in the U.S. Has Become Less Respectful, Fact-Based, Substantive*, PEW RES. CTR. (July 18, 2019), https://www.pewresearch.org/fact-tank/2019/07/18/americans-say-the-nations-political-debate-has-grown-more-toxic-and-heated-rhetoric-could-lead-to-violence/ft_19-07-18_toxicpolitics_most-americans-say-political-debate-us-less-respectful-fact-based-substantive/ (finding that 76% of American adults believe political debate has grown less fact-based in recent years).

[4] WEBER SHANDWICK, POWELL TATE & KRC RESEARCH, CIVILITY IN AMERICA 2019: SOLUTIONS FOR TOMORROW 2, 8–9, 10–15 (2019), https://www.webershandwick.com/news/civility-in-america-2019-solutions-for-tomorrow/.

on their perspective and preferences,[5] and assess evidence in accordance with preferences and prior beliefs.[6] And recent research has found that people's ideological beliefs can even make it difficult to evaluate the basic logical validity of arguments.[7]

Despite these tendencies, we tend to believe that our own perceptions and experiences are objective and accurate, and often fail to realize the ways that our perceptions are influenced by our own perspective, knowledge, expectations, and desires—a phenomenon known as *naïve realism*.[8] This naïve realism creates the "feeling that [our] own take on the world enjoys particular authenticity, and that other actors will, or at least should, share that take, if they are attentive, rational, and objective perceivers of reality and open-minded seekers of truth."[9] This feeling tends to make us confident that we should be able to persuade others of the rightness of our positions.[10] But when others persist in having different views, it can lead us to conclude that they are unreasonable, biased, or

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[5] *See, e.g.*, Albert H. Hastorf & Hadley Cantril, *They Saw a Game: A Case Study*, 49 J. ABNORMAL & SOC. PSYCHOL. 129, 132–34 (1954) (finding partisan interpretations by the fans of opposing sports teams); Dan M. Kahan et al., "*They Saw a Protest": Cognitive Illiberalism and the Speech-Conduct Distinction*, 64 STAN. L. REV. 851, 854–55, 883–85 (2012) (finding that preferences and prior beliefs influenced interpretations of videotape of a political demonstration); David Tannenbaum et al., *On the Misplaced Politics of Behavioural Policy Interventions*, 1 NATURE HUM. BEHAV. 1, 5 (2017) (finding that people find behavioral interventions more ethical when the nature of the intervention matches their political beliefs and less ethical when it does not); Leaf Van Boven et al., *Psychological Barriers to Bipartisan Public Support for Climate Policy*, 13 PERSP. ON PSYCHOL. SCI. 492, 493, 496–500 (2018) (describing how partisans devalue policy proposals from an opposing party).

[6] Charles G. Lord et al., *Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence*, 37 J. PERSONALITY & SOC. PSYCHOL. 2098, 2108 (1979); Raymond S. Nickerson, *Confirmation Bias: A Ubiquitous Phenomenon in Many Guises*, 2 REV. GEN. PSYCHOL. 175, 197 (1998).

[7] Anup Gampa et al., *(Ideo)Logical Reasoning: Ideology Impairs Sound Reasoning*, 10 SOC. PSYCHOL. & PERSONALITY SCI. 1075, 1082 (2019). *See generally* Peter H. Ditto et al., *At Least Bias Is Bipartisan: A Meta-Analytic Comparison of Partisan Bias in Liberals and Conservatives*, 14 PERSP. ON PSYCHOL. SCI. 273 (2019) (reporting a meta-analysis of the tendency "to evaluate otherwise identical information more favorably when it supports one's political beliefs and allegiances").

[8] Emily Pronin et al., *Understanding Misunderstanding: Social Psychological Perspectives*, *in* HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT 636, 646 (Thomas Gilovich et al. eds., Cambridge Univ. Press 2002).

[9] *Id.* Naïve realism also leads to the belief that we make more accurate assessments of other people than they make of us. This is the *illusion of asymmetric insight*. "We insist that our 'outsider perspective' affords us insights about our peers that they are denied by their defensiveness, egocentricity, or other sources of bias. By contrast, we rarely entertain the notion that others are seeing us more clearly and objectively than we see ourselves." Emily Pronin et al., *You Don't Know Me, But I Know You: The Illusion of Asymmetric Insight*, 81 J. PERSONALITY & SOC. PSYCHOL. 639, 639 (2001). This can mean that we are prone to "talk when we would do well to listen and to be less patient than we ought to be when others express the conviction that they are the ones who are being misunderstood or judged unfairly." *Id.* at 652–53.

