(1) Role of conflict

CONTENT

(a) Adversarial System VS Non-Adversarial System

Adversarial system:

The Australian Law Reform Commission defines the adversarial system as one in which ***(Australian Law Reform Commission, 2000, para 1.117):*** [T]he parties, and not the judge, have the primary responsibility for defining the issues in dispute and for carrying the dispute forward. The system is based not only on substantive and procedural law, but also on an associated legal culture and ethical base.

Non-Adversarial Justice:

- **Definition:** Non-adversarial justice is an umbrella term coined for a constellation of theories and practices used across the civil and criminal justice systems which have in common a tendency towards prevention rather than post-conflict solutions, cooperation rather than conflict and problem solving rather than solely dispute resolution.
- **Elements:**
  - ADR (including mediation, negotiation, arbitration, etc)
  - Therapeutic jurisprudence
  - Preventive law
  - Restorative justice
  - Creative problem-solving
  - Problem-oriented/solution focused courts
- **King et al 2014:**
  - **Description of non-adversarial justice:** 'Its basic premises are prevention rather than post-conflict solutions, cooperation rather than conflict, and problem solving rather than solely dispute resolution. Truth-finding is the aim, rather than dispute determination, and there is a multi-disciplinary rather than a predominantly legal approach.'
  - It is a term that captures an array of theories, practices and approaches to justice.
  - It is not the antithesis or antidote to adversarialism – these are best thought of as sitting on a continuum – they are not mutually exclusive concepts.
  - **Points** ***(from King et al, Chapter 1)***
    - A justice system, not a court system
    - Problem-solving, not dispute resolution
    - Process, not outcome
    - Partners, not adversaries
    - Active, not passive judges
    - Interdisciplinary
    - Towards comprehensiveness
- **Emphasis on:**
  - Changing roles of lawyers
  - Different techniques and skills underpinned by a philosophy such as therapeutic jurisprudence or problem-solving
  - Collaboration
  - Understanding and connecting with your values

Why study Non-Adversarial Justice?

- Theory AND practice
- Criminal / family / civil law – caters for all interests.

- The unit is structured so that your knowledge and understanding of non-adversarial theories and practices grows incrementally
- Underpinning theme of course is the importance of law in context – taking a broader lens to legal problems outside questions of law
- One of the most practical law subjects – real-life law?
- Subject has an interesting political dimension and is law-reform focused.
- Exposure to different ways of lawyering that employ non-adversarial, psychologically beneficial and humanistic methods
- Increase understanding that there are multiple ways to resolve conflicts and creative ways to approach the law
- There is an emphasis on self-reflection on values and reflection on the role of the lawyer in non-adversarial processes
- More satisfying approach to law? Large therapeutic jurisprudence community that is very supportive. Hopefully this is the start of building those relationships with your peers.
- Exposure to expert practitioners explaining how they work non-adversarially

The Ideas of Mahatma Gandhi:

- **Non-adversarial lawyer who founded a movement known as Satyagraha ('insistence of truth'):**
  - **Satyagraha:** Means **'holding onto truth'** – a concept introduced by Gandhi in the early 20th century to indicate a determined but non-violent resistance to evil
  - **'Clinging to truth in conflict'** - in every conflict there must be an outcome that is beneficial to both parties (as unlikely as that may seem).
  - **In sanskrit**: 'satya' means truth and 'graha' means insistence
  - Gandhi believed that non-violence can match violence and Satyagraha has played a significant role in the civil rights movement since. ***(Check out 'Beautiful Trouble'!)***
  - Non-violence is a force greater than violence, and can fight it effectively, ultimately disarming it.
  - Patient suffering is the driving force of satyagraha; one lets the oppressors use as much force and oppression as they can on the nonviolent protestors, until a stage came when they can incur no more violence or oppression.
- **Gandhi's legal philosophy -**
  - *"the true function of a lawyer is to unite parties riven asunder…. The lesson was so indelibly burnt in me that a large part of my time during the 20 years of my practice as a lawyer was occupied in bringing about private compromises in hundreds of cases. I lost nothing thereby – not even money, certainly not my soul"* ***(M K Ghandi, An Autobiography, Chapter 38 - see Moodle)***
  - To unite parties riven asunder, to solve the problems the 2 have.
  - "I lost nothing thereby - not even money, certainly not my soul
- **Mahatma Gandhi Obituary-** ***Obituary: Mohandas K Gandhi: The Indian Leader at Home and Abroad' New York Times, Jan 31 1948. Via Moodle.***
  - **Preached passive nonviolent resistance.**
    - 1918: Began organising Satyagraha (insisting onto truth') movement, defined as follows:
      - ✓ "Satyagraha differs from passive resistance in that... the latter has been conceived as a weapon for the weak and does not exclude the use of physical force or violence for gaining one's end. On the other hand, the former has been conceived as a weapon of the strongest and excludes the use of violence in any shape or form."
  - Fasted as a means of protest and persuasion towards demands.
  - Advocated a 'non-violent rebellion' against the British in WW2 if they did not acquiesce to demands for Indian independence o Refused blood transfusions, maintaining that 'the essential life stream of one human should not be used to extend the life of another'.
  - Hailed as the "architect of India's freedom through non-violence." (Viscount Mountbatten, Viceroy of India)
  - One of the people to start focusing on less adversarial mechanism in the law
- **Mahatma Gandhi Autobiography**

- Reflected on his time as a lawyer. Client was a winner, but the loser wasn't able to pay, and to do so would bankrupt him. Gandhi assisted in compromise - losing party would repay in instalments.

