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## Dispute Resolution and Spiritual Congruity

F. Peter Philips

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## Chapter 7

# Dispute Resolution and Spiritual Congruity

*F. Peter Phillips\**

### 1

There are more things in heaven and earth, Horatio,  
Than are dreamt of in your philosophy.

*Hamlet, Act 1, Scene 5*

Imagine taking a trip around the world, and observing, in each place you visit, how disputes are handled, consistent with each place's culture or spiritual tradition.

Start at the American Southwest and consider tribal practices of Native Americans. You will observe deep and continuous spiritual traditions arising from worship of the components of the natural world and the underlying forces that animate them. Conflict among individuals is an indication of being out of balance with the earth, the wind, the sun. Those who walk wayward need to be counseled; those whom they have harmed need to be restored. The tribe casts out members who are incapable of rejoining the spiritual balance by which the tribe thrives. The welfare of the community, and the continuing energy that the community derives from the spirits, are the guiding force behind conflict resolution.<sup>1</sup>

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1. On cultural aspects of various Native American societies, see *JUSTICE FOR NATIVES: SEARCHING FOR COMMON GROUND* (Andrea P. Morrison, ed., 1997); *NAVAJO NATION PEACEMAKING: LIVING TRADITIONAL JUSTICE* (Marianne O. Nielsen and James W. Zion, eds., 2005); ED MCGAA, *MOTHER EARTH SPIRITUALITY: NATIVE AMERICAN PATHS TO*

Then you travel to the island of Hawai'i and observe the practice of *ho'oponopono*. A family that experiences divisiveness invites a wise and insightful *kahuna* from the community to join in a session lasting as long as it needs. As the group lays truths and resentments on the table, under the watchful guidance of the *kahuna* and the Spirit, each member assesses her contribution to the problem having arisen and her responsibility for overcoming it. Individual members experience anew the ancient truth that conflict is like a tangled net, constricting and compromising all of the members of the unit, and that letting go of hurt, blame, and indignation is necessary in order to move forward with joy and interdependence. One may voice an apology for his acts (*mihi*); another may offer forgiveness and a willingness to let go of resentment (*kala*), but these two expressions are independent of each other, individually prompted, and independently meaningful. That is to say, one is not a response to the other; rather, each is a clearing of the heart and offered not to solicit an offering in return, but rather for therapeutic relief, in self-healing. Finally, when the family is settled, a closing prayer (*ho'omalu*) is offered, commending these hurts to the great eye of the sun to be sunk into the sea, never again to be discussed and nevermore to be referenced.<sup>2</sup>

Next you visit China. An argument between neighbors over a barking dog escalates from request, to demand, to hostility, to community-wide backbiting and thence to the People's Court. Eventually one of the disputants receives an informal and unannounced visit from the local mandarin, who asks for tea and passes the time. Then the mandarin informs the disputant the terms on which the dispute is to be resolved, and the host immediately and without reserve complies with these terms. The dispute is ended. An unspoken reprimand lingers, however, that a visit from the mandarin should not have been needed. These neighbors fell out of balance with a critical relationship on which the community depends. It was their own responsibility to return to balance, and their inability to do so was what required the mandarin's intervention. Neighbors who cannot sustain their relationship lose face in the larger community. And the community

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HEALING OURSELVES AND OUR WORLD (1990); THOMAS E. MAILS, *FOOLS CROW: WISDOM AND POWER* (2001); JOHN (FIRE) LAME DEER, *LAME DEER, SEEKER OF VISIONS* (2009).

2. On the practice of Ho'oponopono, see MARY KAWENA PUKUI ET AL., *NANA I KE KUMU* (1972); PALI JAE LEE, *HO'OPONO* (2007); E. VICTORIA SHOOK, *HO'OPONOPONO: CONTEMPORARY USES OF A HAWAIIAN PROBLEM-SOLVING PROCESS* (1985). See also F. Peter Phillips, "There is a World Elsewhere": *Preliminary Studies on Alternatives to Interest-Based Bargaining*, 13 *CARDOZO J. CONFLICT RESOL.* 413, 415–23 (2012).

has other, bigger challenges to address; neighbors fighting over a dog is not one of them. In the future, one expects them to recognize that some things are large and some are small; from the point of view of the village, this merits no investment of community resources whatsoever. Right acting is a function of right thinking, following Confucius' *Analect* XIII, 6:

*If a man is correct in his own person, then there will be obedience without orders being given; but if he is not correct in his own person, there will not be obedience even though orders are given.*<sup>3</sup>

On to Bali. You witness an accident involving a woman who is waiting for the pedestrian signal to change, and a motorcyclist who inadvertently clips her foot. A policeman appears, but you wait in vain for him to take witness statements, issue a summons, make an arrest or prepare an insurance report. Rather, he counsels, cajoles and intervenes between the injured woman and the defensive cyclist, helping them to agree upon a corrective course of action that will address the issue appropriately. The cyclist apologizes to the woman right there, face-to-face, and offers her a sum of money that she, he, and the policeman all agree is the correct compensation for her injury and her inconvenience. All three participants acknowledge that they have addressed the situation in alignment with the principles inherent in their Hindu tradition. By coming to an immediate and peaceful resolution, they trust that they mitigate any future resulting karma to the best of their ability in that moment. They accept that the misfortune has created an opportunity to behave appropriately: Each finds an opportunity to do goodness by acknowledging an unintentional harm, by forgiving the accident upon receipt of appropriate compensation, and by acting as a neutral agent for reparation and healing.<sup>4</sup>

In Syria you witness a terrible event—the rape of the daughter of one clan, by the son of a neighboring clan. The second family instructs their son to leave the area, and the family patriarch visits a highly respected member of the community. He admits his son's crime without reservation and asks the community leader to act as *jaha*—intermediary—in conveying to the victim's family his own family's acknowledgement, remorse, and willingness to obey the *jaha's* judgments. The *jaha* immediately visits the victim's home, where the

3. CONFUCIUS, *THE ANALECTS* (D.C. Lau, trans.) (Penguin Books 1979) at 119. For further discussion of traditional Chinese conflict resolution practices, see *infra* notes 14–17 and accompanying text.

4. Anecdote witnessed, and related to the author, by Jay Folberg.

angry family members reject him at first and treat him harshly, his importunities met with indignation. Finally, however, a family member reminds them that this is a highly respected elder, and by rejecting his entreaties they are disrespecting his honor. The family agrees to forego the revenge that tradition and honor otherwise dictate, and enter into the process of *sulha*, which culminates in the families agreeing to exchange a *diyya*, or offering of settlement. The truce is further signified by a public ritual where the village witnesses the *diyya*, all members of both families exchange handshakes (*musafaha*), and the patriarch of the victim's family extends forgiveness (*musalaha*). Blood feud is avoided, harm is acknowledged, reparation is made, and the families pronounce themselves satisfied before the larger community (which otherwise might have been disrupted for decades).<sup>5</sup>

In Burkina Faso, the landlocked West African country, you visit outside the city of Ouagadougou and see a massive banyan tree with several people huddled at its trunk. One person is the hub of the activity—one person whose advice is being sought and who is involved in the various discussions. A villager explains that this person is the mediator, and that everyone has come in the shared expectation that she will be at the banyan tree to hear complaints and concerns, and to help with resolution of conflicts. When did this practice start? Our informant knows only that his mother went there, and her mother, and her mother before her. Who is this confidante, whom people acknowledge and seek out? Is this person designated by the town? *Non*. Is she trained, or does her family have a tradition of conciliation? *Non*. Then how do you know

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5. On the practice of *sulha* and Islamic cultural attitudes regarding conflict generally, see G.E. IRANI & N.C. FUNK, *Rituals of Reconciliation: Arab Islamic Perspectives*, in *PEACE AND CONFLICT RESOLUTION IN ISLAM: PRECEPT AND PRACTICE* (A.A. Said et al., eds. 2001); M. ABU-NIMER, *Conflict Resolution in an Islamic Context: Some Conceptual Questions*, *Id.* at 130–32; H-C. ROHNE, *Cultural Aspects of Conflict Resolution—Comparing Sulha and Western Mediation*, in *CONFLICTS AND CONFLICT RESOLUTION IN MIDDLE EASTERN SOCIETIES—BETWEEN TRADITION AND MODERNITY 187–214* (H-J Albrecht et al. eds., 2006); H. Tarabeih, D. Shmueli & R. Khamaisi, *Towards the Implementation of Sulha as a Cultural Peacemaking Method for Managing and Resolving Environmental Conflicts Among Arab Palestinians in Israel*, 5 *J. PEACEBUILDING AND DEVELOPMENT* 50 (2009); D. Pely, *Resolving Clan-Based Disputes Using the Sulha, the Traditional Dispute Resolution Process of the Middle East*, 63 *DISP. RES. J.* 80 (2008); L. Lang, *Sulha Peacemaking and the Politics of Persuasion*, 31 *J. PALESTINE STUDIES* 52 (2002); E. Jabbour, *SULHA: PALESTINIAN TRADITIONAL PEACEMAKING PROCESS* (1996). See also Phillips, *supra* note 2, at 423–35.