[10] Lee Ross & Andrew Ward, *Naïve Realism in Everyday Life: Implications for Social Conflict and Misunderstanding*, *in* VALUES AND KNOWLEDGE 103, 116 (Edward S. Reed et al. eds., 1996).

ill-motived.[11] Research has found that people commonly conclude that those who disagree with them are biased, simply because they disagree.[12] Once a person attributes bias to another, they tend to see their conflict as more pervasive, to expect cooperation to be less worthwhile, and to act more competitively. Not surprisingly, this tends to cause the other person to respond in kind, creating a spiral of conflict.[13] And incivility makes arguments seem less sound,[14] likely contributing to the escalation of conflict.

When differences in perspective are particularly focal—e.g., two people are on different sides of a contentious issue—we tend to overestimate those differences.[15] Similarly, we tend to overestimate the degree to which things like ideology and self-interest influence other people's views and behavior, believing that others are more motivated or influenced by these than we are ourselves.[16] One study asked people with varying views on an issue to express their own judgments and also to predict how their understandings would differ from those with other political views.[17] While there were, in fact, differences in how people with different political views perceived the case, these differences were relatively small compared to the large differences predicted by the participants.[18] These sorts of mispredictions can mean that people are overly doubtful and cynical about the potential fruits of collaboration or finding common ground.[19]

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[11] *Id.* at 111; Emily Pronin et al., *Objectivity in the Eye of the Beholder: Divergent Perceptions of Bias in Self Versus Others*, 111 PSYCHOL. REV. 781, 793 (2004); Leigh Thompson & George Loewenstein, *Egocentric Interpretations of Fairness and Interpersonal Conflict*, 51 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 176, 193 (1992).

[12] Kathleen A. Kennedy & Emily Pronin, *When Disagreement Gets Ugly: Perceptions of Bias and the Escalation of Conflict*, 34 PERSONALITY & SOC. PSYCHOL. BULL. 833, 845 (2008).

[13] *Id.*

[14] Jason R. Popan et al., *Testing the Effects of Incivility During Internet Political Discussion on Perceptions of Rational Argument and Evaluations of a Political Outgroup*, 96 COMPUTERS HUM. BEHAV. 123, 130 (2019).

[15] Nicholas Epley & Eugene M. Caruso, *Perspective Taking: Misstepping into Others' Shoes*, *in* HANDBOOK OF IMAGINATION AND MENTAL SIMULATION 297, 304 (Keith D. Markman et al. eds., 2009).

[16] Chip Heath, *On the Social Psychology of Agency Relationships: Lay Theories of Motivation Overemphasize Extrinsic Incentives*, 78 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 25, 26 (1999); Dale T. Miller, *The Norm of Self-Interest*, 54 AM. PSYCHOL. 1053, 1053 (1999); Rebecca K. Ratner & Dale T. Miller, *The Norm of Self-Interest and Its Effects on Social Action*, 81 J. PERSONALITY & SOC. PSYCHOL. 5, 14 (2001); *see also* Justin Kruger & Thomas Gilovich, *"Naive Cynicism" in Everyday Theories of Responsibility Assessment: On Biased Assumptions of Bias*, 76 J. PERSONALITY & SOC. PSYCHOL. 743, 751 (1999) (finding that "people have cynical intuitions about how others assess responsibility").

[17] Robert J. Robinson et al., *Actual Versus Assumed Differences in Construal: "Naive Realism" in Intergroup Perception and Conflict*, 68 J. PERSONALITY & SOC. PSYCHOL. 404, 414 (1995).

[18] *Id.*

[19] *Id.* at 416.

Lawyers, of course, are not immune from these human tendencies. The adversarial nature of our legal system and the representative nature of legal practice means that lawyers must necessarily operate much of the time with a partisan perspective.[20] This partisan lens can contribute to the sorts of spirals just described.[21] And incivility in the profession has been a topic of concern.[22]

But good lawyers have, and good law schools teach, a range of values, knowledge, and skills that should be useful in fostering and modeling more productive debate and resolution of conflict.[23]

Importantly, lawyers are trained and socialized to internalize and safeguard the foundational tenets of our constitutional democracy.[24] The rule of law in the United States—and the prospect over time of formulating better policy that itself will be respected as legitimate—depends on notice and opportunity to be heard, the robust exercise of freedom of speech and a free press, substantive engagement of ideas, and confidence that dissenting viewpoints are engaged on their merits rather than merely overridden or

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[20] *See, e.g.*, George Loewenstein et al., *Self-Serving Assessments of Fairness and Pretrial Bargaining*, 22 J. LEGAL STUD. 135, 150–51 (1993) (finding that representation of a party on one side of a legal case influences perceptions of fairness). *See also* Dan M. Kahan et al., *Whose Eyes Are You Going to Believe?* Scott v. Harris *and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837, 838, 887, 896–97 (2009) (critiquing the Supreme Court's failure to recognize how different people might interpret a video of a police chase in *Scott v. Harris*).

