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Introduction to “Dispute Resolution and Political Polarization”

Rafael Gely*

Dispute resolution practitioners and scholars know conflict. In fact, some would say that we love conflict. And yet, despite our affinity with conflict, the polarization that is evident in today’s public space has been disconcerting. While we generally operate in a space where we are constantly exploring options, seeking compromise, helping participants explore their interests and finding ways to move towards agreement, what seems like an inability to even engage in any kind of dialogue is troubling. These and other related concerns led the editors of the *Journal of Dispute Resolution* to solicit contributions from seven well-known conflict resolution scholars on the topic of political polarization and dispute resolution principles. The articles in this virtual symposium serve as an initial building block in what we hope is a sustained engagement across the dispute resolution community with this topic. Recognizing the importance of the topic, and the fact that in the era of Twitter, social media and continuous communication, news travels faster than it ever has in human history, the symposium is being published online in order to accelerate its publication and hopefully its contribution to this important debate.

Carrie Menkel-Meadow’s opening article, provides both a somewhat gloomy description of the current state of political discourse, and yet an optimistic outlook regarding how dispute resolution theory and practice might provide a path forward.¹ She reminds us that hard as we may try, “rationality will not necessarily bring us together,” and that conflict resolution needs to operate at different levels – principled (brain), interest-based bargaining and trading (stomach) and affective-emotional-value based (heart).² Through the use of references to popular culture (plays, movies, books), Menkel-Meadow identifies possible approaches to dealing with polarization. In particular, she focuses on the importance of getting participants to know each other, to share the same space, and to envision listening to each other’s perspectives.³

Nancy Rogers starts from a similar point of departure, recognizing the challenging nature of the times. Her solution, while also based on dispute resolution principles, is directed inwards, towards what she refers to as the “American spirit.”⁴ Rogers identifies four key characteristics of this American spirit: it encourages active collaboration; keeps concerns in perspective; enhances the ability of groups to listen to each other; and reduces the fears arising from a sense of isolation. Her recommendation is for us to start private conversations at different levels to develop

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1. See generally 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 (2018).

2. *Id.* at 9-10.

3. *Id.*

4. Nancy H. Rogers, *One Idea for Ameliorating Polarization: Reviving Conversations About an American Spirit*, 2018 J. DISP. RESOL. 27, 28 (2018).

a twenty-first century version of this American spirit which can respond to these times of polarization.⁵

The article by Erik Cleven, Robert Baruch-Bush and Judith Saul explores how the principles of “transformative dialogue” could provide a way forward in dealing with the issue of political polarization. Cleven, et al., note that “transformative dialogue is about helping people gain their voice and choose identities and interactions that otherwise would be closed to them.”⁶ The authors identify three key principles. First, they note that transformative dialogue seeks to help the parties achieve a better balance between the need for self-expression and the need to connect with others.⁷ Second, the authors note that individuals have an “inherent capacity” to choose and respond to others.⁸ Finally, Cleven and his colleagues note that the parties themselves are “best positioned to decide who needs to be part of a conversation, what the conversation needs to be about and how they can best have that conversation.”⁹ The problem, the authors argue, is that conflict diminishes individuals’ ability to make these choices. Transformative dialogue seeks to bridge that gap.

Robert Bordone reminds us that, while important, problem-solving might not be sufficient to deal with the problem of polarization. He turns the lens a little bit and in so doing identifies a different dimension of the polarization problem. Instead of looking at polarization from the perspective of the loudest voices in the debate (i.e., those who are willing to express their views loudly and clearly), Bordone reminds us that there are others who chose not to speak. Those are the voices that are not heard because the interlocutor fears being shunned for expressing his or her views. Bordone is concerned about bringing those voices back in the discussion. Based on the experiences from the Harvard Negotiation and Mediation Clinical Program, Bordone proposes a model of facilitated political dialogues.¹⁰ The dialogues are based on two key principles. First, while important, problem-solving is not the ultimate goal. Instead, it is important to “sit with conflict” regardless of whether a specific outcome is accomplished.¹¹ Second, Bordone emphasizes the importance of training individuals to engage constructively in conversations about political differences.¹²

The final article, authored by Arne Spieker, provides both an international perspective and a specific example of how dispute resolution techniques could help facilitate dialogues on topics characterized by polarization. Spieker describes the process utilized by German authorities to engage local communities in the development and implementation of a new energy distribution system in Germany.¹³ He

5. See generally *Id.*

6. Eric Cleven et al., *Living with No: Political Polarization and Transformative Dialogue*, 2018 J. DISP. RESOL. 53, 53 (2018).

7. *Id.* at 55.

