

1996

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Recommended Citation

Gerald R. Williams, *Negotiation as a Healing Process*, 1996 J. Disp. Resol. (1996)

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Negotiation as a Healing Process*

Gerald R. Williams**

I. INTRODUCTION

A. *The Problem of Avoidance*

Beginning in the late 1970's and continuing even today, there has been intense criticism in the media and elsewhere that Americans are too litigious, that people and institutions are too frequently going to court against one another.¹ While the criticism may be partly merited, when considered from a more personal perspective, what seems remarkable is not how *much* litigation there is, but how

* This article is strongly influenced by Robert L. Moore's work on professional-client relationship. In the early stages of his work, Moore published a "preliminary reconnaissance . . . in the hope that others may be enticed into joining [him] in investigations into the ritual processes underlying contemporary [professional] theory and practice." Robert L. Moore, *Contemporary Psychotherapy as Ritual Process: An Initial Reconnaissance*, 18 ZYGON 283, 285 (1982). Although Moore was referring specifically to the profession of psychotherapy, I found that his insights apply to a remarkable degree to law as well. This article is my own preliminary investigation into legal negotiation as a ritual process. In the same spirit as Professor Moore, I hope others will be encouraged to join in exploring the relevance of these concepts to contemporary legal theory and practice. A word of caution is in order: lawyers are not, and are not expected to be, therapists. On the other hand, lawyers are often expected to perform as healers of conflict (just as they are expected to perform other roles too) and many lawyers today are very adept at the task. They can help people heal from the wounds of conflict. There is much to learn by examining lawyers' work in light of this proposition.

** Professor of Law, Brigham Young University. I wish to thank Charles B. Craver, Roger Fisher, Paul Fogelberg, L. Michael Hager, James F. Henry, Robert D. Raven, Larry Ray, Nancy H. Rogers, Leonard L. Riskin, Mary P. Rowe, Frank E.A. Sander, Susan Scott, Allen E. Smith, and Laurence G. Sweeney for their kind encouragement and thoughtful suggestions over the years. I also thank the many teachers, students, and practicing lawyers who have given helpful feedback in response to various drafts of teaching materials from which this article has grown.
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1. See, e.g., Lori B. Andrews, *Suing as a First Resort: A Review of Marks's*, in *THE SUING OF AMERICA and Lieberman's*, *THE LITIGIOUS SOCIETY* 1981 AM. B. FOUND. RES. J. 851-60 and see 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*, 31 UCLA L. REV. 4-71 (1983); for a more balanced analysis, see Julie Johnson & Ratu Kamlani, *Do We Have Too Many Lawyers?*, *TIME*, Aug. 26, 1991 at 54.

little.² For example, most members of society suffer harms, inconveniences, and injustices that infringe on their legal rights and could be, if they chose, grounds for legal action.³ Most individuals recognize, however, that if they made a practice of using the courts to enforce every possible legal right, they would soon be consumed by litigation. Life is too short for people to spend it litigating over every harm or offense that comes their way.

Studies give powerful support for the proposition that most individuals absorb their harms and go on with their lives. The Better Business Bureau, which handles a high volume of consumer complaints, reports that for every one hundred consumers who feel aggrieved about a product or service, fewer than four bother to do anything about it.⁴ Business managers never hear from the remaining ninety-six, who apparently find it easier to absorb the harm and take their business elsewhere than to complain about the poor service or product. This pattern of

2. William Felstiner and his colleagues examined conflict levels in the United States and, in contrast to those who worry that litigation rates are too high, these researchers felt the data legitimately raises the question "of whether these levels [may actually be] too low." William L. F. Felstiner et al., *The Emergence and Transformation of Disputes: Naming, Blaming, and Claiming*, 15 LAW & SOC'Y REV. 631 (1981). Without necessarily deciding the question, the authors conclude that "only a small fraction of injurious experiences ever mature into disputes." *Id.* at 636 (citing Arthur Best & Alan Andreason, *Consumer Response to Unsatisfactory Purchases: A Survey of Perceiving Defects, Voicing Complaints, and Obtaining Redress*, 11 LAW & SOC'Y REV. 701, 708-11 (1977)); S. B. Burman et al., *The Use of Legal Services by Victims of Accidents in the Home - A Pilot Study*, 40 MOD. L. REV. 47 (1977). See also JOYCE L. HOCKER & WILLIAM W. WILMOT, INTERPERSONAL CONFLICT 112 (2d. ed. 1984) (avoidance is "one of the most common ways to cope with conflict;" there are several identifiable types of avoidance tactics).

3. This is *not* to claim that we all suffer equally in our society. Such is clearly *not* the case. Women, minorities, and other groups in society bear a disproportionate share of harms. This disadvantage apparently carries over into litigation. Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95-160 (1974). The inequity of this state of affairs is exacerbated by the phenomenon of denial. Denial is a defense mechanism in each of us by which we avoid facing the harsh realities around us. This mechanism tends to blind us to the predicaments and needs of others. See generally DANIEL GOLEMAN, VITAL LIES, SIMPLE TRUTHS: THE PSYCHOLOGY OF SELF-DECEPTION (1985). It also blinds us to the realities of our own mortality and to the ways we might change our priorities if we were more aware of the indeterminacy of our own existence. See ERNEST BECKER, THE DENIAL OF DEATH (1973).

4. BETTER BUSINESS BUREAU, BENEFITS FOR THE BOTTOM LINE: A CUSTOMER RELATIONS SEMINAR (undated) (citing TECHNICAL ASSISTANCE RESEARCH PROGRAMS, INC., CUSTOMER COMPLAINT HANDLING IN AMERICA: FINAL REPORT (Washington, D.C., 1979)). The report is paraphrased by the Better Business Bureau to the effect that "managers in the average business do not hear from 96% of their unhappy customers." *Id.* at 2. While this may seem like good news to business managers, who are saved the burden of dealing with complaints, the research data reveals it is not. The study indicates customers who are aggrieved will pass the bad word on to nine or ten other individuals, and that 91% of non-complaining customers will not patronize the same business again.

Coming from a different point of view, Stewart Macauley studied breaches of contract between corporations. His study did not find that corporations use avoidance or exit in their intercorporate disputes, but he did find a strong reluctance to bring the matter to the attention of lawyers for fear of unnecessarily escalating the conflict. This suggests that some avoidance behaviors may be based on a disinclination to involve lawyers for one reason or another. Stewart Macauley, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963) (quoted in LAW AND THE BEHAVIORAL SCIENCES 141, 149 (Lawrence M. Friedman & Stewart MacAuley eds., 2d ed. 1977)).

dealing with harms and injuries by forbearance rather than by informing the wrongdoer and seeking redress is called *avoidance* or *exit*.⁵ How should we assess this pervasive use of avoidance and exit? From the point of view of the persons harmed, are these mechanisms the best response to the problem? At least one respected authority sees them in this light. He gives the following appraisal of avoidance behaviors:

Note for instance, *the unexceptional nature* in the U.S. of adolescent children limiting contacts with their parents to perfunctory matters because matters of importance have proved to be too contentious, of friends curtailing their relations because of past quarrels, of consumers switching their trade from one retail merchant to another after a dispute, of casual workers (gas station attendants, waitresses, dishwashers, gardeners, housekeepers) quitting jobs because of problems with employers, of children moving out of their parents' houses because of unreconcilable values and of neighbors who visit less because of offensive pets, obstreperous children, loud parties and unseemly yards.⁶

These examples of avoidance behaviors seem benign enough that we might conclude they are the best responses to the underlying problems. But Danzig and Lowy have shown that avoidance exacts a high price in terms of the economic, social, and psychological dislocations it imposes on the aggrieved parties, their families, friends, employers, neighborhoods, and society.⁷ In her study of disputing in an urban housing project, Merry found that, for many people, the only way out of conflict was moving to a different neighborhood, and that many disputants are forced to endure a continuing pattern of conflict "because the costs

5. For an introduction to the literature on avoidance, see William L.F. Felstiner, *Influences of Social Organization on Dispute Processing*, 9 LAW & SOC'Y REV. 63-94 (1974); Richard Danzig & Michael J. Lowy, *Everyday Disputes and Mediation in the United States: A Reply to Professor Felstiner*, 9 LAW & SOC'Y REV. 675-94 (1975) [hereinafter Danzig & Lowy]; William L.F. Felstiner, *Avoidance as Dispute Processing: An Elaboration*, 9 LAW & SOC'Y REV. 695-606 (1975). Danzig and Lowy note that Felstiner tends to minimize the dislocations in peoples' lives caused by avoidance, and, perhaps for this reason, to underestimate both the need and the potential for dispute resolution methods to reduce the human toll of conflict and conflict avoidance. Some authorities use the term *exit* in place of *avoidance*. See, e.g., ALBERT HIRSCHMAN, *EXIT, VOICE AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS AND STATES* 106-07 (1970).

6. Felstiner, *supra* note 5, at 76, *quoted in* Danzig & Lowy, *supra* note 5, at 678 (italics added).

7. Danzig & Lowy, *supra* note 5, at 678-82. In her pioneering study of conflict in an American urban neighborhood, anthropologist Sally Engle Merry drew similar conclusions:

Felstiner's hypothesis that avoidance is a common strategy for dealing with conflicts in American society is well supported in this neighborhood, but . . . [avoidance] is both more costly and less satisfactory than he implies.

Sally Engle Merry, *Going to Court: Strategies of Dispute Management in an American Urban Neighborhood*, 13 LAW & SOC'Y REV. 891, 920 (1979) (footnotes omitted).

of real avoidance – i.e. moving out – are too high.⁸ Whether conflicted parties move or seek to avoid their antagonists without moving, they still incur many additional costs. Psychologically, avoidance is often experienced as a rupture in valued relationships, and both sides pay a price in terms of their emotional health.⁹ Psychological costs also include the burden of carrying unresolved anger, hostility, and feelings of vindictiveness against the other side. These psychological costs are presumably born by the other side as well and include not only the loss of existing relationships, but also the burden of finding substitute relationships in their place.

There are significant social costs when people use avoidance and thus leave their conflicts unresolved. Danzig and Lowy point out that "avoidance often leaves sources of grievances uncorrected, so that others are likely to fall prey to them."¹⁰ At one extreme, consider conflicts that arise from physical violence such as assault, robbery, and rape.¹¹ If victims of these offenses practice avoidance, they are forced to limit the times they risk being out of doors. Further, if they do not press charges against their assailants, which many victims are understandably fearful of doing for fear of reprisals, the assailants remain free to prey on new victims. At the other extreme are commercial establishments who would like to improve customer satisfaction, but cannot do it without customer feedback to alert them to the problems that need to be addressed. If their customers use avoidance, merchants never know what needs fixing. As Danzig and Lowy put it, avoidance leaves merchants "uneducated" as to why their

8. Merry, *supra* note 7, at 903. Where relocating is the only way out of conflict, even if the conflicted party does have the financial resources to move, if the party is in rental housing, there are additional economic costs as well: the landlord must now find another renter; if the move includes a change of jobs, the former employer suffers the loss of one employee and the cost of finding and training a replacement. Finally, it should be observed that, since the underlying conflict was not resolved at the last location, it may resurface in a new form at the new location.

9. Danzig & Lowy, *supra* note 5, at 678.

10. Danzig & Lowy, *supra* note 5, at 679 (citing HIRSCHMAN, *supra* note 5, at 106-07).

11. It would be difficult to calculate the human toll exacted by conflict-related violence. We gain some idea by considering the following statement. As part of a county wide program to prevent violence in Ramsey County, Minnesota, the Ramsey County Workplace Violence Policy gives a sobering definition of violence, a frank reminder of the extent to which employees and other citizens are subject to violence in their daily lives, and the costs it imposes upon them and upon their employers.

Violence is . . . the use of physical force, harassment or intimidation, or abuse of power or authority, where the impact is to control by causing pain, fear or hurt. Ramsey County recognizes that family violence, violence at work, and any other violence can affect any employee's work performance. The county acknowledges that many of its employees are exposed to violence by the very nature of their jobs. It further understands that all human relationships include the potential for conflict that may be experienced as incidental or sustained violence. This includes actions of employees, supervisors, clients, vendors or any other person.

RAMSEY COUNTY WORKPLACE VIOLENCE POLICY (single page, undated) (copy on file with author).

customers are not coming back.¹² Somewhere in the middle of the spectrum lies most of the rest of humanity. Those of us who, most of the time at least, are not consciously exploiting others the way extortionists or street criminals do, and who are not actually *looking* for feedback the way progressive merchants do, but who nevertheless are oftentimes guilty of causing emotional or other harm to others. We are unlikely to change our ways unless we get feedback that alerts us to our own rough edges that are causing injury or offense to others.

We may conclude from this discussion that even though avoidance behaviors do offer the advantage of reducing the frequency of conflict in society, the costs to individuals and to society far outweigh the gains.¹³

B. How Conflicts Arise

If we accept the proposition that people generally tend to avoid conflict rather than pursue it, we are led to a very intriguing question: how do conflicts arise? What distinguishes the situation that ends up on a lawyer's desk from all the other situations in which people are harmed but elect to deal with it by avoidance? In other words, what is the process by which grievances ripen into open conflicts? An important response to this question comes in an article by Felstiner, Abel, and Sarat, entitled *The Emergence and Transformation of Disputes: Naming, Blaming, and Claiming*.¹⁴ The authors suggest that this sequence of "naming, blaming, and claiming" describes the process by which harms or grievances become full scale conflicts.¹⁵ By *naming*, the authors mean, in part, that people must recognize they have been harmed. This is a problem where physical symptoms are delayed,

12. Danzig & Lowy quote from Hirschman:

The exit option is ineffective in alerting management to its failings . . . customer dissatisfaction would [be better] vented directly and perhaps to some effect in attempts at [improvement] . . . whereas under competition dissatisfaction takes the form of ineffective flitting back and forth of groups of consumers from one deteriorating firm to another without any firm getting a signal that something has gone awry.

Danzig & Lowy, *supra* note 5, at 679 (quoting HIRSCHMAN, *supra* note 5, at 26). See also Albert Hirschman, *Exit, Voice and Loyalty: Further Reflections and a Survey of Recent Contributions*, 13 SOC. SCI. INFO. 7 (1974) (citing LAWRENCE FREIDMAN, LAW AND THE BEHAVIORAL SCIENCES (Bobbs-Merrill et al. eds., 2d ed. 1977)).

13. Danzig & Lowy, *supra* note 5, at 678-82.

14. Felstiner et al., *supra* note 2, at 631-54. For a social psychological analysis of the problem, see Dan Coates & Steven Penrod, *Social Psychology and the Emergence of Disputes*, 15 LAW & SOC'Y REV. 655-80 (1981).

These concerns have contributed to the rise of a literature on "propensity to sue." See, e.g., Herbert M. Krizter, *Propensity to Sue in England and the United States of America: Blaming and Claiming in Tort Cases*, 18 J. LAW & SOC'Y 428 (1991); Sally Lloyd-Bostock, *Propensity to Sue in England and the United States of America: The Role of the Attribution Process*, 18 J. LAW & SOC'Y 430 (1991). They have also encouraged studies of the process by which people come to see themselves as victims. See TOM DURKIN, FRAMING THE CHOICE TO SUE: VICTIM COGNITIONS AND CLAIMS 3-6 (American Bar Foundation Working Paper #9119) (1991).

15. Felstiner et al., *supra* note 2, at 635-37. For an insightful elaboration of the unfolding of the naming, blaming, and claiming process, see Galanter, *supra* note 1, at 12-18 (1983).

as with exposure to slow-acting toxic substances. Except for cases of delayed recognition, however, the distinguishing factor is not awareness of the harm, but rather the victims' subjective reactions to it. For one reason or another, rather than accepting this particular harm as one of the risks of life and simply getting on with their lives, they feel this particular harm is too great, or is one harm too many, or for some other reason is "the straw that breaks the camel's back."¹⁶

In the next step, *blaming*, aggrieved persons assign fault for the injury; they identify a wrongdoer and hold that person or institution responsible for the harm. Note, however, there is not yet a dispute. For the situation to ripen into a dispute, aggrieved parties must decide to assert themselves by making a claim upon the perceived wrongdoer and asking for an appropriate adjustment or other relief. This is called *claiming*. But, as the authors point out, even now there is no dispute. Presumably many problems are prevented from ripening into disputes by a satisfactory response to the claim. But, as Macaulay and Walster have observed, harmdoers are not always eager to give satisfaction:

Individuals react in a variety of ways when they have injured one another. Harmdoers sometimes make voluntary reparation to the victim or acquiesce when forced to make reparation. In other circumstances, they engage in defensive behavior to try to justify their harmdoing. They may insist that the victim deserves to suffer or may deny that he or she was really injured by their actions.¹⁷

For the problem to mature into a dispute, the perceived wrongdoer must reject the claim or otherwise fail to give satisfaction. At this point, the aggrieved

16. When the harm is perceived as the last straw, the aggrieved person may well feel a need for redress not only for this immediate harm, but for all of the accumulated misfortunes he or she has experienced in the past as well. An experienced mediator recently described a particularly compelling example. The plaintiff's husband died about fifteen years ago while the couple's two children were still in elementary school. The plaintiff invested the modest life insurance proceeds. A few years later she remarried, but the man was abusive to her and the children, and the marriage ended in divorce. Soon after the divorce, the plaintiff was diagnosed with breast cancer and was in and out of surgery and chemotherapy for almost two years. In the meantime, her oldest son fell into repeated trouble with the law. Badly in need of money, she sought to draw upon the life insurance proceeds, only to discover that her financial advisor had illegally been speculating with the money and had lost everything. She sued the financial advisor for damages. Prior to trial, the plaintiff and defendant agreed to try mediation. In the course of proceedings, the mediator asked her, "what would you like to have happen as a result of this mediation?" She replied "I want my life back – my husband, my children, my health, my money." What human being in this situation would not see her life as a string of tragedies and feel they were somehow all connected? It seems undeniable that in many cases, from a psychological perspective, resolution of the "presenting problem" may require helping aggrieved persons come to terms with a larger pattern of misfortunes or tragedies in their lives.

17. Stewart Macaulay & Elaine Walster, *Legal Structures and Restoring Equity*, 27 J. OF SOC. ISSUES 173, 173 (1971), reprinted in LAW, JUSTICE, AND THE INDIVIDUAL IN SOCIETY 269 (June Louis Tapp & Felice J. Levine eds., 1977). The focus of their article is to consider factors that encourage and discourage reparation and to determine the effect of current legal practices on the human need to deal equitably with others.

party is faced with the most difficult and fateful decision of all: whether to let go of the problem and get on with their lives (use exit or avoidance) or to "go public" by going to a lawyer or some other outside party or organization for assistance.¹⁸ The aggrieved person might file a complaint with a consumer-oriented organization, ask a respected third party to intervene, file a complaint in small claims court, submit the problem to a neighborhood dispute resolution center, or in some other fashion involve a third party. However, since the purpose of this article is to investigate the dynamics and purposes of legal negotiation, we will limit our discussion generally to situations in which the parties have retained lawyers to represent them.¹⁹

18. The significance of "going public" is emphasized in the work of anthropologist P.H. GULLIVER, *DISPUTES AND NEGOTIATIONS: A CROSS-CULTURAL PERSPECTIVE* 75-76 (1979). In the United States, our emphasis on autonomy and individualism leads us to interpret conflicts between two individuals as primarily their concern, which is to say, as not anyone else's concern. We tend to discount the fact that society also has a stake in conflicts and their resolution. The anthropological perspective invites us to see conflict in these broader terms. As anthropologist Victor Turner explains:

[From the community's perspective, conflict means] a public breach has occurred in the normal working of society, ranging from some grave transgression of the code of manners to an act of violence, a beating, even a homicide. Such a breach may result from real feeling, a *crime passionnel* perhaps, or from cool calculation – a political act designed to challenge the extant power structure. Again, the breach may take the form of unhappy chance: a quarrel round the beer pots, an unwise or overheard word, an unpremeditated quarrel. Nevertheless, once antagonisms are out in the open, members of a group inevitably take sides. Or else they seek to bring about a reconciliation among the contestants. Thus *breach* slides into *crisis*, and the critics of crisis seek to restore peace.

VICTOR TURNER, *FROM RITUAL TO THEATRE* 10 (1982) (emphasis added).

William Felstiner, who has greatly influenced thinking about the emergence of disputes, takes issue with Gulliver's insistence on the significance of the public domain. Felstiner argues that defining conflict to include "going public" is unnecessary and effectively "throws out the greater portion of the universe of negotiations. . . ." William L.F. Felstiner, *Organizing the Ethnography of Negotiations*, 79 MICH. L. REV. 748-53 (1981) (reviewing Gulliver, *supra* note 18, at 749). Since the present article focuses primarily on situations in which the parties have elected to "go public" by *seeking legal representation*, it is both accurate and useful to consider the decision to "go public" as a necessary step in the process.

Sociologist Vilhelm Aubert agrees with Gulliver. He believes, at least for disputes in the legal context, the determining factor is the addition of a third party, "an intermediary who stands outside the original conflict." Indeed, the "position of the third person and the choices which are open to him furnish the most fruitful starting point for an analysis of the development of conflict resolution within law." Vilhelm Aubert, *Competition and Dissensus: Two Types of Conflict and of Conflict Resolution*, 7 CONFLICT RESOL. 26 (1963). Richard Lempert adds a useful final emphasis. For him, disputes are "controversies involving two (or more) parties, each making a special kind of claim: a *normative claim of entitlement*." Richard O. Lempert, *Grievances and Legitimacy: The Beginnings and End of Dispute Settlement*, 15 LAW & SOC'Y REV. 707, 708 (1980-81) (emphasis in original).

19. Here and throughout this article, I speak as though most litigation is initiated by individuals against other individuals as contrasted with organizations. However, a 1974 study of urban trial courts showed that the most frequent plaintiffs were not *individuals*, who filed 42% of cases, but *private institutions*, which accounted for 49% of all cases. The government accounted for the remaining 9% of cases. Institutional plaintiffs included, in order of frequency, banks and other commercial lenders (28% of all institutional cases), hospitals (11%), home construction and maintenance organizations (8%), the service industry (6%), department stores (6%), and insurance, realty, furniture stores, and manufacturers (18%) for a combined total of 77% of all institutional cases. Craig Wanner, *The Public*

C. Procedures for Conflict Resolution

Once a grievance has ripened into a formal dispute and the parties have hired lawyers to represent them, what are the ways it might be resolved? There are basically four possibilities. The first is negotiation.²⁰ It is well established that negotiation is a principle activity of lawyers and the primary method for resolution of legal disputes. By virtue of negotiation, many cases settle without the necessity of a complaint being filed with a court. Even when complaints are filed in court,

Ordering of Private Relations -- Part One: Initiating Civil Cases in Urban Trial Courts, 8 LAW & SOC'Y REV. 421, 425 (1974). The study also examined the characteristics of defendants, reporting that regardless whether the plaintiff was an organization, an individual, or the government, a fairly constant two-thirds of all named defendants were *individuals*. In most instances, individual defendants were male (over three times more men were named defendants than women or married couples). *Id.* at 432. The study focused on named defendants, and did not report how often the named defendant was actually defended by his or her insurer. However, it did show that individual defendants were most frequently sued in contract (24%), divorce (22%), and lien (17%) cases, accounting for about 63% of all actions against individuals. Property damage or personal injury cases (cases in which insurance companies would be most likely involved in defense) accounted for only 23% of suits against individuals. Thus, as important as insurance defense may be economically, socially, and politically, insurers are apparently involved in only a minority of cases. This latter point is supported by statistics from the National Center for State Courts, which show that "personal injury lawsuits now make up less than nine percent of all civil cases, with the number of tort filings declining every year since 1990." Alexandra Varney, *For PI Lawyers, What's Next?*, LAW. WKLY. USA, June 6, 1994, at B1.

20. For a review of the literature on legal negotiation, see Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754-843 (1985); HERBERT M. KRITZER, *LET'S MAKE A DEAL: UNDERSTANDING THE NEGOTIATION PROCESS IN ORDINARY LITIGATION* (1991). The non-legal literature on negotiation is vast. See RICHARD E. WALTON & ROBERT B. MCKERSIE, *A BEHAVIORAL THEORY OF LABOR NEGOTIATIONS* (1965); JEFFREY Z. RUBIN & BERT R. BROWN, *THE SOCIAL PSYCHOLOGY OF BARGAINING AND NEGOTIATION* (1975); BARGAINING: FORMAL THEORIES OF NEGOTIATION (1975); I. WILLIAM ZARTMAN, *THE 50% SOLUTION* (1976); HOWARD RAIFFA, *THE ART AND SCIENCE OF NEGOTIATION* (1982); ROY J. LEWICKI & JOSEPH A. LITTERER, *NEGOTIATION* (1985); DAVID A. LAX & JAMES K. SEBENIUS, *THE MANAGER AS NEGOTIATOR: BARGAINING FOR COOPERATIVE AND COMPETITIVE GAIN* (1986).

The idea that negotiation is a foundational process for dispute resolution was emphasized by Edward Hartfield in his 1989 presidential address to the Society for Professionals in Dispute Resolution: I submit that all of the areas of dispute resolution are manifestations of one central process: negotiation. Negotiation links the various sectors and processes of dispute resolution. If one understands the negotiation process, and understands where he or she fits as the third-party impartial serving that process, then one can serve as a dispute settler in different fields. . . . We are all in the business of helping two or more parties reach a mutually acceptable solution to a perceived problem. . . . And we do this by enabling the parties to negotiate.

Edward Hartfield, *Presidential Address: The Unified Theory of Dispute Resolution*, PROCEEDINGS OF THE 17TH ANNUAL INTERNATIONAL CONFERENCE 1, 4 (Society of Professionals in Dispute Resolution, 1989).

approximately ninety percent will be resolved by negotiation without the need for a full trial on the merits.²¹

Suppose, however, that a particular case is not successfully resolved through negotiation. What is the next more powerful process by which it might be addressed? Although the automatic response is to think "litigation," lawyers and litigants are beginning to recognize alternatives that offer advantages over negotiation and yet stop short of litigation.²² From this perspective, the next step up would be *mediation*. In the public mind, mediation is often confused with arbitration. People assume, for example, that mediators are informal judges who

21. Settlement statistics tend to understate the impact of courts on the settlement process. In an article that created a new metaphor for understanding the relationship between settlement and adjudication, Mnookin and Kornhauser showed the many ways in which divorce settlements are driven by predictions of the outcome if the case went to trial. Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L. J. 950 (1979). Empirical research shows that in approximately one-third of the cases that settle, settlement comes *after* a definitive ruling of some type by the court (typically on pretrial motions). MARC GALANTER, *JUDGES AND THE QUALITY OF SETTLEMENT 3* (College Park, MD: Center for Philosophy and Public Policy, University of Maryland, 1989). On the interplay between settlement negotiations and courts, see KRITZER, *supra* note 20, at 5-29.