[21] *See, e.g.*, Stephen M. Garcia et al., *Morally Questionable Tactics: Negotiations Between District Attorneys and Public Defenders*, 27 PERSONALITY & SOC. PSYCHOL. BULL. 731, 737 (2001) (finding that attorneys viewed questionable negotiation tactics as more appropriate when used in response to the perceived use of questionable tactics by the other side).

[22] *See* NAT'L CTR. FOR PROF'L & RESEARCH ETHICS, SURVEY ON PROFESSIONALISM: A STUDY OF ILLINOIS LAWYERS 2014, at 5 (2014), https://www.2civility.org/wp-content/uploads/2015/04/Study-of-Illinois-Lawyers-2014.pdf (noting that more than eighty-five percent of lawyers surveyed reported experience with some kind of uncivil behavior in the past six months, such as sarcasm, condescension, misrepresentation, or negotiating in bad faith); LAUREN STILLER RIKLEEN, RIKLEEN INST. FOR STRATEGIC LEADERSHIP, SURVEY OF WORKPLACE CONDUCT AND BEHAVIORS IN LAW FIRMS 33, 38 (2018), https://wbawbf.org/sites/WBAR-PR1/files/WBA%20Survey%20of%20Workplace%20Conduct%20and%20Behaviors%20in%20Law%20Firms%20FINAL.pdf (describing inappropriate behavior at law firms); Sam Skolnik, *More Than Third of Female Lawyers Harassed at Work, Survey Shows*, BLOOMBERG L.: BIG L. BUS. (Nov. 29, 2018), https://biglawbusiness.com/more-than-third-of-female-lawyers-harassed-at-work-survey-shows (reporting that more than a third of female lawyers have been sexually harassed at work).

[23] *See* Carrie Menkel-Meadow, *The Lawyer's Role(s) in Deliberative Democracy*, 5 NEV. L.J. 347, 349–51 (2004) (suggesting that lawyers, as neutral advocates, are well-suited to assist in democratic discourse).

[24] Interestingly, the President of the American Bar Association and the President of the Association of American Law Schools both recently highlighted the importance of lawyers and legal education in upholding and educating the public about the rule of law and the "pillars" of constitutional democracy. Judy Perry Martinez, *President's Letter: Promise to a Nation*, A.B.A. J., Sept.–Oct. 2019, at 6; Vicki Jackson, President, Ass'n of Am. Law Sch., 2019 Presidential Address at the Second Meeting of the AALS House of Representatives: Pillars of Democracy: Law, Representation, and Knowledge (Jan. 4, 2019), https://www.aals.org/about/publications/newsletters/winter-2019/pillars-of-democracy/.

ignored.[25] Lawyers are the cultural custodians of this distinctive government by the people, for the people, and of the people.[26] When we say—as we often do—that we are a nation of laws, not people,[27] what we mean is that our highest obedience is to a set of principles of governance, not to the particular people who govern. This is why no person is above (or below) the law, and why lawyers are required and trained to uphold the law, even when it does not reflect their own individual preferences.[28] That does not, of course, mean that lawyers passively accept laws that they believe to be unjust. Indeed, a big part of a lawyer's role is to work for legal reform[29] through the mechanisms of our constitutional democracy. That is why lawyers are permitted to take positions that are not supported by existing law, provided they are, in the words of one important ethics formulation, "warranted . . . by a nonfrivolous argument for the exten[sion], modif[ication], or revers[al of] existing law[,] or for [the] establish[ment] of new law."[30]

In serving as institutional and cultural custodians, lawyers are required to assume particular roles. It is for this reason that professional rules of conduct encourage—and successful law schools teach—lawyers to separate the professional from the personal.[31] Vigorous debate, dissent, and zealous advocacy are all valued—and can all be done in a professional manner. As Shakespeare once said: "[D]o as adversaries do in law, strive

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[25] *Overview – Rule of Law*, U.S. CTS., https://www.uscourts.gov/educational-resources/educational-activities/overview-rule-law (last visited Jan. 26, 2020).

[26] *Former Solicitor General: Government Lawyers Critical to Rule of Law in Troubling Times*, A.B.A. NEWS (Oct. 26, 2018), https://www.americanbar.org/news/abanews/aba-news-archives/2018/10/former-solicitor-general--government-lawyers-critical-to-rule-of/.

[27] David Davenport, *A Nation of Laws, Not Men*, HOOVER INSTITUTION (Sept. 2, 2013), https://www.hoover.org/research/nation-laws-not-men.

[28] MODEL RULES OF PROF'L CONDUCT r. 1.2 (AM. BAR ASS'N 1983) (stating the lawyer must abide by a client's decision and that representation of a client does not mean the lawyer endorses the client's political or moral views).

