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GROUP-CONFLICT RESOLUTION: SOURCES OF RESISTANCE TO RECONCILIATION

ERIN ANN O'HARA*

I

INTRODUCTION

In the past few years a number of scholars in a variety of intellectual disciplines have contributed to a better understanding of dyadic conflicts and their resolution. In particular, sociologists, psychologists, anthropologists, lawyers, and others have explored the dynamics of apology and its role in deescalating disputes and promoting forgiveness and reconciliation.¹ Furthermore, we have a better understanding today of the benefits to individuals from forgiveness and reconciliation. Victims who are able to forgive their transgressors have better psychological and physical health and lead richer lives.² Because lawyers tend to focus their attentions on legal disputes, a growing body of legal scholarship attempts to apply these insights to help promote apology, forgiveness, and reconciliation in courts and alternative dispute-resolution fora.³ This scholarship has in turn provoked a debate among

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1. The literature on apology, forgiveness, and reconciliation is vast and growing. Some very useful articles, books, and book chapters include NICHOLAS TAVUCHIS, *MEA CULPA: A SOCIOLOGY OF APOLOGY AND RECONCILIATION* 26 (1991); Jonathan R. Cohen, *Advising Clients to Apologize*, 72 S. CAL. L. REV. 1009 (1999); Bruce W. Darby & Barry R. Schlenker, *Children's Reactions to Transgressions: Effects of the Actor's Apology, Reputation and Remorse*, 28 BRIT. J. SOC. PSYCHOL. 353 (1989); Robert D. Enright & Bruce A. Kittle, *Forgiveness in Psychology and Law: The Meeting of Moral Development and Restorative Justice*, 27 FORDHAM URB. L.J. 1621, 1623 (2000); Letitia Hickson, *The Social Contexts of Apology in Dispute Settlement: A Cross-Cultural Study*, 25 ETHNOLOGY 283 (1986); Erin Ann O'Hara & Douglas Yarn, *On Apology and Consilience*, 77 WASH. L. REV. 1121 (2002); Lee Taft, *Apology Subverted: The Commodification of Apology*, 109 YALE L.J. 1135 (2000); Bernard Weiner et al., *Public Confession and Forgiveness*, 59 J. PERSONALITY 281 (1991); Elizabeth Latif, Note, *Apologetic Justice: Evaluating Apologies Tailored Toward Legal Solutions*, 81 B.U. L. REV. 289 (2001); Deborah L. Levi, Note, *The Role of Apology in Mediation*, 72 N.Y.U. L. REV. 1165 (1997).

2. See Stephen P. Garvey, *Restorative Justice, Punishment, and Atonement*, 2003 UTAH L. REV. 303, 315 & n.42 (noting possible health benefits from forgiveness); Frans B.M. de Wall, *Evolutionary Ethics, Aggression, and Violence: Lessons from Primate Research*, 32 J.L. MED. & ETHICS 18 (2004) (noting that some studies indicate that forgiveness produces health benefits).

3. See, e.g., law-review articles cited *supra* note 1.

legal scholars regarding the proper use of apology and apology-promoting tools in the context of legal disputes.⁴

The early legal scholarship in this field focused on dyadic disputes. More recently, however, legal scholars have applied the interdisciplinary insights to group conflicts. In the area of apology, for example, one legal scholar has relied on interdisciplinary insights to advocate court-ordered apologies as a civil-rights remedy in cases of civil-rights violations committed against groups of individuals.⁵ Similar insights were used to explore the role of apology for helping to resolve international conflicts between states.⁶ One author uses these insights to advocate that corporations apologize for product defects and accidents that cause public harm.⁷ And another scholar has used the insights to argue that the American Bar Association should apologize and make reparations for its prior exclusion of African American lawyers.⁸ Although this development is exciting (after all, who wouldn't like to see group conflicts and civil unrest avoided), most legal scholars have failed to think carefully about potential differences between dyadic and group conflicts and their resolution. To what extent can insights from apology and forgiveness in dyadic disputes be imported into the group-conflict context? How might differences between the two types of disputes necessitate differing dispute-resolution techniques? And specifically, how is disputant resistance to conflict resolution changed or amplified in the group-conflict context? A group of legal scholars at Vanderbilt Law School, affiliated with the Law and Human Behavior Program, wanted to bring together an interdisciplinary group of scholars whose expertise lies in and around conflict resolution to explore this question.

We partnered with the Andrus Family Fund, which generously provided us with the necessary funding to host this conference. The Andrus Family Fund has provided funding to a number of conflict-resolution practitioners who have played important roles in promoting peace, reconciliation, and problem resolution to groups around the world.⁹ Some of the techniques used by the Fund grantees are adapted from the work of William Bridges,¹⁰ who developed

4. For example, compare Taft, *supra* note 1 (arguing that apology should play no role in law or it will be used strategically), with Cohen, *supra* note 1 (arguing that legal reforms should be put in place to promote apology by wrongdoers).

5. Brent T. White, *Say You're Sorry: Court-Ordered Apologies as a Civil Rights Remedy*, 91 CORNELL L. REV. 1261 (2006).

6. Richard B. Bilder, *The Role of Apology in International Law and Diplomacy*, 46 VA. J. INT'L L. 433 (2006).

7. Taryn Fuchs-Burnett, *Mass Public Corporate Apology*, DISP. RES. J., May–July 2002, at 26.

8. Adjoa Artis Aiyetoro, *Truth Matters: A Call for the American Bar Association to Acknowledge Its Past and Make Reparations to African Descendants*, 18 GEO. MASON U. CIV. RTS. L.J. 51 (2007).