The interdependence between pretrial practice and negotiated settlements has led to the development of excellent course materials specifically addressing this area of law practice. See THOMAS A. MAUET, *MATERIALS IN PRETRIAL LITIGATION* (1992); THOMAS A. MAUET, *PRETRIAL* (1995).

Negotiation with a view to settlement is not limited to cases awaiting trial. It is not uncommon for lawyers to conduct settlement negotiations for cases that have gone to a trial verdict and are now up on appeal. Some courts of appeal have established offices to promote such settlements. See, e.g., Sheila Prell Sonenshine, *Real Lawyers Settle: A Successful Post-Trial Settlement Program in the California Court of Appeal*, 26 LOY. L.A. L. REV. 1001 (1993).

22. The three basic alternatives to court trial are negotiation, mediation, and arbitration, with a rich interspersing of so-called *mixed* or *hybrid* procedures. Mixed or hybrid processes are those which combine elements of two or more of the basic processes of negotiation, mediation, arbitration, and litigation. Their varieties include summary jury trial, the mini-trial, med-arb, early neutral evaluation, use of special masters, etc. There are several excellent text and casebooks covering various combinations of these processes. STEPHEN B. GOLDBERG ET AL., *DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES* (1992); LEO KANOWITZ, *CASES AND MATERIALS ON ALTERNATIVE DISPUTE RESOLUTION* (1986); JOHN S. MURRAY ET AL., *PROCESSES OF DISPUTE RESOLUTION: THE ROLE OF LAWYERS* (1989); LEONARD L. RISKIN & JAMES E. WESTBROOK, *DISPUTE RESOLUTION AND LAWYERS* (1987).

The creative vitality in alternative dispute resolution is captured in the slogan "Don't Pick a Fight, Pick a Solution." American Arbitration Association Advertisement, in THE NAT'L L. J., Oct. 26, 1987, at 4. The concept of "fitting the forum to the fuss" is carried to its logical conclusion in WILLIAM L. URY ET AL., *GETTING DISPUTES RESOLVED: DESIGNING SYSTEMS TO CUT THE COSTS OF CONFLICT* (1988).

For an excellent summary of how to help your clients choose among the various dispute resolution processes, see Frank E.A. Sander & Stephen B. Goldberg, *Making the Right Choice*, 79 A.B.A. J., Nov., 1993, at 66, emphasizing the importance of weighing the clients' dispute resolution goals, including such factors as minimizing costs, obtaining a speedy resolution, preserving privacy, maintaining or improving their relationship with the other side, vindicating their own positions, obtaining a neutral opinion on the merits of the dispute, obtaining an outcome that can serve as a precedent in other cases, and maximizing or minimizing the recovery.

will hear the arguments of both sides and render a decision in the matter. This is mistaken. Mediation is best understood as "assisted negotiation."²³ A mediator is a facilitator, a neutral third person who helps the parties move, step by step, through a process intended to help them find and agree upon a mutually acceptable resolution. From this description, it is also easy to see why lawyers sometimes resist the idea of mediation. Since most lawyers are experienced negotiators, they may feel they do not really *need* a neutral facilitator to assist them in the negotiation process. But this misses the point. The purpose of mediation is not to help the *lawyers* move toward agreement, but rather to help the *parties* do so.²⁴ For reasons I will discuss later,²⁵ the parties may need the assistance of a *neutral* third party to help them with the risky process of moving toward agreement and reconciliation. The lawyers, being adversaries, cannot render *neutral* intercession between the disputants, so it takes nothing away from lawyers to say the parties may also need the assistance of a mediator.²⁶

To underscore this point, recall that most settlement negotiations are carried out by lawyers on behalf of their clients. With relatively few exceptions (principally divorce, but some transactions as well), the clients are not present during the negotiations.²⁷ Rather, the lawyers negotiate on behalf of their clients, then report back what happened. How strange this exclusion of clients from negotiating sessions would seem in more traditional cultures where the essence of the dispute resolution process is bringing the parties together in an appropriate arena and helping them work towards a solution.²⁸ We see, then, that the

23. I first heard this term used by Professor Frank Sander. For a good description of the functions of a mediator, see GOLDBERG ET AL., *supra* note 22, at 103.

24. Most lawyers have not received formal training in the theory and practice of mediation, often because it was not available when they were in law school, and are understandably concerned with filling in the gap. A good place to begin is with Leonard Riskin, *Mediation and Lawyers*, 43 OHIO STATE L. J. 29 (1982). A good overview is KIMBERLEE K. KOVACH, *MEDIATION: PRINCIPLES AND PRACTICE* (1994). The most complete treatise on mediation for practicing lawyers, which also includes extensive material about how to counsel clients about mediation and represent them in the mediation process is NANCY H. ROGERS & CRAIG A. MCEWEN, *MEDIATION: LAW, POLICY, PRACTICE* (1989). See also ERIC GALTON, *REPRESENTING CLIENTS IN MEDIATION* (1994). The transformative potential of mediation is taught most clearly by ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION* 12, 99-112 (1995).

25. See *infra* note 149 and accompanying text.

26. Bush has articulated the mediators role in terms of empowerment and recognition. The richness of his concept of recognition is particularly apt here. Recognition comes through the mediator's capacity "to reorient the parties to each other . . . by helping them to achieve a new and shared perception of their relationship, a perception that will redirect their attitudes and dispositions toward one another." Robert A. Baruch Bush, *Efficiency and Protection, or Empowerment and Recognition?: The Mediator's Role and Ethical Standards in Mediation*, 41 FLA. L. REV. 253, 274 (1989). However, I believe attorneys do have the capacity to help their clients achieve such a recognition, although it is more likely to take place when the opposing party is not present in the room.

27. For a critique of this practice, see *infra* note 71.

28. See, e.g., NORBERT ROULAND, *LEGAL ANTHROPOLOGY* (Philippe G. Planel trans., 1994); Gulliver, *supra* note 18, at 122-26; VICTOR TURNER, *THE RITUAL PROCESS: STRUCTURE AND ANTI-STRUCTURE, SYMBOL, MYTH, AND RITUAL* SERIES 10 (1969).

purpose of mediation is not to help the lawyers communicate, but to bring the clients together under the supervision of a neutral third person who is experienced in helping people move toward resolution of their conflicts. Mediators, being neutral and disinterested in the outcome, are able to help the parties in ways their own lawyers may not be able to.

Suppose, however, that mediation also fails to produce a mutually acceptable agreement. What next? In the dispute resolution hierarchy, *arbitration* would be the next step up. In moving from mediation to arbitration, the parties cross a major divide: they shift from processes in which they retain responsibility for making their own decision, and now submit themselves to processes that are by nature adjudicatory. In arbitration, as in trial, lawyers²⁹ present the evidence and make arguments to a person or panel that is empowered to render a binding decision on the case.³⁰ It typically produces a clear winner and a clear loser. In some cases, however, arbitration offers a number of significant advantages in comparison to trial. Arbitration proceedings are private, readily available, less formal, less subject to appellate review, and often less costly.³¹ The parties have the opportunity to select arbitrators who are experts in the subject-matter, and even to obtain a panel of arbitrators which combines experts from several fields.³²

If arbitration is not suitable for the case, and if none of the various "mixed" or hybrid processes are likely to be fruitful, the next more powerful process is a

29. We are assuming, for purposes of this article, cases in which the parties have elected to be represented by counsel. But arbitration does not require the involvement of lawyers. In small disputes, it is not uncommon for parties to do without lawyers and represent themselves in the arbitration.

30. There are at least two significant exceptions to the rule that arbitral decisions are binding upon the parties. One involves jurisdictions where arbitration is mandatory, meaning the parties in specified kinds of cases are required to submit their dispute to arbitration as a precondition to obtaining a court or jury trial. If such arbitral awards were binding, it would effectively deprive the parties of access to the courts. In these jurisdictions, then, the decision of the arbitrator is *not* binding on the parties. They may accept it, or they may reject it and proceed to trial. See BARBARA S. MEIERHOEFER, COURT-ANNEXED ARBITRATION IN TEN DISTRICT COURTS 13 (1990).

The second exception applies even to binding arbitration awards and also to court decisions. Even after a decision has been rendered on the merits of the case, the parties may mutually agree *not* to be bound by the decision, and may attempt to negotiate terms that are more satisfactory to them than the decision that was handed down. This happens often enough, and with sufficient judicial approval, that some appellate courts have sought to cut down on their caseload by establishing offices that encourage the post-trial-verdict settlement of disputes. See A. David Benjamin & Eugene J. Morris, *The Appellate Settlement Conference: A Procedure Whose Time Has Come*, 62 ABA J. 1433 (1976).

Howard Raiffa has extended the idea of post-trial settlements backward in time to suggest the benefits to both sides of trying what he calls a post-settlement settlement. See Howard Raiffa, *Post-Settlement Settlements*, 1 NEGOTIATION J. 9 (1985). For a current evaluation of this approach, see Robert W. Mendenhall, *Post-Settlement Settlements: Agreeing to Make Resolutions Efficient* at page ___ of this issue.

31. See GOLDBERG ET AL., *supra* note 22, at 199; John S. Murray et al., *supra* note 22, at 387; KANOWITZ, *supra* note 22, at 304; RISKIN & WESTBROOK, *supra* note 22, at 250.

32. For example, in a dispute involving a large construction project, the parties might agree to a panel with three members: perhaps a lawyer with expertise in construction law, an architect with experience in this type of construction, and an accountant with experience in the complex financial arrangements that might be involved.

court trial. The right of access to the trial courts is a very substantial benefit both to individuals and to society at large.³³ One of the crowning achievements of any government is provision of a court system that can serve as the final arbiter in cases of serious conflict. The overall quality and effectiveness of our courts is something we undoubtedly take too much for granted.

Suppose the trial process also is not sufficient.³⁴ In this event, the parties really do not have anything left except self-help, which carries with it a potential for violence; its ultimate expression is *murder*.³⁵ It is an oversimplification to

33. See STEPHEN LANDSMAN, READINGS ON ADVERSARIAL JUSTICE: THE AMERICAN APPROACH TO ADJUDICATION (1988) and Stephan Landsman, *The Decline of the Adversary System: How the Rhetoric of Swift and Certain Justice has Affected Adjudication in American Courts*, 29 *BUFF. L. REV.* 487-530 (1980).

34. By *trial process* I mean not only trial but also appeal.

35. The role of law and the litigation process in reducing violent behavior is detailed by DAVID COHEN, LAW, VIOLENCE, AND COMMUNITY IN CLASSICAL ATHENS (1995). The anthropological literature on the historical propensity for violence in response to conflict is surveyed in NORBERT ROULAND, *supra* note 27, at 255-62. See generally COLIN WILSON, A CRIMINAL HISTORY OF MANKIND (1984).

Over the past thirty years, our society has slowly come to realize that some forms of violence, such as domestic violence, occur on a far greater scale, and at far greater costs to individuals and society, than had previously been imaginable. Family violence is typically a product of interpersonal conflicts within the family. It is ironic that during the same period that interest groups and social service agencies have sought to make us aware of the magnitude of the problem and have lobbied for more effective responses to it, conflict theorists have been inclined to ignore the connection between conflict and violence, whether within the family or not. See, e.g., JEFFREY Z. RUBIN ET AL., SOCIAL CONFLICT: ESCALATION, STALEMATE, AND SETTLEMENT 5 (1994). A notable exception to this pattern is found in the literature on divorce mediation, a setting in which physical abuse is so frequent it cannot reasonably be ignored. See, e.g., Ellis Desmond & Noreen Stuckless, *Preseparation Abuse, Marital Conflict Mediation, and Postseparation Abuse*, 9 *MEDIATION Q.* 205-25 (1992). Divorce mediators and theorists are strongly divided about the appropriateness of mediation when one of the parties (the female, in almost all cases) has been, or is likely to be, abused by the other. For the most spirited argument against mediation in situations involving spousal abuse, see Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 *YALE L. J.* 1545 (1991). A very capable response is given by Joshua D. Rosenberg, *In Defense of Mediation*, 33 *ARIZ. L. REV.* 467-507 (1991).

For a review of the literature on domestic violence, see Dean M. Busby, *Violence in the Family*, in *FAMILY RESEARCH: A 60-YEAR REVIEW, 1930-1990* 335 (1991). Although most violence is a product of interpersonal conflicts between the individuals involved, it would be naïve to assume it all is. For example, we know that in some instances, anger is displaced. The classic example is the husband who comes home angry and vents the anger on his spouse or other innocent family members. See *infra* note 41 and accompanying text.

Law enforcement agencies, courts, and legislatures have been prodded to seek more effective ways to deal with domestic violence. See Sarah Fenstermaker Berk & Donileen R. Loseke, "Handling" Family Violence: Situational Determinants of Police Arrest in Domestic Disturbances, 15 *LAW & SOC'Y REV.* 317-46 (1980-81); Patrick A. Langan & Christopher A. Innes, *Preventing Domestic Violence Against Women* (United States Department of Justice, Bureau of Justice Statistics, 1986); *Developments in the Law -- Legal Responses to Domestic Violence*, 106 *HARV. L. REV.* 1498, 1499-1620 (1993). The relationship between current divorce law and violence is considered in Lynn D. Wardle, *Divorce Violence and the No-Fault Divorce Culture*, 1994 *UTAH L. REV.* 741 (1994). An excellent sociological examination of violence in everyday life is STATES OF RAGE: EMOTIONAL ERUPTION, VIOLENCE, AND SOCIAL CHANGE (Renée R. Curry & Terry L. Allison eds., 1996). For a

suggest that disputants take the long way around, that is, that they first try negotiation, then mediation, arbitration, and trial, and then, if they are still dissatisfied, they resort to self-help.³⁶ That is *not* how it usually happens. It would be more correct to say that when a conflict arises, aggrieved persons who are determined to go forward with the matter choose between two options: one is to go *public* by seeking the help of a neutral third party, which for our purposes means retaining a lawyer. The other is to use self-help, with its accompanying potential for violence.³⁷ The close relationship between conflict and violence is so obvious that one wonders why so little is said about it in the literature on legal negotiation.³⁸

D. Dealing with Conflict: Self-Help vs. Getting Help

Sociologist Vilhelm Aubert defines conflict as "a state existing between two (or more) individuals characterized by some overt signs of antagonism."³⁹ Too

study of the human propensity toward group violence, see ANTHONY STEVENS, *THE ROOTS OF WAR: A JUNGIAN PERSPECTIVE* (1989).

Harms that human beings inflict upon each other are not limited to physical injuries, but include, for example, psychological damage. See, e.g., WILLIAM A. BARTON, *RECOVERING FOR PSYCHOLOGICAL INJURIES* (2d ed. 1991).

36. If a disputant *does* resort to violence after initiating legal process, however, it is most likely to be in domestic relations cases. See, e.g., Henry J. Reske, *Domestic Retaliations: Escalating Violence in the Family Courts*, 79 A.B.A. J. 48-49 (July 1993) (giving examples of the deadly violence that has actually occurred in courtrooms, to say nothing of what may occur outside the courtroom, when the aggrieved party is much more free to act).

37. In her study of about 200 disputes in an urban housing project, Merry found that:

Disputes in all categories are appealed to third parties, but none of these third parties is very effective in providing satisfactory resolution. Violence seems to be effective and is thus frequently employed. The most frequent mode of "settlement" is avoidance. Of the cases I observed, 44 percent were settled in this manner. Six percent were settled by court action [without the assistance of lawyers] and six percent by violence. Some form of nonsettlement, and an enduring state of conflict in which one party temporarily or permanently refrained from pressing its legitimate claims, occurred in 44 percent of the cases.

Merry, *supra* note 7, at 907.

It is unclear, of course, the extent to which Merry's findings are representative of conflicts in other settings, but they do help illustrate several important points: conflicts are a burden on individuals, their family and friends, and upon society; the methods or strategies most people resort to do not lead to satisfactory resolution of the underlying problems, and it would be worthwhile if our efforts could lead to processes that would not only reduce the costs of conflicts but perhaps even lead to use of methods and insights that would permit us to find meaning and personal growth in the process of dealing with our conflicts.

38. Some theorists of social conflict are more realistic and forthright about its destructive potential: "Social conflict may be defined as a struggle over values or claims to status, power, and scarce resources, in which the aims of the conflicting parties are not only to gain the desired values but also to neutralize, injure, or eliminate their rivals." Lewis A. Coser, *Conflict: Social Aspects*, in *INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL SCIENCES* 220, 232 (1968).

39. Vilhelm Aubert, *Competition and Dissensus: Two Types of Conflict and of Conflict Resolution*, 7 *CONFLICT RESOL.* 26 (1963).

often, this antagonism spills over into overt aggression, with the potential to escalate quickly from verbal to physical violence. The aggression may be initiated by the victimizer, or it may be a response by the victim - as Walster and her colleagues make clear, "victims are not hesitant to 'get even' with those who treat them unjustly by retaliating against them."⁴⁰ The fact is that violence is a persistent byproduct of conflict. Consider the worst case, murder. Murders are not random acts of violence committed by strangers, as we might imagine. Nearly half of all murders (forty-seven percent) are committed by family members or acquaintances of the victim; strangers account for only fourteen percent of murders. In the remaining cases (thirty-nine percent), the murderer is unknown, and thus might be family member, friend, or stranger.⁴¹ Murder not only terminates the life of its victims, it causes massive economic, social, and psychological dislocations to family members, friends, and employers of the victims, and also to society at large. The task of bringing murderers to justice makes heavy demands on law enforcement personnel, the court system, and the prison system. Furthermore, the families, friends, and employers of convicted murderers suffer fallouts from the crime similar to those of the victims. Murder and other forms of physical violence exact an excessively high cost on society. Not only murder, but suicide and many other forms of self-destructive behaviors also need to be factored into the equation of conflict-related violence.⁴²

A further dimension of this problem is displaced violence, that is, violence directed against innocent victims rather than the original object of the anger. In his study of violence, Girard notes that "[w]hen unappeased, violence seeks and

40. ELAINE WALSTER ET AL., *EQUITY: THEORY AND RESEARCH* 45 (1978).

41. These statistics were reported by the director of violence research at the Harvard Injury Control Center, in Deborah Prothrow-Stith, *Stop Violence Before it Begins*, USA TODAY, Feb. 24, 1994 at 11A (citing FBI Uniform Crime Reports, Bureau of Justice Statistics). Identical statistics are reported by Aric Press, *A Crime as American as a Colt .45*, NEWSWEEK, Aug. 15, 1994 at 22 (citing 1992 data compiled by James Fox & Glenn Pierce, National Crime Analysis Program, Northeastern University).

These are impressive statistics, but they do not give us any sense of what the problem of violence feels like to those involved, and so it is easy to remain wholly detached from the realities. Anthropologist Sally Engle Merry gives us the flavor of violence:

A second common mode of managing disputes is actual or threatened violence. The injured party gathers friends and attacks the offender. This option demands skill in street fighting and/or a pool of readily mobilizable allies who can fight.

Merry, *supra* note 7, at 900-01.

42. With respect to suicide and other self-destructive behaviors, see KARL MENNINGER, *MAN AGAINST HIMSELF* (1939). Menninger begins his study by reminding us of the pervasiveness of conflict in our lives: ". . . we are faced everywhere with the evidences of conflict" and concluding that the "destructiveness of mankind appears to include a large amount of self-destructiveness." *Id.* at 3, 71. See especially his section on *motives* for suicidal acts. *Id.* at 16-73.

Suicide is not the only form of self-help that puts one's own person or property at risk rather than that of the party on the other side. The person might chain herself to a tree to prevent loggers from cutting it down. Strategies of this nature include forms of civil disobedience where individuals publicly put themselves at risk by refusing to obey laws they consider unjust, as exemplified by such leaders as Gandhi and Martin Luther King.

always finds a surrogate victim. The creature that excited its fury is abruptly replaced by another, chosen only because it is vulnerable and close at hand."⁴³ In this way, spouses, friends, and children find themselves secondary victims of conflicts in which they had no part.

The threat of violence is not limited to people in their individual capacities. The trend today is toward violence in the workplace as well. Too often, when violence erupts in the workplace, there is not just one victim, but many. One of every six violent crimes occurs in the workplace. A telling example of this type of violence occurred in a California law firm:

Eight people were killed and six wounded when a former client of Pettit & Martin went on a 15-minute shooting spree in the law firm's high-rise offices. Armed with three semi-automatic pistols and hundreds of rounds of ammunition, the man killed himself after police trapped him on a staircase.⁴⁴

43. RENE GIRARD, *VIOLENCE AND THE SACRED* 2 (1977).

44. Elaine McArdle, *Fear of Violence is Growing Among Attorneys*, LAW WKLY, USA, May 9, 1994, at B3. In a 1993 article, NEWSWEEK reported that "[murder is] the third leading cause of occupational death." Julie Solomon & Patricia King, *Waging War in the Workplace*, NEWSWEEK, July 19, 1993, at 30. Omitting the more extreme incidents of this kind, here are a few typical examples: THE DAILY HERALD, Apr. 26, 1995 at A3 ("A receptionist who received a bad evaluation and knew he would be fired picked up his last paycheck, then fatally shot two co-workers. . . ."); THE DAILY HERALD, Apr. 29, 1995, at A4 ("A gunman possibly distraught over marital problems opened fire at a supermarket Friday and killed three people, including his wife and a sheriff's sergeant. . . . One person was wounded."); THE DESERET NEWS, Apr. 21-22, 1993 at A3 ("A disgruntled former Universal City Studios driver fired 30 rounds from a rifle into the company's corporate headquarters, wounding eight people in a barrage of bullets and flying glass before surrendering."); Elaine McArdle, *Fear of Violence is Growing Among Attorneys*, LAW WKLY, USA, May 9, 1994, at B3. The NEWSWEEK article also reports that workplace homicides are just "the tip of the iceberg," estimating there are at least 30,000 non-death producing acts of workplace violence per year. NEWSWEEK, July 19, 1993, at 31.

One thesis of this article is that clients who submit the matter to lawyers are far less likely to use self-help. We will examine the characteristics of the lawyer-client relationship that contribute to this reduced propensity to violence and acting out. See *infra* note 70 and accompanying text.

Lawyers need to be aware that clients will sometimes become angry, hostile, and explosive. A major textbook on legal interviewing and counseling reminds us that "[s]ometimes clients' inner pressures escalate to the point that clients explode into fits of anger, hurt, or hostility" and offers suggestions for dealing with these situations. DAVID A. BINDER ET AL., *LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH* 248-49 (1991). See Daniel B. Kennedy, *Deadly Clients*, A.B.A. J. 58 (Jan. 1994); Leslie C. Levin, *Testing the Radical Experiment: A Study of Lawyer Response to Clients Who Intend to Harm Others*, 47 RUTGERS L. REV. 81 (1994) (reporting on an empirical study of the requirement added to the New Jersey Rules of Professional Conduct that was apparently a first instance of a rule "requiring lawyers to disclose client information to prevent a client from committing a criminal, fraudulent, or illegal act that would seriously harm another."). *Id.* at 2 (italics added). See also Desmond Ellis, *Marital Conflict, Mediation and Post-Separation Wife Abuse*, 8 LAW AND INEQ. J. 317, 317-39 (1989), in which Ellis found a lower incidence of post-separation abuse of women who are represented by aggressive attorneys, apparently because aggressive attorneys are keenly aware of the danger and consequently they warn their female clients about the possibility of abuse and teach them ways to avoid it.

The dangers of violence in the workplace are now substantial enough that all workplaces, including law firms, government agencies, businesses, and educational institutions should consider violence prevention training and violence contingency planning.⁴⁵

It has seemed worthwhile to elaborate the connection between conflicts and violence because there is a tendency among legal scholars and practitioners to dissociate physical violence from the kinds of conflicts lawyers routinely handle.⁴⁶ We tend to forget that, historically, a primary function of the legal

45. See CHARLES E. LABIG, PREVENTING VIOLENCE IN THE WORKPLACE (1995); SETH ALLCORN, ANGER IN THE WORKPLACE: UNDERSTANDING THE CAUSES OF AGGRESSION AND VIOLENCE (1994). Members of all helping professions are at risk from attacks by their own clients. Social workers have done better than lawyers in terms of recognizing the problem, talking about it, and developing strategies for coping with it. See, e.g., GLYNIS M. BREAKWELL, PROBLEMS IN PRACTICE: FACING PHYSICAL VIOLENCE (1989) which addresses the problem of violent attacks by clients against practitioners.

46. To the extent lawyers occupy themselves primarily with business and commercial matters, this may be partially justifiable. But it seems far less justifiable for lawyers whose practices deal with a broader range of human interests found in family law, tort law, employment law, workers' compensation law, civil rights work, and, of course, the entire domain of criminal law.

For some reason, scholars and practitioners of conflict resolution prefer to leave physical violence out of the picture. For example, in their excellent book on social conflict, three respected social psychologists dispose of violence with a three-step strategy. They begin by consulting a dictionary, which leads them to acknowledge that *conflict* "originally meant a 'fight, battle, or struggle' – that is, a physical confrontation between parties." But they say the definition of conflict has expanded over time to include not only physical violence but also "sharp disagreement or opposition." They observe *conflict* becoming so loosely defined that it risks losing its meaning entirely, and they offer their solution: "For us, *conflict means perceived divergence of interest, or a belief that the parties' current aspirations cannot be achieved simultaneously.*" RUBIN, *supra* note 35, at 5 (italics in original). With this last step, they drop the prospect of physical confrontation completely out of the picture.

There are at least three objections to their definition of conflict as merely perceived differences of interest. First, they claim this is a more restrictive definition, when in fact it is far more general than "fight, battle, or struggle." Second, they go even further and specifically *exclude* physical violence all together, leaving us with a completely safe and sanitized world of peaceful disputes to work with. *Id.* at 6. Third, they ignore Aubert's crucial distinction between conflicts of interest and conflicts of fundamental values, and thus run the danger of implying that even our fundamental values are nothing more than "interests" that are negotiable. See Aubert, *supra* note 39, at 27. On the other hand, they do acknowledge that parties experience unsettling psychological changes when conflicts escalate, including such feelings as "blame, anger, fear, and perceived threat to Party's (or Other's) image," and, if escalation continues, they may begin to display "hostile and competitive goals, negative attitudes and perceptions, and deindividuation and dehumanization." *Id.* at 83.

This tendency to deny the close connection between conflict and violence has provoked justifiable comment from anthropologists.