[29] The preamble to the Model Rules of Professional Conduct states, "[a]s a public citizen, a lawyer should seek improvement of the law, the administration of justice and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education." MODEL RULES OF PROF'L CONDUCT pmbl. (AM. BAR ASS'N 1983).

[30] FED. R. CIV. P. 11(b)(2).

[31] *See, e.g.*, CODE OF PROF'L COURTESY no. 10 (KY. BAR ASS'N), https://www.kybar.org/page/procourtesy ("A lawyer should recognize that the conflicts within a legal matter are professional and not personal and should endeavor to maintain a friendly and professional relationship with other attorneys in the matter. In other words, 'leave the matter in the courtroom.'"); OBA STANDARDS OF PROFESSIONALISM r. 2.7 (OKLA. BAR ASS'N 2006), https://www.okbar.org/ec/standardsof professionalism/ ("We understand, and will impress upon our client, that reasonable people can disagree without being disagreeable; and that effective representation does not require, and in fact is impaired by, conduct which objectively can be characterized as uncivil, rude, abrasive, abusive, vulgar, antagonistic, obstructive or obnoxious."). For a content analysis of state bar civility codes, see Donald E. Campbell, *Raise Your Right Hand and Swear to Be Civil: Defining Civility as an Obligation of Professional Responsibility*, 47 GONZ. L. REV. 99, 107–28 (2011).

mightily, but eat and drink as friends."[32] In addition to the rules and norms of professionalism, lawyers also have their own interests in treating those on the opposing side of a particular issue, case, or dispute with respect. Lawyers are repeat-players and are likely to encounter each other in future cases. Reputation—for ethicality, competence, problem-solving ability, or civility —is an important asset that should not be squandered.[33] Moreover, someone who is on the opposing side in this case may be a partner or collaborator in the next.

Lawyers are trained to think about issues, cases, or arguments from multiple sides.[34] Lawyers cannot make good predictions if they have not thought about an issue in a complex, and multifaceted way. And lawyers would not be able to act as good advocates if they hadn't at least anticipated the counterarguments. As a profession, moreover, we value principled analysis and rational argument, rather than foregone conclusions.[35] Our system is grounded in the primacy of evidence and facts[36] and the value of neutral processes in which cases are decided on their merits.[37]

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[32] WILLIAM SHAKESPEARE, THE TAMING OF THE SHREW act 1, sc. 2, ll. 281–82 (Oxford, Clarendon Press 1921) (1594).

[33] *See, e.g.*, Catherine H. Tinsley et al., *Tough Guys Finish Last: The Perils of a Distributive Reputation*, 88 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 621, 640 (2002) (finding that negotiator reputation influenced negotiator behavior). *See also* Nancy A. Welsh, *The Reputational Advantages of Demonstrating Trustworthiness: Using the Reputation Index with Law Students*, 28 NEGOT. J. 117, 120 (2012) ("Perhaps paradoxically, the negotiators who are most likely to have a reputation for effectiveness are those who acknowledge that legal negotiation is just as much about the other people who are involved and abiding by relevant professional norms as it is about the task of competing for a favorable share of apparently scarce resources."). *See* Catherine H. Tinsley et al., *Reputation in Negotiation*, *in* THE NEGOTIATOR'S DESK REFERENCE 255, 256–58 (Chris Honeyman & Andrea Kupfer Schneider eds., 2017) (noting that a lawyer with an integrative reputation is perceived to be more effective by her negotiation counterpart).

[34] Charles G. Lord et al., *Considering the Opposite: A Corrective Strategy for Social Judgment*, 47 J. PERSONALITY & SOC. PSYCHOL. 1231, 1239–41 (1984) (exploring the effects of considering alternative outcomes); David McCraw, *Think Like a Libel Lawyer*, N.Y. TIMES (Mar. 9, 2019), https://www.nytimes.com/2019/03/09/opinion/sunday/think-like-a-libel-lawyer.html. *See also* Russell Korobkin, *Psychological Impediments to Mediation Success: Theory and Practice*, 21 OHIO ST. J. ON DISP. RESOL. 281, 296 (2006) (suggesting the utility of taking the perspective of a disagreeable adjudicator).

[35] Vikram David Amar, *The Helpful Role Lawyers Can Play in Rebuilding American Democracy*, JUSTIA: VERDICT (Jan. 12, 2018), https://verdict.justia.com/2018/01/12/helpful-role-lawyers-can-play-rebuilding-american-democracy ("*Lawyers apply logic—and not preconceived notions or forgone conclusions—to the facts. Logic must be tempered by history and experience but at base relies on principled reasoning.").*

[36] *Id.* ("*Lawyers deal in facts, grounded in evidence—they don't trade in speculation, and certainly they do not create or promote fabricated falsehood."). See also* McCraw, *supra* note 34 (discussing the importance of facts to libel lawyers).