- **Salt march:**
  - 'Also called Dandi March or Salt Satyagraha, this was a major nonviolent protest action in India led by Gandhi in March-April 1930. The march was the first act in an even larger campaign of civil disobedience (satyagraha) Gandhi waged against British rule in India that extended into early 1931. It was a protest against the imposition of a salt tax by the British.' (Encyclopedia Britannica)
  - https://www.youtube.com/watch?v=CV3ixOudYpc

(b) Conflict

Role of Conflict

What role can conflict play at a personal societal level?

- **We assume conflict is bad but conflict often leads to positive social change.**
  - American civil war – end to slavery
  - Suffrage movement – women's rights
  - Donoghue v Stephenson – led to consumer protection laws and principles re manufacturers liability and negligence
- **Much of the development in our law has come from conflict.**
- **Benefits:**
  - It helps people develop and realise their positions.
  - It helps people empathise and accept other people's opinions.
  - It can create change to combat social issues which may not be addressed until the conflict arises.
  - It helps people learn to communicate effectively.

Conflict And Its Relationship With Access To Justice:

- The dilemma is whether the objective of legal policy is to enhance access to legal forums for resolution of disputes or whether it should be aimed at preventing problems or disputes from arising, equipping members of the public to solve problems without using legal processes

Articles:

- ***Mayer** (Bernard Mayer ' The dynamics of Conflict Resolution': A practitioner's guide (Lawbook)*
  - Understanding conflict is basic to its resolution.
  - If we seek to end or manage conflict we must understand its nature.
  - Conflict is viewed differently by everyone – and how we view it will determine our attitude and manner of dealing with it.
  - It occurs along cognitive, emotional and behavioural dimensions.
  - It can arise for many reasons with human needs at the centre: along with communication; emotions; history; structure; and values.
- ***Felstiner, Abel and Sarat** (Felstiner, W, R Abel and A Sarat, 'The Emergence and Transformation of Disputes: Naming, Blaming, Claiming' (1980-81) 15 Law & Society Review 631 Via Moodle)*
  - **For a dispute to arise there must be:**
    - Unperceived injurious experience (unPIE)
    - Perceived injurious experience (PIE)
  - **Whether a dispute arises will depend on how/whether the parties Name Blame and Claim.**

Felstiner, Abel and Sarat

Felstiner, Abel and Sarat

Articles:

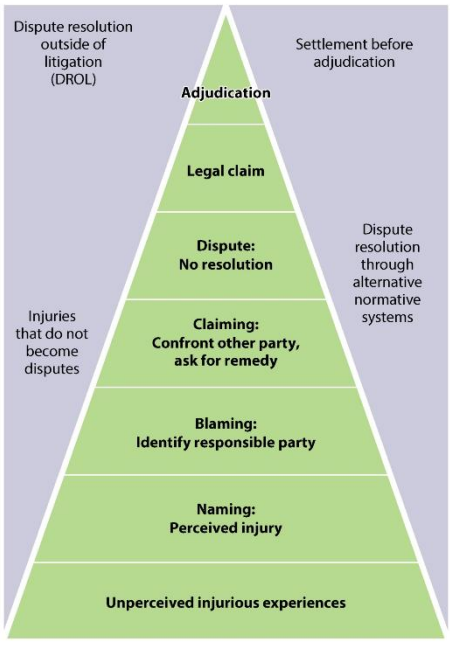
- ***Marc Galanter** (Marc Galanter, 'Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) about Our Allegedly Contentious and Litigious Society' (1983) 31 UCLA Law Rev 4)*
  - Not all conflicts end up in dispute
  - Galanter notes people choose to deal with disputes in lots of different ways including:
    - "Lumping it"
    - Exit and avoidance
    - Self-help
    - Negotiation
- ***Howard Gardner** (Howard Gardner, Milhaly Cziksentmihali and William Damon, Good Work: When Excellence and Ethics Meet 10 (2001)*
  - "The core mission of the legal profession is the pursuit of justice, through the resolution of conflict or the orderly and civilized righting of wrongs"

What are the best ways to manage conflict?