For any field ethnographer who has witnessed a conflict between villagers or neighbors – much less for anyone who has ever slogged through a knock-down-drag-out dispute with a spouse – it must seem that [such scholars] have left out the blood and guts of "real" conflict in the "real" world. When you consider what is left out – left at the laboratory's door, in fact – you find that is the very stuff of conflict: differences in power, passionate differences of opinions, arguments over the facts.

Kevin Avruch & Peter W. Black, *Ideas of Human Nature in Contemporary Conflict Resolution Theory*, 6 NEGOTIATION J. 221, 221 (1990).

system has been to prevent violent action by individuals and groups. In his history of English law, Sir William Holdsworth is emphatic on this point:

The first business of law . . . is to suppress self-help. And so we find that the further back we go into the history of law the more frequent and detailed are the prohibitions against asserting one's rights by force.⁴⁷

The counseling professions have long recognized that individuals under extreme stress may reach a state of crisis in which it is difficult, if not impossible, for these individuals to deal competently with their situations.⁴⁸ Psychotherapists have developed a body of practices known as "crisis management" for dealing with the immediate effects of crisis until the individual is able to return to pre-crisis levels of functioning. Like other members of the helping professions, lawyers often find themselves dealing with people who are in a state of crisis. Although the legal profession does not have specially identifiable procedures for crisis management such as those developed by therapists, the next section of this paper

The neglect of violence is not total. There is occasional discussion of the potential for destructive behavior in the dispute resolution literature on third-party intervention. See, e.g., R. J. Fisher & L. Keashly, *A Contingency Approach to Third-Party Intervention*, THE SOCIAL PSYCHOLOGY OF INTERGROUP AND INTERNATIONAL CONFLICT RESOLUTION 234-38 (R. J. Fisher ed., 1990), cited in BARBARA BENEDICT BUNKER ET AL., CONFLICT, COOPERATION, AND JUSTICE: ESSAYS INSPIRED BY THE WORK OF MORTON DEUTSCH 82 (1995).

One arena in which the potential for violence is more openly dealt with is primary and secondary education. As Ellen Raider has pointed out, two kinds of training are done in schools. One has to do with the traditional consensus-oriented skills of negotiation and mediation. The other pertains to a "violence prevention or crisis management approach," which teaches students "to identify and disengage from potentially life-threatening situations and to deal productively with anger," and instructs teachers "how to intervene safely and humanely during a physical fight between students." Ellen Raider, *Conflict Resolution Training in Schools: Translating Theory into Applied Skills*, in CONFLICT, COOPERATION, AND JUSTICE 93, 96 (Barbara Benedict Bunker et al. eds., 1995).

47. 3 SIR WILLIAM SEARLE HOLDSWORTH, A HISTORY OF ENGLISH LAW 278 (5th ed. 1942). Pollock and Maitland drew similar conclusions:

Had we to write legal history out of our own head, we might plausibly suppose that in the beginning law expects men to help themselves when they have been wronged, and that by slow degrees it substitutes a litigatory procedure for the rude justice of revenge. There would be substantial truth in this theory. For a long time law was very weak, and as a matter of fact it could not prevent self-help of the most violent kind.

2 SIR FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I 574 (2d ed. 1968).

48. James L. Greenstone & Sharon C. Leviton, *Crisis Management for Mediators*, 17 MEDIATION Q. 39, 40-41 (1987). Greenstone and Leviton are experienced mediators and practicing psychotherapists. They list many examples of events that may give rise to a crisis, including "accidents in the home, automobile accidents with or without injuries, being arrested, appearing in court, or anticipating a [hearing], changes in job situation or income, . . . death of a significant person, divorce or separation, and actual loss or impending loss of something significant in one's life." *Id.* at 45.

will argue that a well-formed lawyer-client relationship does in fact provide a safe environment that protects clients from the dangers of self-help outlined above.⁴⁹

E. The Lawyer-Client Relationship

A major premise of this paper is that the lawyer-client relationship does help to stabilize clients while they are in crisis and to reduce the likelihood they will "act out" in ways that are destructive to themselves or others.⁵⁰ Recall that clients who are determined to pursue a particular matter to a conclusion typically choose between two courses of action. One is self-help, with its attendant risks. The other is to submit the matter (and one's own self) to a lawyer. Either way, the client will experience the unpleasant effects of crisis. But in the first case, persons are *on their own*, in the second they are *in a relationship with a member of the helping professions*. What, then, is the significance of being in a relationship with a lawyer (or other member of the helping professions)? The thesis of this article is that the lawyer-client relationship offers crucial support to people in conflict that goes far beyond the legal protection lawyers provide, especially when lawyers are attuned to the nature of conflict and the processes by which it can be resolved.

To elaborate on the healing role of lawyers, it is helpful to invoke the work of Lakoff and Johnson on the centrality of metaphors in human perception and understanding.⁵¹ A metaphor is simply a comparison between two things; it permits us to understand one thing in terms of its resemblance to another.⁵² Lakoff and Johnson show that human beings understand and interpret the world largely by means of metaphors, despite the fact that we are strangely unaware of their importance and power. To illustrate how metaphors shape meaning, they begin with the metaphor that *argument is war* and list typical expressions that show how strongly this comparison is reflected in our speech. For example, in argument it is said that claims are *defensible or indefensible*; opponents use *strategies and tactics*; they *attack* and we *defend*; one's points may be *right on target* or *may miss the target*; contentions may be *shot down* or *wiped out*; there

49. For development of the concept of crisis management for attorneys, see Brian Easton, *Crisis Intervention For An Attorney*, in this issue.

50. "Acting out" is an expression "of *unconscious* emotional conflicts or feelings in actions rather than words. The person is not consciously aware of the meaning of such acts. . . . Acting out may be harmful or, in controlled situations, therapeutic" (e.g., children's play therapy). AMERICAN PSYCHIATRIC GLOSSARY 3 (Jane E. Edgerton ed., 7th ed. 1994).

51. GEORGE LAKOFF & MARK JOHNSON, METAPHORS WE LIVE BY (1980).

52. In literature, "metaphor" is defined as:

An implied analogy imaginatively identifying one object with another and ascribing to the first object one or more of the qualities of the second or investing the first with emotional or imaginative qualities associated with the second. It is one of the TROPES; that is, one of the principal devices by which poetic "turns" on the meaning of words are achieved.

C. HUGH HOLMAN & WILLIAM HARMON, A HANDBOOK TO LITERATURE 298 (5th ed. 1986).

is usually a *winner* and a *loser*.⁵³ With these kind of comparisons in mind, Lakoff and Johnson invite us to

[i]magine a culture where an argument is viewed as a dance, the participants are seen as performers, and the goal is to perform in a balanced and aesthetically pleasing way. In such a culture, people would view arguments differently, experience them differently, carry them out differently, and talk about them differently.⁵⁴

In the next several chapters, Lakoff and Johnson offer more examples, each one adding to the reader's realization that metaphors really do guide our thinking in powerful ways we are typically unaware of.⁵⁵ They also show that we understand some concepts by an interlacing of several metaphors, such as "time is money," "time is a limited resource," and "time is a valuable commodity."⁵⁶

We are now ready to apply the tool of metaphorical analysis briefly to litigation and negotiation. Let us begin with the most obvious metaphor: *litigation is war*. This seems emphatic and final. However, just as Lakoff and Johnson did with metaphors relating to *time*, we can elaborate the meaning of *litigation* by calling to mind other metaphors that emphasize some of the refining characteristics of litigation. For example, *litigation is a game*. Although there are rules for the conduct of war, there is a vast difference between a war and a game. The *game* metaphor can be refined even further. *Litigation is a game played according to strict rules*. The rules have recently been rendered somewhat less warlike; before the 1993 amendments, the Federal Rules of Civil Procedure regarding discovery effectively defined litigation as a game in which you are only required to divulge information the other side specifically asks for.⁵⁷ By virtue of the amendments, litigation became a game in which each party is required to promptly volunteer to the other side virtually all information relevant to the case.⁵⁸ These metaphors help us see that litigation does *not* have to be, and is not intended by the courts to be, all-out war. Rather, *litigation is ritual combat conducted under well-established, judicially-enforceable rules*.⁵⁹

53. LAKOFF & JOHNSON, *supra* note 51, at 4.

54. *Id.* at 5.

55. *Id.* at 7-24.

56. *Id.* at 7-9 (specific examples are very convincing).

57. FED. R. CIV. P. 26.

58. *Id.*

59. Trial and negotiation are both ritual processes, albeit that trial is far more formal, expensive, and awe-inspiring to the parties. The necessity for such rituals is alluded to by Terence Turner: "Ritual and ceremonial behaviors develop in response to situations in which some transition, ambiguity, conflict, or uncontrollable element threatens a given structure of relations either explicitly or, simply by remaining beyond control, implicitly." Terence S. Turner, *Transformation, Hierarchy and Transcendence: A Reformation of Van Gennep's Model of the Structure of Rites de Passage, in* SECULAR RITUAL 53, 61 (Van Gorcum et al. eds., 1977).

The explanation about the importance of metaphors and the brief exploration of their use in refining our understanding of litigation leads us now to consider a final question. What metaphors are most useful for framing our understanding of negotiation? Rather than attempt an exhaustive catalogue of metaphors, I would like to limit discussion to just a few. The first must be *negotiation is war*. This is the general attitude of negotiators who by innate ability, temperament, or strategic choice adopt a highly competitive or aggressive approach to negotiation.⁶⁰ In an empirical study of attorney negotiating patterns conducted in 1986, approximately one-third of the practicing bar was found to be basically competitive in their approach to negotiation.⁶¹ However, the literature on negotiation has persistently divided itself into essentially two camps: that which adopts a basically competitive viewpoint and that which adopts a basically cooperative viewpoint.⁶² The cooperative viewpoint claims a majority of legal practitioners (sixty-seven percent according to the 1986 study) and probably a larger majority of academics who teach and write about negotiation.⁶³ The metaphor that best captures the cooperative approach for lawyers is *negotiation is problem-solving for mutual gain*.⁶⁴ The classic work in our day is Fisher and

60. For a brief introduction to the literature on cooperative and competitive negotiating patterns, and for an empirical description of the competitive or aggressive mode among lawyers, see GERALD R. WILLIAMS, *LEGAL NEGOTIATION AND SETTLEMENT* 48-52 (1983). See generally Morton Deutsch, *A Theory of Cooperation and Competition*, 2 *HUMAN RELATIONS* 129 (1949) and THOMAS J. BERNARD, *THE CONSENSUS-CONFLICT DEBATE: FORM AND CONTENT IN SOCIAL THEORIES* (1983). The aggressive viewpoint is represented by scholars such as THOMAS C. SCHELLING, *THE STRATEGY OF CONFLICT* (1960); BARGAINING: FORMAL THEORIES OF NEGOTIATION (Oran R. Young ed., 1975) (especially the chapter on manipulative models of negotiation at 303).

61. The 1986 empirical study is reported in Lloyd Burton et al., *Feminist Theory, Professional Ethics, and Gender-Related Distinctions in Attorney Negotiating Styles*, 1991 *J. DISP. RESOL.* 199, 237 (1991).

One could postulate a subcategory of competitive negotiators for whom the metaphor was *negotiation is maximizing the spoils of war*. It is represented by such titles as ROBERT J. RINGER, *WINNING THROUGH INTIMIDATION* (1974) and MICHAEL SCHATZKI, *NEGOTIATION: THE ART OF GETTING WHAT YOU WANT* (1981).

62. WILLIAMS, *supra* note 60, at 47 n.15 (citing variations on this basic dichotomy by numerous scholars, including Lasswell's administrators vs. agitators, Nicolson's shopkeepers vs. warriors, Posner's risk averse vs. risk preferring, Gamsen's co-active communicator vs. actor orientation, and Rubins and Brown's cooperative orientation vs. competitive orientation). Similar bi-polar pairs are recognized in the labor context by RICHARD E. WALTON & ROBERT B. MCKERSIE, *A BEHAVIORAL THEORY OF LABOR NEGOTIATIONS* 6 (1965) (integrative vs. distributive bargaining). See also RAIFFA, *supra* note 20, at 33 (integrative and distributive bargaining in non-labor contexts); LAX & SEBENIUS, *supra* note 20, at 29-35 (value creating vs. value claiming).

For other perspectives on cooperation, see ROBERT AXELROD, *THE EVOLUTION OF COOPERATION* (1984) and ALFIE KOHN, *NO CONTEST: THE CASE AGAINST COMPETITION* (1986).

63. The 1986 study is reported in Burton et al., *supra* note 61, at 237. I have not tried to quantify the numbers of cooperative and competitive negotiation teachers, so I am reporting nothing more than my own impressions on this score.

64. See, e.g., *NEGOTIATION: STRATEGIES FOR MUTUAL GAIN* (Lavinia Hall ed., 1993) (subtitled *The Basic Seminar of the Harvard Program on Negotiation*); Menkel-Meadow, *supra* note 20, at 754-843. On problem solving strategies of five groups of professionals, see DONALD A. SCHÖN, *THE REFLECTIVE PRACTITIONER: HOW PROFESSIONALS THINK IN ACTION* (1983).

Ury's book, *Getting to Yes*.⁶⁵ Two additional metaphors highlight other aspects of the negotiation process: *negotiation is a ritual process* and *negotiation is a healing process* will be developed in later sections of this article.

Lakoff and Johnson identified a special category they call "ontological metaphors" which are more fundamental and essential than others because they are vehicles for understanding the nature of our physical and spiritual existence. Ontological metaphors enable us not only to *understand* our experiences, but also to "refer to them, categorize them, group them, and quantify them – and, by this means, reason about them."⁶⁶ One group of ontological metaphors cluster around the concept of *container* or *vessel*. Related metaphors include the concepts of *boundary* (having an inside and an outside), *territoriality* (being within the limits of the territory or outside the limits), *capacity* (how much or how many is the vessel able to contain), *threshold* (points of entry or exit from the vessel), *permeability* (do you have to use the entrance to get in and out, or can you squeeze in and out through the cracks), *duration* (how long can or must one stay inside the vessel), *internal environment* (what does it feel like in there; is it hostile or nurturing; secular or sacred; pleasant or painful, structured or unstructured, confining or expansive), *privacy* (can people see inside; can you have visitors there; and vice versa), *security* (is it safe or dangerous inside), *prohibitions* (who may enter, when may they enter, what special rules apply inside, etc.), *transformative potential* (is it capable, like ordinary cooking vessels, of transforming the contents by application of the right amount of heat for the right amount of time). A full development of these metaphorical possibilities will have to wait for a later time, but in the meantime there are plentiful resources for interested readers.⁶⁷ For the present, I will attempt to apply these metaphors to

65. ROGER FISHER & WILLIAM URY, *GETTING TO YES* (1981). Fisher and Ury label this *principled negotiation*. Fisher and his colleagues at the Harvard Program on Negotiation (actually a consortium of scholars from five Boston area universities) have been enormously influential across many disciplinary lines on a worldwide basis by virtue of the teaching methods they have developed, the research they have published, their willingness to share their knowledge with all interested parties, and the sheer volume of students and practitioners they have trained over the years.

The famous running debate between James White and Roger Fisher is revealed, then, as a dispute over metaphors. Which metaphor is, or ought to be, the one that guides our understanding: negotiation is war or negotiation is problem-solving for mutual gain. See, e.g., James White, *The Pros and Cons of Getting to Yes*, 34 J. LEGAL ED. 115 (1984) (reviewing ROGER FISHER & WILLIAM URY, *GETTING TO YES* (1981)) and Roger Fisher, *Comment*, 34 J. LEGAL ED. 120 (1984) (response to James White's review).

66. LAKOFF & JOHNSON, *supra* note 51, at 25-32. Like other metaphors, ontological metaphors are "so natural and so pervasive in our thought that they are usually taken as self-evident, direct descriptions of" reality, whether it be mental processes or more general life experiences. *Id.* at 28.

67. My own education in these matters began with an introduction to Jungian psychology through such Works as CALVIN S. HALL & VERNON J. NORDBY, *A PRIMER OF JUNGIAN PSYCHOLOGY* (1973); CARL G. JUNG, *MAN AND HIS SYMBOLS* (1964); M. ESTHER HARDING, *THE I AND THE NOT I: A STUDY IN THE DEVELOPMENT OF CONSCIOUSNESS* (1973); CARL G. JUNG, *MEMORIES, DREAMS, REFLECTIONS* (Aniela Jaffé ed. & Richard & Clara Winston trans., 1962); and EDWARD F. EDINGER, *EGO AND ARCHETYPE* (1973). The specific application of Jungian psychology to the lawyer-client relationship came largely by analogy from the work of Robert L. Moore in such publications as Robert

the lawyer-client relationship, and if that succeeds, to other aspects of our topic as well.

We concluded in an earlier section of this paper that, when clients are in conflict, they are vulnerable to feelings of crisis that make them a potential danger to themselves and to others. Richard Lewis describes the symptoms accompanying such crises in these terms:

Psychosomatic symptoms typical of people in crisis include headaches, loss of appetite, insomnia, fatigue, chest pains, rapid heart rate, and skin rashes. Mental characteristics include inability to concentrate, repetitiousness, forgetting what was just said, and loss of ability to think rationally. Primary social characteristics of people in crisis are extreme feelings of ineptitude and consequent social withdrawal, loss of important significant others, and an experience of losing friends at the time of crisis. People in crisis typically feel lone. Even if other people are trying to help them, those offering help are not perceived as fully understanding the situation, and those in crisis feel that there is no way they can be helped.⁶⁸

L. Moore, *Contemporary Psychotherapy as Ritual Process: An Initial Reconnaissance*, 18 ZYGMON 283-94 (1982); Robert L. Moore et al., *Introduction: Symposium on Ritual in Human Adaptation*, 18 ZYGMON 209, 210 (1983); Robert L. Moore, *Ritual Process, Initiation, and Contemporary Religion*, in JUNG'S CHALLENGE TO CONTEMPORARY RELIGION 147-60 (Murray Stein & Robert L. Moore eds., 1987); Robert L. Moore, *Ritual, Sacred Space, and Healing: The Psychoanalyst as Ritual Elder*, in LIMINALITY AND TRANSITIONAL PHENOMENA 13-32 (Nathan Schwartz-Salant & Murray Stein eds., 1991). As the titles of these works express, Moore's emphasis was on the therapist-client relationship, but in studying these works it quickly became apparent that most of his observations relating to container, vessel, boundaries, sacred space, and so on, applied as much to lawyers, doctors, religious leaders, and dispute resolution professionals in relationship to their clients as it did to therapists. Moore draws heavily on the work of historian of religion Mircea Eliade and anthropologist Victor Turner. Freudian analysts have been very influential in developing the concept of boundaries in the therapeutic relationship. See, e.g., BOUNDARY AND SPACE: AN INTRODUCTION TO THE WORK OF D. W. WINNICOTT (Madeline Davis & David Wallbridge eds., 1987).

68. Richard Lewis, *Crisis Intervention Verbatim by Nira Kfir*, 24 PSYCHOL. PERSP. 160, 162 (1991) (book review). From an anthropological perspective, they are experiencing "liminal space." Victor Turner, *Variations on a Theme of Liminality*, in SECULAR RITUAL 36, 43 (Van Gorp et al. eds., 1977). Turner drew on the pioneering work of van Gennep in his famous study of rites of transformation or rites of passage. ARNOLD VAN GENNEP, THE RITES OF PASSAGE (Monika B. Visedom & Gabrielle L. Caffee trans., 1909), which identifies three stages of transition: separation from one's normal status or situation, time spent at the margins or in "liminal" space, and aggregation or reintroduction back into "normal" time and space, but now as a different person, or a person with new or different status than before the experience. Turner's ability to articulate the elements of ritual process and his competence in differentiating between "normal" and "liminal" states are very pertinent to our investigation of how it feels to be *in conflict* and how people may get back *out* of conflict. VICTOR TURNER, THE RITUAL PROCESS 94-165 (1977). Turner distinguishes between normal and liminal experience in this way:

It is as though there are here two major "models" for human interrelatedness, juxtaposed and alternating. The first is of a society as a structured, differentiated, and often hierarchical system of politico-legal-economic positions with many types of evaluation, separating [people] in terms of "more" or "less." The second, which emerges recognizably

We spoke earlier about the choices they face: either they give vent to this disorienting energy by means of self-help with its attendant risks, or they go public, which for our purposes means seeking the help of a lawyer. In this context, we can see that *the lawyer-client relationship is best understood in terms of the metaphor of a vessel*,⁶⁹ perhaps even a sacred vessel, which has the capacity to contain the potentially dangerous energies activated by the conflict and to channel them in ways that are socially and individually non-destructive.⁷⁰ Although it will be important to describe more specifically the qualities or

in the liminal period, is of society as an unstructured or rudimentarily structured and relatively undifferentiated *comitatus*, community, or even communion of equal individuals who submit together to the general authority of the ritual elders.

Id. at 96. We will return to Turner's work below at note 177. At a minimum, it suggests that for lawyers, as for therapists and other professionals, the movement into liminal space opens the possibility that one important function of the professional-client relationships is "simply to provide a space, a *temenos*, a magic circle, a vessel, in which the transformation inherent in the patient's condition would be allowed to take place." C.G. Jung, *quoted in* Robert H. Hopeke, *On the Threshold of Change: Synchronistic Events and Their Liminal Context in Analysis*, in *LIMINALITY AND TRANSITIONAL PHENOMENA* 115, 117 (1991).

69. My introduction to the metaphor of the lawyer-client relationship as a vessel came from a series of three lectures given in 1984 by Robert L. Moore at the C.G. Jung Institute of Chicago. The lectures, entitled *The Nature of Sacred Space, The Liminaloid and the Liminal*, and *The Vessel of Analysis*, are available on audiotape from the Institute, 1567 Maple Avenue, Evanston, IL 60201. In these lectures, Dr. Moore focuses on the nature of the therapist-patient relationship, and on the structure and other characteristics of this relationship that helps to produce the beneficial effects for the client. The more carefully I listened, the more clear it became that Moore's remarkable insights about the therapist-patient relationship were also true, to a large degree, of the lawyer-client relationship as well. Most importantly, it was apparent that these qualities were not dependent upon the therapist's unique skills, but were more general, and would hold true for any relationship between a member of a learned profession (such as a medical doctor, a member of the clergy, a lawyer, or therapist) and a person seeking help. See Moore, *supra* note 67, at 283; Robert L. Moore, *supra* note 67, at 147-60; Moore, *supra* note 67, at 13-32.

70. Roiphe has summarized the case from the perspective of Freudian analysis. While the present article draws more heavily from the psychology of Jung than Freud, Roiphe's point is valid regardless of which psychological system one prefers. Because of its pertinence, I give the quote in full:

Why does an individual need a lawyer? What use is she to her client? Well, we answer, because the lawyer is an *expert*. She has a superior understanding of a highly technical field. And, of course, this is usually true. But that is not all. *The client needs the lawyer not merely for her legal expertise, but for the management of his aggression.* The lawyer offers not just legal defense, but defense against the fury of the drives, on the one hand, and the fury of the superego, on the other. The lawyer operates for the client as an auxiliary ego function, offering him an expanded area of conflict-free functioning in which to pursue potentially creative and adaptive solutions.

Jean Roiphe, *Aggression, Unconscious Conflict, and the Role of the Lawyer*, 16 *CARDOZO L. REV.* 1205, 1205 (1995) (emphasis added). From an entirely different perspective, that of sociology, Vilhem Aubert affirms the importance of the channeling function. Aubert, *supra* note 39, at 27.

Ellen Kandoian, who is both a law professor and Jungian analyst in training, describes the interconnection of law and psychology in a most helpful way: "Both law and psychology are essentially concerned with conflict: they address the ways in which people handle conflict and the problems which arise when they avoid conflict, and they seek to resolve conflict in ways that will create greater understanding in the future." Ellen Kandoian, *Law From the Perspective of Depth Psychology: A Jungian View*, 24 *U. TOLEDO L. REV.* 515, 533 (1993).

characteristics of the lawyer-client relationship that help to produce these effects (especially those that can be enhanced by the conscious efforts of the lawyer), it is sufficient for the present to emphasize that the efficacy of the vessel does not require lawyers to be therapists, but only to fulfill their proper roles as members of a learned profession. The full implications of these observations become more apparent as we consider them in the context of the negotiation process.

F. Negotiation and the Lawyer-Client Relationship

It is a convention in legal negotiation to speak as if negotiation means Lawyer A against Lawyer B.⁷¹ This habit may stem from the historic practice of lawyers, which has been to negotiate *without their clients present*.⁷² In the mid-1970's, my colleagues and I studied a random sample of 150 cases that were scheduled to go to trial. Most of the cases settled, but some of them went to trial. With respect to the cases that went to trial, we asked responding attorneys why the cases went to trial, or why they did not settle. In fifty-three percent of the cases going to trial, the reason they went to trial was *not* a failure of the two attorneys to work out a framework for agreement. Rather, it was the failure of one lawyer or the other to "bring his or her client along."⁷³ This is an extremely sobering statistic. If the data are representative of cases generally, it appears that, in approximately half of the cases going to trial, the reason they do not settle is not a failure of the lawyers to work out a proposed agreement between themselves, but a refusal by one party or the other to agree to the terms recommended by their

71. With few exceptions, the focus in the literature on legal negotiation has been upon the lawyer-to-lawyer dynamics, my own work included. A welcome exception is ROBERT M. BASTRESS & JOSEPH D. HARBAUGH, *INTERVIEWING, COUNSELING, AND NEGOTIATING: SKILLS FOR EFFECTIVE REPRESENTATION* (1990). For an analysis of the effect of lawyers as negotiating agents, see Ronald J. Gilson & Robert H. Mnookin, *Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation*, 94 *COLUM. L. REV.* 509-66 (1994). See also Jeffrey Z. Rubin & Frank E. A. Sander, *When Should We Use Agents? Direct vs. Representative Negotiation*, 4 *NEGOTIATION J.* 395 (1988) (two experts in dispute resolution address the question from the client's perspective).

72. Many dispute resolution professionals today would counsel against this practice, and would favor involving clients more actively in the process generally and in the negotiations in particular. See Leonard L. Riskin, *The Represented Client in a Settlement Conference: The Lessons of G. Heileman Brewing Co. v. Joseph Oat Corp.*, 69 *WASH. U. L.Q.* 1059, 1097-1103 (1991). In his landmark study of negotiation, however, Eisenberg made the following case for excluding clients:

Since dispute-negotiation usually turns in large part on whether the respondent has violated some norm, a settlement often cannot be achieved unless the respondent accounts for his past actions by explicitly or implicitly admitting that a norm-violation has occurred. The difficulties involved in admitting fault might therefore provide a substantial obstacle to settlement in many cases, if the account had to be rendered by the actor himself. One set of institutions whose purpose or effect is to overcome this obstacle are those involving the concept of *party*, in which the roles of *actor* and *accountant* are split between different persons, so that the negotiator can concede a norm-violation without admitting *his own* fault. The legal profession is an obvious example. . . .