[37] *See, e.g.*, Steven L. Blader & Tom R. Tyler, *A Four-Component Model of Procedural Justice: Defining the Meaning of a "Fair" Process*, 29 PERSONALITY & SOC. PSYCHOL. BULL. 747, 748 (2003) (describing the importance of neutrality to procedural justice).

Conflict resolution skills—often taught in dispute resolution courses or clinics—are also an important part of the lawyer's toolkit.[38] Lawyers are routinely called upon to assist parties on opposite sides of a deal, case, or issue to come to mutual agreement. Listening actively, with curiosity, and for understanding—and listening with respect even in disagreement—helps lawyers understand the interests of the parties.[39] Lawyers can help bring clients along to agreement by counseling them to assess both their own interests and those of the other side.[40] Lawyers rely on empathy and creativity to craft or frame proposals that will satisfy the interests of both sides.[41] Lawyers know that differences in interests or values make it possible to create value through exchange.[42]

Of course, any serious and productive attempt to better align law school curricula and culture with modes of argumentation that might better serve individual law school graduates and society must reckon with the reality that conflict itself and lawyers' roles are each varied. These variations, and the nuanced approaches to conflict that they require of lawyers, may themselves equip lawyers with abilities that can help them generate and manage more productive debate.

Conflict is often thought of as necessarily bad. But conflict theorists distinguish between constructive and destructive conflict.[43] And, indeed,

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[38] *See* RANDALL KISER, SOFT SKILLS FOR THE EFFECTIVE LAWYER 96 (2017) ("Higher levels of self-control are correlated with . . . superior conflict resolution skills."); JENNIFER K. ROBBENNOLT & JEAN STERNLIGHT, PSYCHOLOGY FOR LAWYERS: UNDERSTANDING THE HUMAN FACTORS IN NEGOTIATION, LITIGATION, AND DECISION MAKING 1 (2012) (describing the skills that will help lawyers to be better negotiators and counselors); Menkel-Meadow, *supra* note 23, at 359–60 (describing conflict management and consensus building skills). *See also* Symposium, *ADR's Place in Navigating a Polarized Era*, TEX. A&M L. REV. (forthcoming) (considering the pros and cons of applying alternative dispute resolution techniques to contentious issues in a polarized climate).

[39] *See, e.g.*, RISKIN ET AL., DISPUTE RESOLUTION AND LAWYERS 76–90 (6th ed. 2019) (describing active listening); Jack Zenger & Joseph Folkman, *What Great Listeners Actually Do*, HARV. BUS. REV. (July 14, 2016), https://hbr.org/2016/07/what-great-listeners-actually-do ("[P]eople perceive the best listeners to be those who periodically ask questions that promote discovery and insight. . . . Good listeners may challenge assumptions and disagree, but the person being listened to feels the listener is trying to help."). *See also* Jonathan R. Cohen, *"Open-Minded Listening"*, 5 CHARLOTTE L. REV. 139, 144 (2014) (discussing the importance of open-minded listening and the factors that hinder and promote it).

[40] Perspective taking is complicated. *See, e.g.*, Tal Eyal et al., *Perspective Mistaking: Accurately Understanding the Mind of Another Requires Getting Perspective, Not Taking Perspective*, 114 J. PERSONALITY & SOC. PSYCHOL. 547, 547 (2018) (finding that perspective taking is difficult and that accuracy about another person is better aided by engaging in conversation with them).

[41] Andrea Kupfer Schneider, *Teaching a New Negotiation Skills Paradigm*, 39 WASH. U. J.L. & POL'Y 13, 27–37 (2012).

[42] *See, e.g.*, 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*, J. DISP. RESOL. 5, 9 (2018) (describing the importance of focusing on interests and values in conflict resolution).

[43] *See* LEWIS A. COSER, FUNCTIONS OF SOCIAL CONFLICT 16, 20–21, 47 (1956) (discussing both the dysfunctional and beneficial aspects of conflict); MORTON DEUTSCH, THE RESOLUTION OF

while conflict can sometimes be devastating, it can also be "the seedbed that nourishes social change"[44] or the impetus to engage in creative thinking about how to accommodate or reconcile legitimate, though differing, interests. The goal, therefore, is not to eliminate disagreement or to invariably compromise quickly. Instead, it is important to distinguish between conflict that is necessary or useful and conflict that is unnecessary or unproductive. A lawyer might, for example, reasonably choose to litigate a case rather than agree to a settlement that does not meet her clients' interests or might pursue a strategy of litigation in the service of legal reform. But she might also readily agree to a request for a delay in the proceedings from opposing counsel, when doing so would not compromise her client's interests.