- Be rational and reasonable where possible.
- Compromise.
- Persist if you strongly believe in your position. People hope and expect you to drop your position
- When faced with challenges, especially in a bureaucracy

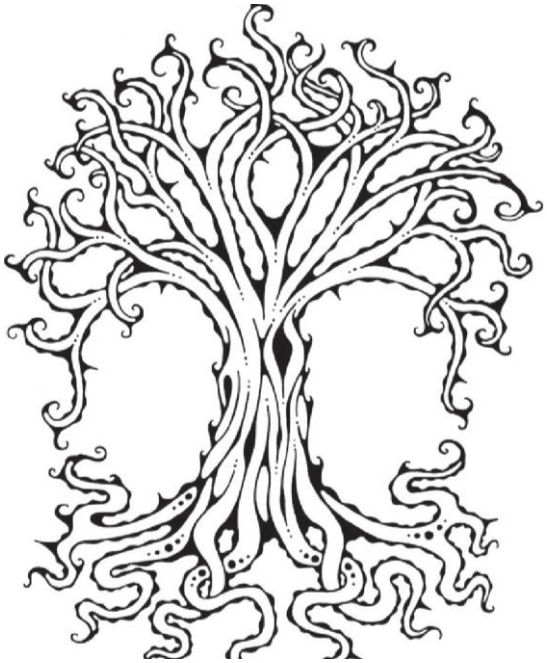
***Dispute Resolution Pyramid** - 'The Dispute Tree and the Legal Forest' Catherine R. Albiston, Lauren B. Edelman, and Joy Milligan, 2014, p108*

- Rather than narrowing to a single point at the top, the dispute tree grows many branches from a central trunk.
- Some branches represent **traditional paths** through the legal system, with side branches for settlement and private ordering, truncated branches for injuries named and blamed but not claimed, and fruitless tips for grievances that were pursued without remedy then abandoned.
- Other branches represent **quasi-legal alternative dispute resolution processes** for potential legal claims, including grievance procedures within organisations, community mediation and dispute resolution mechanisms, and formal alternative dispute resolution (ADR), such as formal processes often required by the courts before adjudication
- Still other branches represent **extra-legal alternatives** to formal legal claims, such as informal legal mobilisation, collective action, self-help and even self-reflection and prayer
- The tree imagery improves upon the pyramid not only because it better represents the multiplicity of options, but also because it reflects the living and evolving nature of disputes



***Dispute Tree Analogy** - Catherine R. Albiston, Lauren B. Edelman, and Joy egal Forest' (2014)*

- The dispute tree grows many branches from a central trunk.
- Some branches represent traditional paths through the legal system
- Others represent quasi-legal alternative dispute resolution processes for potential legal claims.
- Still other branches represent extralegal alternatives to formal legal claims such as self- help.
- They suggest this imagery improves reflects the living and evolving nature of disputes.



<u>The role of law in resolving conflict -</u> Hazel Genn, Paths to Justice: What People Do and Think About Going to Law (1999)

- Most common way of responding to problems was to:
  - try to sort the problem out or
  - take some direct personal action
  - very few people did nothing at all.
  - very limited use of formal legal proceedings

<u>Law Survey Law and Justice Foundation NSW 2012 (</u>Christine Coumarelos et al, Legal Australia-Wide Survey: Legal Need in Australia (Law and Justice Foundation of New South Wales, 2012) xiv)

- **Info:**
  - Legal problems widespread and have adverse impacts on many life circumstances
  - Disadvantaged people are particularly vulnerable to substantial and multiple legal problems
  - A sizeable proportion of people take no action to resolve their legal problems = poor outcome
  - Most people do not seek legal advice and resolve their problems outside of the formal justice system
- **50 percent survey participants experienced one or more legal problems:**
  - Consumer, crime, housing and government problems most common
  - Multiple legal problems common
  - One legal problem often leads to another
  - Many people do not recognise they have a legal problem (Broken heater in a rental. Robodebt. Abusive relationship. Exclusion from services based on disability or gender etc).
- **Action taken for legal problems:**
  - **Actions include:** Seeking advice (from a legal or non-legal professional) (51% across Australia as a whole), handling problems without advice (31%), and taking no action (18%).
  - **For those seeking advice:** legal advice from legal professionals accounted for 30% of people.
  - **Cost of legal advice:** is a barrier BUT many preferred to handle it themselves.

- **Finalisation:**
  - 3% of legal problems were finalised via formal proceedings in a court or tribunal
  - further 3% via formal dispute resolution or complaint handling processes.
  - 30% of legal problems were finalised by agreement;
  - 30% did not pursue the matter further;
  - 15% the legal problem was resolved through the decisions or actions of government bodies, insurance companies or the police.
- **Reasons for ignoring legal problems (unmet legal need):**
  - it would take too long to resolve the problem (35%);
  - the respondent had bigger problems (31%);
  - it would be too stressful (30%);
  - it would cost too much (27%);
  - the respondent did not know what to do (21%);
  - or it would damage the respondent's relationship with the other side (13%).
- **Victorian Government recommendations:**
  - Focus on understanding legal needs
  - Victoria Legal Aid as a primary source of legal info
  - Triage at courts (ie can a person go to diversion)
  - ADR expanded at courts and VCAT
  - Modernise small claims at VCAT
  - Improve ways courts work with self-represented litigants

How does all of this relate back to access to justice?