Melvin Aron Eisenberg, *Private Ordering Through Negotiation: Dispute-Settlement and Rulemaking*, 89 *HARV. L. REV.* 637, 660-61 (1976) (footnotes omitted) (emphasis in original).

73. This research is reported in WILLIAMS, *supra* note 60, at 59.

own attorney.⁷⁴ This highlights the problem. The usual emphasis in legal negotiation is upon the process by which *attorneys* reach agreement with one another.⁷⁵ This mindset has distracted negotiation theorists and practitioners from the more important problem, which is to understand and facilitate the process by which the disputing parties themselves move from conflict to agreement. The following section of this article lays a foundation for consideration of this question.

II. NEGOTIATION AS A RITUAL PROCESS

In an earlier portion of this article, we saw that metaphors can give us insight about one thing by comparing it to something else. Examples are *negotiation is war* and *negotiation is problem-solving for mutual gain*.⁷⁶ At this point, I would like to introduce a third metaphor for negotiation that I hope will broaden our understanding of the reason why negotiation is so important and from whence it derives power. The metaphor is that, in many respects, *negotiation is a ritual*

74. This problem can be articulated another way, with the emphasis on the attorneys rather than their clients. We might say it is a failure of one lawyer or the other to adequately communicate with his or her own client, by which I mean a failure to adequately understand the underlying interests and needs of one's own client. Practicing lawyers sometimes refer to this in terms of client control. They might say, for example, that such and such a lawyer "failed to bring his client along" or "failed to get her client hitched up." These phrases make it sound as if lawyers know what is best for their clients and are supposed to talk their clients into accepting their proposed solution. This does not represent the attitude of all lawyers, but to the extent it is true, it suggests that lawyers do not always take the time or have the skills needed for effective interviewing and counseling of their clients. An excellent book for practicing lawyers in this regard is DAVID A. BINDER ET AL., *LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH* (1991). I also have benefitted from THOMAS L. SHAFFER & JAMES R. ELKINS, *LEGAL INTERVIEWING AND COUNSELING IN A NUTSHELL* (1987). See also ROBERT M. BASTRESS & JOSEPH D. HARBAUGH, *INTERVIEWING, COUNSELING, AND NEGOTIATING SKILLS FOR EFFECTIVE REPRESENTATION* (1990); ANDREW S. WATSON, *THE LAWYER IN THE INTERVIEWING AND COUNSELING PROCESS* (1976).

One of the conveniences of legal training and law practice has been its emphasis on remaining emotionally detached from our clients and focusing our attention almost exclusively on the legally relevant issues, facts, rules, options, and possible outcomes. In their textbook on lawyers as counselors, Binder, Bergman and Price propose a more client-centered approach that addresses lawyer-client communication as the most helpful way. As lawyers develop their insights and abilities as legal counselors, they will find the negotiation process is more meaningful, a higher percentage of cases settle, and clients are more satisfied with the process and the outcome.

75. This statistic helps us to see that, for lawyers, negotiating with the lawyer or non-lawyer on the other side is only half the task. The other half is to negotiate with – that is, to adequately communicate with – their own clients. Unless lawyers are willing to invest at least as much time and effort in interviewing and counseling their own clients, they will fail at their essential purpose. If it is true, as the data suggests, that over half of all cases going to trial are forced into trial by poor lawyer-client communication, it follows that clients, lawyers, and the courts all stand to gain immeasurably if lawyers would become better educated and trained in the theory and practice of counseling their clients.

76. See *supra* notes 51, 66 and accompanying text.

*process.*⁷⁷ Since this metaphor may be unfamiliar to some readers, I would like to begin the discussion by suggesting three aspects of ritual that come most readily to mind.

A. Negotiation is a Stylized Form of Interaction

The first aspect is illustrated by two examples. One comes from a short story told by a Chinese-American woman who is making her first visit to mainland China to visit relatives there. She is escorted by her sister, Kwan, who was born

77. As members of a modern secular society, we are inclined to be uninterested in, if not hostile to, the idea that ritual process has importance for our lives today. Indeed, "the history of secularization in Western culture can be read as a history of the decline and devaluing of ritual process." Moore et al., *supra* note 67, at 209. In view of this general hostility, it is remarkable that we are witnessing a renewed interest in ritual by scholars and practitioners in many disciplines.

The easy dismissal of human ritual behaviors as regressive or pathological, which has been so characteristic of the modern mind, has of late come into question. Evidence from sources varying from neurophysiology to cultural anthropology, from socio-biology to depth psychology, indicates that our views of the nature and role of ritual in human culture and personality are undergoing fundamental reassessment.

Id. at 210. I hope to show, in the course of this article, that whether we are aware of it or not, rituals play a central role in contemporary American society, both inside and outside the legal system, and that, as lawyers and other dispute resolution professionals become more conscious of how and why rituals are so important, and learn to pay more attention to them in our practice, we will find an increasing ability to help people in conflict and increasing satisfaction in our work. As Moore, Burhoe, and Hefner have said, "ritual is the means for dealing with, responding to, and resolving problems that the human organism finds otherwise intractable." *Id.* at 218.

For an excellent introduction to the scholarly literature on ritual across several disciplines, see WILLIAM G. DOTY, *MYTHOGRAPHY: THE STUDY OF MYTHS AND RITUALS* (1986) (anthropology, psychology, ethnology, linguistics, biogenetics, and literature). See also RONALD L. GRIMES, *BEGINNINGS IN RITUAL STUDIES* (1982). Interest in ritual processes in pre-modern cultures was fostered by the work of such pioneers as ARNOLD VAN GENNEP, *THE RITES OF PASSAGE* (Monika B. Visedom & Gabrielle L. Caffee eds., 1960) (drawing attention to the importance of initiatory ritual processes in conjunction with transitions in being or status such as birth, adolescence, marriage, and death), MIRCEA ELIADE, *THE MYTH OF THE ETERNAL RETURN: OR, COSMOS AND HISTORY* (Willard R. Trask trans., 1974); *RITES AND SYMBOLS OF INITIATION: THE MYSTERIES OF BIRTH AND REBIRTH* (Willard R. Trask trans., 1975); VICTOR TURNER, *THE RITUAL PROCESS: STRUCTURE AND ANTI-STRUCTURE* 94-203 (1977) (elaborating on the functions of ritual processes in terms of liminality, *communitas*, *structure*, and *anti-structure*); Victor Turner, *Body, Brain, and Culture*, 18 *ZYGON* 221 (1983) (exploring the role of genetics and culture in the transmission of human ritual practices).

For a visual survey of the importance of life-cycle rituals, see *THE CIRCLE OF LIFE: RITUALS FROM THE HUMAN FAMILY ALBUM* (David Cohen ed., 1991) (commentary by Arthur Davidson) (life cycle divided into sections such as Birth and Childhood, Initiation and Adolescence, Marriage and Adulthood, Death and Remembrance). Victor Turner refers to these kinds of events as "life crisis rites and calendrical rites" and enumerates examples of each, including those attuned to birth, to maturation from youth to adult, and to movement from single to married, from non-parent to parent, from adult to middle age, from parent to grandparent, from middle age to old age, etc. Turner, *supra* note 77, at 168-69. The best exploration of the theory and application of initiatory processes at significant transition points in contemporary secular life is *BETWIXT AND BETWEEN: PATTERNS OF MASCULINE AND FEMININE INITIATION* (L.C. Mahdi et al. eds., 1987). A more general introduction to current interest in ritual process is TOM F. DRIVER, *THE MAGIC OF RITUAL: OUR NEED FOR LIBERATING RITES THAT TRANSFORM OUR LIVES AND OUR COMMUNITIES* (1991).

in China, speaks Chinese fluently, and still has many friends there. On a morning walk, they find a large cluster of food stalls and stop at one to order pancakes.

"How much?" Kwan opens her change purse.

"Six yuan," the pancake vender tells her.

I calculate the cost is a little more than a dollar, dirt cheap. By Kwan's estimation, this is tantamount to extortion. "Wah!" She points to another customer. "You charged him only fifty fen a pancake."

"Of course! He's a local worker. You . . . are tourists."

"What are you saying! I'm also local."

"You?" The vender snorts and gives her a cynical once-over. "From where, then?"

"Changmain."

His eyebrows rise in suspicion. "Really, now! Who do you know in Changmain?"

Kwan rattles off some names.

The vender slaps his thigh. "Wu Ze-min? You know Wu Ze-min?"

[She does. They talk about Wu Ze-min while the pancakes are eaten. Soon its time to leave.]

"All right, older brother," Kwan says, "how much do I owe you?"

"Six yuan."

"Wah! Still six yuan? Too much, too much. I'll give you two, no more than that."

"Make it three, then."

Kwan grunts, settles up, and we leave.⁷⁸

Anyone who has traveled in Third World countries will recognize in scenes like this an archetypal quality. Variations on this familiar negotiation dance are reenacted countless times daily in local bazaars throughout the world; this mode of interaction is woven into the very fabric of life.

Before going on to the second example, a few comments are in order. I get the feeling that, when Kwan negotiates, she is engaging in a conscious performance. It may be so commonplace as to seem like second nature to her, but behind each negotiation is an awareness that, within limits, the price she will pay depends on the quality of her performance as a negotiator.⁷⁹

The second is an account by an American observer about bargaining⁸⁰ in Italy.

I used to know an old man in one of the decrepit suburbs of Naples who made a precarious living out of a ramshackle antique store his family had

78. Amy Tan, *Young Girl's Wish*, THE NEW YORKER, Oct. 2, 1995, at 80-81.

79. The theme of negotiation as performance will be developed. See *infra* notes 84, 102, and accompanying text.

80. *Bargaining and negotiation* are generally used interchangeably, as in the title of Young's book: *BARGAINING: FORMAL THEORIES OF NEGOTIATION* (Oran R. Young ed., 1975). I follow this practice throughout this article.

owned for generations. One morning a prosperous-looking American lady walked into the store, and after looking around for a while, asked the price of a pair of baroque wooden *putti*, those chubby little cherubs so dear to Neapolitan craftsmen of a few centuries ago, and to their contemporary imitators. Signor Orsini, the owner, quoted an exorbitant price. The woman took out her folder of traveler's checks, ready to pay for the dubious artifacts. I held my breath, glad for the unexpected windfall about to reach my friend. But I didn't know Signor Orsini well enough. He turned purple and with barely contained agitation escorted the customer out of the store: "No, no, signora, I am sorry but I cannot sell you those angels." To the flabbergasted woman he kept repeating, "I cannot make business with you. You understand?" After the tourist finally left, he calmed down and explained: "If I were starving, I would have taken her money. But since I am not, why should I make a deal that isn't any fun? I enjoy the clash of wits involved in bargaining, when two persons try to outdo each other with ruses and with eloquence. She didn't even flinch. She didn't know any better. She didn't pay me the respect of assuming that I was going to try to take advantage of her. If I had sold those pieces to that woman at that ridiculous price, I would have felt cheated."⁸¹

As with the first example, there is something timeless and enduring in the pattern that plays itself out.⁸² Here we discover that observance of the ritual of bargaining is so important to this merchant that *he would rather forego a profitable sale than sell without proper observance of the ritual*. This insight bears repeating: where negotiation is expected,⁸³ we cannot hope to reach mutually acceptable terms unless we are willing to invest ourselves in a *satisfactory performance of the ritual*.⁸⁴ The performance is a *necessary means*

81. MIHALYI CSIKSZENTMIHALYI, *FLOW: THE PSYCHOLOGY OF OPTIMAL EXPERIENCE* 47 (1990). The author is telling the experience to support his contention that getting into the flow of one's work makes life more enriching and enjoyable. For this concept, he uses the word "fun." I suspect that Signor Orsini might have had something like "legitimacy" in mind besides mere fun.

82. This is not the place to attempt a full analysis of the factors at play in these transactions, although it seems apparent they include economic, social, and psychological elements that would reward more careful study.

83. Enforcement of the rule is at the discretion of the party for whom bargaining carries the most importance. In our Italian example, the merchant expected to yield from his initial demand and, when the customer failed to permit him yield by responding with a counteroffer, the merchant cut off negotiations and refused to go through with the sale. He was willing to make a financial sacrifice in order to maintain the integrity of the process. By his own account, however, if he had been more desperate for money, he might have compromised the principle.

84. The suggestion that negotiation is a *performance* is not intended to *demean* the negotiators role, but rather to enhance it, to give it more status and meaning by making it a more conscious undertaking and by developing criteria by which negotiators may understand *why* they must take on this role and *what* they may hope to accomplish with it. As we will see in the remainder of this article, the performance I have in mind is *not* to achieve maximum exploitation of the other side, but rather to bring about the appropriate resolution of conflict. Perhaps an anthropological perspective on this will clarify the importance of performance:

to the end. We cannot get to mutually acceptable terms without it. As the Italian example abundantly illustrates, this principle holds true not only when a prospective buyer makes an unacceptably low offer and refuses to move from her initial position,⁸⁵ but also when she agrees to pay too much, as she did by naively accepting the merchant's opening demand, which (from the merchant's point of view) she should have known was too high. By agreeing to the merchant's opening demand, she deprived him of the opportunity to observe another rule in negotiation, which is the parties must "yield from their initial demands." Her offense was serious enough that the merchant, faced with a choice between *accepting too much money* for the cherubs and violating this rule, *chose to forego a profitable sale rather than break the rule*, even when it would have been to his substantial financial benefit to break the rule.⁸⁶ The merchant chose to forego a profitable sale rather than sell the goods in violation of the basic rules of negotiation.

If we accept the proposition that negotiation is a necessary means to the end sought, we can see that the ritual of negotiation is an *indirect* means for accomplishing something that cannot be obtained more *directly*. This aspect of negotiation is frustrating for Americans, with our Yankee can-do directness, who want to cut through the preliminaries and get the matter resolved. We are impatient with *delay*, or it makes us feel we are *wasting time*. We seem to be guided by the metaphor that *time is money*, and we do not permit ourselves to *waste* it. This attitude reduces our effectiveness in doing business in many countries of the world, where meaningful interpersonal relationships are necessary preconditions for *doing business together*. As Nancy Adler so aptly puts it:

Rituals are stylized because they must be convincing. People must recognize what rituals are saying, and find their claims authentic, their styles familiar and aesthetically satisfying. Rituals can be distinguished from custom and mere habit by their utilization of symbols. They have significance far beyond the information transmitted. They may accomplish tasks, accompany routine and instrumental procedures, but they always go beyond them, endowing some larger meaning to activities they are associated with.

Barbara G. Myerhoff, *We Don't Wrap Herring in a Printed Page: Fusion, Fictions and Continuity in Secular Ritual*, in *SECULAR RITUAL* 199-200 (Van Gorcum et al. eds., 1977). See also *THE PERFORMANCE OF HEALING* (Carol Laderman & Marina Roseman eds., 1996) (collection of essays by anthropologists on healing and its relationship to sincere dramatic performance).

85. This tactic is called take-it-or-leave-it. It is related to Boulwarism, except that in Boulwarism, the offeror begins not with a low offer, but with her best estimate of a fair offer. See WALTON & MCKERSIE, *supra* note 20, at 360-65. Either way, if the tactic is accompanied by a refusal to move from that initial offer, it violates the first of the four rules Ross observed in negotiations in the insurance settlement context, which is that parties must be willing to yield from their opening offer or demand. I believe the four rules also reflect the unwritten rules of bargaining in local bazaars. H. LAURENCE ROSS, *SETTLED OUT OF COURT: THE SOCIAL PROCESS OF INSURANCE CLAIMS ADJUSTMENT* 149 (2d ed. 1980).

86. The buyer's breach of negotiating etiquette caused the merchant such agitation that he felt compelled to break another rule as well – the rule that once a demand has been accepted by the other side, you cannot retract it. ROSS, *supra* note 85, at 150.

Americans need to increase their emphasis on building relationships with bargaining partners. They need to discuss topics other than business, including the arts, history, culture, and current economic conditions of the countries involved. Effective negotiators must view luncheon, dinner, reception, ceremony, and tour invitations as times for interpersonal relationship building, and therefore as key to the negotiating process. When American negotiators, often frustrated by the seemingly endless formalities, ceremonies, and "small talk," ask how long they must wait before beginning to "do business," the answer is simple: wait until your opponents bring up business (and they will). Realize that the work of conducting a successful negotiation has already begun, even if business has yet to be mentioned.⁸⁷

87. NANCY J. ADLER, *INTERNATIONAL DIMENSIONS OF ORGANIZATIONAL BEHAVIOR* (2d ed. 1991), *quoted in* STEPHEN B. GOLDBERG ET AL., *DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES* 363, 365 (2d ed. 1992). *See also* I. WILLIAM ZARTMAN & MAUREEN R. BERMAN, *THE PRACTICAL NEGOTIATOR* 224-29 (1982); Howard F. Van Zandt, *Comparative International Negotiating Practices*, in *NEGOTIATION: READINGS, EXERCISES, AND CASES* 245-49 (Richard D. Irwin et al. eds., 1985).

The emphasis for American negotiators is *action*, while the emphasis for our Japanese or South American counterparts (from the viewpoint of someone in a hurry to make a deal) seems more like *inaction*. Of course, no one can be all action or all inaction, so moving between cultures requires us to acknowledge the tension between these two principles and to find a balance somewhere in between the two poles. Psychologist James Hillman labels the tension between action (compulsion) and inaction (inhibition) as a kind of ambivalence and claims there is meaning and potential in the interplay between the two extremes:

The compulsion-inhibition ambivalence shows in ritual, in play, and in mating, eating, and fighting patterns, where for each step forward under the urge of compulsion there is a lateral elaboration of dance, of play, of ornamentation -- a "breather," which delays, heightens tension, and expands imaginative possibility and aesthetic form, making patterns, delightful and devious, cooling the compulsion of inborn release mechanisms for direct fulfillment in relation to the stimulus object -- whether it is to be copulated with, eaten, or killed. . . . The indirect movement is not a pattern of flight, though it may be intertwined with the reflective is not, essentially, a bending-back or a turning-away from the object; it is rather a continued advance upon in, but indirectly and *with a different timing*, and it overcomes compulsion, yet fulfills its need in another way.

JAMES HILLMAN, *THE MYTH OF ANALYSIS: THREE ESSAYS IN ARCHETYPAL PSYCHOLOGY* 75-76 (1972) (italics in original). Applying Hillman's insights, we can see that in seeking a negotiated resolution of conflict, the parties are essentially electing against the two extremes: unrestrained direct action (physical violence or other potentially destructive means of self-help; the very things the legal system is designed to prevent) and complete inaction (doing nothing). By choosing something in between the two extremes, the parties are able to advance toward their respective goals "indirectly and with a different timing." In place of physical aggression, there is a "lateral elaboration of dance [which] . . . delays, heightens tension, and expands imaginative possibility and aesthetic form." *Id.*

If Hillman's observation can appropriately be applied to negotiation, as I believe it can, it calls for a major revision of our assumptions about negotiation and other dispute resolution processes. They are not mere empty forms, but processes alive with creative potential. Later in this article, I will try to show how this insight can help us better understand and appreciate the work of Fisher & Ury and the others who have focused on the potential in negotiation for problem solving and for creating and distributing joint gains.

In the United States and other industrialized countries, we tend to think the give-and-take of bargaining is a hazard we encounter abroad, but not something we must deal with at home. As to consumer transactions, it is true that shoppers have come to expect "fixed prices." But even here, there are many settings in which bargaining is virtually unavoidable, as on new or used car lots,⁸⁸ or where bargaining, if it is not *required*, is at least *permissible*, as in flea markets, garage sales, or responding to classified ads in the newspaper.⁸⁹ In fact, even in mainstream retail outlets the concept of fixed prices is illusory in the sense that essentially all retailers conduct seasonal or other periodic "sales" in which prices are reduced below the usual sticker price on some pretense (pre-inventory sale, post-inventory sale, inventory reduction sale, pre-season sale, post-season sale, and so forth). Some high volume retailers of consumer goods take this notion a step further by advertising "we will not be undersold," so that, regardless of the current selling price of their goods, if a customer brings an ad or other evidence of a lower price offered by a competitor in the relevant geographic area, they will match it. Some stores go even further by offering to beat any competitors' price by, say, five percent. Add to these the use of coupons, rebates, and other sales devices, and we begin to see that all of these mechanisms are forms of bargaining. They manage to introduce price breaks without spoiling the apparent simplicity and efficiency of fixed prices. But they also force us to admit that so-called fixed prices are actually highly fluid and variable, if not wholly illusory. In actuality, fixed prices are nothing more than statements of the retailers' initial position. Shoppers who need the item immediately, or who do not have the patience or time to play the game, are required to pay full price. Shoppers interested in better terms must be willing to devote some time and energy to the process. They must watch the newspaper for a sale, or find a coupon or rebate offer, or drive across town to a discount outlet. In our consumer economy, then, the form of discipline required of shoppers is not a willingness to devote time and energy to the *interpersonal* give-and-take of traditional marketplace bargaining, but the capacity to delay gratification while seeking some "objective" justification for receiving a lower price. Thus, the skills demanded of modern consumers are not the skills of human interaction; they are the *impersonal* skills of information processing, storage, and

88. The burden of facing the uncertainties of this mode of shopping, and the knowledge that customers for a new car are at a distinct disadvantage in comparison to the experienced salesperson, has prompted sellers of the new Saturn automobile to adopt a fixed price strategy, promising customers a fair price and no haggling. A recent article suggests a similar strategy developing in the used car market, beginning with the CarMax "used-car superstore": "CarMax's focus is on selling top-of-the-line used cars to consumers who shudder at the thought of buying them from a plaid-sport-coated huckster." *Used-Car Fever*, BUSINESS WEEK, Jan. 22, 1996, at 34-35.

The pervasiveness of marketplace bargaining throughout the world (especially in less industrialized countries, but in all countries nonetheless) and the concurrent animosity towards it in certain contexts, such as the new car showroom or used car sales lot (especially in the United States and perhaps in other industrialized countries) is an intriguing pair of opposites that deserves further attention from negotiation scholars.

89. An explicit invitation to come in and bargain arrived this week in the mail. It is a card advertising a "going out of business sale" and proclaims "no reasonable offer refused."

retrieval; the ability to scan the media for announcements of sales, to collect and organize coupons and rebate offers, and to make the rounds of stores to take advantage of items on sale.⁹⁰

Most importantly, as a matter of practice, the give-and-take of negotiation has always been a characteristic of the negotiating process among lawyers.⁹¹ The prototypical example is negotiation of personal injury settlements,⁹² but negotiation is used by lawyers in virtually all settings.⁹³

90. One social effect of fixed price systems is to make the marketplace increasingly impersonal; they replace a continuing system of interpersonal relationships between local merchants and their customers with an impersonal system in which customers see merchants as interchangeable objects. Consumers feel more loyalty to brand names and favorite stores than to the people who sell them. It leaves consumers with virtually no sense of connection to or meaningful relationship with any individual salesperson. Although fixed prices may reduce the amount of time and energy required for each individual transaction, they increase the psychological distance between consumer and retailer to the point that personal relationships and personal interaction are virtually irrelevant. Fixed prices contribute to our tendency to live isolated, disconnected lives.

91. Indeed, there is good reason to suppose the basic pattern of the negotiation ritual occurs in all cultures world wide. See, e.g., the work of anthropologist Gulliver, which concludes that "processes of negotiations occur in all societies, including of course our own Western ones, and . . . there are common patterns to them, cross-culturally, which merit attention." P.H. Gulliver, *Negotiations as a Mode of Dispute Settlement: Towards a General Model*, 7 LAW & SOC'Y REV. 667, 667 (1973). Gulliver's conclusion patterns of negotiation occur across many cultures is presumably based on his own observations and readings as an anthropologist. It is very much on point, and there is much evidence from other quarters to support it. The concept that certain patterns of human behavior manifest themselves across the entire human population has until recently been uncertain at best. But credible scientific evidence to this effect is mounting. I refer in particular to the work of ethnologists, who study animal behavior with an emphasis on behavioral patterns that occur in natural environments. In his exhaustive work on archetypes, Anthony Stevens summarizes the research in this field. He finds as follows:

All cultures, whatever their geographical location or historical era, display a large number of social traits which are in themselves diagnostic of a specifically human culture. These have been independently catalogued by George P. Murdock (1945) and Robin Fox (1975). According to them, no human culture is known which lacked . . . procedures for settling disputes [and more than thirty additional universal behavior patterns].

ANTHONY STEVENS, ARCHETYPES: A NATURAL HISTORY OF THE SELF 23 (1983) (citing G.P. Murdock, *The Common Denominator in Culture*, in THE SCIENCE OF MAN IN THE WORLD CRISIS (R. Linton ed., 1945)); R. FOX, ENCOUNTER WITH ANTHROPOLOGY (1975).

92. ROSS, *supra* note 85, at 149. See also Marc A. Franklin et al., *Accidents, Money, and the Law: A Study of the Economics of Personal Injury Litigation*, 61 COLUM. L. REV. 1, 11 (1961); Jenny Phillips & Keith Hawkins, *Some Economic Aspects of the Settlement Process: A Study of Personal Injury Claims*, 39 MOD. L. REV. 497, 509 (1976).