9. See, e.g., Andrus Family Fund, Community Reconciliation Grantees, http://www.affund.org/Community_Reconciliation.html (last visited July 31, 2009).

10. Andrus Family Fund, Transitions: Sustaining Social Change, <http://www.transitionandsocialchange.org/links.html> (last visited July 31, 2009).

a conceptual framework for how people transition to changes that affect their lives in important ways.¹¹

The Bridges framework treats transitions in three phases. External changes often require internal psychological transitions, which involve “(1) an ending, (2) a neutral zone, and (3) a new beginning.”¹² In the ending phase, the individual struggles to accept the end of an old way of being. Our connections to people and places, jobs, activities, ways of being, and attitudes help to define us, and the loss of any of these connections can cause not just mourning for the loss of that connection but also a kind of crisis of identity. Endings thus can be painful even when the change is desired.¹³ According to Bridges, ending experiences typically involve disengagement, dismantling, disidentification, disenchantment, and disorientation.¹⁴ In the neutral zone, the individual feels confused and anxious, because she does not yet know her new state of being. But in this stage the individual is able to be very creative and to conceive many possibilities for future courses of action.¹⁵ In the ending phase the individual adopts her new course of action or sense of self, or both, and reintegrates her new identity with the enduring elements of her old identity.¹⁶ Transitions are often aided by rituals set in place to mark the phases of transition and their significance to the individual.¹⁷ The Andrus Family Fund believes that conflicts throughout the world are often caused by or take on their own difficulties in responding to transition. Understanding the Transitions Framework and its implications for dealing with difficulties can significantly aid the process of promoting peace and reconciliation.

In addition to providing the conference funding, the Andrus Family Fund was able to provide us with a connection to successful conflict-resolution practitioners who had thought a lot about the relationship between transition and conflict-resolution theory and practice. At the same time, the Fund was equally interested in the question of the extent to which work on individuals can be translated to the group-conflict context. Andrus Family Fund President Steve Kelban noted privately at the conference that the Fund had always proceeded under the assumption that learning about individuals could be applied to groups. But to what extent is this so, and how, if at all, should legal and social policies take into account differences?

Of course, this is a huge question that cannot be resolved in a single conference. Many of the participants were addressing the question only

11. *See generally* WILLIAM BRIDGES, TRANSITIONS: MAKING SENSE OF LIFE'S CHANGES (2d ed. 2004).

12. *Id.* at 4.

13. *See id.* at 11.

14. *See id.* at 109–23.

15. *See id.* at 133–55.

16. *See id.* at 169–74.

17. *See id.* at 101–05.

indirectly, and, like any good conference, we crafted as many questions and disagreements as we did seeds of understanding. Even so, conceptual progress was made at the conference, and the product of the individual scholars' and practitioners' thinking is provided in this issue. Before describing the basic thesis of each of the articles in this issue, let me elaborate on some of the insights regarding group-conflict resolution that were identified at the conference.

II

WHAT WE LEARNED

First, many of the insights applicable to dyadic conflicts are also useful for group conflicts. Whether involving dyads or groups, conflicts involve humans who are experiencing predictable and powerful emotions. A wrongdoer, whether acting as individual or as part of a group, might resist acknowledging wrongdoing if (as is often the case) that acknowledgment produces feelings of shame and vulnerability. A victim, whether suffering as individual or as part of a group, can significantly benefit from apology, and apologies can set the stage for productive discussions regarding reparations and reconciliation. In all conflicts, regardless of type, reconciliation is easier after unintentional rather than intentional harms, and after minor rather than major harms. Timing of apology is critically important in both dyadic and group conflicts, as are the words chosen and the body language, tone of voice, and other details of the apologetic gesture. In both contexts effective apology can reduce the reparation demands, and enduring reconciliation is more likely when the victim is able to forgive.

The group nature of conflicts complicates the conflict-resolution process, however. When individuals behave in a group frame, emotional biases, heuristics, and other tendencies that favor in-group members and disfavor out-group members are much more likely to be present. Among other effects, these tendencies can result in individuals selectively attending to stimuli, assimilating information in a biased manner, and selectively remembering facts and events surrounding the conflict.¹⁸ Each of these factors can complicate dispute resolution. In addition, these tendencies can profoundly shape one's attitude toward another, and in this case can cause fear, distrust, and hostility toward out-group members,¹⁹ making resistance to conflict resolution stronger in the context of group conflicts. When one experiences conflict with in-group members, feelings of distrust and hostility can sometimes be overcome by an offsetting need to preserve the benefits of an ongoing relationship, but no such

18. Roger Conner & Patricia Jordan, *Never Being Able to Say You're Sorry: Barriers to Apology by Leaders in Group Conflicts*, 72 LAW & CONTEMP. PROBS. 233 (Spring 2009).

19. Douglas H. Yarn & Gregory Todd Jones, *A Biological Approach to Understanding Resistance to Apology, Forgiveness, and Reconciliation in Group Conflict*, 72 LAW & CONTEMP. PROBS. 63 (Spring 2009).

pressure toward reconciliation is present when conflict involves out-group members.²⁰ Moreover, group leaders know that loyalty to the group enhances the group's cause, especially against powerful opponents, and group loyalty is facilitated through polarization, which is achieved by dehumanizing, blaming, and resenting opponents.²¹

Authors Doug Yarn and Greg Jones suggest that out-group hostilities, or at least the differential assessment of in-group and out-group members, are biologically based.²² Terry Maroney notes that the idea is supported by psychological experiments showing that “both [blacks and whites] . . . acquire[] a stronger anticipatory fear response to [racial] out-group than to in-group faces, and both [groups] show[] a resistance to fear extinction only for out-group faces.”²³ If these biases are biologically based, then that suggests group conflicts might be even more resistant to reconciliation than are dyadic conflicts.