Not only is conflict itself multifaceted, but lawyers are trained to operate in many different types of advocacy roles. In a transactional setting, getting to an agreement with other stakeholders (while preserving the things that are most important to one's own client) is often the ultimate mark of success; lawyers who are unable to ultimately facilitate deal-making have a tough time earning a living in transactional practice areas. To the extent that naïve realism and other confirmation biases make it harder to appreciate—much less work to address or accommodate in relatively low-cost ways—the interests, perspectives, and proposals of other stakeholders in an agreement, classroom and skills training that helps students recognize and combat such subjective blind spots can only be to the good.

In litigation (or litigation-like) arenas, things might get even more complicated. Even in litigation, most cases end up being settled out of court[45] and, even in cases that go to trial, there are many procedural or substantive agreements to be made along the way.[46] Litigators, therefore, need to be dealmakers. But not all cases can or should be settled,[47] and our

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CONFLICT: CONSTRUCTIVE AND DESTRUCTIVE PROCESSES 17 (1973) (differentiating constructive and destructive conflict).

[44] DEAN G. PRUITT & SUNG HEE KIM, SOCIAL CONFLICT: ESCALATION, STALEMATE, AND SETTLEMENT 10 (3d ed. 2004).

[45] Theodore Eisenberg & Charlotte Lanvers, *What Is the Settlement Rate and Why Should We Care?*, 6 J. EMPIRICAL LEGAL STUD. 111, 112 (2009); Marc Galanter & Mia Cahill, *"Most Cases Settle": Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339, 1339 (1994). Litigation is really a process of "litigotiation." Marc Galanter, *Worlds of Deals: Using Negotiation to Teach About Legal Process*, 34 J. LEGAL EDUC. 268, 268 (1984).

[46] *See, e.g.*, J.J. Prescott & Kathryn E. Spier, *A Comprehensive Theory of Civil Settlement*, 91 N.Y.U. L. REV. 59, 62 (2016) (describing the range of agreements made by parties throughout the litigation process).

[47] The right balance is debated. *See* Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1075 (1984) (discussing problems with settlement); Carrie Menkel-Meadow, *Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (in Some Cases)*, 83 GEO. L.J. 2663, 2665–66 (1995) (responding to Fiss); Symposium, *Against Settlement: Twenty-Five Years Later*, 78 FORDHAM L. REV. 1117 (2009) (discussing various views and perspectives on settlements).

adversarial process is premised on the notion of vigorous advocacy. This means that litigators must be prepared to simultaneously cooperate and advocate. It also means that litigators must necessarily think about other audiences, including judges, juries, and arbitrators. To be sure, to the extent that these neutral finders of fact (or law) lament needless disagreement, bickering, and incivility by the participants in a dispute-resolution process, those lawyers who are best-trained in being reasonable—and appearing to be reasonable—will be rewarded. But there is nothing to guarantee that deciders of cases always react negatively to entrenched or combative presentation.[48] A lawyer who has reason to know (or even think), for example, that a particular "old-school" judge (or a particular jury panel) will view empathy for and acknowledgement of the plausibility of the other side's positions as weaknesses or implicit doubts about the validity of one's own arguments, is duty bound by her oath to take such information into account when framing her presentation.

Even within the roles of transactional dealmaker or litigator, the lawyer's role has many facets. For example, to appropriately advise their clients as to the merits of a deal or lawsuit and the prospects for a better deal or settlement, lawyers must be able to objectively evaluate the deal or case. At the same time, to effectively promote clients' interests, lawyers must act as advocates. It is not easy to wear these two hats—neutral observer and partisan advocate—at the same time,[49] as these roles require different skills. Similarly, lawyers "cannot steward . . . effective deal[s] without both minimizing and facilitating risk taking."[50] As advisors, lawyers must often simultaneously seek creative solutions for clients while also ensuring their compliance with the law.[51]

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[48] The research literature is sparse and somewhat mixed. *See* Margaret S. Gibbs et al., *Cross-Examination of the Expert Witness: Do Hostile Tactics Affect Impressions of a Simulated Jury?*, 7 BEHAV. SCI. & L. 275, 280 (1989) (finding a negative effect of hostile and leading cross examination tactics); Peter W. Hahn & Susan D. Clayton, *The Effects of Attorney Presentation Style, Attorney Gender, and Juror Gender on Juror Decisions*, 20 LAW & HUM. BEHAV. 533, 548 (1996) (finding that an aggressive presentation style was more effective than a passive style); William M. O'Barr & John M. Conley, *When a Juror Watches a Lawyer*, 3 BARRISTER 8, 11 (1976) (discussing the effects of language and presentation); Janet Sigal et al., *The Effect of Presentation Style and Sex of Lawyer on Jury Decision-Making Behavior*, 22 PSYCHOLOGY 13, 16 (1985) (finding that an aggressive presentation style was seen as more effective than a passive style). *See generally* Dominic A. Infante & Andrew S. Rancer, *Argumentativeness and Verbal Aggressiveness: A Review of Recent Theory and Research*, 19 ANN. INT'L COMM. ASS'N 319, 327–44 (1996) (reviewing research finding that argumentativeness is associated with higher credibility, but verbal aggression is associated with lower credibility). For recent research in a different context, see Popan et al., *supra* note 14, at 123.