93. Negotiation has always been a central feature of lawyers' work, but it was not recognized as a distinct lawyering skill until the 1960's. Since then, there has been a steady stream of books on negotiation for lawyers. See CORNELIUS J. PECK, CASES AND MATERIALS ON NEGOTIATION, UNIT 5 OF LABOR RELATIONS AND SOCIAL PROBLEMS (Bureau of National Affairs 1972); HARRY T. EDWARDS & JAMES J. WHITE, PROBLEMS, READINGS, AND MATERIALS ON THE LAWYER AS NEGOTIATOR (1977); GARY BELLOW & BEA MOULTON, THE LAWYERING PROCESS: NEGOTIATION (1981); WILLIAMS, *supra* note 60; ROGER S. HAYDOCK, NEGOTIATION PRACTICE (1984); RISKIN & WESTBROOK, *supra* note 22, at 112-194 (chapter on negotiation); DONALD G. GIFFORD, LEGAL NEGOTIATIONS: THEORY AND APPLICATIONS (1989); JOHN S. MURRAY ET AL., *supra* note 22, at 74-246 (chapter on negotiation); BASTRESS & HARBAUGH, *supra* note 74; GOLDBERG ET AL., *supra* note 22, at 17-102 (chapter on

B. The Negotiation Process is Highly Predictable

In law school we learn that no two cases are alike, and in our culture we assume that no two people are alike. We might surmise from this that no two negotiations are alike. Fortunately, this is only partially true. One of the defining characteristics of a ritual, including the ritual of negotiation, is that it provides an accepted structure for and sequencing of events. As a general proposition, then, we can say *the ritual of negotiation unfolds in predictable stages over time*.⁹⁴ The predictability helps explain why so many lawyers lose patience with the process; it is highly repetitive, and thus not as stimulating as new adventures would be. This aspect of ritual is well captured by W. John Smith when he says, "*ritual connotes . . . behavior that is formally organized into repeatable patterns. Perhaps the fundamental and pervasive function of these patterns is to facilitate orderly interactions between individuals.*"⁹⁵ The point could not be more clear. Negotiation is a highly repetitive process. Without predictable patterns, the negotiators could not hope to achieve orderly interaction with each other. As Smith explains: "*Ritual behavior facilitates interactions because it makes available information about the nature of events, and about the participants in them, that each participating individual must have to interact without generating chaos.*"⁹⁶ the task now is to develop a working knowledge of the predictable stages of the negotiation process.

Scholars do not agree on how to characterize the process. Respected authorities have described as many as eight stages.⁹⁷ In an earlier work, I described four stages.⁹⁸ The minimum useful number is three, in line with

negotiation); EUGENE F. LYNCH ET AL., *NEGOTIATION AND SETTLEMENT* (1992); CHARLES B. CRAVER, *EFFECTIVE LEGAL NEGOTIATION AND SETTLEMENT* (2d ed. 1993); E. WENDY TRACHTE-HUBER, *NEGOTIATION: STRATEGIES FOR LAW & BUSINESS* (1995); ROGER S. HAYDOCK ET AL., *LAWYERING: PRACTICE AND PLANNING* 124-89 (1996) (listing negotiation as a fundamental skill of lawyers).

In his analysis of data from the Civil Litigation Research Project, Herbert Kritzer was able to determine, for the set of cases included in the CLRP study, what he calls exchange intensity, the number of exchanges of offers and counteroffers between the negotiators. He reports that "the largest proportion of lawyers (41%) reported two exchanges of offers/counteroffers." KRITZER, *supra* note 20, at 36-37. Kritzer indicates this number is lower than he expected, and says that, if anything, his data "probably *overstate* the exchange intensity of bargaining in ordinary litigation," implying that it is less important than we might have thought. The important point for our purposes is not how many times the ball bounces back and forth between the two sides (at least four times if there are two exchanges of offers/counteroffers), but the fact that this is an inherent part of the negotiating process between lawyers involved in litigation.

94. Note, however, that it is the *process* which is predictable, and not the *outcome*, which depends on the interplay of the negotiators throughout the process itself. See Otomar J. Bartos, *How Predictable are Negotiations?*, 11 J. CONFLICT RESOL. 481 (1967).

95. W. John Smith, *The Ritual and Ethology of Communicating*, in EUGENE G. D'AQUILI ET AL., *THE SPECTRUM OF RITUAL: A BIOGENETIC STRUCTURAL ANALYSIS* 51 (1979).

96. *Id.*

97. GULLIVER, *supra* note 18, at 81-82.

98. WILLIAMS, *supra* note 60, at 70-72.

Aristotle's conception of the tragic whole. To be whole or complete, says Aristotle, good drama must have a beginning, a middle, and an end.⁹⁹ There is a rich literature on stages of the negotiation process.¹⁰⁰ How many stages you identify depends upon your technical orientation, which aspects of the process you wish to emphasize, and the level of detail you find it useful to address. For our purposes, the most helpful elaboration of the negotiation process is by Gulliver. In his processual model of negotiation, he sees two interrelated dynamics simultaneously in operation. One is iterative and cyclical; the other is linear and developmental. He compares these two processes to an automobile. The iterative, cyclical aspects are analogous to the movement of the wheels, driveshaft, pistons, and valves. Their motion is continual and infinitely repetitive, yet they provide the energy which propels the car forward. The more linear development process is compared to the actual progress of the car from its point of origin to its final destination.¹⁰¹ Both of these processes are highly predictable, in the sense they typically occur over the course of each negotiation.

In summary, then, while negotiation *outcomes* are not predictable, the stages are. There are several advantages to being aware of these developmental stages. They tell negotiators what to expect at each stage, give them guidance in planning their own strategy and a basis for interpreting the strategies of their opponents, facilitate coordination of the negotiation process with the litigation process, and prevent the embarrassment and harmful effects of mistakes in timing.

Finally, it is helpful in this context to recall that negotiation calls for an adequate and appropriate performance by the lawyers involved.¹⁰² Lawyers are, to this extent, ritual leaders who must adequately perform their roles. They should learn their parts and coordinate their efforts throughout the entire process, i.e., so

99. ARISTOTLE, *POETICS* 30 (Gerald F. Else trans., 1967).

100. The classic work is ANN DOUGLAS, *INDUSTRIAL PEACEMAKING* (1962) (negotiation process in the labor-management context). For the legal context, see WILLIAMS, *supra* note 60, at 70-89 and CRAVER, *supra* note 93, at 69-166.

101. GULLIVER, *supra* note 18, at 81-82.

102. The notion of *performance* is intrinsic to all rituals, including the ritual of negotiation. This outlook is elaborated by Geertz:

Rooted as it is in the repetitive performance dimensions of social action -- the reenactment and thus the reexperiencing of known form -- the ritual theory not only brings out the temporal and collective dimensions of the action and its inherently public nature with particular sharpness; it brings out also its power to transmute not just opinions but, as the British critic Charles Morgan has said with respect to drama proper, the people who hold them. "The great impact [of the theater]," Morgan writes, "is neither a persuasion of the intellect nor a beguiling of the senses. . . it is the enveloping movement of the whole drama on the soul of man. We surrender and are changed."

CLIFFORD GEERTZ, *LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY* 28 (1983). The centrality of performance in ritual has been a primary interest of Victor Turner's. See generally Turner, *supra* note 18; VICTOR TURNER, *THE ANTHROPOLOGY OF PERFORMANCE* (1986). See also, *BY MEANS OF PERFORMANCE: INTERCULTURAL STUDIES OF THEATRE AND RITUAL* (Richard Schechner & Willa Appel eds., 1990). The connections between the courtroom and drama/theatre are well established and are developed not only in scholarly literature, but on the stage and in the movie theater.

as to achieve a clear beginning, a clear middle, and a clear end. It follows that one important task for negotiators is to consciously strive to stay "in sync" with each other and with their clients, so they do not make the mistake of getting too far ahead or too far behind and jeopardizing the negotiation with tactics that are inappropriate or incongruent with a given stage in the process, or if they do fall behind or get ahead, that they clearly signal to the other side what they are doing and why.¹⁰³

C. *Negotiation Can Transform Peoples' Lives*

The final aspect of negotiation as a ritual process is that, if you do it right, something sacred may happen.¹⁰⁴ I do not mean *sacred* in a narrowly religious or theological sense. Perhaps the better word is transcendent, suggesting that negotiation is also a healing process, and something transformative can happen to the parties involved as the process unfolds and comes to an appropriate

103. I earlier quoted Gulliver to the effect that "processes of negotiations occur in all societies, including of course our own Western ones, and . . . there are common patterns to them, cross-culturally, which merit attention." GULLIVER, *supra* note 18, at 667 n.91. I agree that cross-culturally, negotiation has common patterns that seem inherent in the process. To the degree that the patterns seem to appear in all cultures, without conscious human planning about how negotiations should be structured, there is no need for negotiators to worry about conforming to the "natural" patterns. But unlike marketplace bargaining, legal negotiations are often lengthy and complex, stretching over weeks, months, or even years. The greater the complexity of the case, and the longer the time involved, the greater the likelihood the negotiators will not automatically be synchronized in their conception of where they stand in the process. Being conscious of stages is also important in the sense that individuals in modern societies have become less attuned to the natural rhythm and flow of interpersonal processes and are more likely to try to impose their own timetables on such processes. For these reasons, I believe the negotiation process is improved when the negotiators work consciously to keep in synch with each other and to understand what each is trying to accomplish at this point in the process.

104. This is an unfamiliar way of making this point, but it provides the best foundation for the materials which follow below at notes 123-160 and accompanying text.

Historically, the learned professions (religion, medicine, and law) have had functions that tie them to the phenomenology of the sacred. This sense is expressed, for example, in ZANE ROBINSON WOLF, *NURSES' WORK: THE SACRED AND THE PROFANE* (1988). Wolf was concerned about her use of the term "sacred" and has this to report about its reception among her colleagues in the medical community:

In the beginning I doubted that anyone in the scientific nursing community would accept my assumption that the American hospital is a quasi-religious or sacred institution. I was pleasantly surprised. I found that others share this assumption and that in many cultures, including our own, health and illness are symbolically located in the sacred domain.

Id. at X. Coming from an entirely different orientation and drawing upon a completely different literature, Wolf found fit to describe nurses' work in terms of "ritual," referring, for example, to "the nursing ritual of post-mortem care," "the nursing ritual of medication administration," "nursing rituals in medical aseptic practices," and "the nursing ritual of change-of-shift report." *Id.* at 68, 140, 181, and 231 respectively (capitals omitted).

resolution.¹⁰⁵ But use of the term sacred *does* imply that being in conflict leaves many disputants with a sense of spiritual deprivation and that the negotiation ritual does have the potential to help them heal from the conflict and get on with their lives.¹⁰⁶ There is much evidence of an urge in people of our day to recover a sense of connection to the sacred.¹⁰⁷ E. F. Schumacher's advice to economists

105. There is a question in some people's minds whether the notion of transformative process applies to corporations, government agencies, and other institutions. The answer is an unequivocal "yes." In fact, institutions have at least as great a need for transformation as individuals, and litigation is one of the few ways that parties can engage the attention of institutions long enough (and with enough threat of adverse effects) to open them to the possibility of change.

106. Law schools often do not teach that lawyers can be healers, and how to develop our potential for healing. To heal is to "make healthy, whole, or sound; restore to health; free from ailment," and also "to bring to an end or conclusion, as conflicts between people or groups, usually *with the strong implication of restoring former amity.*" RANDOM HOUSE UNABRIDGED ELECTRONIC DICTIONARY (CD-ROM version of the RANDOM HOUSE AMERICAN UNABRIDGED DICTIONARY 6 (2d ed. 1994) (emphasis added)). The concept of lawyers as healers is articulated very nicely by Professor James Gordon:

Good lawyers must have the skills required for professional competence. But this is not enough. They must know how to carry the burdens of other people on their shoulders. They must know of pain, and how to help heal it. Lawyers can be healers. Like physicians, ministers, and other healers, lawyers are persons to whom people open up their innermost secrets when they have suffered or are threatened with serious injury. People go to them to be healed, to be made whole, and to regain control over their lives.

James D. Gordon, III, *Law Review and the Modern Mind*, 33 ARIZ. L. REV. 265, 271 (1991). Although the concept of healing is rarely mentioned in the literature on legal negotiation, it is gradually being recognized as a central goal of mediation. See Leonard L. Riskin, *Toward New Standards for the Neutral Lawyer in Mediation*, 26 ARIZ. L. REV. 329 (1984) and Special Issue, *Beyond Technique: The Soul of Family Mediation*, 11 MEDIATION Q. 1-106 (1993). Healing is also an underlying value in Bush & Folger, *supra* note 24, and JEFFREY A. KOTLER, *BEYOND BLAME: A NEW WAY OF RESOLVING CONFLICTS IN RELATIONSHIPS* (1994).

107. It is remarkable that so many of the leaders in the movement to reconnect to our souls, to become aware again of spiritual purpose and meaning in life, have been scholars and practitioners much removed from the religious vocation. Psychologists and psychiatrists have been chief among them (Freud and some of his followers notwithstanding), along with philosophers, artists, and many others. In addition to the citations, given *supra* note 67, influential works include: RUDOLF OTTO, *THE IDEA OF THE HOLY* (John W. Harvey trans., 1958); ERICH FROMM, *THE FORGOTTEN LANGUAGE* (1951); ROLLO MAY, *MAN'S SEARCH FOR HIMSELF* (1953); MARTIN BUBER, *I AND THOU* (Ronald Gregor Smith trans., 2d ed. 1958); *EXISTENTIAL PSYCHOLOGY* (Rollo May ed., 2d ed. 1961) (includes works by Rollo May, Abraham Maslow, Herman Feifel, Carl R. Rogers, and Gordon W. Allport; also a selective bibliography on existential and phenomenological psychology); CARL ROGERS, *ON BECOMING A PERSON* (1961); ABRAHAM H. MASLOW, *RELIGIONS, VALUES, AND PEAK-EXPERIENCES* (1964); Edinger, *supra* note 65; DAVID L. NORTON, *PERSONAL DESTINIES: A PHILOSOPHY OF ETHICAL INDIVIDUALISM* (1976); ABRAHAM H. MASLOW, *TOWARD A PSYCHOLOGY OF BEING* (1968); JOHN WEIR PERRY, *THE HEART OF HISTORY: INDIVIDUALITY IN EVOLUTION* (1987); BARBARA HANNAH, *STRIVING TOWARDS WHOLENESS* (1988); LAWRENCE W. JAFFE, *LIBERATING THE HEART: SPIRITUALITY AND JUNGIAN PSYCHOLOGY* (1990); ROLLO MAY, *THE CRY FOR MYTH* (1991); KENNETH LEECH, *SOUL FRIEND: AN INVITATION TO SPIRITUAL DIRECTION* (1992); THOMAS MOORE, *THE CARE OF THE SOUL* (1992); ERNEST KURTZ & KATHERINE KETCHAM, *THE SPIRITUALITY OF IMPERFECTION* (1992); THOMAS MOORE, *SOUL MATES: HONORING THE MYSTERIES OF LOVE AND RELATIONSHIP* (1994). For teachers seeking to open themselves and their students to an experience of the sacred, I

applies to lawyers as well. He said, "[t]he guidance we need for this work cannot be found in science or technology, the value of which utterly depends on the ends they serve: but it can still be found in the traditional wisdom of mankind."¹⁰⁸ In practical terms, the healing function of negotiation probably fails more often than it succeeds, in part because the parties and their counsel are generally not conscious enough of the ritual aspects of negotiation and its potential for healing.¹⁰⁹

To illustrate what is involved in a healing perspective on negotiation, let us assume a typical lawsuit in which both sides have hired lawyers to represent them, the plaintiff has filed a complaint, the defendant has filed an answer, discovery is proceeding apace, and a trial date has been set. By definition, the parties are now *in conflict*. Once they are fully engaged in the conflict, they confront a far more fateful and hazardous problem, *how to get out of that conflict*.¹¹⁰

Once the case has been filed in court, we might say metaphorically that the legal system itself constitutes a kind of vessel or container which holds the two contestants in an uncomfortable relationship with each other until they have resolved their problem. This is a highly paradoxical situation. On the one hand, they see the legal system as the vehicle for obtaining their will over the other party. On the other hand, at the same time, the legal system constitutes a metaphorical vessel which holds the protagonist and antagonist together in the same vessel in a forced relationship with each other until they resolve their conflict or it is resolved for them. By the very act of engaging the legal system, they condemn themselves to be in the legal vessel with the person against whom they hold the hardest of feelings, and to staying together in the heat and discomfort of that vessel until their conflict is resolved.

recommend, in addition to the these books, PARKER J. PALMER, *TO KNOW AS WE ARE KNOWN: A SPIRITUALITY OF EDUCATION* (1983).

108. E.F. SCHUMACHER, *SMALL IS BEAUTIFUL* 250 (1974) (quoted in Leech, *supra* note 107, at 10).

109. Barbara Myerhoff explains the importance of being conscious of what we are doing in legal negotiation:

Ritual gestures announce instrumental activities very often. As such they call the subject's attention to his undertaking. He is acting with awareness. He has taken the activity out of the ordinary flow of habit and routine, and performed the gesture to arouse in himself a particular attitude, demonstrating that his actions mean more than they seem.

Myerhoff, *supra* note 84, at 199-200.

Contemporary literature on the healing function is significant and growing. See PAUL R. FLEISCHMAN, *THE HEALING SPIRIT: EXPLORATIONS IN RELIGION AND PSYCHOTHERAPY* (1990) and *HEALERS ON HEALING* (Tarcher et al. eds., 1989).

110. As Fred Ikle so cogently reminds us, every war must end, and it is far easier to *start* a conflict than to *end* one. FRED CHARLES IKLE, *EVERY WAR MUST END* (1971).

D. Getting Out of Conflict

Once parties are in conflict, there are essentially only two ways out: negotiation or adjudication.¹¹¹ Both are ritual processes. Both are intended to end the conflict and permit the parties to get on with their lives. Nevertheless, except for the relatively few cases which require a trial verdict,¹¹² the most desirable outcome is for both to have a change of heart, to arrive not only at an

111. This is an oversimplification which deserves clarification in at least two respects. First, the ADR movement stands for the proposition that there are more choices than negotiated settlement and trial. They include the intermediate procedures of mediation (assisted negotiation) and arbitration (informal adjudication) as well as the various hybrids discussed *supra* note 22. From the perspective of this article, the trial is the most formal, expensive, and awe-inspiring of the available methods, and should be reserved for those few cases that really require, for one purpose or another, such an impressive and complex ritual performance. By using the term "performance," I do not mean to suggest any insincerity going through the motions or the mere appearance of justice being served, but rather the opposite, a perfectly sincere enactment of the trial for the very purpose that justice be properly served. Trial, like negotiation and other legitimate rituals, requires the actors (judge, lawyers, court personnel, parties) to have at least some consciousness of the fact that they are rendering a performance in accordance with time-honored rules and standards.

Second, the statement implies a vast difference between negotiation and adjudication that is only partly justified. There is a large gulf between them in the sense that negotiated settlements do not have the benefit of a full ritual display of a trial and do not feature a decision imposed upon the parties by a judge or jury. On the other hand, there is an important symbiosis between these two processes that must also be taken into account. *See, e.g.*, Mnookin & Kornhauser, *supra* note 21, at 950. Here is Kritzer's summary of the relationship:

[It has been argued that] the combination of *litigation* leading to formal adjudication and *negotiation* to achieve an out-of-court settlement should be thought of as "a single process of disputing in the vicinity of official tribunals that might [be] call[ed] *litigation*, that is, the strategic pursuit of a settlement through mobilizing the court process."

KRITZER, *supra* note 20, at 4 (quoting Marc Galanter, *Worlds of Deals: Using Negotiation to Teach about Legal Process*, 34 J. LEGAL EDUC. 268, 268 (1984)).

112. It is difficult to lay out a hard and fast rule about which cases should settle and which should go to trial. An excellent evaluation of trial as a method of resolving disputes is given in DISPUTE RESOLUTION 149-188 (Stephen B. Goldberg et al. eds., 1985) which includes readings on reasons people choose, rightly or wrongly, to take cases to judgment as well as a thoughtful analysis of functional criteria to use in deciding whether a case would be better served by a trial or by some other process. *Id.* at 152, 163-71. A listing of factors weighing between trial and settlement is given in WILLIAMS, *supra* note 60, at 10-12. For an economic analysis of decisions to litigate versus decisions to settle, *see* George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984). These authors unfortunately apply a model which assumes "the determinants of settlement and litigation are solely economic," a conclusion solely at odds with research findings and conclusions of virtually all the authorities cited throughout this article. *Id.* at 4. The best empirical data comes from the Civil Litigation Research Project (CLRP). *See* Herbert M. Kritzer, *Studying Disputes: Learning from the CLRP Experience*, 15 LAW & SOC'Y REV. 503 (1980) (part of a series of articles in the same issue of Law & Society Review focusing on the Civil Litigation Research Project); DAVID TRUBEK ET AL., CIVIL LITIGATION RESEARCH PROJECT: FINAL REPORT (1983); HERBERT M. KRITZER, THE JUSTICE BROKER: LAWYERS AND ORDINARY LITIGATION (1990).

acceptable compromise,¹¹³ but to also experience a genuine reconciliation. The fundamental principle is this: if both sides do not experience a change of heart, then one or both of them will continue to carry everything that was left unresolved into the indefinite future with little prospect for resolving it short of another conflict.¹¹⁴ This conclusion is supported by research showing that in many situations, conflicts are *not* resolved, but continue in an endless cycle until one party or the other is able to “exit,” that is, to escape the situation by moving far enough away that the disputants no longer see each other. However, it should be noted that this exit does not really “resolve” the conflict because nothing has really changed in either of the parties. The best prediction is that *both parties will soon find themselves in similar conflicts* wherever they may end up. More troublesome still, there is research suggesting that even when plaintiffs have retained lawyers and obtained a mutually agreeable settlement (but not a genuine settlement or change of heart), they will continue to suffer from emotional and physical traumas growing out of the original problem.¹¹⁵

113. In the case law, *settlement* is a term of art with its own specialized meaning which is more demanding than conventional usage. In formal legal usage, *settlement* belongs to the second half of the phrase *compromise and settlement*, and the proper shorthand term for a compromise and settlement is a *compromise* or a *compromise agreement*, not a *settlement*. The operative word is not *settlement*, but *compromise*. A compromise agreement is enforceable provided it satisfies the requirements for a valid contract (offer, acceptance, consideration). WILLIAMS, *supra* note 60, at 95-98. Although I have been inclined to look harshly at the compromise rule as being insufficient to bring about transformation in the parties, there is evidence to suggest that, when parties enter into a compromise agreement in the right setting and spirit, they are engaging in a form of “sacred exchange,” as described by Werbner, who said:

Sacred exchange, like all social exchange, involves the giving and receiving of valued goods. It is distinctive of sacred exchange, however, that the giving and receiving . . . is a means of renegotiating the distance to the invisible world and thus the moral condition, even the vitality, of a person or a community. In other words, what are transferred in sacred exchange are qualities of life.

RICHARD P. WERBNER, RITUAL PASSAGE, SACRED JOURNEY 2 (1989).

114. A listing of examples of such unresolved feelings is given *infra* beginning with the text accompanying note 138. This might include continuing resentment and a sense of victimization by the aggrieved party, and also feelings of guilt and anxiety by the wrongdoer, or yet again they might take the reverse form of denial of his or her own complicity.

Here is another way to approach the same question. In negotiation, it is axiomatic that if neither side moves from its initial position, there will be no agreement. If this is true, then the purpose of negotiation must be to bring about a change in one or more of the lawyers and parties involved. This brings us to the central question: Who is supposed to be changed by the negotiation process, and in what ways? Is it the lawyer on the other side? The client on the other side? The opposing lawyer *and* opposing client? Or, if I am representing a client, is it my client who may need to be changed by the process, or is it me, or both? Regardless of how one answers these questions, it should be clear that, when it works, negotiation is necessarily a transformative process, at least if we limit *transformation* to its most literal meaning - a change in both sides (clients and their lawyers) sufficient to permit them to agree to a compromise solution, or to concede points they earlier were unwilling to concede. Ideally, it will also include a reconciliation.

115. In a landmark study of 110 personal injury litigants who were seeking compensation for emotional damages, the need for physical and emotional healing is abundantly evident. A consulting psychiatrist concluded as follows:

These residual negative effects may include, for one or both parties, unresolved anger, fear, vengefulness, or feelings of helplessness, victimization, distrust, and alienation. On the part of the antagonist or victimizer, these traumas may evoke responses that vary from denial of responsibility and a pretense that the entire problem was caused by the other (or that the other wholly deserved the bad treatment they received), at one extreme, to feelings of guilt, remorse, and of missed opportunity to make restitution or to do equity.¹¹⁶

If their individual situations warrant it, and if the process works well enough, the parties will experience a change of heart.¹¹⁷ On the other hand, if the situation does not warrant it, or if the negotiation process is not powerful enough, and as a consequence the parties fail to reach a mutually acceptable compromise agreement (much less a change of heart), the traditional fallback position is recourse to a much more formal and explicit ritual, that of a court trial.¹¹⁸ This is not to say that trial is unimportant, or that it should always be avoided.¹¹⁹

What is clear is that many of these patients do suffer physically and emotionally and that their symptoms and disability continue long after their case is settled. Like other victims in our society, they often suffer silently and alone and feel that they are not understood by others because their injuries and their rage are frequently invisible.

Brian F. Hoffman, *The Demographic and Psychiatric Characteristics of 110 Personal Injury Litigants*, 19 BULL. OF THE AM. ACAD. OF PSYCHIATRY & THE L. 227, 235-236 (1991) (footnotes omitted). Hoffman also reports that:

Numerous studies have concluded that the vast majority of litigants do not improve after settlement including excellent follow-up studies by Tarsh and Royston, Balla and Moraitis, Mendelsohn, Woodyard, Kelly and Smith, and Thompson. There is evidence that posttraumatic symptoms may develop equally in compensation seekers and nonseekers.

Id.

116. They may also carry the perception that they are pragmatic compromisers who have nothing to learn from this experience. They may feel above the conflict or detached from or in denial of its implications.

117. Up to this point, the discussion assumes the parties are individuals as contrasted with corporate, governmental, or other organizational entities or groups. However, the analysis applies to groups of individuals and to institutions as well.

118. It is remarkable, given the indifference and even hostility with which today's secular society tends to look upon ritual, that our trial courts have been able to preserve a good deal of their ritually evocative and powerful aspects. Adequate development of this theme will need to be reserved for another time, but a few examples may be mentioned. For example, as a matter of tradition, trial courtrooms are divided by a fence or bar that separates and protects the innocent public from contamination by the fallout from the powerful processes taking place on the other side of the bar. If there is a jury, they are enclosed by a separate fence or bar which protects them, in part, from contamination by the public, and in part, from contamination by the potent proceedings taking place immediately on the other side of the protective bar. Then, most remarkable of all in our secular age, the trial plays itself out before a judge, clothed in a black robe, who sits behind an elevated judgment bar to officiate over the proceedings and, at the end, to render a binding judgment in the case.

For purposes of clarity of argument, we are leaving out the possible use of alternative methods of dispute resolution which, as discussed *supra* in notes 22 through 30 and accompanying text, may be more potent than negotiation but less formal and costly than a courtroom trial. The most important of these is mediation, but the list also includes arbitration and the various mixes or hybrids.