who the person is who is expected under the banyan tree? *On connais*. (You just know.)<sup>6</sup>

You return, then, to the United States with a keener and more critical eye. And what do you see? What are our communal expectations as to how our disputes are resolved? Vast quantities of valuable social resources — time, money and intellect — are diverted from health, education, manufacturing and innovation, and are instead devoted to backward-seeking processes of determining whether someone did something wrong in the past (which is contested); whether and to what extent that act caused another person harm (which is contested); whether each party can obtain information concerning those questions to assist in these determinations (which is contested); whether the fact-finding process is being fairly conducted (which is contested); what legal standards should apply to the dispute (which is contested) and what constitutes just compensation for injury (which is separately contested). Once the matter is adjudicated, the parties have at it anew, testing whether the outcome is correct or should be revisited (which is contested), and subsequently whether that appeal was itself rightly determined (which is contested).

When the adjudication process is public, the success is measured against a concept of “justice,” or more frequently simply whether a particular outcome conforms to other outcomes of disputes arising from similar or identical facts. When the process is private, it is measured against the personal interests and objectives of the parties themselves. It is deemed good if you got what you wanted.

Moreover, Americans consider these systems of public “justice” and private “interest-based negotiation” to be ideal. They extol them, they honor those who excel in them, and they hold these skills out to the world as models for others to emulate. In fact, however, they are deeply flawed when contextualized with the moral and spiritual assumptions of the culture from which they arise.

Study of the cultural limitations of the interest-based model of negotiation yields two important outcomes. The first is practical: Negotiators with distinct cultural biases are unlikely to come to fruitful agreement (unless by sheer luck) without acknowledging and comprehending the other party’s cultural predisposition. The other is more subjective, but far richer: Negotiators whose main

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6. Author’s interview with Mme. Bintou Boly, Secrétaire Permanente, Centre d’Arbitrage, Médiation et Conciliation, Ouagadougou, Burkina Faso, May 14, 2009.

objective is to get as much as they can are indulging in behaviors that in any other context they would condemn, and are professionally engaging in a brand of selfishness that is inimical to the way they were raised and the way they raise their children. That is to say, there is a spiritual dissonance embedded in the way Western negotiators perceive successful negotiation.

Some questions that arise from your round-the-world trip:

- The processes outside America were aimed at healing and moving on. Is the American process?
- The processes outside America were characterized by a prompt convening of the disputants, a collaborative method of addressing wrongs, and an agreement not to revisit the issue once it has been addressed. Is the American process?
- The processes outside America drew a distinction between conflicts that merited prolonged application of public resources and those that did not. Does the American process?
- The outcomes of the processes outside America reflected, to one degree or the other, shared social values, and were informed by broadly-held community expectations and traditional experiences. Does the American process?
- The processes outside America were consonant with the professed spiritual traditions of the people who engaged in them. Is the American process? That is to say, in light of its avowedly Judeo-Christian culture, is the American system of conflict resolution based on concepts of forgiveness, humility, compassion, patience, atonement, and a recognition that we are all children of God? Or has it instead been directed to chastisement, blame, accountability, restitution and prosecution?

We can easily illustrate the depth of this removal from professed spiritual norms by comparing two broadly accepted models of American conflict resolution: the Harvard model of *Getting to Yes*<sup>7</sup> and the Thomas-Kilmann framework of categorizing individual responses to conflict.<sup>8</sup> Modern theory of interest-based negotiation emphasizes four principles: Identifying and negotiating underlying interests rather than legal positions;<sup>9</sup> focusing on the problem rather than

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7. ROGER FISHER, WILLIAM URY & BRUCE PATTON, *GETTING TO YES* (Updated rev. ed. 2011).