[49] *See* Don A. Moore, Lloyd Tanlu & Max H. Bazerman, *Conflict of Interest and the Intrusion of Bias*, 5 JUDGMENT & DECISION MAKING 37, 43 (2010) (describing the difficulty of simultaneously enacting multiple roles).

[50] Susan P. Sturm, *Lawyering Paradoxes: Making Meaning of the Contradictions* 7 (Columbia Pub. L. Research, Working Paper No. 14-642, 2019).

[51] *Id.*

When engaging in negotiation—whether the negotiation of a contract, the settlement of a lawsuit, or any other negotiation—lawyers often find themselves with multiple, and conflicting, goals. In identifying the "Negotiator's Dilemma," scholars have recognized that negotiations involve "two separate but complementary negotiation tasks—claiming or distributing value, often described as 'dividing the pie,' and potentially creating new value from the opportunities that the negotiation presents, often described as 'enlarging the pie.'"[52] The best lawyers draw on skills—some cooperative, some competitive—that allow them to be successful in both of these tasks.[53]

All of this suggests a few possible directions for reform. First, law schools can strive to provide (1) an even better grounding in establishing and critically evaluating facts[54] and a deeper understanding of empirical evidence;[55] (2) an understanding of the habits of mind that influence policy debate;[56] (3) more training in a wide range of approaches to dispute resolution and the relevant toolbox of skills;[57] (4) facility in navigating the multiplicity of roles and making the nuanced distinctions required of

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[52] RISKIN ET AL., *supra* note 39, at 149–66. *See also* DAVID A. LAX & JAMES K. SEBENIUS, THE MANAGER AS NEGOTIATOR 29–45 (1986) ("There is a central, inescapable tension between cooperative moves to create value jointly and competitive moves to gain individual advantage."). *See* Keith G. Allred, *Distinguishing Best and Strategic Practices: A Framework for Managing the Dilemma Between Claiming and Creating Value*, 16 NEGOT. J. 387 (2000) (discussing best practices and strategies to manage this tension).

[53] Andrea Kupfer Schneider, *Shattering Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Style*, 7 HARV. NEGOT. L. REV. 143, 147–49 (2002); Tinsley et al., *supra* note 33, at 621–22, 624, 637.

[54] *See* Beryl Blaustone & Lisa Radtke Bliss, *The Role of the Lawyer and the Essential Skills to Teach Law Students in an Era of Fake News, "Alternative Facts," and Governing by Disruption*, 19 LOY. J. PUB. INT. L. 139, 154–55 (2018) (discussing lawyers' role in investigating, identifying, and establishing facts; challenging assumptions; looking behind alleged facts; and thinking about permissible inferences). Also important is the ability to distinguish the less than helpful concepts of "alternative facts" or "nonexistent truth" from the more useful notion of "constructive ambiguity" in dispute resolution. Noam Ebner, *Begun, The Trust War Has: Teaching Negotiation When Truth Isn't Truth*, 35 NEGOT. J. 207, 208 (2019).

[55] *See* ROBERT M. LAWLESS ET AL., EMPIRICAL METHODS IN LAW 1–2 (2d ed. 2016) (explaining the importance for lawyers of understanding research design and statistics).

[56] *See, e.g.*, JOHN COOK & STEPHAN LEWANDOWSKY, THE DEBUNKING HANDBOOK 1 (2011) (examining how attempts to debunk myths can reinforce those myths); ROBBENNOLT & STERNLIGHT, *supra* note 38, at 1 (describing psychological phenomena that influence conflict and its resolution); Jiin Jung et al., *A Multidisciplinary Understanding of Polarization*, 74 AM. PSYCHOL. 301, 307–10 (2019) (discussing a multidisciplinary approach to understanding polarization); Sami R. Yousif et al., *The Illusion of Consensus: A Failure to Distinguish Between True and False Consensus*, 30 PSYCHOL. SCI. 1195, 1195 (2019) (discussing how false consensus can influence what information we trust); *supra* notes 5–18 and accompanying text (discussing how preferences and prior beliefs can lead to biases when evaluating arguments).