- The dilemma is whether the objective of legal policy is to enhance access to legal forums for resolution of disputes or whether it should be aimed at preventing problems or disputes from arising, equipping members of the public to solve problems without using legal processes

(c) Intersectionality & Law

Intersectionality & The Law:

- **Intersectionality:** The interconnected nature of social categorizations such as race, class, and gender, regarded as creating overlapping and interdependent systems of discrimination or disadvantage; a theoretical approach based on such a premise. ***(Oxford Dictionary)***
- **Video:** ***Kimberlé Crenshaw, law professor and social theorist, first coined the term intersectionality in her 1989 paper*** "Demarginalizing The Intersection Of Race And Sex: A Black Feminist Critique Of Antidiscrimination Doctrine, Feminist Theory And Antiracist Politics."
  - https://www.youtube.com/watch?v=yWa63FLEYsU
  - https://www.youtube.com/watch?v=H4m7BR1JeVY (up to 11.20)

- Intersectionality in Law and Legal Contexts. G Ajele and J McGill, Women's Legal Education and Action Fund (LEAF) up to page 38.
  - The term intersectionality first attracted widespread attention through the work of Kimberlé Williams Crenshaw, an African American law professor at Columbia University and at the University of California, Los Angeles. In two scholarly papers written in 1989 and 1991, Crenshaw critiqued the frameworks of American antidiscrimination law, second wave feminism, and the civil rights movement, demonstrating how each of these models for remedying oppression fails Black women. Crenshaw argued:
    - antidiscrimination law treats identity categories like "sex" and "race" as mutually exclusive grounds of discrimination;

- second wave feminism focusses on gender as the predominant vector of analysis and in so doing casts white women as the unstated norm; and
- antiracist policy focuses on race as the predominant vector of analysis and in so doing casts Black men as the unstated norm.

- Thanks to the vastness of the literature, and the diversity of theoretical and practical engagements with intersectionality, there is no singular account that perfectly captures the many nuances and various applications of the concept.25 Crenshaw explains intersectionality as:
  - a metaphor for understanding the ways that multiple forms of inequality or disadvantage sometimes compound themselves, and they create obstacles that often are not understood within conventional ways of thinking about antiracism or feminism or whatever social justice advocacy structures we have. Intersectionality isn't so much a grand theory, it's a prism for understanding certain kinds of problems.
- **Critiques of Intersectionality:**
  - **Intersections beyond Race/Sex:** First, there is a category of engagements that focus on whether and how intersectionality addresses oppressions at complex intersections beyond race and sex. For example, professor of African American and gender and sexuality studies, Jennifer Nash, critiques Crenshaw's theory for its "wholesale abandonment of addressing how factors beyond race and sex shape Black women's experiences of violence [which] demonstrates the shortcomings of intersectionality to capture the sheer diversity of actual experiences of women of colour."55 Atrey explains this line of critique as arguing that "in keeping intersectional analysis limited to too few (two) and 'cultural' categories (like race and sex) alone, intersectionality falls short of its own promise of revealing truly complex systems of domination and structures of power."56 Much of the literature falling under this umbrella is written by those with complex identities beyond race/sex who wonder whether and how intersectionality attends to their unique experiences of discrimination
  - **Reliance on Identity Categories:** A second group of critiques focuses specifically on intersectionality's maintenance of, and reliance on, identity categories.65 For example, some have noted that by focusing on the complexity of relations between identity categories, intersectionality leaves intact the identity categories themselves, and accepts the assumed inherent distinctions between them.66 Intersectionality thus does not do enough to problematize the fact of identity categories even though, as queer theorist and gender studies scholar Jasbir Puar argues, "…many of the cherished categories of the intersectional mantra…are the products of modernist, colonial agendas and regimes of…violence" designed to "sort" people according to aspects of their physical or social person.
  - **The Depoliticization of Intersectionality:** Finally, there is a group of appraisals that focus less on the theoretical boundaries of intersectionality and more on practical engagements with the idea. Some argue that through its proliferation, intersectionality has become depoliticized, often "treated as a gesture or catchphrase…[or] …used in a token manner to account for a nebulous, depoliticized, and hollow notion of "difference."71 For example, the term "intersectional feminism" is sometimes used as a simple proxy for "inclusive feminism". Used in this way, "intersectional" marks contemporary feminism as distinct from the overwhelmingly white liberal and radical feminisms of the past but often does little to engage with intersectionality's calls for systemic change. Puar argues that the mainstreaming of intersectionality has resulted in it becoming little more than "a tool of diversity management and mantra of liberal multiculturalism."72