8. *Id.* at 56.

9. *Id.*

10. Robert C. Bordone, *Building Conflict Resilience: It's Not Just About Problem-Solving*, 2018 J. DISP. RESOL. 65, 68 (2018).

11. *Id.* at 70.

12. *Id.* at 71.

13. See generally Arne Spieker, *Stakeholder Dialogues and Virtual Reality for the German Energiewende*, 2018 J. DISP. RESOL. 75 (2018).

describes how the use of public and stakeholders dialogues can serve as a model of citizen participation surrounding large infrastructure projects.¹⁴

Although these articles may seem very different on their face, they are actually remarkably consistent in both identifying the problem and in proposing possible approaches to move forward. Of particular interest to dispute resolution scholars, I believe, are the following three points, with which I conclude this introduction.

First, the articles emphasize the importance of engaging with conflict as a good in and of itself, even if the process does not result in a resolution. In different ways, several of the articles provide dispute resolution scholars an important warning regarding our sometimes-zealous insistence in helping the parties solve a conflict by reaching an agreement.

Menkel-Meadow refers to the importance of getting to know the other side and of walking a mile not only in another's shoes, but "with the other person's feet."¹⁵ Bordone explains this issue in the context of dispute resolution training in law schools. He notes that over the last few decades, law schools have reoriented their curricula "around the relentless and single-minded goal of 'problem-solving'."¹⁶ While an important goal, Bordone worries that this focus has made it more difficult to promote "conflict resistance", a skill that he argues is "essential in a pluralistic and diverse society where not every difference can be or will be resolved, but where we still need to find ways to coexist and work with each other peaceably and constructively in order to thrive and survive."¹⁷ Cleven and colleagues highlight the importance of dialogue "especially where common ground is not sought."¹⁸ Rogers points out that the common bond that is part of what she calls the American spirit allows for members of one group to listen to members of a different group and preempt demonizing "those in another group as not having an opinion worthy of consideration."¹⁹

Second, the articles alert dispute resolution scholars and practitioners of the need to recalibrate their instruments and tools in order to help society deal with political polarization. Rogers suggests starting conversations about what the American spirit for a twenty-first century should look like. She proposes that dispute resolution scholars could combine approaches with which they are familiar, such as "The Big Table" initiatives, which brings together members from different communities, with the knowledge that comes from polling data.²⁰ In the context of suggesting that transformative dialogue can support the political process, Cleven and colleagues advise us that "it is all right to 'live with no.'"²¹ Bordone brings this point to the granular level by reminding practitioners not to "over-design" conversations in a way that results in "conflict stay[ing] out of the room."²² He admonishes us not to be troubled by the presence of emotion and conflict that arises from having to live in a pluralistic society.²³

14. *Id.*

15. Menkel-Meadow, *supra* note 1, at 18.

16. Bordone, *supra* note 10, at 69.

17. *Id.* at 70.

18. Cleven et al., *supra* note 6, at 61.

19. Rogers, *supra* note 4, at 33.

20. *Id.* at 48.

21. Cleven et al., *supra* note 6, at 62.

22. Bordone, *supra* note 10, at 71-72.

23. *Id.* at 72.

Finally, while all the authors raise serious concerns about the impact that political polarization is having in our civil institutions and social life, they are all hopeful that the work that dispute resolution scholars and practitioners have done over the last fifty-odd years provides us with the ability to find a path forward. The concluding passages in the contributions by Rogers and Menkel-Meadow are worth repeating.

“If Americans can identify and embrace an American spirit that resonates today, it may spark something constructive – a collaborative approach on some matters, people listening to other viewpoints, weighing the overall national values as they plan their own advocacy, resisting efforts to divide them, and feeling more often that they want to join in achieving the aims implicit in the American spirit. This is the hope – though not the certainty – that might lead some to revive the conversations about an American spirit.”²⁴

“But, I remain somewhat optimistic, that in the interstices of federal, and many state, agencies and offices, and in private work settings, universities and organizations, people who care about each other will use the techniques of conflict resolution and sensible policy management to continue to set the table, sow the land, clean the machinery, and practice their scales to keep ourselves ready, not rusty, to work wherever we can—to keep doing facilitation, empathy trainings, personal narrative workshops, consensus building exercises, mediated negotiation, (and for me, teaching and working with my students on our annual Global Justice Summit) in order to innovate new policy solutions to seemingly intractable problems, provided the weather and geo-politics allow it.

Inside of cursing the darkness, I will light a candle and ask a question of curiosity. I hope you will too.”²⁵

24. Rogers, *supra* note 4, at 52.

25. Menkel-Meadow, *supra* note 1, at 25.