[57] *See generally* RISKIN ET AL., *supra* note 39 (surveying a range of skills and approaches relevant to dispute resolution).

lawyers;[58] and (5) a foundation of essential skills for making good decisions and working effectively with other people, including adversaries.[59]

Second, at the very least, a lawyer who is trained in civil advocacy could present to her client the choice between a no-holds barred approach that might yield a somewhat better financial outcome and a more enlightened strategy that may leave the client with a bit less money in her pocket but serve other interests the client may have, leaving her feeling better about herself, the opposing party (with whom the client may have an ongoing business or personal relationship), and the legal system in general.[60] Even more broadly, lawyers can work to distinguish the professional and the personal, to distinguish necessary and unnecessary conflict, to distinguish instances in which litigation is necessary from those in which a consensual solution is attainable, to distinguish their roles of advocate and advisor, and to distinguish the ways in which they present arguments to different audiences.[61] Educating clients and opponents about these nuances can open the door to more problem-solving and less needless conflict.

Third, law schools should—in the short and long term—look to educate would-be decision makers (current and future judges and the citizenry at large) about how the adversarial system can generate the most accurate and fair results in individual cases and for society at large.[62] Just

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[58] *See* Sturm, *supra* note 50, at 5 (discussing the importance of "making sense of, and being able to forge constructive tension between [the] oppositional aspects of lawyering").

[59] *See* KISER, *supra* note 38, at 4–5, 9–11 (describing the increasing importance of intrapersonal and personal competencies to the success of lawyers and other professionals); ROBBENNOLT & STERNLIGHT, *supra* note 38, at 5 (noting the most important skills for lawyers); John M. Lande & Jean R. Sternlight, *The Potential Contribution of ADR to an Integrated Curriculum: Preparing Law Students for Real World Lawyering*, 25 OHIO ST. J. ON DISP. RESOL. 247, 251 (2010) (highlighting the importance for lawyers of understanding emotion, communication skills, and creativity); Jean R. Sternlight & Jennifer K. Robbennolt, *Psychology and Effective Lawyering: Insights for Legal Educators*, 64 J. LEGAL EDUC. 365, 365–73 (2015) (discussing the connection between psychology and the core competencies of working with other people and making good decisions).

[60] *See* MODEL RULES OF PROF'L CONDUCT r. 2.1 (AM. BAR ASS'N 1983) ("In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.").

[61] Sturm, *supra* note 50, at 7 (noting that these sorts of tensions "lie at the heart of what makes lawyers distinctive, necessary, and effective. The most successful and impactful lawyers live in these tensions. This capacity to hold paradox may be what equips lawyers to exercise truly effective leadership"); Symposium, *ADR's Place in Navigating a Polarized Era*, *supra* note 38 (considering "whether and how we can teach our students to be discerning in making appropriate use of these approaches and skills, both in their future representation of clients and in their future roles as leaders within their local, professional, religious, and political communities").

[62] The preamble to the Model Rules of Professional Conduct notes that "a lawyer should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority." MODEL RULES OF PROF'L CONDUCT pmbl. 6 (AM. BAR ASS'N 1983). *See* Justin Sevier, *A*

as with democracy, there is no guarantee that America's distinctive contribution to formal dispute resolution (an adversarial system with robust lawyer ethical obligations and information protection, combined with mechanisms to help all kinds of clients secure competent and zealous representation) will be maintained in the next century as it has over the last two. We are at an historical moment in which sharp disagreements and seeming inability to appreciate the other side's points is causing policy leaders in Washington and on the campaign trail to threaten major reform of the country's highest legal institutions, so nothing can or should be taken for granted.

At the same time, we are not suggesting a world in which lawyers are trained to facilitate consensual resolution of all controversies. Indeed, one increasingly prominent critique of the nation's dispute-resolution system is that certain kinds of cases are settled too frequently, such that institutions that represent the public, like appellate courts and legislatures, are starved of fodder to reflect on and weigh in on major policy issues that should, because of their external and symbolic effects, not be left entirely to private ordering.[63] But even here, disputes that are best resolved by our government leaders among the three branches can be clarified, streamlined, and facilitated—not hindered—when lawyers better understand how to present arguments in a less histrionic and more balanced and data-informed way. Our adversarial system is most worth preserving when we keep firmly in mind that adversarial is not the same thing as belligerent, and certainly not the same thing as bellicose.

[Relational] Theory of Procedure, 104 MINN. L. REV. 1987, 1996–98 (2020) (describing establishing truth and providing justice as key objectives of dispute resolution). For empirical work on how U.S. laypeople view adversarial and inquisitorial systems, see Justin Sevier, *The Trust-Justice Tradeoff: Perceptions of Decisional Accuracy and Procedural Justice in Adversarial and Inquisitorial Legal Systems*, 20 PSYCHOL. PUB. POL'Y & L. 212, 213 (2014).

[63] *See, e.g.*, Fiss, *supra* note 47, at 1075 (describing the potential costs of settlement); Menkel-Meadow, *supra* note 47, at 2663–67 (discussing "when, how, and under what circumstances" disputes should be settled); Symposium, *Against Settlement: Twenty-Five Years Later*, *supra* note 47 (presenting a range of views on settlement).