Group conflicts and their resolution often involve public statements made on behalf of a group or directed toward another group. Public statements are dangerous mechanisms by which to attempt to air disagreements because, as Susan Bandes points out in the context of victim impact statements, such statements are very often ritualized and unnatural, and third-party victims and others often are unable to respond in a meaningful way.²⁴ Moreover, any speech act that must cross racial, ethnic, or class boundaries (which is more likely for conflict with an out-group) risks misinterpretation by the communication's target.²⁵

Even without these tendencies toward bias, hostility, and misinterpretation, group conflicts can be harder to resolve because each individual in a group must follow her own psychological journey through blame, anger (or guilt), acceptance, and, finally, peace. Several of the Andrus Family Fund grantees at the conference spoke of conflict resolution within William Bridges' Transitions Framework. Recall that when one confronts change, such as a new job, divorce, personal tragedy, victimization, or cessation of hostilities, one must travel through three psychological stages: endings, neutral zone, and new beginnings.²⁶ In the endings stage, an individual feels a sense of loss for an old way of being. Even if the old way of being was painful or otherwise problematic, it often was familiar and contained known rules of conduct that facilitated a sense of

20. *Id.*

21. Meghan Clarke, *Polarization: The Role of Emotions in Reconciliation Efforts*, 72 LAW & CONTEMP. PROBS. 27 (Spring 2009).

22. Yarn & Jones, *supra* note 19.

23. Terry A. Maroney, *Unlearning Fear of Out-Group Others*, 72 LAW & CONTEMP. PROBS. 83 (Spring 2009).

24. Susan A. Bandes, *Victims, "Closure," and the Sociology of Emotion*, 72 LAW & CONTEMP. PROBS. 1 (Spring 2009).

25. *See id.* (discussing the misinterpretation problem in the context of victim impact statements).

26. *See supra* notes 12–17 and accompanying text.

comfort. The end point of the process, “new beginning,” is a state of comfort with the new state of being. But in between, in the neutral zone, lies anxiety and insecurity and a feeling of chaos from the uncertainty surrounding that new state. The neutral zone can be full of excitement and creativity because it involves rewriting history and forming a new identity. In the context of conflict, this stage also requires the individual to interact with people that she might prefer to avoid.²⁷

An individual’s progress through these three stages might depend on any number of factors, including the personality and disposition of the individual, whether the individual is a direct or indirect victim or perpetrator,²⁸ the influence of family members and of others in one’s close social groups, and the standing of the individual within these social groups. Some individuals involved in group conflict might be eager to take early steps toward conflict resolution, whereas others might take months or years longer to be ready to work toward resolution. Reluctant members of the group can call on group identity to try to discourage resolution efforts by more-eager group members. Dyadic-conflict resolution also can be hampered by the individuals’ relationships and alliances with third parties who have their own strong views about the nature of the conflict and its appropriate resolution. Ken Downes provides the example of the sibling who wishes to forgive her brother but is reluctant to take that step given the anger and resentment expressed by her other siblings.²⁹ But these problems are much more severe in the context of group conflicts, in which it is much less clear who in the group does and should own the right to forgive or to cease hostilities.

Individuals are also differently situated with regard to their cognitive sophistication regarding the conflict, which means that it is challenging to provide effective communication regarding conflict resolution. Individuals with high cognitive sophistication are much more likely to pay attention to these communications, but their views tend to be highly resistant to change.³⁰ The views of those with less cognitive sophistication are more malleable, but these individuals are less likely to be attending to communications.³¹

The complicated dynamics of group conflicts suggest that they might well be harder to resolve than dyadic conflicts. Many of these complications can be overcome, however, with effective leadership and sensible conflict-resolution procedures. The key for resolving all conflicts is to promote mutual understanding. Each side needs to see why the other side cares passionately

27. Clarke, *supra* note 21.

28. In this issue, Susan Bandes points out in the context of criminal wrongdoing that direct and indirect victims are very differently situated. See Bandes, *supra* note 24.

29. Rev. Dr. Kenneth R. Downes, *A Reflection and Response to Using Criminal Punishment to Serve Both Victim and Social Needs*, 72 LAW & CONTEMP. PROBS. 227 (Spring 2009).

30. James L. Gibson, *On Legitimacy Theory and the Effectiveness of Truth Commissions*, 72 LAW & CONTEMP. PROBS. 123 (Spring 2009).

31. *Id.*

about the issue.³² Because group leaders can strongly influence group members' attitudes, they are essential to promoting a sense of understanding.³³ Effective leaders will sense an opportunity to promote attitude change and can use apology or other reconciliation gestures to invite the opposing group to enter into a new relationship.³⁴ Roger Conner and Patricia Jordan point out that apology in the context of a group conflict can be effective if (1) the timing is right in the sense that negative attitudes have been softened, (2) there is a window of opportunity that provides a leader with the ability to confine the subject of the apology to a manageable scope, and (3) symbolic communication is used to help strengthen the perceived significance of the apology.³⁵ This third factor is especially important in the context of group conflicts. To promote a harmonious sense of appropriate timing for conflict resolution, the individuals in the group may need social markers to guide them through the psychological transition, and ceremonies and rituals help to acknowledge endings and new beginnings.³⁶ Symbolic gestures, including statues and plaques, also aid healing and provide a sense of reparation in situations in which multiple individuals suffer from wrongdoing.³⁷

Brent White points out that leaders might apologize less frequently than would be ideal because they are worried about losing face, and that anxiety can promote defensive behaviors, including denial, minimization, and mental disengagement.³⁸ That sense of face threat can be greater in the context of group conflicts because by definition a group will observe the apology. On the other hand, if the face threat is perceived as a threat to the group rather than to its leader, then it might be relatively easy for the leader to apologize on behalf of the group.