119. For a strong defense of the values of adversarial trial proceedings, see LANDSMAN, *supra* note 33, at 487.

Rather, it is meant to emphasize that by choosing trial, the parties are giving up substantial benefits to themselves and society, benefits that have not traditionally been included in evaluating the value of negotiated outcomes. As Robert Baruch Bush has so insightfully pointed out, if the parties go to trial, they both give up the possibility of learning things that can only be obtained by submitting themselves to the painful process of working out an appropriate solution to a conflict,¹²⁰ namely the possibility of learning more about themselves (becoming more self-aware), more about the other side (becoming more aware of the other), more about their own powers (the capacity for self-transformation by staying with the task), and more about their own ability "to transcend [their] narrow self-interest, to realize and recognize – even if only fleetingly – some element of legitimacy in the other side's position, some element of common humanity with the other party."¹²¹ A broader enumeration of potential benefits follows below.¹²²

120. These four values are identified and elaborated in the context of mediation in a masterful article by Robert A. Baruch Bush, *Mediation and Adjudication: Dispute Resolution and Ideology: An Imaginary Conversation*, 3 J. CONTEMP. LEGAL ISSUES 1, 13-15 (1989). In my opinion, these values can and ought to be served as well by the ritual of legal negotiation.

121. *Id.* at 13. Bush is remarkable for his ability to discern and articulate values that ordinarily escape our notice, but which, once identified, are recognizable as among the most fundamental of values. In his article, Bush differentiates between the values served by adjudication and by mediation, at least by what he calls the "empowerment-and-recognition approach to mediation." As Bush explains, in this approach to mediation, "the mediator's role is to encourage the parties' exercise of their own autonomy and independent choice in deciding whether and how to resolve the dispute, and to promote their mutual recognition of each other as fellow human beings despite their conflict." *Id.* n.41 (citing Bush *supra* note 26, at 259-60; Riskin, *supra* note 24, at 41-42, 51). It is not easy to articulate the values served by this approach. Perhaps it can only be done by way of example. A great strength of Bush's article is his use of a dialogue format in which four individuals discuss the handling of six kinds of cases. Readers who have not had the privilege of seeing these values actualized in the lives of disputants owe it to themselves to read the full article.

Bush observes that the discussion between proponents of mediation and adjudication has been so passionate that it "can only be explained by differences over ideology, not by differences over the relative effectiveness, cost, etc. of different processes." *Id.* at n.2-3.

122. This view assumes, as a general rule, that there is always meaning in conflict. In most cases, our conflicts are a manifestation of areas in the lives of one or both sides we need to work on, to further develop, or to heal. It is in conflicts that our complexes, blind spots, and our shadow attributes become manifest. For an explanation of these terms, see HALL & NORDBY, *supra* note 67, at 35-54.

Even if a party is wholly innocent (a victim of random auto accident or whatever), if the claim is not satisfactorily resolved and the aggrieved person feels a need to pursue the matter, the effect of the resulting conflict has the effect of *polarizing* both parties. They become more entrenched in the rightness of their own views and more extreme in their attitudes towards the other side. Polarization occurs in conflicts outside of the legal context as well, but it is often intensified by the adversarial process. Once the parties become polarized this way, the polarization becomes part of the problem. The problem is not fully resolved until the parties have been helped to exit from the polarized position, that is, to heal or to be reconciled.

IV. THE FIVE STEPS FOR RECOVERING FROM CONFLICT

To articulate more specifically the kinds of changes the negotiation ritual is intended to encourage in disputants, I would like to propose a preliminary five-step model of the stages clients must generally move through in order to shift from being *in* a state of conflict to being healed from the conflict. The stages are: *denial, acceptance, sacrifice, leaps of faith, and renewal*.¹²³ Just as researchers have found that getting *into* a conflict is a multi-step process that typically involves naming, blaming, claiming, rejection, and a decision to go public, even so, the task of getting *out of* a conflict requires the disputants to work their way through a multistage process.

123. I believe I first heard these five steps put together in this way by Robert L. Moore, a professor of psychology and religion at The Chicago Theological Seminary, a practicing Jungian psychoanalyst, a prominent figure in the men's movement, and President of the Institute for World Spirituality. My own thinking has been greatly enlarged and enriched by his work. See Moore's works, *supra* note 67. He is also co-author, with Douglas Gillette, of a series of books on masculine development beginning with ROBERT MOORE & DOUGLAS GILLETTE, *KING, WARRIOR, MAGICIAN, LOVER: REDISCOVERING THE ARCHETYPES OF THE MATURE MASCULINE* (1990). Moore emphasizes masculine development in his work because he feels men are typically less mature and less "whole" than women, and thus have some catching up to do. However, he believes there are four basic developmental patterns which are characteristic of women and men alike. His conception of the parallel patterns in men and women are detailed in ROBERT MOORE & DOUGLAS GILLETTE, *THE WARRIOR WITHIN* 217 (1992).

In reading his work and listening to his audiotaped lectures on ritual aspects of the therapist-client relationship, I have been repeatedly impressed at how strongly certain aspects of the therapist-client relationship are equally true for the lawyer-client relationship. This is not to suggest that lawyers can or ought to be therapists (or therapists, lawyers). Rather, I believe that further investigation will show that there are common features in the relationship between professional and client which are true across each of the learned professions and which apply equally well to therapist-client, lawyer-client, doctor-client, and clergy-parishioner relationships. The primary emphasis for therapist is to help the client work through *inner* conflicts, while the emphasis for lawyers, as addressed in this article, is to help the client work through *outer* conflicts. It goes without saying that many inner conflicts (neuroses, depressions, etc.) for which people seek therapy manifest themselves externally in the person's relationship with others, and, conversely that many outer conflicts for which people seek legal counsel are driven by conscious or unconscious inner needs and conflicts. Thus, therapists and lawyers may find that some of their clients overlap, and there may be a need for cross-referrals.

The interaction between mental health and law has been recognized in a more limited context in the therapeutic jurisprudence developed by David Wexler and others. According to Wexler, therapeutic jurisprudence "views the law itself as a potential therapeutic agent. . . . Legal rules, procedures, and the roles of legal actors may produce therapeutic or antitherapeutic results" and focuses itself on "how the law may improve therapeutic outcomes without sacrificing the interests of justice." David B. Wexler, *Putting Mental Health into Mental Health Law: Therapeutic Jurisprudence*, 16 *LAW & HUM. BEHAV.* 27, 27 (1992). See also DAVID B. WEXLER, *THERAPEUTIC JURISPRUDENCE: THE LAW AS A THERAPEUTIC AGENT* (1990); DAVID B. WEXLER & BRUCE J. WINICK, *ESSAYS IN THERAPEUTIC JURISPRUDENCE* (1991).

A. Denial

As a preliminary model of the process of recovering from conflict, the first stage is typically a condition of *denial*.¹²⁴ As James Hall explains, there is in

124. Denial is "[a] *defense mechanism, operating unconsciously, used to resolve emotional conflict and allay anxiety by disavowing thoughts, feelings, wishes, needs, or external reality factors that are consciously intolerable.*" AMERICAN PSYCHIATRIC GLOSSARY 57 (Jane E. Edgerton ed., 7th ed. 1994). It is a tendency to see the other side as wholly at fault, and to see oneself as innocent and deserving of vindication.

It is tempting to fault our clients for being in denial, and to feel that we ourselves are not victims of a similar dynamic. However, a major premise of this article is that lawyers and other professionals are also human, and that we ourselves are also engaged in an effort to become less self-consumed and more whole. The phenomenon of denial offers a helpful illustration. From all evidence, denial is a way of life for us in the United States. Consider first the scale of human suffering outside of the United States. Despite the efforts of many organizations to raise our consciousness about the situation of many other peoples, we continue to ignore them. A recent "International Human Suffering Index" ranks 141 countries for poverty, nutrition, education, and other basics of human well-being. It concludes that "three-quarters of the world lives in countries where human suffering is the rule rather than the exception." *What's the Worst Place In the World? Mozambique*, SALT LAKE TRIBUNE, May 18, 1992, at 1. This is to say nothing of mass murder as practiced in modern times in many countries and regions of the globe, which if we could get beyond our collective denial would bring home the fact that scapegoating is still being practiced on a scale that defies imagination. See, e.g., *Butchery Reigns in 20th Century*, DAILY HERALD, Sept. 17, 1995, at A9, listing 25 major episodes of mass killings in this century and reminding us "[i]n this most civilized century, by one estimate the killing rage has extinguished 170 million lives. That's more than four times the number of people sacrificed to war."). *Id.* (citing examples ranging from the systematic mass murder of the Holocaust to the epidemic acts of genocide and "ethnic cleansing" of Uganda, the Sudan, Rwanda, Cambodia, China's cultural revolution, and Bosnia).

Scapegoating, as it is currently practiced, means finding the one or ones who can be identified with evil or wrong-doing, blamed for it, and cast out from the community in order to leave the remaining members with a feeling of guiltlessness, atoned (at-one) with the collective standards of behavior. It both allocates blame and serves to "inoculate against future misery and failure" by evicting the presumed cause of misfortune.

SYLVIA BRINTON PERERA, *THE SCAPEGOAT COMPLEX, STUDIES IN JUNGIAN PSYCHOLOGY BY JUNGHAN ANALYSTS* 9 (1986). See generally *THE SCAPEGOAT: RITUAL AND LITERATURE* (John B. Vickery & J'nán M. Sellery eds., 1972). It appears that scapegoating is really a massive form of denial in which our own human weaknesses and propensities are "combated, punished, and exterminated as 'the alien out there' instead of being dealt with as 'one's own inner problem.'" ERICH NEUMANN, *DEPTH PSYCHOLOGY AND A NEW ETHIC* 50 (Eugene Rolfe trans., 1969). We in the United States consider ourselves a peace-loving, non-militaristic people, and we feel anger at the French and Eastern Europeans for their massive weapons sales to Third World countries. But we carefully protect ourselves from the knowledge that "the United States is by far the world's largest manufacturer and exporter of weapons. In 1991, the last year for which figures are available, we sold more weapons to the Third World than all other nations combined." Comment, *The Economics of Peace*, NEW YORKER, April 19, 1993, at 4.

In the United States, we are even more resistant to recognizing extreme needs of people within our own borders. Examples of our collective denial abound: doctors (I say at the risk of making *them* the scapegoats) are legend for their denial of their own humanity and fallibility, leading them often to refuse to acknowledge harms they inadvertently cause. See, e.g., MARIANNE A. PAGET, *THE UNITY OF MISTAKES: A PHENOMENOLOGICAL INTERPRETATION OF MEDICAL WORK* (1988). Far worse, contrary to all evidence and experience, we pretend that racial integration is working. But see ANDREW HACKER, *TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL* (1992) and United States

each of us "a deep-seated human desire *not* to be the one at fault, *not* to be the one who must change."¹²⁵ This resistance to being the one at fault, to being the one who must change, is part of what makes conflict so painful and its resolution so difficult. Most conflicts are a story of two parties, both of whom contributed to the problem, and neither of whom wants to admit his or her role in it.¹²⁶ In the literature on grieving we gain a broader sense of what is meant by the term *denial* and some of the risks it poses to the parties and others: "The person will strongly deny the reality of what has happened, or search for reasons why it has happened, and take revenge on themselves and others."¹²⁷

prison statistics, which show that the number of inmates in prison tripled between 1980 and 1994, and that the highest incarceration rates were for black males (2,678 per 100,000, compared to 372 for white males, 143 for black females and 20 for white females). *U.S. Prisons Set Record; Inmate Totals Triple*, DAILY UNIVERSE, June 2, 1994, at 1. It seems clear that whites are scapegoating African-Americans, and that African-Americans may also be scapegoating whites, and so on among various other racial, ethnic, and language groups in our country. Irrespective of race, we find that:

The accounts of rape, wife beating, forced childbearing, medical butchering, sex-motivated murder, forced prostitution, physical mutilation, sadistic psychological abuse, and other commonplaces of female experience that are excavated from the past or given by contemporary survivors should leave the heart seared, the mind in anguish, the conscience in upheaval. But they do not. No matter how often these stories are told, with whatever clarity or eloquence, bitterness or sorrow, they might as well have been whispered in wind or written in sand: they disappear, as if they were nothing. The tellers and the stories are ignored or ridiculed, threatened back into silence or destroyed, and the experience of female suffering is buried in cultural invisibility and contempt.

Mary Joe Frug, *A Postmodern Feminist Legal Manifesto (An Unfinished Draft)*, 105 HARV. L. REV. 1045, 1047 (quoting ANDREA DWORKIN, *RIGHT-WING WOMEN* 20 (1983)). The highest toll in terms of denial may be the denial of our own humanity, which leads us to deny the humanity of others. See generally BECKER, *supra* note 3. We become victims of our denial. Tragic examples are AIDS and smoking. Consider smoking:

Smoking is emerging as the world's largest single preventable cause of illness and deaths, killing an average of six people every minute. . . . The [World Health Organization] report said smoking kills 3 million people a year, expected to increase to 10 million a year by 2020 . . . the increase will occur because of the "latency period up to or exceeding 20 years before diseases develop in people who smoke."

AIDS, smoking loom large as "epidemics," DESERET NEWS, May 2-3, 1995, at A5. Despite such warnings, we find that as tobacco consumption decreases in the United States, the tobacco industry is "turning to Asia, where the United States government has already pressured four nations into opening their markets to American cigarettes. The industry's new target: a billion Chinese." Stan Sesser, *Opium War Redux*, NEW YORKER, Sept. 13, 1993, at 78.

125. JAMES A. HALL, *THE JUNGIAN EXPERIENCE: ANALYSIS AND INDIVIDUATION* 17 (1986) (*italics added*).

126. Just as litigation seeks a clear winner and a clear loser, when we are in conflict with an eye to a litigated outcome our own thought patterns become polarized and we tend to adopt the attitude that my side is completely right and the other side is completely wrong. This shift has been identified by Aubert as a shift from a *conflict of interests* to a *conflict of values or beliefs*. Aubert, *supra* note 18, at 26, 34.

127. Lewis, *supra* note 68, at 160, 162. Readers familiar with the literature on grieving will recognize many parallels to the approach in this article. For example, a recent writer on grief reactions and negotiation explains grief in this way:

In Bush's terms, the parties are at a low ebb in self-awareness and in capacity for empathic other-awareness. From this perspective, we might even say that, in most instances, conflicts are meaningful; they have a purpose. Their purpose is to hold up a mirror so disputants may see themselves in a new light, an experience as painful as it is valuable. As Edward Edinger so elegantly teaches:

the mirror . . . shows us what we otherwise cannot see for ourselves because we are too close to it. Without a mirror, for instance, we would never even know what our face looks like; since we are inside looking out, there can be no self-knowledge, even the elementary self-knowledge of what we look like, unless there is some device that can turn the light back on us, unless there can be a reflexive movement. The whole process of consciousness, in both the individual and collective sense, is served by an instrument that produces reflections, images giving us an objective sense of what we are.¹²⁸

Grief is a normal, multifaceted reaction to severe loss. Grief reactions may occur immediately, or considerably after, a loss or traumatic event. Acute grief reactions include physical reactions (such as respiratory disturbances, lack of strength and exhaustion, and digestive/appetite disturbances), feelings of distance from other people, preoccupation with the loss, anger, guilt, depression, and/or aimlessness. More specific conditions of the overall grief process include, but are not limited to, denial, isolation, anguish, fear, anger, anxiety, loss of self esteem, changing identity, despair, depression, anxiety, and eventually, some degree of acceptance.

Nancy Lewis Buck, *Grief Reactions and Effective Negotiation*, 7 NEGOTIATION J. 69, 71 (1991). Buck notes these reactions are not limited to bereavement, but "have been found to arise following physical injuries and lesser losses, such as loss of employment, property, and relocation." *Id.* Grieving and healing fall at the opposite end of the spectrum from blaming. In discussing the response of individuals to trauma, Judith Allen explains:

There is a subtle difference between being appropriately angry about what happened and *blaming*. To blame is to hold on to anger as though it could compensate for what we lost. Nothing can. Only grieving can heal us and blaming obstructs the mourning process. . . . [T]he intent of Alice Miller's writing is not to blame but to *understand*, so that we can break the patterns that have crippled us as individuals and nations. Until this happens, we will not be able to function as one world.

Judith Allen (reviewing ALICE MILLS, *THE UNTOUCHED KEY*) 24 PSYCHOL. PERSP. 154, 156 (1991). See also VERENA KAST, *A TIME TO MOURN: GROWING THROUGH THE GRIEF PROCESS* (1988); JOHN W. JAMES & FRANK CHERRY, *THE GRIEF RECOVERY HANDBOOK* (1988), and Jolanthe de Tempe, *Grief Therapy from an Anthropological Point of View*, in *COPING WITH LOSS: THE THERAPEUTIC USE OF LEAVE-TAKING RITUALS* 150 (Onno van der Hart ed., 1988).

128. EDWARD F. EDINGER, *THE ETERNAL DRAMA: THE INNER MEANING OF GREEK MYTHOLOGY* 85 (1994). The "process of consciousness," or the process of becoming *more conscious*, is a lifelong task, and, in psychological terms, may be considered a primary task in life. The "discovery" of a vast area of *unconsciousness* in the human psyche is one of the great achievements of psychology. HENRI F. ELLENBERGER, *THE DISCOVERY OF THE UNCONSCIOUS* (1970) (see especially the chapters on Sigmund Freud, Alfred Adler, and Carl Jung on pages 418, 571, and 657 respectively) and ERICH NEUMANN, *THE ORIGINS AND HISTORY OF CONSCIOUSNESS* (R.F.C. Hull trans., 1954). The approach in the present article draws primarily from the work of Carl Jung, whose perspective gives the greatest clarity to the nature and functions of transformative ritual processes and offers the richest understanding of meaningfulness of existence.

Properly understood, then, conflicts serve as such a mirror. They expose the disputants' weaknesses; the areas in which they have been too much the victim, or too much the exploiter; their complexes, their unresolved angers, and their feelings of specialness and entitlement.¹²⁹ Because it is so painful for disputants to see these parts of themselves exposed by their own involvement in the conflict, they need the protection and reinforcement, the containment and channeling, that the lawyer-client relationship provides, and they need the benefit of the full play of the negotiation process to help them gradually face what they see in the mirror and to come to terms with it.¹³⁰

This is why the negotiation ritual must be performed with such understanding and care. It is intended to help the disputants through an extremely painful and threatening process.

Seen in this light, conflicts are opportunities to increase in self-knowledge and in an empathetic understanding of the world around us. But it is extremely difficult for disputants to learn from this painful experience without the assistance of experienced, knowledgeable, ritual leaders. In our secular society, it seems as though law is one of the few authentic mediating structures left. This should not lead us to overlook other valuable resources. One of the most neglected sources of transformative energy is the theatre. It is not necessary that we make every mistake and suffer every anguish by our own direct experience. Aristotle showed we can learn powerful lessons and experience catharsis in the theatre when we empathically witness "the tragic hero's recognition of some fundamental truth and

For Jung, consciousness "is *not* the result of intellectualization and cannot be achieved by the mind alone," but is "the result of recognition, reflection upon and retention of [inner] experience, enabling the individual to combine it with what he has learned, to feel its relevance emotionally, and to sense its meaning for his life." ANDREW SAMUELS ET AL., *A CRITICAL DICTIONARY OF JUNGIAN ANALYSIS* 36-37 (1986) (emphasis added).

129. There is a direct relationship between our inner conflicts and our outer conflicts – the conflicts we get into with spouses, children, parents, neighbors, merchants, significant others, and even institutions. See KAREN HORNEY, *OUR INNER CONFLICTS* 143-216 (1945) (discussing consequences of unresolved conflicts which include impoverishment of the personality, hopelessness, and sadistic movement against others).

130. At trial, plaintiffs have at their disposal one of the most impressive and potent rituals presently available, backed by the full power of the state. There are a number of limiting rules and presumptions in place to protect against abuses of this awesome power by litigants or the state. One limitation is the presumption of innocence. Criminal defendants, for example, have no burden to prove their innocence. They are innocent until plaintiffs establish a prima facie case against them, at which point the burden of proof shifts to the defendant, and so on.

The advantage of negotiation over litigation is it invites the parties to step back from the fray and begin to examine their own motives, attitudes, and actions in relation to the conflict. Rather than remaining polarized and remaining locked in a potentially mistaken attitude of *righteous indignation*, the disputants are invited to be more introspective and see what they can learn about themselves and others in the process.

his consequent reversal of some former ignorance."¹³¹ Edinger elaborates on the healing potential of art:

All art forms, literature, and drama are basically mirroring phenomena. Shakespeare tells us that in Hamlet's remark about the nature of the drama: "The purpose of playing . . . is to hold, as twere, the mirror up to nature; to show virtue her own feature, scorn her own image, and the very age and body of the time his form and pressure." When we attend the theater we are, in effect, being mirrored. Jung called the theater the place where people work out their private complexes in public. We discover there what it is we react to, what it is that gets under our skin; we discover what is relevant to us. . . . The things we react to are mirroring some aspect of our inner nature and enable us to see it. The whole body of mythology serves that mirror function.¹³²

We can see, then, that theater, movies, and other art forms can be powerful mediating structures in our lives. If we participate, *not* for entertainment, but for self-knowledge, we can benefit from the tragedies and painful experiences of the characters in the drama rather than insist, through our ignorance, upon repeating every one of their mistakes in our own lives. But modern society seems characterized by a severe decline in appreciation of and participation in such mediating structures, and by an increasing tendency to bring conflicts to the legal arena for resolution. This brings us full circle. It is possible that the legal system is one of the few remaining social structures in which one can hope to experience transformative ritual process.

B. Acceptance

The next step is *acceptance*. It may take time, but at some point the parties need to move beyond denial and to *accept the possibility that they themselves are part of the problem*. They do not yet need to *do* anything about it, just to accept the possibility that the problem does not begin and end with the other side, that they themselves may have some complicity in the problem. In some cases, however, it may be that one side actually is wholly innocent and the other wholly

131. ROBERT COHEN, *THEATRE* 56 (3rd ed. 1994) (Greek terms omitted). For a more thorough consideration of Aristotle's *Poetics* in particular and dramatic theory in general, see MARVIN CARLSON, *THEORIES OF THE THEATRE: A HISTORICAL AND CRITICAL SURVEY, FROM THE GREEKS TO THE PRESENT* (Expanded ed., 1993). Carlson presents diverse interpretations of Aristotle, but concludes that "all agree upon *katharsis* as a beneficial, uplifting experience, whether psychological, moral, intellectual, or some combination of these." *Id.* at 18-19.

132. EDINGER, *supra* note 128, at 85.

to blame for the problem. But even when parties are wholly innocent,¹³³ they still need to accept the possibility there is *something they could do now to move the situation in the direction of an appropriate resolution*. Again, they don't need to actually take action, they simply need to register a change in attitude that opens them to the possibility of movement in the direction of an appropriate solution.

C. Sacrifice

Assuming the parties have accepted the possibility they are part of the problem, or the possibility there is something they could do now to move in the direction of a resolution, the next step is to consider what they might be willing to do about it. In its starkest form, the principle is that, for the conflict to be resolved, the parties must be willing to make a sacrifice.¹³⁴ From a judge's point of view, the minimum sacrifice required for a valid settlement agreement is

133. A classic example is a rear-end collision at a stop sign in which the aggrieved party – the one whose car was run into – was driving lawfully and prudently while the driver behind, through a momentary lapse of attention or worse, was 100% to blame for the accident. Another example might be the consumer who prudently shops for and buys, say, a toaster, which a week later erupts into flame and melts a large hole in the consumer's recently-installed kitchen countertop.

134. I use the term "sacrifice" advisedly, instead of the accepted terms "compromise" or "concession" because compromise and concession are too limiting in their meanings. Compromises and concessions do not require a change of heart. They may be made in anger, with a vindictive spirit, and even in bad faith. Any of these might be sufficient to rope the other side into a settlement agreement, but from the point of view of this article, they would have failed at the larger task of helping the parties to heal from the trauma of the underlying conflict. The word "sacrifice" also suggests that the process of working through conflicts has a transcendental aspect; it has the potential to take people beyond ordinary or common experience; in dealing with the pain of conflict and conflict resolution, they are approaching a more sacred realm. The fact is that living life, facing our problems, making mistakes, learning from our conflicts, all of this has a special quality to it that we should not ignore, but should be more conscious of and should open ourselves to. This feeling for the "sacred" I am referring to is independent of any particular belief system. It is captured, for example, in the wonderful book of text, pictures, and poetry by social anthropologist FRANCIS HUXLEY, *THE WAY OF THE SACRED* (1989) and in the remarkable recent book by THOMAS MOORE, *THE CARE OF THE SOUL* (1992) (subtitled "A Guide for Cultivating Depth and Sacredness in Everyday Life").

We should acknowledge that making sacrifices is not always the answer, and even when it *may* be the answer, it is a difficult and hazardous process at best. As to the first point, some people respond to conflict *not* by becoming more aggressive, but by becoming more compliant. That is, instead of refusing to make a sacrifice, they will sacrifice far too much in the hope of regaining favor in the other's eyes. This may be due to an inordinate need for affection and approval, or it may be a response to intimidation or other forms of abuse by a more powerful other. Either way, the answer in these circumstances is *not* sacrifice for the other, at least not in the sense of making concessions to them. Rather, it would be sacrifice in the sense of "letting go" of the needy or frightened part of oneself and finding empowerment in the process of working through the conflict. People who tend to be too compliant are especially in need of a safe vessel or container (for our purposes, a good lawyer-client relationship) to give them ritual protection and support throughout the painful process. Fortunately, the negotiation ritual is a time-honored process. If lawyers and other dispute professionals become conscious of their role as ritual leaders and of the vulnerable position of the clients, they are in a position to do much good.

a *compromise* by each side,¹³⁵ meaning that both parties must make some concession, must move from their original position. But as a general matter, mere concessions or compromises do not require a change of heart. It has been observed that people usually are not willing to make a sacrifice until they have been brought to a more humble attitude. Anthropologists say it without varnish: the way people move from denial and to acceptance and willingness to sacrifice is by means of *ritual mortification*.¹³⁶ Because power leads to abuses of power, and *ritual mortification* sounds like an abuse of power, it is good if we feel some discomfort with the idea that part of the lawyers' task is to lead their clients through a ritually mortifying process. Assuming, for the sake of argument, that the experience of ritual mortification is a necessary part of the process, is it possible to identify the elements that produce it? The first element that comes to mind is the lawyers' monthly billing statement. It is, and ought to be, painful for clients to pay their lawyers to pursue this conflict.¹³⁷ Another means of mortification is to involve the client in the preparation of the case, for example, helping to answer the written interrogatories, and other tasks.¹³⁸ If this is not sufficient to bring about the needed broadening of perspective, then perhaps it is time for oral depositions. One can see that, from a ritual perspective, there is symbiosis here; the things that lawyers do, on one level, to prepare the case for trial should trial become necessary, are the very things that, on another level, are most likely to help the clients see their own role in the conflict more clearly and open up the possibility of an appropriate, mutually agreeable resolution.