8. KENNETH W. THOMAS AND RALPH H. KILMANN, *THOMAS-KILMANN CONFLICT MODE INSTRUMENT* (1974).

9. FISHER AND URY, *supra* note 7, at 40–55.

being distracted by the personal traits of the negotiator;<sup>10</sup> creating options that serve the interests of both parties rather than assuming that outcomes that benefit one party necessarily are detrimental to the other;<sup>11</sup> and using objective, independent means to measure the value of proposed outcomes.<sup>12</sup> The goal is to end up with a deal that reflects, as much as possible, the underlying needs of all concerned.<sup>13</sup>

The Thomas-Kilmann Instrument charts personal attitudes towards conflict itself, rather than outcomes of conflict once engaged in by charting reactive behaviors as a function of the assertiveness and cooperativeness of the individual. A highly assertive and uncooperative disputant is a competitor. A disputant who is highly cooperative and not assertive accommodates her desires to others. Someone who is neither assertive nor cooperative seeks to ignore or avoid the conflict altogether; someone who is both seeks to collaborate on a solution that is devised by all stakeholders.

Interest-based negotiation assumes an outcome that is mutually self-centered. It is measured by how many of the marbles that each person desires end up in that person's bag. Collaborative approaches to disputes—particularly legal disputes—are rarely observed and almost never formally taught in the American legal tradition.

## 2

... In his brain,  
Which is as dry as the remainder biscuit  
After a voyage, he hath strange places cramm'd  
With observation . . . .

*As You Like It*, Act 2, Scene 7

10. *Id.* at 17–39.

11. *Id.* at 56–80.

12. *Id.* at 81–94.

13. *Id.* at 14 (“To sum up, in contrast to positional bargaining, the principled negotiation method of focusing on basic interests, mutually satisfying options, and fair standards results in a *wise* agreement. The method permits you to reach a gradual consensus on a joint decision *efficiently* without all the transactional costs of digging in to positions only to have to dig yourself out of them. And separating the people from the problem allows you to deal directly and empathetically with the other negotiator as a human being, thus making possible an *amicable* agreement.”).



Traditional Asian attitudes toward conflict stand in sharp contrast. Professor Joel Lee is an advocate and solicitor in Singapore and a principal mediator at the Singapore Mediation Centre, as well as an associate professor on the Faculty of Law at the National University of Singapore. He and his colleague, Teh Hwee Hwee, have written four essays and collected others in a volume called *An Asian Perspective on Mediation*. The authors observe Asian attitudes towards negotiated outcomes of interpersonal disputes and the impact of those attitudes on the mediation process as practiced in Western cultures.<sup>14</sup>

By providing definitive analysis of the components of Asian negotiation, Lee and Teh address the topic with candor and sympathy. For example, they postulate that three interrelated “core concepts” inform Asian conflict resolution: Confucianism, collectivism, and face concerns.<sup>15</sup> These three “core concepts” interact to promote conflict resolution approaches that accept and even emphasize social hierarchy, appropriate peer-to-peer interactivity, harmony, relationships, and dignity. Without relying on stereotype, the authors demonstrate the root cultural sources for contextual negotiation and the importance of recognizing and promoting *guanxi*.<sup>16</sup>

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14. JOEL LEE & TEH HWEE HWE, AN ASIAN PERSPECTIVE ON MEDITATION (2009).

15. *Id.* at 54.

16. “The connotations of the term ‘*guanxi*’ are really deeper and broader [than the English word “relationship”], encompassing more the notion of kinship or the kind of relationship or social connection that is built around mutual interests and benefits. It reflects both self-identity and social-identity, and explains the logic of human contact and the sense of connection and bonding. There is no word in the English language that is equivalent to *guanxi*, which may refer to one or all of the following ideas: (a) social interconnectiveness of individuals and groups; (b) ties, connections and network of individuals and communities; (c) a series of mutual and reciprocal activities; (d) social rules and principles of human relations; (e) *bao* (reciprocal exchange); (f) *renqing* (human and emotional debt); (g) *mianzi* (face).” Law Siew Fang, *More Than Collectivism: A Guanxi-Oriented Approach to Mediation*, in LEE & HWE, *supra* note 14, at 173–74.

Further insight into this elusive term is provided by a colleague, Zhang Chuncheng: “To understand the meanings of the characters, we should go to their traditional forms. The traditional characters for ‘*guanxi* 关系’ would look like 關係. The original meaning of 關 is a door with a bolt (you can see the two doors), a pass, a gate or a juncture. So its verb form means to connect, to close. The character 係 originally meant prehistoric people keeping records or chronicles by making knots with a rope, or to tie something up with ropes. When used as a noun, it means a net, a network or a system made up of individual components.” Private correspondence, October 30, 2013, on file with the author.