- **Intersectionality and Legal Advocacy:**
  - If you have come here to help me you are wasting your time, but if you have come because your liberation is bound up with mine, then let us work together
  - Intersectionality highlights the importance of understanding power differentials between lawyers and clients not only in terms of legal knowledge, but also in respect of the complex identities and resulting privileges and dis-privileges of both a lawyer and their client, how this relationship impacts the lawyer-client relationship, and the kinds of advocacy a lawyer pursues on behalf of a client or community. As Ontario lawyer Omar Har-Redeye explains, intersectionality helps "illustrate how advocacy on behalf of a

discriminated or marginalized group can also inadvertently create its own patterns of oppression and exclusion, not only towards other discriminated groups, but within the advocating group itself when ignoring its own internal complexities and power dynamics."86 Two ideas are particularly relevant in this regard: positionality and allyship

- Alcoff notes that "there is a growing recognition that where one speaks from affects the meaning and truth of what one says, and thus one cannot assume an ability to transcend one's location".93 In other words, no matter their background, advocates must consider their social location and be aware of how that impacts what they can or cannot understand about a client's case. Further, advocates should be aware of the way their positionality may reinforce certain power structures that further disadvantage a client. This awareness should compel advocates to continually take stock of their implicit biases, and constantly educate themselves on the nature and nuances of the discrimination experienced by those they represent.
- Further, legal advocates must also consider the social and political position of the tool they use to advocate for others – the legal system. The Canadian legal system is not only a product of colonization, it is itself a colonizing instrument that entrenches existing systems of power that continually disenfranchise Indigenous peoples and communities.95 In other words, the legal system not only reflects the values, worldview, and needs of the dominant group, it is also used to marginalize those who are not considered part of that group.96 With this in mind, legal advocates should wield the power of the legal system carefully, recognizing its potential to effect the particular harms of colonialism.

Australian institute of criminology:

- The National Deaths in Custody Program (NDICP) has monitored the extent and nature of deaths occurring in prison, police custody and youth detention since 1980. The NDICP was established at the Australian Institute of Criminology in 1992 in response to recommendation 41 by the Royal Commission into Aboriginal Deaths in Custody.

This dashboard presents national real-time deaths in custody data for the most recent year starting 1 January 2023. See the **explanatory notes** for more information about the NDICP and the dashboard, and the **glossary** for definitions of data presented on the dashboard.

There have been 547 Indigenous deaths in custody since the Royal Commission.

42
deaths in custody since 1 January 2023

6 *Indigenous deaths*

36 *non-Indigenous deaths*

0 *deaths where Indigenous status is unknown*

Data notes

- Data are preliminary and may be revised.
- Data are provided by state and territory police and corrections and are not cross-referenced with coronial data.
- Data includes deaths that fall clearly within the scope of the NDICP and as defined by the Royal Commission into Aboriginal Deaths in Custody. See **explanatory notes** for definitions of a death in custody.

Wheel of Power:

Intersectionality In Law And Legal Contexts (Women's legal education & Action fund):

- **Broadly speaking, intersectionality is based on two key ideas.**
  - First, viewing a problem through an intersectional lens reveals the nature of discrimination that flows from the intersection of multiple identities. When oppressions based on two or more identity categories intersect, a new form of oppression is created that is different from the constituent forms of oppression added together. Intersectionality emphasizes that there is no singular kind of marginalization experienced by everyone who shares an intersectional identity, though there may be patterns or similarities between the experiences of individuals located at a particular intersection, in a given context.
  - The second idea connects individual and group experiences of disadvantage based on intersecting identities to broader systems of power and privilege. In doing so, intersectionality recasts identity categories not as objective descriptors of an individual's innate characteristics, but as socially constructed categories that operate as vectors for privilege and vulnerability within our social, cultural, political, economic and legal power structures. Ultimately, intersectionality has as its goal the transformation of systems of intersectional disadvantage.

- **Intersectionality In Legislation -** ***Mental Health and Wellbeing Act 2022 (commenced 1 September 2023)***
  - ***Section 25 Diversity principle***
    - ***(1)*** The diverse needs and experiences of a person receiving mental health and wellbeing services are to be actively considered noting that such diversity may be due to a variety of attributes including any of the following—
      - (a) gender identity;
      - (b) sexual orientation;
      - (c) sex;
      - (d) ethnicity;
      - (e) language;
      - (f) race;
      - (g) religion, faith or spirituality;
      - (h) class;
      - (i) socioeconomic status;
      - (j) age;
      - (k) disability;
      - (l) neurodiversity;
      - (m) culture;
      - (n) residency status;
      - (o) geographic disadvantage.

(2) Mental health and wellbeing services are to be provided in a manner that—

a) is safe, sensitive and responsive to the diverse abilities, needs and experiences of the person including any experience of trauma; and

b) considers how those needs and experiences intersect with each other and with the person's mental health.

- **Holistic, intersectional, therapeutic, anti-racist lawyering calls on us to:**
  - Consider and reflect on our own privilege.
  - Strive to understand our clients' lived experience (and experience of the law) through an intersectional lens.
  - Understand that our worldviews, frames of reference, cultural heritage, inter-generational experiences WILL DIFFER from our clients. Actively work on examining how, and work toward acting accordingly.