135. The compromise requirement is discussed above at note 113 and accompanying text.

136. It was not until I heard these words that I realized why so many people, myself included, are drawn to the law; few systems can compare to lawyers and the legal system for making people feel ritually mortified. I say this only partially in jest. There is an upside and a downside to existence of such power. The downside is recognition that since lawyers and other professionals do in fact *have* a lot of power, by the exercise of that power they dramatically impact peoples' lives. Wherever there is power, there are abuses of power. In general, lawyers, doctors, members of the clergy, and therapists are not cognizant enough of their power and not well equipped to recognize and make corrections for their tendencies to abuse that power. See ADOLF GUGGENBUHL-CRAIG, *POWER IN THE HELPING PROFESSIONS* (1971); William L.F. Felstiner & Austin Sarat, *Enactments of Power: Negotiating Reality and Responsibility in Lawyer-Client Interactions*, 77 CORNELL L. REV. 1447 (1992).

137. This should not be interpreted as a license to run up one's fees; our most economically rendered services will cause sacrifice enough. But it does suggest that as a general matter, clients are better engaged by the process if they are making some financial sacrifice for it, even if they are on a contingent fee basis.

138. In a study of personal injury litigation in New York City, Rosenthal found the more actively the client is involved in the process, the better the outcome for the client. Thus, in the long run, attorneys can better serve clients by helping them to keep actively engaged in the process. Rosenthal suggests a number of ways to improve the quality of the relationship with the client. Although his suggestions are given from a plaintiff's personal injury point of view, they can readily be generalized to fit plaintiffs and defense lawyers and clients in virtually all subject-areas. DOUGLAS ROSENTHAL, *LAWYER AND CLIENT: WHO'S IN CHARGE* 154 (1974).

Assuming that sacrifices need to be made, what should they be?¹³⁹ This is an extremely delicate question. We know, for example, that some people have a history of being *too compliant*, of giving away too much, whether motivated by a need for affection and approval,¹⁴⁰ by fear of reprisals, or for some other reason. For those who are too compliant, the sacrifice called for would probably *not* be to make more concessions to their antagonist, but rather to forebear from giving, to reverse themselves, to give up the part of themselves that always wants to please others. For other people, the problem may be just the opposite. They may be exploiters who are too good at looking out for themselves at others' expense. For them, the sacrifice may be to recognize their exploitive patterns and become more conscious of the interests and needs of other people. There are many other possibilities. The answer will depend on the personalities involved and the particularities of their situations. In some situations, parties may need to sacrifice – to let go of – such things as a desire for a total victory, or an impulse for revenge, a mistaken belief that they themselves are faultless and the other side totally to blame, their pride, their unwillingness to acknowledge or appreciate another's point of view, or their unwillingness to forgive another for his or her mistake.¹⁴¹ In other situations, parties may need to give up the belief that they can get away with exploiting others, their belief that they are better or more deserving than others, or their excessive opinions of their own abilities, worth, privileged status, etc.¹⁴² There may be situations in which parties need to give

139. We will return later to the question of "who decides" what sacrifice should be made. The short answer is that the parties must decide. It would be an enormous presumption for their attorneys to attempt to answer this question for them; doing so would be imposing our own values, attitudes, complexes, and biases, and presuppositions on our clients.

140. See HORNEY, *supra* note 129, at 48 (discussing the overly compliant person who's "need to satisfy this urge [for affection and approval] is so compelling that everything he does is oriented toward its fulfillment").

141. Forgiveness has a two-fold healing effect. It helps to heal the one who is angry and the one who is forgiven. The importance of forgiveness to the one who is angry at another is developed in SIDNEY B. SIMON & SUZANNE SIMON, *FORGIVENESS: HOW TO MAKE PEACE WITH YOUR PAST AND GET ON WITH YOUR LIFE* (1990). For more on forgiveness, see *infra* note 150.

142. An excess of any one of these traits is associated with narcissism, a trait which manifests itself as "[s]elf-love as opposed to . . . love of another person." Egotism is a common form of narcissism, with its "self-centeredness, selfishness, and conceit." AMERICAN PSYCHIATRIC GLOSSARY 134 (Jane E. Edgerton ed., 7th ed. 1994). The trait is named for the mythological character Narcissus who, in Ovid's account, was cursed to "fall in love; but . . . be denied the prize he craves." Hot from a chase, Narcissus laid face down to drink and saw his image reflected from:

a pool whose waters, silverlike, were gleaming, bright. . . .

and he gazes in dismay at his own self; he cannot turn away his eyes; he does not stir,
 . . . Unwittingly, he wants himself; he praises, but his praise is for himself; he is the
 seeker and the sought, the longed-for and the one who longs; he is the arsonist – and is
 the scorched.

OVID, *THE METAMORPHOSIS* 93-94 (1993). "Narcissistic disorders generate a wide range of symptoms including grandiosity, rage, inferiority, overidealization, entitlement, and a lack of empathy." MICHAEL LEWIS, *SHAME: THE EXPOSED SELF* 11 (1992). Healthy individuals have some degree of narcissism, but an excess hinders relationships and is the underlying problem in many conflicts. Edinger gives a Jungian interpretation of narcissism and its treatment in EDWARD F. EDINGER, *EGO AND ARCHETYPE*

up their hope of obtaining a windfall or other unearned benefit, or give up their envy or spite or jealousy with respect to possessions, luck, and social position.¹⁴³

Before proceeding to the fourth step, there is one final consideration. Is it mandatory that parties make a sacrifice? The answer is a firm "no." There can be no *requirement* that the client have a change of heart. It is fundamental that, as lawyers, we implicitly and explicitly declare to our clients that they can stay just the way they are, and so long as they do not expect us to do that which is illegal or unethical, we will stand by them. Our willingness to represent our clients should not depend upon their willingness to change, much less to move in directions *we think right*. As Shaffer and Elkins remind us, "[t]he client has to be free to be wrong."¹⁴⁴ The negotiation process, then, is not intended for lawyers to impose our values upon our clients, but for us to help contain and channel our clients' energies in appropriate ways until they have had enough time to see their own situations more clearly and to discover for themselves what steps they may be willing to make.

D. *Leap of Faith*

The fourth stage refers to action or movement, what might be called the *leap of faith*. It is a leap of faith, for example, to admit to the other side that you might be *willing* to make a sacrifice to resolve the case. Practicing lawyers recognize it as the moment when their client looks them in the eye and asks, "[I]f I do this, can you guarantee it will work?" And the lawyer has to reply, "[N]o, I can't guarantee that, because I don't know that. But the trial is coming up really soon, and we haven't thought of anything better to do, but you decide." And the client must decide.¹⁴⁵

161 (1973). For a more popular treatment of the problem, see CHRISTOPHER LASCH, *THE CULTURE OF NARCISSISM* (1979).

143. As we list the possible sacrifices, it becomes increasingly clear what a risky process this is, because it calls for us to change, to be willing to give up or to let go of something we presently value, something that goes against our self-interest as we presently define it. For this reason, people are right to be worried and cautious about this approach.

144. THOMAS L. SHAFFER & JAMES R. ELKINS, *LEGAL INTERVIEWING AND COUNSELING IN A NUTSHELL* 297 (1987).

145. If you have forgotten about leaps of faith, see some movies. A good place to start is with *FIELD OF DREAMS* (Universal Studios, 1989). Movies, like live theatre, are a very powerful medium for teaching, indirectly and metaphorically, things that are difficult to see by more direct means. They have the power to transform our lives if we will let them. See generally GEOFFREY HILL, *ILLUMINATING SHADOWS: THE MYTHIC POWER OF FILM* (1992) (if you did not like *FIELD OF DREAMS*, see *id.* at 297). For a filmography listing selected transition movies, see BETWIXT AND BETWEEN: *PATTERNS OF MASCULINE AND FEMINE INITIATION* 489 (Louise Carus Mahdi et al. eds., 1987).

Verana Kast has her own term for *leaps of faith*. She sees a leap of faith as a turning point, and refers to it as the "creative leap," by which she means the point in a crisis at which attitudes and behaviors must make way for change. It is at this moment, signaled by anxiety, even panic, that the creative leap is required. VERANA KAST, *THE CREATIVE LEAP: PSYCHOLOGICAL TRANSFORMATION THROUGH CRISIS* (Douglas Whitcher trans., 2d ed. 1990).

A leap of faith is an expressed willingness to make a sacrifice in the hope of moving a conflict toward a meaningful and appropriate resolution.¹⁴⁶ One of the most powerful is an apology sincerely given. The wrongdoer says to the aggrieved person, "I am truly sorry for the trouble I have caused you."¹⁴⁷ In our

146. I emphasize again that this is a very sensitive process; it is not for lawyers to tell their clients what to do to improve their lives; rather, this is something the clients must discover for themselves; the role of the lawyer is to provide a good enough container to hold and sustain the parties during this painful process of becoming more conscious and aware.

147. An apology is, in our culture at least, an all-too-uncommon example of a leap of faith. To apologize is to sacrifice one's pride, the illusion that one is perfect, the satisfaction that you "never say you are sorry." It is also risky in the sense that an apology is admissible at trial as evidence of wrongdoing. On apology generally, see Hiroshi Wagatsuma & Arthur Rosett, *The Implications of Apology: Law and Culture in Japan and the United States*, 20 LAW & SOC'Y REV. 461 (1989); John O. Haley, *Comment: The Implications of Apology*, 20 LAW & SOC'Y REV. 499 (1989); Comment, *Healing Angry Wounds: The Roles of Apology and Mediation in Disputes Between Physicians and Patients*, 1987 J. DISPUTE RESOL. 111 (1987).

To my understanding, the reason for apology is not only to give the person we have wronged the solace and comfort they may need in order to heal from the wrong, but also to relieve ourselves of the burden of having wrongly or unwittingly harmed another – to obtain, in a word, forgiveness that will contribute to our own psychic or spiritual healing. In our rights-oriented society, we tend to assume that we hope to get away with our breaches of contract, our negligent acts, and the harms we may do to others. But this attitude denies our own humanity, and should not cause us to forget that a fundamental human characteristic is to want to do equity. The responses of wrongdoers to the situation they have caused is explored in an unfortunately little-known article by Stewart Macaulay & Elaine Walster, *Legal Structures and Restoring Equity*, 27 J. OF SOC. ISSUES 173 (1971) (reprinted in LAW, JUSTICE AND THE INDIVIDUAL IN SOCIETY (June Louin Tapp & Felice J. Levine eds., 1977)).

The common law has long acknowledged this and similar impulses as moral obligations, but as a matter of policy, generally refuses to enforce them as legal duties. See JOHN D. CALAMARI & JOSEPH M. PERILLO, *THE LAW OF CONTRACTS* 177 (2d ed. 1977) (especially notes 32-33 and accompanying text).

In their discussion of the role of apology in dispute resolution, Goldberg, Green and Sander discuss both the potential benefits of apology and the obstacles to its use. They suggest, among other factors, that:

Reluctance to apologize may also be a product of rules of evidence that treat an apology as an admission of fault that can be used to prove wrongdoing. Thus, it is commonplace for insurance companies and attorneys to advise policyholders against expressing sympathy for a person injured by the policyholder, for fear such an expression will be treated as an admission of guilt.

GOLDBERG ET AL., *supra* note 22, at 137, 138. But see Peter Rehm, *Legal Consequences of Apologizing*, in this issue, which suggests that, contrary to the fears of potential defendants and their insurers, courts are rather favorably disposed toward apologies and expressions of sympathy by alleged civil wrongdoers. Stated more accurately, the cases identified thus far show that while the expressions are admissible, trial courts and appellate courts are strongly *disinclined* to draw negative inferences from timely expressions of apology, regret, sympathy, etc., by defendants. If further research confirms this as a consistent judicial attitude, then lawyers, target defendants, and insurance companies can let go of some of their fears about negative connotations of apology. While it would be jaded and cynical for them to suggest that potential defendants ought to apologize when they do not actually regret or sympathize with the injured's situation, it would be an important step forward for lawyers and insurers to advise potential defendants that timely and sincere expressions of apology, sympathy, or regret are unlikely to work against them in the event of trial and, in fact, might actually work for them.

Further, if we consider the analogous situation in criminal law, we find that evidence of contrition and remorse is viewed as acting in defendant's favor when it comes to sentencing.

rights-oriented society, we are quick to justify our own harmful acts, and we are slow to recognize how healing it can be to the injured person for us to acknowledge our fault, to offer an appropriate apology, and, if the situation warrants, to offer to make reparation.¹⁴⁸ Similarly, we usually think the lawyers' role, when representing defendants, is to *protect their clients from having to admit wrongdoing or having to make legal compensation for the harms they cause*. But as Macaulay and Walster remind us, just as there are negative psychological consequences to people who are harmed, there are also psychological consequences to those who do the harming, whether purposefully or not.¹⁴⁹ There may be an innate human need to be fair, to make reparation for the harms we cause.¹⁵⁰ This fundamental human need – the need to be equitable – has been largely overlooked in the legal literature.¹⁵¹

Presentence investigative reports routinely take note of the presence or absence of these attitudes. Here are some typical phrases from presentence reports: "he is very regretful for his behavior . . . [h]e openly admitted his participation and the fact he was the one who grabbed the purse," "[t]he defendant did express regret for his activities and seemed to recognize and appreciate the severity of the offense," and "defendant seems to be a courteous young man who expresses regret for his involvement in the offense and seems to appreciate its severity." F. REMINGTON ET AL., CRIMINAL JUSTICE ADMINISTRATION: CASES AND MATERIALS 582, 587 (Rev. ed. 1982). The reverse is also true: when defendants deny their complicity despite good evidence to the contrary, judges feel that they "must necessarily forego leniency" at the sentencing stage. See, e.g., United States v. Wiley, 184 F. Supp. 679 (N.D. Ill. 1960) (citing CRIMINAL JUSTICE ADMINISTRATION: CASES AND MATERIALS, *supra* this note, at 531, 532). We must recognize, in making this analogy, that a primary purpose of criminal law is to punish guilty defendants, whereas, except for claims for punitive damages, punishment of the defendant is not considered an appropriate objective in determining the amount of damages to be paid in civil litigation. But human nature being what it is, we can probably assume that judges and juries, if they were influenced by such considerations, would be inclined to award lesser damages against a remorseful defendant and greater damages against a defendant who refuses to acknowledge, much less to apologize for, the harm caused to the plaintiff.

148. Earlier in this article, we saw that conflicts develop through a series of stages called naming, blaming, and claiming and that, for a conflict to arise, the person or institution against whom the claim is made must *reject the claim*, or refuse to give adequate satisfaction. See *supra* note 15 and accompanying text. That was the first opportunity to offer an apology or to otherwise give satisfaction. This is now the second opportunity, and it is likely to feel more difficult and may be more costly as a result of the delay.

149. Macaulay & Walster, *supra* note 147, at 173.

150. In a brief magazine article, John Bradshaw talks about twelve-step programs and the importance of *seeking forgiveness* from those we have harmed. Bradshaw explains that, as a person progresses through the twelve steps, "she is asked, twice, to make lists of people she may have harmed and, where possible, to make amends to them -- to ask their forgiveness." John Bradshaw, *Spiritual Awakening in Recovery*, LEAR's 50 (June 1992). Why should the healing benefits of this process be limited to those who follow the twelve steps?

151. The basic human need to do reparation is a theme in several of Shakespeare's plays. A good introduction for lawyers to the theme of reparation and to its development by Shakespeare is JOSEPH WESTLUND, SHAKESPEARE'S REPARATIVE COMEDIES: A PSYCHOANALYTIC VIEW OF THE MIDDLE PLAYS (1984). First noting that "psychoanalysis dwells upon guilt and conflict," Westlund quotes Freud to the effect that psychoanalysis is a process of "remembering, repeating, and working through," and adds to these three steps a fourth, which he calls "making good." *Id.* at viii, citing David M. Gottesman, *Working Through: A Process of Restitution*, 62 PSYCHANALYTIC REV. 644 (1975-76). Westlund further develops the theme by reference to Melanie Klein's theory of reparation, which

Other leaps of faith are to admit one's part in causing the conflict or in making the problem more difficult to resolve. Here are examples: I acknowledge that I was really angry at myself, but I was shouting at you; I can see that made the problem much worse; I am sorry that I was so accusatory when I talked with you; I was wrong to say you were completely at fault; I see now that I really misunderstood your intentions; it was at least half my fault that we got so angry at each other; I was wrong to blame you so strongly,¹⁵² or I'm sorry I overreacted; I can see now that it made things worse.¹⁵³ At a more fundamental level, at the appropriate time (after receiving an apology, for example) it is a leap of faith to explicitly forgive the other side,¹⁵⁴ and perhaps to add the hope of someday also being forgiven by the other.¹⁵⁵

Leaps of faith are inherently risky. This is what gives them their healing power. They open people to danger, exploitation, and ridicule. Admissions can be used in court as evidence against us. When one side to a conflict takes a step downward, in the direction of a less demanding or more understanding attitude, the other side has a choice: they may choose to reciprocate with a downward movement of their own, or they may use it as a pretext for stepping up their own demands. Because lawyers have seen the latter response many times before, they are understandably wary about encouraging clients to take steps downward, and often try to shield their clients from this essential part of the healing process. This

"places restitution in the largest human context. Without reparation, everyone – and not just patients – would wallow in guilt and unresolved conflict." One final point. For Westlund, the willingness to make reparation is *not* a sign of defeat or of self-defeating behavior. Rather, "being reparative requires that our healthy narcissism, our self-esteem, be engaged. . . . Guilt makes us feel worthless; being reparative, on the other hand, can create in us something like [healthy] narcissistic elation." *Id.*

For a similar perspective on needs of victims and perpetrators in the criminal context, see Michelle Munn, *Restorative Justice: An Alternative to Vengeance*, 20 AM. J. CRIM. L. 299 (1993) (reviewing MARTIN WRIGHT, *JUSTICE FOR VICTIMS AND OFFENDERS: A RESTORATIVE RESPONSE TO CRIME* (1991)).

152. Consider this about blame:

There is a subtle difference between being appropriately angry about what happened to us and *blaming*. To blame is to hold on to anger as though it could compensate for what we lost. Nothing can. Only grieving can heal us and blaming obstructs the mourning process.

Allen, *supra* note 127, at 154-58.

153. According to some authorities, many of our conflicts arise from the phenomenon of shame. We feel shamed by the actions of another, and we cause others to feel shamed. An important scholarly examination of shame is MICHAEL LEWIS, *SHAME: THE EXPOSED SELF* (2d ed. 1995). Lewis details things that trigger shame; for example, when we see reflected from the other disgust, contempt, or withdrawal of love. We may respond defensively, with anger and rage, or with depression. The most important aspects of the book are how to appropriately deal with shame, which include acknowledging it and finding a way to heal from it. Lewis discusses denial and forgetting (which are *not* effective ways for dealing with shame) and highlights the role of such things as laughter, secular or religious confession, and forgiveness.

154. On the importance of ultimately forgiving others, see KENNETH CLOKE, *MEDIATION: REVENGE AND THE MAGIC OF FORGIVENESS* (1990) and SIMON & SIMON, *supra* note 141.

155. These examples are really specific applications of the many suggestions about how to reach agreement given by ROGER FISHER ET AL. in *GETTING TO YES* (1981, 1991).

is good and bad. It is good that lawyers help clients avoid making concessions when those concessions will be used against them. It is bad because, unless both sides are willing to take some risks, there is no chance for mutual agreement and reconciliation. So the question is not *whether* to permit or encourage the client to make leaps of faith, but *when* and *under what circumstances*. To understand *when* to make concessions, lawyers need to be well attuned to the people involved, the stages of the negotiation process, and their own inner dynamics. It is actually at this point, in my opinion, that the work of Roger Fisher, William Ury, and their colleagues becomes especially relevant, because they describe a method that helps attorneys and clients step safely through in this particularly risky and difficult stage of the negotiation process.¹⁵⁶ Use of neutral third parties as go-betweens is also a highly effective method for reducing the risk involved in leaps of faith, which may be one reason why healing has emerged more clearly as a potential byproduct of mediation while it remains largely ignored in the negotiation literature.¹⁵⁷ The same may be true for such leaps of faith as forgiveness¹⁵⁸ and apology.¹⁵⁹

156. ROGER FISHER & SCOTT BROWN, *GETTING TOGETHER: BUILDING A RELATIONSHIP THAT GETS TO YES* (1988); JEANNE M. BRETT ET AL., *GETTING DISPUTES RESOLVED: DESIGNING SYSTEMS TO CUT THE COSTS OF CONFLICT* (1988); ROGER FISHER ET AL., *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* (2d ed. 1991); WILLIAM URY, *GETTING PAST NO: NEGOTIATING WITH DIFFICULT PEOPLE* (1991).

157. See, e.g., Lois Gold, *Influencing Unconscious Influences: The Healing Dimension of Mediation*, 11 *MEDIATION Q.* 55-66 (1993) (includes references to additional literature). It is important to stress at this point that mediation is an exceptionally effective procedure for assisting the parties through the steps of the negotiation ritual. Its greatest strength may be its ability to facilitate leaps of faith, but it also permits the parties to each tell their side of the story. This often has a cathartic effect, helping disputants to let go of their anger and to begin searching for means of resolving the conflict. It also permits each party to hear, often for the first time, the situation as it is seen by the other side. This helps each side realize there are two sides to every conflict, and that the other side may also have legitimate reasons for being so upset, defensive, or vindictive, etc. Most importantly, however, is the use of caucusing in which the mediator, after the initial session with all parties present, meets first with one side of the dispute, and then with the other side, and continues shuttling back and forth between them in an attempt to help the parties arrive at a solution.

158. See, e.g., Kenneth Cloke, *Revenge, Forgiveness, and the Magic of Mediation*, 11 *MEDIATION Q.* 67-78 (1993). Included in the same issue of *Mediation Quarterly* is an article reviewing conceptions and practices about forgiveness from various religious traditions and seeking to develop from them guidance for mediators. Peter A. Kirkup, *Some Religious Perspectives on Forgiveness and Settling Differences*, 11 *MEDIATION Q.* 79-94 (1993).

159. A major textbook on alternative dispute resolution discusses the issue of apology. The authors point out one of the problems: "It is commonplace for insurance companies and attorneys to advise policyholders against expressing sympathy for a person injured by the policyholder, for fear such an expression will be treated as an admission of guilt." GOLDBERG ET AL., *supra* note 22, at 137. They note that in American culture we have come to see apology as demeaning, but offer the hope that, with the emerging emphasis on accommodative dispute resolution, this resistance to apology may diminish. *Id.* at 138.

E. Renewal or Healing from Conflict

If the process works well enough, and both parties are willing to move by incremental leaps of faith in the direction of agreement, and if they seek in the process to fathom the underlying problems and address them along the way, the effect can be two-fold: they may reach a mutually acceptable solution¹⁶⁰ and, in the best of circumstances, they may also experience a change of heart, be reconciled to one another and healed and feel renewed as human beings. This is the transformation objective; it is the goal or purpose of all ritual processes, whether it be theater or court trial or graduation exercise or religious rite or negotiated settlement. Rituals are to help prepare the participants, those on whose behalf the ceremony is enacted, to move forward in a new condition, to a new phase of life. *Renewal* or transformation in this context means not simply they are as good as they were before the conflict, but they are better -- they are more whole, or more compassionate, or less greedy, or otherwise changed in an important way from their attitude or condition before the crisis began. Certainly, when people experience such a fundamental change through the process of conflict resolution, they will be far less likely to find themselves in a similar conflict again. On the other hand, if they fail at this process, then to the extent the conflict was a product of their own developmental shortcomings, it is likely they will find themselves in similar conflicts in the future, returning again and again until the party acknowledges and addresses the underlying developmental need.

V. THE ROLE AND CHARACTERISTICS OF THE LEARNED PROFESSIONS¹⁶¹

In earlier portions of this article, we saw that conflicts are dangerous to disputants and to people around them. We also saw that the lawyer-client relationship functions, in many respects, as a safe vessel that helps to contain, channel, and protect disputants until the conflict is resolved by settlement or adjudication. According to some scholars, human beings are hardwired or

160. To the extent any agreement is arrived at by a fair procedure and on mutually agreeable terms, it will presumably pass this test. But not all such agreements are equal in terms of economic efficiency, distribution of joint gains, savings or economy of transaction costs, etc.

161. In my opinion, it is no coincidence that, at common law, the concept of "learned profession" included law, religion and medicine. For example, THE OXFORD ENGLISH DICTIONARY 1427 (1970) defines "profession" as:

[t]he occupation which one professes to be skilled in and to follow. . . [a] vocation in which a professed knowledge of some department of learning or science is used in its application to the affairs of others or in the practice of an art founded upon it. Applied *spec. to the three learned professions of divinity, law, and medicine; also to the military profession.*

JOWITT'S DICTIONARY OF ENGLISH LAW 1442 (1977) gives a similar definition: "Profession, calling, vocation, known employment; divinity, medicine, and law are called the learned professions." See generally Harold Wilensky, *The Professionalization of Everyone?*, 70 AM. J. SOCIOLOGY 137 (1964).

genetically predisposed, when we are in crisis, to seek help from particular kinds of individuals.¹⁶² They propose, for example, that when we are having a crisis of the spirit or soul, we seek out a spiritual or religious leader, or today, we might alternatively seek out a therapist. If it is a crisis in the nature of physical illness or injury, we seek out a medical doctor or other similar healer. And if it is a crisis in the nature of a conflict, we seek out a lawyer or similar ritual leader. To my mind, it is no coincidence that at common law, the concept of a *learned profession* was limited to just three vocations: theology,¹⁶³ medicine, and law.¹⁶⁴

It would seem, then, that we have a built-in instinct to recognize that, when we are in crisis, we need expert help. In fact, our tendencies in this direction make us eminently vulnerable to shams and frauds, to con artists and sellers of snake oil, to all of those who promise to magically solve the financial, emotional, spiritual, and other problems in our lives. For this reason, it becomes especially important for members of the learned professions to discover and develop in ourselves those qualities that differentiate us from quacks and frauds and equip us to better serve the individual needs of people in crisis who may come to us for help. I would like to suggest six qualities that seem especially important in differentiating lawyers and other professionals from those whose business is to design, advertise, produce, or sell goods and services for their own gain, rather than for the true benefit of those they pretend to serve.