Group conflicts can involve multiple perpetrators and multiple wrongs that can have the effect of defining one or both groups in problematic ways. In these cases, mechanisms must be designed to address both the individual and the broader harms and to provide a symbolic mechanism for the groups to move forward with new identities, or at least with a new relationship. As Meir Dan-Cohen describes the challenge, the goal is to facilitate the loss of collective memory (in which personal identities are tangled up in the wrong) while retaining a collective history (a more impersonal narrative) of the wrong.³⁹

32. Clarke, *supra* note 21.

33. Steven D. Martin, *Encountering and Countering Tribal Conflict with Film and Dialogue*, 72 LAW & CONTEMP. PROBS. 89 (Spring 2009).

34. See Conner & Jordan, *supra* note 18.

35. *Id.*

36. Downes, *supra* note 29.

37. See Brent T. White, *Saving Face: The Benefits of Not Saying I'm Sorry*, 72 LAW & CONTEMP. PROBS. 261 (Spring 2009).

38. *Id.*

39. Meir Dan-Cohen, *Skirmishes on the Temporal Boundaries of States*, 72 LAW & CONTEMP. PROBS. 95 (Spring 2009).

In the aftermath of widespread wrongs, individuals are sometimes brought to justice using criminal tribunals. The tribunals have the advantage of holding wrongdoers accountable, but often they are used to prosecute one or a few and highlight the victimization of only one or a few.⁴⁰ In other cases, truth and reconciliation commissions (TRCs) are set up to better understand the wrongdoing. TRCs typically provide an opportunity for all victims and perpetrators to come forward, but they do so by providing amnesty to those who testify, and so accountability is dampened. As Laurel Fletcher notes, differing groups within a society might differ in their preferences for criminal tribunals or TRCs, and good choices will depend on context, the cultural environment, and the timing of redress.⁴¹ As the conflicts in the Balkans, Rwanda, and Uganda show, identity groups and local politics strongly influence people's reactions to these reconciliation choices. Nevertheless, both of these reconciliation mechanisms can promote peaceful coexistence while helping a society to create an official history about the past.

Jill Williams cautions, however, that at some point TRCs can create a tension between truth and reconciling a community.⁴² For example, TRCs are set up to enable victims and perpetrators to come forward and testify about their activities and experiences. Ideally, a collective history would consist of an aggregation of the individual recollections of past wrongdoing. But James Gibson expresses his conviction that in order to be truly successful in promoting group-conflict resolution, a TRC must focus on the needs of the larger society rather than on those of the individual perpetrators and victims.⁴³ Diminishing the focus on individuals works better in situations in which, as in South Africa, relatively few gross human-rights violations occurred and most people aggrieved do not perceive themselves to have been specifically victimized. Regardless of perceived focus, TRCs cannot ignore those directly affected by conflict, however, because direct victim buy-in is often needed to achieve social reconciliation and to ensure that future recommendations are implemented.⁴⁴

When societies are cleaved by ethnic or social conflict, effective reconciliation is much more likely if the individual members of each of the groups involved in the conflict also feel loyalty to the superordinate group. This loyalty can be engendered in situations in which the larger group is held

40. See Donald L. Hafner & Elizabeth B.L. King, *Beyond Traditional Notions of Transitional Justice: How Trials, Truth Commissions, and Other Tools for Accountability Can and Should Work Together*, 30 B.C. INT'L & COMP. L. REV. 91, 91, 95-96 (2007) (noting that international criminal tribunals cannot alone accomplish justice because they try only a few cases involving the gravest crimes).

41. Laurel E. Fletcher, *Institutions from Above and Voices from Below: A Comment on Challenges to Group-Conflict Resolution and Reconciliation*, 72 LAW & CONTEMP. PROBS. 51 (Spring 2009).

42. Jill E. Williams, *Legitimacy and Effectiveness of a Grassroots Truth and Reconciliation Commission*, 72 LAW & CONTEMP. PROBS. 143 (Spring 2009).

43. Gibson, *supra* note 30.

44. Williams, *supra* note 42.

together by a common history, ethnicity, and religious and social values.⁴⁵ As Tom Tyler points out, superordinate-group loyalty in very diverse societies can be promoted alternatively with procedural justice in general and with regard to the conflict at issue.⁴⁶ Tyler describes procedural justice as including (1) the opportunity to state one's case to authorities, (2) neutral decisionmaking, (3) treatment by authorities with dignity and respect, and (4) apparently trustworthy behavior on the part of the authorities. Fair procedures help to build stronger group identity, and they enhance the legitimacy of the authority of the superordinate group. In Tyler's view, loyalty to the larger group that is not otherwise glued together will depend on both identification and legitimacy. If this loyalty can be engendered, then individuals will react relationally to the decisions of the larger group, meaning that they will accept and comply with those decisions simply because the decisions further the concerns of the group. If not, then individuals will react instrumentally to the group's decisions, meaning that they will accept and comply with the group's decisions only when the decisions favor their own self-interest. It is much easier to resolve conflicts when individuals are thinking relationally rather than instrumentally about their relationship to the superordinate group.