(d) Law School Stress

Importance of reflection on your values

- Wealth of research indicating distress of university students is high and law students even higher
- Reported high levels of stress and mental distress among lawyers and judges
- Research indicates the importance of connecting with your values and practicing reflection.
- We need to recognise this but also that many lawyers and judges flourish & enjoy work.

Krieger – The Hidden Sources of Law School Stress:

- **Intrinsic values:** Krieger highlights the importance of focussing on your 'intrinsic' values or a personal/interpersonal focus on 'personal growth, close relationships, helping others and improving community' are happier and more satisfied with their lives. ***(p 4)***
- **Extrinsic values:** Whereas a primary focus on 'extrinsic values and on external rewards and results, including affluence, fame and power has been found to be unfulfilling and correlated with unhappiness.' ***(p 4)***
- **Motivation:** The motivations for choosing your work that have been shown to promote life satisfaction are:
  - **That you inherently enjoy the process of doing that work; or**
  - **The work supports a fundamental value or makes a higher goal possible**

What else can law students do to reduce stress:

- Building resources/strategies to manage stress now and in practice
  - Mindfulness as a coping resource buffers against negative effects of stress
  - Self-compassion
  - Self-care – exercise/connection with peers and family/nature/reduce isolation
- Understanding that there are numerous career paths in the law, and lots of different ways to be a lawyer!

Importance of mindfulness:

- Bergin and Pakenham 2016 study - 'The stress-buffering role of mindfulness in the relationship between perceived stress and psychological adjustment' (2016) 7(4) *Mindfulness* 928
- Study of Australian law students showed that higher levels of mindfulness improved depression, anxiety and other areas of psychological well-being
- Self-compassion is also important for wellness – Fong and Loi 2016
- Law schools providing more opportunities for reflection as part of curricula…

READINGS

Felstiner, W, R Abel and A Sarat, 'The Emergence and Transformation of Disputes: Naming, Blaming, Claiming' (1980-81) 15 Law & Society Review 631

- **MAIN IDEA:** a healthy social order is one that minimises barriers inhibiting the emergency of grievances and disputes and preventing their translation into claims for redress (654). IT IS ABOUT UNDERSTANDING THE TRANSFORMATION OF DIPSUTES
- Perceiving conflict (naming), become grievances (blaming) and ultimately disputes (claiming)
- Formal litigation and even disputing within unofficial for a account for a tiny fraction of the antecedent events that could mature into disputes (631)
- What happens at earlier stages determines both the quantity and the contents of the caseload of formal and informal legal institutions (631)
- Institutions…embody disputes in a concrete form…by examining the economic and legal context in which cases occur. But disputes are not things: they are social constructs. Their shapes reflect whatever definition the observer gives to the concept (631-632)
- **Unperceived Injurious Experience (unPIE)** must be transformed into a Perceived Injurious Experience (PI) – so that disputes can emerge and remedial action can take place (632)
- This urges us to examine, in this case, differences in class, education, work situation, social networks etc, between those who become aware of their cancer and those who do NOT (633)
- FIRST STEP – Saying that a particular experience has been injurious is **NAMING**
- NEXT STEP – When a person attributes an injury to the fault of another individual or social entity - the transformation for PIE to grievance is called **BLAMING**
- FINAL STEP – When someone with a grievance voices it to the person or entity believed to be responsible and asks for a remedy – **CLAIMING**
- The claim is transformed into a dispute when it is rejected in whole or in part (^635)
- Why is this important to understand? It will increase our understanding of the disputing process and our ability to evaluate dispute processing institutions – identify the societal structure of disputing!!
- **Only a small fraction of injurious experiences** ever mature into disputes (636)
- It also permits a more **critical look** at recent efforts to improve A2J. The public commitment to formal legal equality required by the prevailing ideology of liberal legalism has resulted in substantial efforts to equalise the later stages of disputing – where inequality becomes more visible and implicates official institutions (637)

  - It is about HOW DISPUTANTS, LAWYERS OR OTHERS CAN CHOOSE THE MOST APPROPRIATE PROCESS FOR RESOLVING A PARTICULAR DISPUTE. In other words, as ***Felstiner, Abel and Sarat*** explain, once a "perceived injurious experience" (or a potential conflict) with someone else occurs, the next question is what to do with that perception.

Bernard Mayer, The Dynamics of Conflict Resolution (2000) - From Conflict to Dispute

- Understanding conflict is basic to its resolution. If we seek to manage conflict, we must understand its nature
- It can arise for many reasons with human needs at the centre: along with communication, emotions, history, structure and values
- **Theory:** Mayer holds that conflict has a social utility and should not be viewed as inherently 'bad'. For instance, the American Civil War was a bloody of conflict, but it brought about the end of slavery. Therefore, Mayer posits that "conflict is threatening, yet it is inevitable to vital relationships

Menkel-Meadow, L Porter Love and A Kupfer Schneider (eds), Dispute Resolution: Beyond the Adversarial Model (Aspen Publishers, 2005) 6

- **MAIN POINT – ROLE OF LAWYERS IN CONFLICT AND CONFLICT THEORY**
  - Many problems don't require a "legal" solution. Many problems, even when strictly legal, never go further than the lawyer's office.