Lee and Teh presume a level of cohesiveness between the way people conduct business in Asia and the shared cultural values of the region.<sup>17</sup> For example, in discussing the impact of Confucianism on Asian business negotiation, they postulate that the following four “tenets” have obvious applicability:

- FIRST, social harmony is the ultimate goal of human affairs; conflict is an unacceptable form of social disruption.
- SECOND, the five chief relationships are hierarchical (father to son, ruler to subject, etc.) and fulfilling one’s role is preferable to advancing one’s personal objectives. Overt expressions of anger or hostility are discouraged, especially if directed at figures of authority.
- THIRD, an individual’s self-esteem is derived from his relationship with others, particularly the family, and a high degree of social conformity is expected in furtherance of this value.
- FOURTH, compromise, non-litigiousness and yielding are virtuous; self-sacrifice is sometimes required for the sake of restoring or maintaining harmony. Litigation is to be avoided because it signifies a lack of willingness to compromise and a failure to persuade the other side to make appropriate concessions—worse, an over-concern for one’s own interests, which involves a loss of face.<sup>18</sup>

Another example of consonance between social/spiritual values and approaches to dispute resolution is found in James Duffy’s examination of the traditional dispute resolution processes of civil dispute resolution in the Kingdom of Bhutan, and an assessment of the impact of “process-driven, interest-based models of mediation” on these traditional methods.<sup>19</sup> Duffy’s work chronicles a culture that “has become more amenable to (western) cultural influence, but there remains a concerted effort to balance tradition with modernity, and secularism with religion.”<sup>20</sup>

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17. For other overviews of Chinese negotiating practices reflecting traditional cultural values, see DANNY MCFADDEN, *MEDIATION IN GREATER CHINA: THE NEW FRONTIER FOR COMMERCIAL MEDIATION* 39–73 (2013); F. Peter Phillips, *Commercial Mediation in China: Challenge of Shifting Paradigms* in *CONTEMPORARY ISSUES IN INTERNATIONAL ARBITRATION AND MEDIATION: THE FORDHAM PAPERS* 319 (Arthur Rovine, ed., 2009).

18. LEE, *supra* note 2, at 55–57.

19. James Duffy, *Nangkha Nangdrik in the Land of the Thunder Dragon: Psychology, Religion and the Potential of Mediation in the Kingdom of Bhutan*, 7 *ASIAN J. COMPARATIVE LAW* 1, 1 (2012).

20. *Id.* at 2.

For example, the tricameral form of government set forth in Bhutan's 2008 Constitution contemplates a court system that is hierarchical based upon the size of geographic regions—from national to village courts.<sup>21</sup> Yet at the same time, the Constitution specifically refers to the establishment of “Alternative Dispute Resolution Centres”<sup>22</sup>—a reflection not of innovative court-annexed systems but rather of the cultural reality that “mediation or adjudication through negotiated settlement has been practiced at the local/village level for hundreds of years.”<sup>23</sup>

This is so, Duffy writes, because “the formal and more adversarial nature of the court system inherently conflict[s] with Buddhist principles of compromise, social harmony and the preservation of relationships.”<sup>24</sup> Duffy nevertheless advocates the establishment of modern interest-based mediation practices because they can assist the effectiveness of this tradition by improving understanding of how mediation processes are commenced, what they involve, how “mediators who hold positions of authority and respect (village elders and elected representatives)” should be available to act in these matters, and how “problem-based intervention” might better yield to western-style “process-driven” mediation.<sup>25</sup>

Nevertheless, these dispute resolution processes take place in the context of, and are deemed effective only insofar as they promote, the overall social goal of the Kingdom. This concept was expressly articulated by His Majesty King Jigme Singye Wangchuck in the late 1980s: Gross National Happiness.

Gross National Happiness is a nation building development concept that counterpoints Gross Domestic Product as a measure of national prosperity. Government policy and national laws are assessed on their capacity to maximize happiness rather than economic growth. Economic growth and development is still viewed as important to Bhutan, but measures like Gross Domestic Product are seen as means to an end (happiness), rather than ends in themselves. Gross National Happiness resides in the belief that happiness is found through the satisfaction of non-material needs and emotional and spiritual growth (once basic material needs have been met). As a result, this development

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21. *Id.* at 3–4.