Some but not all group conflicts turn violent. At first blush, it might seem that violent conflicts are much harder to resolve, because they are more likely to involve atrocities that seem unforgivable, and presumably they are often very difficult to resolve. But group conflicts that manage to stay nonviolent typically involve groups that are separated geographically, socially, and governmentally and involve disagreements with low stakes that in particular do not threaten the core identity of any of the involved groups.⁴⁷ As Bob Mnookin and Alain Verbeke point out, sometimes the very factors that keep group conflicts from escalating into violence also work to minimize the prospects for reconciliation.⁴⁸ When the stakes are relatively low and the groups are not forced to coexist at a fundamental level, each side can afford to insist on adherence to its own position, and mutual goals do not create pressure for compromise.

As this introduction indicates, much of the intellectual collaboration contained in this conference and this issue focused on identifying the special challenges of group conflicts and on exploring a variety of mechanisms that can be used to help overcome those challenges. In reaction to this overexuberance, some conference participants expressed a concern that group conflicts might implicate special ethical issues that counsel against pressing too hard for

45. See Tom Tyler, *Governing Pluralistic Societies*, 72 LAW & CONTEMP. PROBS. 187 (Spring 2009).

46. *Id.*

47. See, e.g., Robert Mnookin & Alain Verbeke, *Persistent Nonviolent Conflict with No Reconciliation: The Flemish and Walloons in Belgium*, 72 LAW & CONTEMP. PROBS. 151 (Spring 2009).

48. *Id.*

reconciliation.⁴⁹ Group-conflict resolution can run the risk of disempowering individual victims when community leaders take ownership of the victim's grievance and her power to forgive (or not) her perpetrator. Thomas Brudholm and Valérie Rosoux point out that when leaders, in their zeal to promote community reconciliation, place undue pressure on direct victims to forgive wrongdoing, especially atrocities, those victims can be left feeling lonely, abandoned, shameful, fearful, distrusting, and confused.⁵⁰ And Frank Dukes argues that it sometimes makes sense to respect the difference between solving problems and healing relationships.⁵¹ In some cases the goals of group-conflict resolution should be truth, understanding, and reparations rather than apology and forgiveness. Dukes worries that in some cases forgiveness can be problematic when it has the symbolic effect of mitigating a wrong. These concerns could and sometimes should influence both the timing and the ultimate goals of conflict-resolution efforts.

Some of the articles and comments in this issue explore conflict resolution issues peculiar to the criminal-justice system. Criminal wrongs involve dyadic conflict in that they typically involve actions taken by a perpetrator against a victim. But crimes are defined and treated in litigation as wrongs perpetrated against the state, and in this sense one side of the dispute involves a group (community). When a wrong harms both an individual victim and a group (society), it is difficult for a single process to effectively serve the needs of both. This was an instinct expressed by James Gibson in his discussion of TRCs, when he took the position that a TRC should function ultimately to serve the needs of the larger community rather than those of the individual victims.⁵² The modern criminal-justice system seems to take a similar stance toward criminal cases in that they serve the needs of the state (the prosecutor) rather than the preferences of the victim (who is not a direct party to a criminal case). Victim-offender mediation (VOM), sometimes used as a substitute for criminal prosecution, does a better job of serving the victim's needs but it fails to address social needs. As Maria Mayo Robbins and I argue, the two dispute-resolution mechanisms, VOM and criminal trials, can work together to more effectively serve the needs of both groups.⁵³ John Haley pushes even harder for criminal-justice reform by arguing that Japanese-style restorative justice—which involves

49. E.g., Thomas Brudholm & Valérie Rosoux, *The Unforgiving: Reflections on the Resistance to Forgiveness After Atrocity*, 72 LAW & CONTEMP. PROBS. 33 (Spring 2009); E. Franklin Dukes, *Truth, Understanding, and Repair*, 72 LAW & CONTEMP. PROBS. 57 (Spring 2009).

50. Brudholm & Rosoux, *supra* note 49.

51. Dukes, *supra* note 49.

52. Gibson, *supra* note 30.

53. Erin Ann O'Hara & Maria Mayo Robbins, *Using Criminal Punishment to Serve Both Victim and Social Needs*, 72 LAW & CONTEMP. PROBS. 199 (Spring 2009).

mediation by victim, offender, and community representatives—might do an even better job simultaneously serving victim and social needs.⁵⁴

III

ARTICLES AND COMMENTS: WHAT WE WROTE

The eight articles and their accompanying comments were roughly grouped into eight topics of discussion at the conference: (1) perspectives on polarization, (2) unrightable wrongs?, (3) natural-science insights into conflicts and their resolution, (4) philosophical perspectives on conflict and transformation, (5) transitioning toward coexistence, (6) reconciling nonviolent conflicts, (7) the power of apology, and (8) overcoming resistance to conflict resolution. A brief description of the thesis of each of the papers is provided below.

A. Perspectives on Polarization

In *Victims, "Closure," and the Sociology of Emotion*, Susan Bandes discusses the polarizing function of victim impact statements (statements by victims or family members about the effect of the crime on their lives) used in the context of the death penalty.⁵⁵ The use of victim impact statements is justified in order to promote "closure" for the victim, but it is unclear what psychological closure can be accomplished from the formal litigation process. Even if victim impact statements do help their authors, in the context of the death penalty the authors are family members of the victim, not the direct victim, and Bandes questions whether it is important to further their interests at the expense of the interests of the defendant. In any event, victim impact statements are necessarily highly scripted and highly impersonal, and they provide no ability for listeners to respond to the authors' anguish in a meaningful way. The only recourse for the jury is to deliver a sentence of death, so the statements have the effect of polarizing the conflict in ways that Bandes thinks interfere with promoting justice.