- Disputes are resolved in non-court settings, like employee grievance systems, internal ombuds or complaint services, with privately contracted dispute resolution professionals or community action organisations.
- **The theory of process pluralism**- different kinds of matters may require different kinds of procedures or ways of dealing with the underlying conflict.
- Not all legal disputes have to be "tried" in order to be resolved – but nonetheless lawyers play a key role in helping to resolve a broad array of conflicts in society.
    - Lawyers job is to make choices about what process is best for the particular matter at hand – whether it is personal, local, transactional, community, governmental or international
    - Must think outside the box – be aware of many alternative modes of conflict resolution (page 4)
- While adversary processes have their place in modern life, with multiple parties and multiple issues present in almost every human endeavour, it may not fit so easily in the casebook headings where often only one name appears on either side of the "v" page 4
- Page 9 talks about GAME THEORY – compete or cooperate
- ***Deboah Tannen, 'The Argument Culture: Moving From Debate to Dialogue" (1998) "the argument culture urges us to approach the world – at the people in it – in an adversarial frame of mind***
- ***Carrie Menkel-Meadow 'The Trouble with the Adversary System in a Postmodern Multicultural World" (1996)***

- **MAIN POINT: NEGATIVES OF ADVERSARIALISM**
    - Courts have a "limited remedial imaginations" – may not be the best institutional settings for resolving some of the disputes that we continue to put before them (pg 14)
    - The "adversary model" employed in the courtrooms has bled inappropriately into and infected other aspects of lawyering, including negotiation carried on both in the "shadow of the court" and outside of it in transactional work
    - Modern lawsuits and the complexities of modern life have shown us that disputes often have more than two sides of the legal dispute – structuring the discourse so that parties must ultimately align themselves on one side of the adversarial line or the other – MODERN ADVERSARIALISM TEACHES PEOPLE HOW TO ACT TOWARDS EACH OTHER!!
    - Adversarial behaviours produce more conflict, making the likelihood greater that the parties will produce a 'competitive' or 'zero' or 'negative-sum' result.
    - Similarly, if the parties choose negotiation, but use adversarial and competitive techniques (like deception, threat, intimidation) rather than problem-solving approaches, they may wind up either in a total loss (or at best, a coerced 'compromise') (page 19)

Carrie Menkel-Meadow, 'Mothers and Fathers of Invention: The Intellectual Founders of ADR' (2000)

- **MAIN POINT: ADR**
    - For Lon Fuller, the leading jurisprudential thinker about ADR, law was a 'problem solving activity'. It was enacted in and enforced by a variety of different legal institutions, which is why he is referred as concerned with "problems of institutional design"
    - Re: Mediation: Fuller believed its principal functional strength lay in its release of the parties "from encumbrances of rules" and of accepting, instead, a relationship of mutual respect and understanding that will enable them to meet shared contingencies without the aid of formal prescriptions laid down in advance"
    - Today's 'hybrid processes' combine structures of neg, med and arb, to attempt to perform a wide variety of functions, from relationship reorientation to dispute settlement to conflict resolution to administrative rulemaking and public policy decision making

Jerold S, Auerbach, 'Justice Without Law? Resolving Disputes Without Lawyers; (1983)

- Legal institutions constitute only part, indeed of a small part, of an intricate mosaic of disputesettlement patterns in the colonies (US colonies) (pg30)
- The idea of alternative dispute settlement has shimmered elusively like a desert mirage (pg 31)

Frank E.a Sander 'Varieties of Dispute Processing' (1976):

- **INACCURATE PREDICTION:** In 1976, Professor John Barton predicted, in an article titled 'Behind the Legal Explosin' that by the year 2010, we can expect to have well over 1 million federal appellate cases each year, requiring 5 thousand federal appellate judges to decide them and one thousand new voluntes of the Federal Reporter each year to report the decisions. (PG 34 MENKEL)
- Litigation rates, like population rates, cannot be assumed to grow ineluctably, unaffected by a variety of social factors.
- **Nonetheless, Sander's methods of addressing this potential problems are still relevant:**
  - **1. Through greater emphasis on preventative law →** with the advent of prepaid legal services, this type of practice (skilful drafting and planning to prepare for cases in advace) will be utilised more widely, resulting in a probable dimunition of litigation
  - **2. Reduce judicial caseload by exploring alternative ways of resolving disputes outside of the courts**
    - GOOD OR BAD THING?? By establishing new dispute res mechanisms, or improving existing ones, we may be encouraging the ventilation of grievances that are now being suppressed (Good? Supplying a constructive outlet for suppressed anger and frustration) or (bad? Waste scarce societal resources by validating unmeritorious claims)
    - The courts cannot continue to respond effectively to accelerating demands. It becomes essential therefore to examine other alternatives
    - **Mediation over adjudication:** The central quality of mediation is its capacity to reorient the parties towards each other, not by imposing rules on them, but by helping them to achieve a new and shared perception of their relationship, a perception that will redirect their attitudes and disposition toward one another" ***– Lon Fuller***
    - A **fact finding proceeding** may be a potent tool for inducing settlement – particularly if the fact finder commands the respect of the parties, his independent appraisal of their respective positions will often be difficult to reject (i.e. use of an OMBUDSMAN!!) (PG 37)
- ***Professor William Felstiner*** recently pointed out that in a "technologically complex rich society" avoidance becomes an increasingly common form of handling controversy – i.e. a child leaving home, a tenant moving to another apartment, a businessman terminating a commercial relationship – since disputing individuals are far less interdependent PAGE 37