22. *Id.* at 4 (*citing* Bhutan Constitution Article 21(16)).

23. *Id.*

24. *Id.* at 6.

25. *Id.* at 8–17.

concept “places the individual at the centre of all development efforts and it recognizes that the individual has material, spiritual and emotional needs.”<sup>26</sup>

The adaptability of this social philosophy to such mediation attributes as party autonomy and interest-driven outcomes is readily apparent. As Duffy observes, “Self-determination, empowerment, empathy and mutual gain are all central tenets of mediation, but they marry up nicely with Buddhist ideals of compassion, social harmony and material detachment as well as government policy relating to Gross National Happiness.”<sup>27</sup>

More to the point, it is evident that the process of negotiated resolution to interpersonal conflicts is recognized as an extension of—indeed, an expression of—Buddhist assumptions that the Bhutan society widely embraces. One might go so far as to say that dispute resolution in Bhutan, even as formalized in the legislature and departmentalized in the judiciary, is a spiritual exercise. In any event, Duffy concludes, “[i]t is the common ground between these concepts—government policy, alternative dispute resolution, psychology and religion—that highlight the unique opportunity the Kingdom of Bhutan has to craft culture-specific alternative dispute resolution processes that reflect the secular and the spiritual.”<sup>28</sup> Indeed, his espousal of certain attributes of interest-based (“process-oriented”) mediation is in furtherance of normative cultural and spiritual outcomes, not in contrast to them.

### 3

[H]e no more remembers his mother now than an eight-year old horse.

*Coriolanus*, Act 5, Scene 4

These analyses of dispute resolution practices outside of the contemporary American legal experience are appealing on a variety of levels, not least because they portray dispute resolution as coherent with broadly acknowledged social virtues. By contrast, the core concepts of American conflict resolution express assumptions that are directly opposite our espoused cultural

26. *Id.* at 17–18 (citing Planning Commission Royal Government of Bhutan, *Bhutan 2020: A Vision for Peace, Prosperity and Happiness*, Part 2, 11).

27. *Id.* at 27.

28. *Id.*

and spiritual values. I was taught as a child to say “I’m sorry” when I make a mistake, to acknowledge responsibility, and to share; yet American law teaches me as an adult *not* to speak to a person I’ve harmed, *not* to admit error, *not* to offer to remedy my inadvertent injuries to others, and to take as many cookies as I can get away with when the plate is passed around.

One asks: How did this come to pass? How did it happen that we are counseled to behave in ways that are antithetical to what our mothers taught us? We live in a diverse culture, but no one’s religious and ethical tradition rests on the principle that each of us should get as much of what we want as we can. No one’s teachers of the spirit, instead of urging us to love our enemies, taught us to manipulate or overpower them to our selfish advantage. Which influential philosophers have instructed us to see disputes through a rear-view mirror and concentrate on who was at fault, rather than looking ahead, forgiving or quickly resolving past affronts, and devoting our energies and resources towards our mutually shared future? Who taught us to measure outcomes of disputes by how much stuff we got?

It need not be so. Neither our culture nor our economic well-being relies upon our denying responsibility for our actions, or accepting that responsibility only under compulsion. Western institutions can operate entirely successfully while adhering to basic principles of moral responsibility, voluntary restitution and collaborative prevention. Principles of corporate social responsibility and systemic conflict resolution are based, not on charity, but on the fact-driven managerial conclusion that enterprises are more successful if they attend to the needs of essential stakeholders.

For example, teaching hospitals have developed protocols for error acknowledgement, apology, remediation, and prevention that have resulted in benefits to the organizations on a variety of measures.<sup>29</sup> Toro Company also engaged in a proactive effort to identify injuries caused by their lawn care products, determine their culpability, exchange information, and negotiate (or, if necessary, mediate)