Meghan Clarke, in her comment *Polarization: The Role of Emotions in Reconciliation Efforts*, points out some strategies that have been used in the Collaborative Change Approach to group-conflict resolution that are designed to help depolarize the competing sides' stances toward one another.⁵⁶ In order to try to break down the hostility between the groups, Clarke and others bring together each identity or stakeholder group in order to share with one another why each group cares passionately about the issue. Understanding one another's values and motivations will not resolve the conflict, but it does tend to

54. John O. Haley, *Comment on Using Criminal Punishment to Serve Both Victim and Social Needs*, 72 LAW & CONTEMP. PROBS. 219 (Spring 2009).

55. Bandes, *supra* note 24.

56. Clarke, *supra* note 21.

help aid depolarization. Clarke provides the example of a groundfishery conflict that involved recreational fishermen, commercial fishermen, environmentalists, researchers, and government officials. The interests of each of these groups conflicted, but no group had morally problematic motivations or values, and it aided discussions to make that clear at the outset. These meetings can be difficult to achieve if hostile attitudes have already set in, because sometimes group resentment is so strong that one group does not want to legitimate another group by letting it participate in discussions. But the resulting depolarization is often critical to constructive resolution of the problem.

B. Unrightable Wrongs?

This panel explored the question whether it always makes sense for third-party advocates to fight hard for depolarization, conflict resolution, and forgiveness. In *The Unforgiving: Reflections on the Resistance to Forgiveness After Atrocity*, Thomas Brudholm and Valérie Rosoux question the ethics of having religious and political leaders call on individual victims to forgive wrongdoing as an aid to group-conflict resolution.⁵⁷ Even though a group might strongly desire political stability and peace, Brudholm and Rosoux argue that these goals should not be obtained at the expense of the needs of the victim. In addition, Brudholm and Rosoux argue that the future is not per se more important than is the past. And, even when the group strongly desires reconciliation, reconciliation does not necessarily require forgiveness. The authors argue that “the intimate experience and personal pace of each [victim and] survivor” should be respected in the process of attempting to build a peace.⁵⁸

Laurel Fletcher, in *Institutions from Above and Voices from Below: A Comment on Challenges to Group-Conflict Resolution and Reconciliation*, challenges the current consensus in the international community that criminal tribunals are the best mechanism for rebuilding society.⁵⁹ To Fletcher, it is not clear that a legal response—in the form of a criminal tribunal or TRC—is either necessary or desirable for reconciling group conflicts. In the end, Fletcher thinks that the appropriate role of the law depends critically on the situation, including the cultural identities involved and the timing of the response, and that the international community should rethink its rush to aid conflict resolution with tribunals and TRCs.

In *Truth, Understanding, and Repair*, Frank Dukes explains that his work as an environmental advocate and mediator often focuses on environmental problems that can be characterized as “unrightable wrongs.”⁶⁰ In these cases, the wrongs involve past injustices that

57. Brudholm & Rosoux, *supra* note 49.

58. *Id.* at 48.

59. Fletcher, *supra* note 41.

60. Dukes, *supra* note 49.

- (1) were systematically or intentionally inflicted upon a . . . group, often seemingly motivated by prejudice or discrimination;
- (2) have historic, present, and future consequences;
- (3) have come to involve a . . . complex set of issues and stakeholders [complicating resolution]; [and]
- (4) have spiritual, moral, emotional, social, economic, and political aspects and implications.⁶¹

In these situations Dukes focuses primarily on addressing ongoing environmental problems and hazards rather than on mending the relationship. Dukes acknowledges that he does focus on helping to build resilient and sustainable communities, but he also insists that productive resolution of some problems can happen in spite of, even because of, the lack of full reconciliation, including forgiveness, in social relationships.

C. Natural-Science Insights into Conflicts and Their Resolution

This panel explored the extent to which behavioral biology and neuroscience can help us to understand interpersonal conflicts and the dynamics of conflict resolution. In *A Biological Approach to Understanding Resistance to Apology, Forgiveness, and Reconciliation in Group Conflict*, Douglas Yarn and Gregory Jones note that conflicts between members of an in-group can be impeded by psychological resistance to apology and forgiveness, but that the problems associated with resolving conflict are exacerbated when the conflict extends to out-groups or out-group members.⁶² When conflict involves someone from an out-group, there is much less need to preserve the benefits of cooperation. In addition, as Yarn and Jones describe, we tend to show more fear, distrust, and hostility to out-group members than we do to in-group members. Yarn and Jones argue that these reactions are evolutionarily adaptive but that they nevertheless serve as impediments to group-conflict resolution that are not necessarily present in dyadic conflicts.

In *Unlearning Fear of Out-Group Others*, Terry Maroney describes a neuroscientific fear-extinction study as preliminary evidence supporting the notion that out-group hostilities might be influenced by biological predispositions.⁶³ In the fear-extinction study, subjects were conditioned to fear the presentation of black or white faces with the introduction of an electric shock when such faces appeared on a screen. Then the experimenters stopped using the shock when that race's faces appeared on the screen. Subjects' fear was extinguished much more effectively when the subject was conditioned to fear faces of individuals of her own race than when the subject was conditioned to fear faces of individuals of another race.

61. *Id.* at 58 (numbers and internal punctuation added).

62. Yarn & Jones, *supra* note 19.

63. Maroney, *supra* note 23.

Steven Martin, in *Encountering and Countering Tribal Conflict with Film and Dialogue*, explores the ability of group leaders to overcome resistance to reconciliation in group conflicts, whether innate or otherwise.⁶⁴ Martin uses an example of a group conflict that occurred across religious lines with the pending release of a movie titled *Theologians Under Hitler*. Even if out-group biases make group conflicts harder to resolve, offsetting that complication might be a predisposition to attend to the views of a respected leader of the in-group.