Galanter, M, 'Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society' (1983) 31 UCLA Law Review 4

- Familiar contention that American (Aus) legal institutions are overwhelmed by an unprecedented flood of litigation which is attributable to the excessive litigiousness of the population (pg 5)
- "Litigation explosion: or "legal pollution: - pg 5
- A citizenry of unparalleled contentiousness exercises a hair trigger readiness to invoke the law – asking courts to address both trifles unworthy of them and social problems beyond their grasp
- The "hyperlexis" explosion – an excessive amount of disputing
- But – the view of litigation as a destructive force undermining social institutions, strikes me as misleadingly one-sided (pg 70) If litigation marks the assertion of individual will, it is also a **reaching out for communal help and affirmation**!!!!

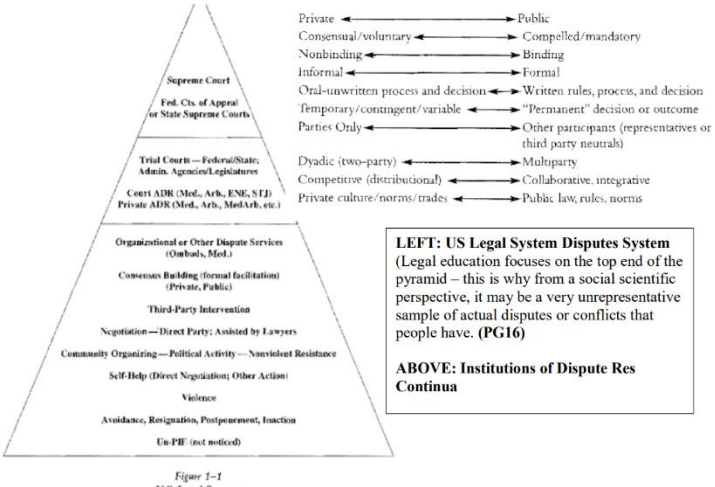


Figure 1–1
U.S. Legal System

LEFT: US Legal System Disputes System (Legal education focuses on the top end of the pyramid – this is why from a social scientific perspective, it may be a very unrepresentative sample of actual disputes or conflicts that people have. **(PG16)**

ABOVE: Institutions of Dispute Res Continua

Readings:

- Obituary: Mohandas K Gandhi: The Indian Leader at Home and Abroad' New York Times, Jan 31 1948
- Gandhi, Chapter XVI, Part II "Preparation for the Case" from An Autobiography or The Story of My Experiments with Truth (Navajivan Publishing House, Ahmedabad, trans Mahadev Desai, (1927) pages 121-124
- **https://d25zr1xy094zys.cloudfront.net/4e/cb/4ecbe24020f0f697df7e78644c57cc70febbbfea?response-content-disposition=inline%3Bfilename%3D%22Felstiner%20Abel%20Sarat%20Dispute%20Processing%201980.pdf%22&response-content-type=application%2Fpdf&Expires=1721817240&Signature=RJAdIs5i1nw7KqtgTlcTEJd7TXHVkQN16qJ4DG5M~c5k96La9TCuxJXAqMp87~DR3WHjlL6Jzg5OcinvH486KGbIj30L6cw~Lnu2IqUBpJvgEZXeTXh6vkDdj4WDCgRykb70QxQ27zjGqjie1egJrYKT5EyGcYoYFlDCX65hQrEmT7MeXBUakoYc7BjBOKiUuztyqgKLvxSWBWytYRnAebxC9amRIFhQCGy3TClOyX0wCKl4VPHSrZFQqe9R6DrN0yn8jqPk6Mb4rdj7BE83X05PV79jHoN4hQUK~jlNWegeWcMJbCP~0j5aJqE99Zhky4euRv0U4zDai4wvLFdf7w__&Key-Pair-Id=K1I589YUQOO6ZB**
- Coumerelos et al, Legal Australia Wide (LAW) Survey Legal Need Survey Australia (Law and Justice Foundation, NSW, 2012)
- Danielle M. Conway, Antiracist Lawyering in Practice Begins with the Practice of Teaching and Learning Antiracism in Law School, 2022 ULR 723 (2022). https://doi.org/10.26054/0d-rq7x-pfw5
- INTERSECTIONALITY IN LAW AND LEGAL CONTEXTS

On Being a Happy, and Ethical Member of an Unhappy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession: Patrick J. Schiltz