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29. Jonathan R. Cohen, *Apology and Organizations: Exploring an Example from Medical Practice*, 27 *FORDHAM URB. L. J.* 1447, 1451–1460 (2000). See also *The Michigan Model: Medical Malpractice and Patient Safety at UMHS*, HEALTH SYSTEM, UNIVERSITY OF MICHIGAN, <http://www.uofmhealth.org/michigan-model-medical-malpractice-and-patient-safety-umhs> (last visited July 3, 2016); Liz Kowalczyk, *Hospitals Promise Openness, Apologies*, BOSTON.COM (Apr. 18, 2012), [http://www.boston.com/lifestyle/health/articles/2012/04/18/mass\\_hospitals\\_promise\\_openness\\_apologies/](http://www.boston.com/lifestyle/health/articles/2012/04/18/mass_hospitals_promise_openness_apologies/); Beth Howard, *Hospitals Owning Up to Their Mistakes*, U.S. NEWS (July 12, 2013), <http://health.usnews.com/health-news/hospital-of-tomorrow/articles/2013/07/12/hospitals-owning-up-to-their-mistakes>.

a mutually acceptable outcome, with substantial cost savings and other benefits to all parties concerned.<sup>30</sup> These practices are commercially rational, while also being consonant with broad principles of acknowledgement of responsibility and remediation for unintentional harm.

These concerns fall with particular weight on lawyers who perceive that their ethical duty of zealous representation of their clients' interests requires them to counsel their clients to breach cultural or spiritual norms by denying responsibility for their actions, and to refuse to compensate those injured as a result of their behavior. As Professor Jonathan Cohen has pointed out,<sup>31</sup> the ethical acceptability of denying responsibility has resulted in the creation of intricate, recondite, and expensive systems of factual determination and judicial standards, overlapping among local, state and federal courts and absorbing not only public resources but also private wealth.<sup>32</sup> On top of that, delays caused by such adjudications (and appeals from their determinations) exact yet more cost from the injured and the injurer as well,<sup>33</sup> all this in pursuit of a process prompted by denial of responsibility: an act that has no moral justification whatsoever. Assuming responsibility for having harmed someone is the immediate corollary to the broadly-held principle that one should refrain from harming others in the first place:

The negative moral principle of refraining from harming others ("negative" for it prescribes what one should not do) is a, if not the, foundational tenant of many ethical and religious systems. It is found, for example, in the core emphases on the Golden Rule within Judaism, Christianity, Hinduism, and Confucianism and is taught in many other religious traditions too. For philosophers, refraining from harming others is fully consonant with Kant's categorical imperative, and is quite compatible with utilitarianism as well. One might think, too, of the

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30. See Cohen, *Apology and Organizations*, *Id.* at 1460–61 ("Toro's average total cost per claim [during the period 1992–96] fell from \$115,620 to \$30,617, saving Toro \$54,329,840 during that period. In addition, Toro saved on insurance costs."). For more information on Toro's model, see <http://www.adrprocess.com/images/20071107094925439.pdf>.

31. Jonathan R. Cohen, *The Immorality of Denial*, 79 TUL. L. REV. 903 (2005).

32. *Id.* at 922.

33. *Id.* at 922–23 ("Failing to take responsibility profoundly . . . affects the injurer. This is true whether or not the injurer 'gets away with it,' that is, whether or not an external authority forces and injurer, for example, to pay compensation . . . [T]he interwoven moral, psychological, and economic ramifications of the injurer's failure to actively take responsibility are profound.").

physician's credo commonly associated with, but not actually found within, the Hippocratic Oath, "First, do no harm." . . . [R]efraining from harming others has withstood history's test as among the most basic of moral ideals.<sup>34</sup>

Cohen therefore concludes that a refusal to acknowledge injuries that one commits—a refusal to atone, to bear responsibility—constitutes "an act of *moral regression* and as such may have profound psychological and spiritual consequences."<sup>35</sup> It is the flouting of "a fundamental moral lesson."<sup>36</sup> That is to say, the practice has not only social, political and communal consequences, but personal and moral ones as well.

I am not indicting the American approach to conflict resolution for its wastefulness or inefficiency (though it is both wasteful and inefficient). I do not challenge our practices based on whether they "work" or whether other systems are better (though examples of private justice suggest there may be viable alternatives). I simply point out that, as a society, we deal with each other in conflict situations in a manner that is at variance with our professed spiritual values. There is a lack of congruence between who we are and how we behave. Living this incongruity, we not only hold ourselves back in our quest for public "justice" and private "self-interest"—we invite social disharmony and spiritual dysfunction.

And if this is so, then it is worthwhile for us to take responsibility for it, and at the very least to call it what it is.

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34. *Id.* at 927–28 (footnotes omitted).

35. *Id.* at 934.

36. *Id.* at 953.

**TRANSFORMING JUSTICE, LAWYERS,  
AND THE PRACTICE OF LAW**