D. Philosophical Perspectives on Conflict and Transformation

What about the philosophical view of group conflicts? To what extent do group conflicts differ from individual ones in terms of the normative implications of conflict? And how do wrongdoers—individuals and groups—get past their wrongdoing? In *Skirmishes on the Temporal Boundaries of States*, Meir Dan-Cohen points out that on the individual level the wrongdoer uses apology and remorse to try to redefine herself as a person in such a way that others no longer continue to hold her responsible for her prior bad conduct.⁶⁵ In the process of forgiveness, the wrongdoer's personal identity is redefined in such a way that the reactive attitudes of the victim terminate. Dan-Cohen posits that a similar redefinition occurs when the wrongdoing is committed by a nation. He describes this process as one in which the temporal boundaries of the state are redrawn. The end result of such boundary drawing is that the collective memory of the wrong (attached to personal identity) is undone while the collective history of the wrong (a cognitive recollection that the wrong happened) is retained.

In *Comment on Meir Dan-Cohen, Skirmishes on the Temporal Boundaries of States*, John Goldberg praises Dan-Cohen's creative thinking about state wrongdoing but argues that it is ultimately unclear how a nation gets relieved of responsibility for its past harms.⁶⁶ Equally unclear is why as a normative matter nations should be permitted to obtain temporal shifts. Dyadic conflicts that redefine the wrongdoer might be easier to envision because the victim is empowered to redraw the boundary of the wrongdoer. When a nation commits wrong, the justification for redrawing its boundaries often must come from somewhere other than a single victim's forgiveness.

E. Transitioning Toward Coexistence

This panel discussed the use of TRCs to transition away from conflict and toward peaceful coexistence. In *On Legitimacy Theory and the Effectiveness of Truth Commissions*, James Gibson uses the example of South Africa's TRC to

64. Martin, *supra* note 33.

65. Dan-Cohen, *supra* note 39.

66. John C.P. Goldberg, *Comment on Meir Dan-Cohen, Skirmishes on the Temporal Boundaries of States*, 72 LAW & CONTEMP. PROBS. 115 (Spring 2009).

illustrate the factors necessary to help achieve societal change.⁶⁷ The TRC needs an ability to attract the attention of constituents, which requires a simple message containing personal relevance. The TRC needs to be perceived as legitimate, which requires that it proceed with impartiality and evenhandedness. If perceived as legitimate, then the TRC will be perceived as a credible source of information. And information will not help to transform attitudes unless it is thought to come from a credible source. The challenge to widespread TRC success, according to Gibson, is that people with low cognitive sophistication are relatively unwilling to pay attention to the TRC, and those with high sophistication, while attentive, are highly resistant to attitudinal change.

Jill Williams, in *Legitimacy and Effectiveness of a Grassroots Truth and Reconciliation Commission*, provides a slightly different perspective on the success of TRCs. She describes the TRC process that was put into place in Greensboro, North Carolina.⁶⁸ That process was set up to address community hostilities that had been festering for more than twenty years, since the 1979 killings of black protesters by Ku Klux Klansmen and American Nazis. In that case a grassroots-initiated TRC was formed to address the community problems, but it was not backed by the local government and it lacked the ability to grant amnesty or to subpoena witnesses. Community members had very different views regarding the necessity and likely helpfulness of the TRC. Williams concludes that in that case, in which local community leaders did not play a central supporting and empowering role for the TRC process, truth was enhanced but reconciliation was not furthered. Without local government buy-in, institutional reform was not taken seriously and trust between racial groups was not enhanced.

F. Reconciling Nonviolent Conflicts

This panel focused on group conflicts that manage not to turn violent and on the extent to which their resolution differs from that of violent conflicts. In *Persistent Nonviolent Conflict with No Reconciliation: The Flemish and Walloons in Belgium*, Robert Mnookin and Alain Verbeke describe the nonviolent but very serious conflict in Belgium between the Flemish (Dutch) of the North and the Walloons (French) of the South.⁶⁹ The Flemish economy is more prosperous than the Walloon economy, and the Flemish constitute a majority of the Belgian population. Nevertheless, the Walloons enjoy a financial subsidy from the Flemish and share equally in the political power of the nation due to antimajoritarian restrictions built into the government structure. Even though significant and persistent, this conflict remains nonviolent due to several factors cited by Mnookin and Verbeke, including largely separate geography, language, and social structure; a low-stakes conflict;

67. Gibson, *supra* note 30.

68. Williams, *supra* note 42.

69. Mnookin & Verbeke, *supra* note 47.

relatively small wealth disparities; a federal system largely enabling separate political systems; and a pragmatic tradition. In this case, the authors argue that the disputants can continue to coexist with a civilized separation short of divorce. They further point out that the very factors that help keep this conflict nonviolent also serve to provide little incentive to work toward a more cooperative relationship.

Tom Tyler is not so sanguine about the ability of the Flemish and the Walloons to continue to coexist under the same government structure.⁷⁰ In *Governing Pluralistic Societies*, he points out that the legitimacy of the Belgian government is jeopardized because decisions are often made by the elites to the exclusion of the public. When legitimacy is compromised, Tyler argues, citizens no longer deal relationally with their government, giving it the benefit of the doubt on individual decisions. Instead, citizens begin to evaluate government instrumentally based on their own sense of self-interest regarding each policy decision. When the citizens deal instrumentally with their government, then the government is forced to try to deliver benefits to each of the diverse groups of constituents and the stability of the sociopolitical relationship is threatened.