A. Esoteric Knowledge

The first characteristic is special knowledge,¹⁶⁵ which for our purposes means a combination of two things. First, it means knowledge that can only be gotten from what might figuratively be called thick, impenetrable books written in arcane language not accessible to the ordinary person. Second, the knowledge

162. As described in more detail at *supra* note 91, Anthony Stevens has reviewed the research on features common to all cultures and reports that "no human culture is known which lacked laws about ownership, inheritance and disposal of property, procedures for settling disputes, religious rituals, and medicine." STEVENS, *supra* note 91, at 23. The need for experts in law, religion and medicine appears intrinsic to human existence.

163. Today it certainly includes psychotherapy. The similarity of function and task among the learned professions should not escape our notice. For each of them, the focus is on the well-being of the individual client. And for each, they are most likely to see people when they are in pain. What Kenneth Leech has said about spiritual crises applies to medical and legal ones as well: "to become whole and integrated is painful, it is a process which involves conflict and crises, and all spiritual direction is involved in the crises of the soul." LEECH, *supra* note 107, at 109.

164. JOWITT'S DICTIONARY OF ENGLISH LAW (1977) (profession is a calling or vocation; "divinity, medicine, and law are called the learned professions") and OXFORD ENGLISH DICTIONARY 1427 (1970) (profession is "applied specifically to the three learned professions of divinity, law, and medicine; also to the military profession").

165. A profession is an occupation or calling "in which one professes to have acquired some special knowledge used by man either of instructing, guiding, or advising others or of serving them in some art." WEBSTER'S INTERNATIONAL DICTIONARY 1976 (2d ed. 1941).

from such books can only be gained by going through a ritually mortifying process, which is not an inaccurate description of the first year of law school (or any other rigorous graduate program). Those hard-nosed first-year law professors (and some second- and third-year ones too) may not be aware of it, but they are engaging students in a transformative process.

B. Special Authority

A second quality is special power or authority. It is essential that this kind of helper be formally endowed with the necessary authority by the community, and that the political or social center of authority say to the world that, when you need this kind of help, "these people, and only they, are qualified to help you."

C. Distinguishing Qualities

The third category is a constellation of elements including distinctive qualities of appearance, speech, demeanor, etiquette, office arrangements, feasting, drinking, and observance of taboos. Each of these factors deserves more elaboration than is possible in the present article. Chief among the factors relating to appearance are clothing, regalia (robes, hats, pins, and other distinguishing symbols such as powdered wigs),¹⁶⁶ and items of personal grooming (including wearing of appropriate hair styles).¹⁶⁷ Speech,¹⁶⁸ etiquette, and demeanor refer to special rules for decorum and propriety not only in the courtroom but in other professional contexts as well; they include speech patterns, manner of greeting and leave-taking, and various verbal and non-verbal cues. Feasting has traditionally been a major feature of community life and is particularly associated with ritual occasions, whether they be rites of passage (births, weddings, funerals, etc.) or rites in response to individual crises. Eating,¹⁶⁹ drinking, and spending non-

166. See, e.g., RUTH P. RUBINSTEIN, *DRESS CODES* 73-80 (1995).

167. See, e.g., E. R. Leach, *Magical Hair*, 88 J. OF ROYAL ANTHROPOLOGICAL INST. 147, 164 (1957).

168. See generally Brenda Danet, *Language in the Legal Process*, 14 LAW & SOC'Y REV. 445, 564 (1980). A more sobering review is given in RICHARD H. WEISBERG, *THE FAILURE OF THE WORD: THE PROTAGONIST AS LAWYER IN MODERN FICTION* (1984).

169. This category includes meals in celebration of important events and meals in times of crisis, as following a funeral. On the importance of eating together over human history, see COOKING, EATING AND THINKING: TRANSFORMATIVE PHILOSOPHIES OF FOOD (Deane W. Curtin & Lisa M. Heldke eds., 1992). See also STEPHEN MANUAL ET AL., *THE SOCIOLOGY OF FOOD AND EATING* (1993) (also published as a special issue of CURRENT SOCIOLOGY, Vol. 40, Issue 2); W. ROOT & R. DO ROCHEMONG, *EATING IN AMERICAN: A HISTORY* (1976).

There is no question that people in industrialized countries generally, and in the United States especially, do not associate as much meaning to food and meal-taking as peoples in less prosperous areas of the world or people in earlier, less abundant times. There are several ways to track the changing perceptions. One interesting comparative approach is given in ALLEN J. GRIECO, *THEMES IN ART: THE MEAL* 78 (1992):

Attitudes toward food and the table have undergone a long and profound change in Western history since the Middle Ages. In six centuries we have gone from a time when

business-related time together have become much less important in American life styles, but should nevertheless be considered essential aspects of professional functioning.¹⁷⁰ In terms of ritual process, various cultures and ethnic groups have well-established practices with respect to foods that should be eaten and foods that must *not* be eaten.¹⁷¹ Office furnishings and decor also influence the

food supplies were always short and when famine struck frequently to our present health problems due to excessive food consumption. This radical change in the availability of food has also determined a basic change in the way we see it. From a quasi-sacred object of desire it has slowly become a mass commodity.

Paintings constitute a particularly sensitive documentation of this changing attitude to food. . . . They allow us to follow the slow but steady changes in how people ate, where they ate, what they ate and with whom they ate.

Paintings also document, with a wealth of detail, the importance of meals and banquets in bringing people to a table, thus reinforcing the links responsible for the cohesion of traditional societies. . . . the reason for holding such gatherings was not just eating together, it was above all a social and political event in which the menu, the seating arrangements and the very shape of the table itself constituted an outward and visible sign of the hierarchies at work.

Id. at 7-8.

170. The element of spending time together has become increasingly difficult and uncommon in western societies. One becomes most aware of this devaluation of spending time together by making cross-cultural comparisons. See, e.g., Edward T. Hall & William Foote Whyte, *Intercultural Communication: A Guide to [People] of Action*, HUMAN ORGANIZATION 5 (Spring 1960), in which the authors show that cultures may vary in their perception of how to spend time in respect to at least five different purposes or situations: "appointment time, discussion time, acquaintance time, visiting time, and time schedules." Their illustrations about the need to spend more time establishing relationships with people when we are in some other cultures than we are dealing with people acclimated to American conceptions of time. To appreciate how extreme our obsession is with saving time, see LAKOFF & JOHNSON, *supra* note 51, at 7-9. The authors show that Americans tend to live by the idea that "time is money." In other words, time is a commodity so valuable we allocate it only in short blocks, and in legal or business settings, we expect something in return for our time, as lawyers do with the concept of "billable hours." Compare practices in Latin America, Asia, and Africa, where business and other interdependent relationships are premised on strong social relationships that can only be developed by spending significant amounts of non-business-related time together, whether sitting in an office sipping coffee or tea, or in homes or restaurants sharing meals and conversation. It is axiomatic that negotiators from more westernized countries consider this a "waste of time" and are eager to "get down to business" because "time is money."

171. IN THE METAMORPHOSES OF APULEIUS, we find a typical example of the role of dietary restrictions and other rules with respect to food in Roman initiatory rituals. Here Apuleius explains the instructions he received with respect to food on the eve of his initiation:

Secretly he gave me certain instructions too holy for utterance, and then openly, with all the company as witnesses, he ordered me to restrain my pleasure in food for the next ten days, not to partake of animal food, and to go without wine. I duly observed these restrictions with reverent continence.

APULEIUS, THE METAMORPHOSES II 339 (J. Arthurt Hanson trans., 1989). His account of the full process is instructive reading for anyone interested in ritual process. It includes descriptions of the special clothing, the esoteric knowledge, rules with respect to food, hair, feasting with ritual leaders and other initiates, cautions regarding various taboos, as well as the author's subjective account of what, for him, was a significantly transformative process. *Id.* at 338-59. Apuleius' hero, Lucius, was a lawyer. *Id.* at 357. These are not the only reasons to read this classic work; it is a sensational story in its own right.

nature and quality of the lawyer-client relationship.¹⁷² This is *not* a recommendation for expensive or lavish offices, which may actually detract, but for including furnishings, resources, and symbols historically associated with the functions and powers of the legal profession.¹⁷³ There are hundreds to choose from, leaving plenty of room for individuality in selecting and displaying them.¹⁷⁴ These historic symbols serve two primary purposes. One is to give clients a sense of the kinds of power lawyers are able to exercise on behalf of their clients. The other is to remind lawyers about their duty to exercise those powers for the benefit of the client, and for the larger good. In his work on symbolism, the great ethnologist Mircea Eliade refers not only to "the cognitive value of the symbol," but also to his belief that "the symbol, the myth and the image are of the very substance of the spiritual life." Eliade feels that such symbols "may become disguised, mutilated or degraded, but are never extirpated."¹⁷⁵

172. For an excellent development of the importance of the law office, see Fred Williams, *The Law Office as Indicator (and Amplifier) of Professional Status* in this issue.

173. Critics argue that the traditional trappings of lawyers' offices only serve to make lawyers more self-aggrandizing, arrogant, and elitist. There is certainly cause for concern, because the powers associated with these lawyerly trappings are all too easily abused. But the underlying purpose of these symbols is to prevent such aggrandizement by reminding lawyers of their duty *not* to serve themselves, but rather to use their powers to serve a larger good.

174. The best source I know for ideas is a catalog entitled *For Counsel: The Catalog for Lawyers*, 18615 Willamette Drive, West Linn, Oregon 97068 (The catalog may be requested by calling 503-635-2422, or 1-800-637-0098, or by sending a FAX to 503-697-3851). In addition to the essential books (a few, at least, should have leather bindings) and basic furnishings, you might consider some of the following: originals or fine reproductions of appropriate certificates or other documents received upon graduation from law school, admission to the bar of various jurisdictions; paintings, prints, etchings, photographs, or other reproductions of scenes, people, or events relating to law and legal processes (courtroom scenes, lawyers or judges in judicial robes, wigs, and other accouterments (especially British or Continental); the Inns of Court; statues, figurines, or other representations of Themis, the Greek goddess of justice and law (often represented blindfolded, often holding a scale of justice and a sword, sometimes also depicted with shield and sword); or the scales of justice alone (without the lady of justice); the Statue of Liberty; the United States flag; documents reflecting our legal heritage, such as the Magna Carta, the Declaration of Independence, the United States Constitution, the Bill of Rights, photographs or prints showing United States Supreme Court Chief Justices (or other appropriate groupings of judges), displays of individual or groups of stamps commemorating legally significant organizations or events (examples of United States Post Office stamps include a 1953 stamp commemorating the ABA; a 1986 stamp honoring Belva Ann Lockwood, who, after being barred because of gender from arguing a case before the United States Supreme Court, successfully lobbied Congress for remedial legislation, and subsequently became the first woman to argue a case before the Supreme Court; stamps honoring Justices Marshall, Black, Warren, and others; the stamp commemorating World Peace Through Law; etc.). These are all illustrated in *For Counsel: The Catalog for Lawyers* referenced above.

175. MIRCEA ELIADE, *IMAGES AND SYMBOLS* 10 (Philip Mairet trans., 2d ed. 1991). See generally CARL G. JUNG, *MAN AND HIS SYMBOLS* (1964).

D. Limited to Certain Times and Places

As a fourth consideration, powers pertaining to the learned professionals typically may only be used in appropriate times and places. What are the appropriate places? As a general matter, for the religious vocation, the places are houses of worship and the offices of those who officiate in houses of worship. For the medical vocation, it is the hospital and the offices of those who officiate in hospitals. And for the legal profession, it is the courthouse and the offices of those who have authority as officers of the court.¹⁷⁶ As Mircea Eliade and subsequent scholars have shown, in primitive cultures people recognize two kinds of time and space; ordinary (secular) and sacred.¹⁷⁷ Houses of worship, hospitals, courtrooms, and consulting rooms are among the very few places where modern peoples may experience non-ordinary time and space. They have preserved qualities and powers that set them apart from ordinary or profane space and experience. Although some authorities, such as Mircea Eliade, fear the modern peoples have lost their ability to recognize and be empowered by the experience of sacred space, the fact is that contemporary peoples continue to sense the transformative potentials of such places and are willing to pay extravagant sums in order to receive the best possible health care and to have their day in court.

E. Client Confidentiality and Safety

The fifth characteristic relates directly to our metaphor of the lawyer-client relationship as a safe vessel or container. Our metaphor provides us with concepts and vocabulary for talking about subtle but important aspects of the relationship. The primary purpose of a vessel is that of a container. The walls of the container form a boundary whose function is to hold some things out, so they cannot contaminate what is in the vessel, and to keep some things within the vessel,

176. This is not to say that professionals are strictly limited to these locations. For example, a doctor who comes unexpectedly upon the scene of an accident or finds herself on an airliner when another passenger becomes seriously afflicted, is certainly empowered to use all of her doctoring qualities and skills immediately, on the spot, and their expertise will generally be acknowledged and appreciated. On the other hand, the doctor would have been better equipped and the victim would have been more comfortable and in a better frame of mind if the doctor could have seen him in facilities set up for that purpose. The same would be true for clergy, therapists, and lawyers. They can, in emergencies, function outside their usual vessels, but in general will do better in properly equipped surroundings and at a prearranged and appropriate time.

177. MIRCEA ELIADE, *THE SACRED AND THE PROFANE* 20-116 (Williard R. Trask, trans., 1957, 1959). See particularly the work of MOORE, *supra* note 123, and these selected works of Victor Turner: *THE RITUAL PROCESS* (2d ed. 1977); *FROM RITUAL TO THEATRE: THE HUMAN SERIOUSNESS OF PLAY* (1982); *Body, Brain, and Culture*, 18 *ZYGON* 221-245 (1983), *THE ANTHROPOLOGY OF EXPERIENCE* (Victor W. Turner & Edward M. Bruner eds., 1986); *THE ANTHROPOLOGY OF PERFORMANCE* (1987).

frequently so they can be put through some kind of processing.¹⁷⁸ In kitchens and laboratories, heat is typically applied to increase the temperature and pressure within the container. Some kind of cooking is going on. It is important to apply enough heat, but not too much, and the cooking should continue for the right amount of time, so the product will be properly done and not underdone or overdone. The concept of boundaries and containers is also applied pervasively, especially in archaic societies, to separate sacred from secular time and space.

Each of these associations to *container* or *vessel* deserves further examination, but for the present, it is sufficient to emphasize the concept of boundaries in respect to the lawyer-client relationship. In terms of fulfilling our professional obligation to our clients, we might say that lawyers must guard against three kinds of boundary violations in particular. The first function of the vessel is to protect the client from exploitation or harm originating from *outside* the vessel, which in means to protect clients from harm by the adverse party and his or her legal counsel. The second is to protect the confidentiality of information revealed by the client to the lawyer inside the vessel. Wigmore described the lawyer's duty – or rather the client's privilege – of confidentiality in the following terms:

(1) Where legal advice of any kind is sought (2) from a professional legal advisor in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at this instance permanently protected (7) from disclosure by himself or by the legal advisor, (8) except the protection be waived.¹⁷⁹

The third, and perhaps the most subtle and least talked-about boundary is that which protects the client from exploitation or harm originating *within* the vessel. This latter one deserves our greatest attention, for we live in a day of epidemic violations across all professions. Our frame of reference begins with a reminder that when clients are in crisis, they are vulnerable which is to say they are unusually susceptible to wounding and exploitation, especially by those who occupy a position of trust. In this unguarded condition, clients are especially dependent upon the trustworthiness and self-restraint of their lawyer. The duty of lawyers, then, is to make the interior of the vessel the safest place in the world, the one place where clients are utterly safe from opportunism and exploitation. To offer this level of security to their clients, lawyers need to consciously establish

178. Again, it is helpful to think of vessel and boundaries by analogy from the therapeutic setting, where, because of the more intensely psychological nature of the work, individual theorists have put great effort into articulating the qualities of a suitable therapeutic container or structure. See, e.g., Hans Dieckmann, *The Analytical Ritual*, in *METHODS IN ANALYTICAL PSYCHOLOGY* 71 (Boris Matthews, trans., 1979, 1991) and Alexander McCurdy III, *Establishing and Maintaining the Analytical Structure*, *JUNGLIAN ANALYSIS* 81, 93-94, 96, 100 (Murray Stein ed., 1995). If any one thing stands out above the rest, it would be the need for more regular communications between lawyer and client. All else depends upon the relationship that develops between them, and relationships take time and effort.

179. 8 WIGMORE, EVIDENCE § 2292 (McNaughton rev. 1961) (quoted in ROBERT H. ARONSON & DONALD T. WECKSTEIN, *PROFESSIONAL RESPONSIBILITY IN A NUTSHELL* 197 (2d ed. 1991)).

a second boundary, this one *inside* the vessel, one that protects clients from any trespass by the professional into their personal space and integrity. The literature demonstrates that professionals are too often guilty of failing to establish and maintain appropriate boundaries between themselves and their clients. One frequent boundary violation is sexual.¹⁸⁰ It appears, for example, that fifteen to twenty-five percent of male clergy have had sexual relations with members of their own congregations. For therapists, the figures are even worse: between twenty-five to fifty percent of all therapists have had sexual relations with their own paying clients.

The legal profession has been slow to recognize how vulnerable clients are to sexual exploitation and how serious the consequences can be to individual clients when their boundaries are violated. Joanne Pitulla, assistant ethics counsel for the ABA Center for Professional Responsibility, has written an excellent overview of the situation for lawyers.¹⁸¹ If there has been any doubt about the legal profession's duty in this regard, that time has passed. As Pitulla reports:

The ABA Standing Committee on Ethics and Professional Responsibility released a new opinion dated July 6 [1992], declaring that attorney-client sex may violate not only the current ABA Model

180. See PETER RUTTER, *SEX IN THE FORBIDDEN ZONE: WHEN MEN IN POWER BETRAY WOMEN'S TRUST* (1989). As the title indicates, this book focuses on one specific aspect of the relationship between professionals and their clients, namely the sexual boundary. This book should be read by every member of a helping profession, certainly including lawyers. Rutter begins by dispelling some myths:

[M]en who have sex with their female patients, clients, parishioners, students, and protégées are not the obviously disturbed men who occasionally show up in the headlines. Instead, they are *accomplished professionals, admired community leaders, and respectable family men whose integrity we tended to take for granted*. I can now see that sexual violation of trust is an epidemic, mainstream problem that reenacts in the professional relationship a wider cultural power-imbalance between men and women.

Id. at 1-2. The book is intended to help each of us become conscious of the powerful unconscious forces that attract professionals and their clients in the direction of sexual contact, and being conscious of them, we are better able to resolve them without acting out. The book is especially important because many lawyers, perhaps as many as 50%, have crossed this boundary with one or more clients in the past. If so, this book is even more important, because Rutter offers sound, healing advice in a chapter entitled, "If You Have Violated the Forbidden Zone: How to Make Amends." Another important chapter is addressed to the two groups of professionals who are most likely to find themselves in a sexual boundary violation: one is those who are presently "on the edge" of a boundary violation; the other is to those who may feel we are invulnerable to this serious problem. Of the latter group, Rutter says, "[t]hey must realize that *the inherent conditions of the forbidden zone place them at risk of feeling erotically intoxicated by [their female clients]*." For this latter group, the operant principle is this: "The more you acknowledge what is inside, the better prepared you will be to find the help you need when you need it, to avoid betraying the trust placed in you." *Id.* at 203 (italics added).

181. Joanne Pitulla, *Unfair Advantage*, A.B.A. J. 76-80 (Nov. 1992). See also, John M. O'Connell, *Keeping Sex out of the Attorney-Client Relationship: A Proposed Rule*, 92 COLUM. L. REV. 887 (1992); Linda Jorgenson & Pamela Sutherland, *Fiduciary Theory Applied to Personal Dealings: Attorney-Client Sexual Contact*, 45 ARK. L. REV. 459 (1992).

Rules of Professional Conduct but the old ABA Model Code of Professional Responsibility as well. Formal opinion 92-364 states that a sexual relationship between lawyer and client "may involve unfair exploitation of the lawyer's fiduciary position, and/or significantly impair a lawyer's ability to represent the client competently."¹⁸²

In addition to sexual violations, the most frequent boundary infractions are financial or emotional exploitation of clients. According to psychologists, there is an inherent temptation to persons in positions of power to use their power to advance their own interests at the expense of those they presume to serve. The single best reference is a book entitled *Power in the Helping Professions* by Jungian analyst Adolf Guggenbühl-Craig.¹⁸³ Although it was not written specifically for lawyers, it lays out in language we can all understand a reminder of how much power professionals possess in relation to their clients, and how frequently we are guilty of abusing that power. He acknowledges that while our *conscious* motives are generally appropriate, each of us has unconscious motivations as well, including unconscious power drives, that influence our actions, sometimes to the extreme detriment of our clients. The more we deny the existence and effects of these drives, or the more we reassure ourselves that we are "just fulfilling our professional obligations to our clients," the more likely it is that we are unconsciously exploiting our clients along one or more of these domains. He calls these unconscious drives our "power shadow." For lawyers, the adversary system offers temptations and deflections that increase the likelihood we are acting from a desire for power while, at the same time, making the unconscious basis of our motives more difficult to discern. In legal negotiation, the personal effectiveness or power of each lawyer is explicitly part of the equation. Clients naturally desire strong advocates in much the same sense as disputants in the early days of the Common Law sought the strongest champions to fight on their behalf. But strong champions did not fight out of a concern for the client so much as a concern for their own reputation and glory. So it is with lawyers. In any specific contest, the matter may boil down to a power struggle between opposing counsel. Whenever this happens, the power shadow is by definition invoked. There is no way for lawyers to have pure motives (i.e., motives purely and exclusively concerned with the client's welfare) in this setting. Their own interests and needs are necessarily at play. What is needed, then, is not a denial of the problem, but rather an express working with it in order to make

182. Don J. DeBenedictis, inset accompanying Pitulla, *supra* note 181, at 79. For a review of this issue in the legal context, see Margit Livingston, *When Libido Subverts Credo: Regulation of Attorney-Client Sexual Relations*, 62 *FORDHAM L. REV.* 5 (1993). See also MARILYN R. PETERSON, *AT PERSONAL RISK: BOUNDARY VIOLATIONS IN PROFESSIONAL-CLIENT RELATIONSHIPS* (1992), certainly the most aptly named book on the subject. See generally JANICE RUSSELL, *OUT OF BOUNDS: SEXUAL EXPLOITATION IN COUNSELING AND THERAPY* (1993).

183. ADOLF GUGGENBUHL-CRAIG, *POWER IN THE HELPING PROFESSIONS* (Myron Gubitz trans., 1971).

our various motives conscious and explicit, where they can be evaluated and put in proper perspective in the light of day.

F. Stewardship: The Transpersonal Commitment

The sixth and crowning principle is a commitment by professionals *never to use their considerable powers to serve themselves, but rather to use them only to serve a larger good.*¹⁸⁴ This does not mean that professionals must do their work without fair compensation when clients can afford to pay. They are entitled to a reasonable income for their professional services. But it does mean the decisions about who to represent, what to do on their behalf, how much time to put into it, and so forth, should be made *not* with one's own personal advancement or compensation in mind, but in service to the appropriate interests and needs of the client and to the larger good. In the words of Professor Stephen Carter, this involves at least two steps. First, *discerning* the differences between the client's

184. The principle here is *not* how much or how little money we make in the practice of law, but rather whose interests we are serving. In Cardozo's words, "I know that for most of you, the law, though a profession, must also be a means of livelihood." BENJAMIN N. CARDOZO, *SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO* 418 (1947). There is no impropriety in earning an honest living in the practice of law; the impropriety, when it exists, lies in using our powers to promote our own interests and needs (e.g., more money, a larger office, a nicer car, a greater reputation, a larger home higher on the hill, etc.) rather than serving the legitimate needs of our clients consistent with the principles that lend the entire system its integrity. There is nothing improper in accepting just compensation for services rendered; indeed, without a certain amount of compensation from most clients, we could not make ourselves available. If we speak of income, the guiding principle is not poverty but moderation.

Rosenthal takes a somewhat condescending view of the concept of transpersonal commitment. Here is his language: "According to traditionalists, a profession is to be distinguished from a mere trade or occupation by its primary devotion to public service rather than to personal gain for the individual practitioner." DOUGLAS ROSENTHAL, *LAWYER AND CLIENT: WHO'S IN CHARGE* 8 (1974). It is clear to me that "traditionalists" are correct about this; if lawyers desire to be healers, they must earn the confidence of the public generally and their clients in particular by giving up the notion of law as a business. Two recent books that demonstrate how far our professional ideals have been eroded by the profit motive are ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* (1993), and SOL M. LINOWITZ WITH MARTIN MAYER, *THE BETRAYED PROFESSION* (1994).

Rather than saying what *not* to do, here is an example of the attitude we ought to emulate. It is Robert E. Lee's response to an offer by a well-intentioned potential donor to donate money to Washington College (where Lee was President) for the purpose of increasing Lee's salary.

I fully appreciate the kind motives which prompted you thus to appropriate it. But, when I tell you [I have already received] a large[r] amount from the college than my services are worth, you will see the propriety in my not consenting that it should be increased. The great want of the college is more extensive buildings, suitable libraries, cabinets, philosophical and chemical apparatus, etc. A liberal endowment will enable it to enlarge the means of its usefulness, to afford the facilities of education to worthy young [people] who might not otherwise obtain one, and as we must look to the rising generation for the restoration of the country, it can do more good in this way than in any other.

Kjartan T. Magnusson, *The History of Washington College Under Robert E. Lee: 1865-1870* 134 (Doctoral Dissertation, Ed.D., BYU, 1989).

interests and our own, and second, "acting on what [we] have discerned, even at personal cost."¹⁸⁵

VI. CONCLUSION

In this article I have drawn upon the literature in law, psychology, anthropology, and related disciplines to suggest that negotiation is far more important to lawyers and their clients than we might otherwise suppose. For hundreds of years, lawyers have been negotiating on behalf of their clients. With the benefit of insights from modern psychology and anthropology, we can see there is more at stake than mere settlement of conflicts. Lawyers and clients can now recognize that conflicts are meaningful, and see that if negotiation is handled with patience and understanding, there is a potential for the disputants (and even for the lawyers themselves) to be transformed by the process - not only to settle the conflict, but to resolve the underlying issues and be reconciled to one another. This realization lends meaning and purpose to the daily work of lawyers.

Finally, this is only a preliminary exploration, offered in the hope it will entice others to join in a more complete investigation of the healing function of lawyers and the healing potential of various dispute resolution processes.

185. STEPHEN L. CARTER, *INTEGRITY* 7 (1996).