In *Examining the Applicability of the Concepts of Apology, Forgiveness, and Reconciliation to Multi-Stakeholder, Collaborative Problem-Solving Processes*, Jennifer Pratt Miles discusses her efforts to help reconcile a nonviolent group conflict in northern New Mexico, where water-quality-improvement issues divided watershed groups.⁷¹ The ingredients of the conflict-resolution efforts were not drastically different here than they would be in other circumstances, although perhaps the efforts to resolve nonviolent conflict bear fruit more easily than they do elsewhere. Specifically, Pratt Miles pointed out that her conflict-resolution efforts provided a forum for voice, bearing witness, acknowledging the history and past injustices regarding land rights, and incorporating language regarding important social values into the documents symbolizing the resolution of conflict.

G. The Power of Apology

This panel focused on the ways in which the use of the U.S. criminal-justice system can conflict with the needs of victims and offenders to come to terms with wrongs and to heal from emotional harms. In *Using Criminal Punishment to Serve Both Victim and Social Needs*, Maria Mayo Robbins and I argue that our current criminal-justice system could do a better job of simultaneously serving the needs of victims and society.⁷² Currently, criminal wrongs are treated as wrongs against the state, and the needs of society are served at the expense of

70. Tyler, *supra* note 45.

71. Jennifer Pratt Miles, *Examining the Applicability of the Concepts of Apology, Forgiveness, and Reconciliation to Multi-Stakeholder, Collaborative Problem-Solving Processes*, 72 LAW & CONTEMP. PROBS. 193 (Spring 2009).

72. O'Hara & Robbins, *supra* note 53.

the needs of victims, who are often left feeling frustrated and powerless in the process. Robbins and I propose to give victims a more direct voice in the timing of parole by allowing them to make an offender eligible for parole ten to twenty percent sooner than they would be eligible for parole under governing, default rules. Victims who have the power to enable early parole could choose to exercise that power as an act of forgiveness toward the offender, or could choose not to exercise that power as an act of vengeance; either way the victim has a way to give effect to her emotional needs. By so empowering the victim, offenders have an incentive to participate in victim–offender mediation, a process which has played a significant role in helping victims to heal after crimes by promoting understanding, apology, and forgiveness.

John Haley, in *Comment on Using Criminal Punishment to Serve Both Victim and Social Needs*, argues for even stronger reform of the U.S. criminal-justice system.⁷³ Haley advocates the adoption of a restorative-justice model similar to the one employed in Japan, and he argues that the restorative-justice model has proven successful given Japan’s much lower crime and recidivism rates. Haley argues that as a normative matter an offender who accepts responsibility for her actions, shows remorse, and offers reparations should be reintegrated into the community in socially and economically meaningful ways.

In *A Reflection and Response to Using Criminal Punishment to Serve Both Victim and Social Needs*, Kenneth Downes expresses his support for increased victim–offender mediation.⁷⁴ VOM serves as a quasi-ceremonial process that creates a safe space for enabling victims to “restore[] [their own] status and voice” and for enabling “the work of apology, forgiveness, and reconciliation . . . [to] begin.”⁷⁵ Downes cautions, however, that policy changes will require buy-in from prosecutors, judges, and others in the criminal-justice process. These participants all have powerfully formed professional identities, and they may therefore need their own group-transition process for VOM to be successful.

H. Overcoming Resistance to Conflict Resolution

The final conference panel focused on gaining a greater understanding of the role of leaders in either contributing to or helping to resolve group conflicts. In *Never Being Able to Say You’re Sorry: Barriers to Apology by Leaders in Group Conflicts*, Roger Conner and Patricia Jordan point out that, at least in theory, leaders can reap great reputational benefits by successfully diffusing group conflict with apology, and yet leaders very rarely offer apologies, either on their own behalf or on behalf of the groups they lead.⁷⁶ Conner and Jordan seek to understand why this apologetic behavior gets hindered, and they find

73. Haley, *supra* note 54.

74. Downes, *supra* note 29.

75. *Id.* at 231.

76. Conner & Jordan, *supra* note 18.

three explanations: (1) in many group conflicts, leaders believe that the fault lies with the other group(s); (2) leaders or their groups, or both, might privately acknowledge wrongdoing but be unwilling to endure the psychological transitions required to change their identities and their behavior; and (3) apology can be politically risky for the leader. Despite these impediments, leaders do sometimes issue public apologies for wrongdoing. Conner and Jordan argue that for apology on behalf of a group to be effective, the necessary ingredients include (1) ripeness, (2) a window of opportunity (that bounds the scope of responsibility), and (3) a symbolic communication for moving forward beyond the mere words of the apology.

In *Saving Face: The Benefits of Not Saying I'm Sorry*, Brent White adds to the list of factors that can hinder apology by leaders.⁷⁷ He focuses on factors of a dispute that tend to trigger feelings of shame on the part of the leader, because shame can hinder a leader from standing tall and stepping forward to take responsibility. White argues that apology is less likely when the conduct that constitutes the wrong is especially blameworthy, when the conduct is harshly reproached by the victim, and when the events at issue have already been thrown into the public domain. Perhaps for separate reasons, White argues that leaders are less likely to apologize when the victim is of low status. In these circumstances, White argues that court-ordered forced apologies may be necessary to overcome the barriers.

Alphonse Gerhardstein, in *Can Effective Apology Emerge Through Litigation?*, provides a number of examples in which the factors identified by Conner and Jordan—ripeness, a window of opportunity, and a symbolic act or gesture—came together to facilitate apology by a public leader.⁷⁸ But Gerhardstein does not think that the window of opportunity needs to be exogenously determined. Rather, advocates can, through litigation and settlement demands, create that window. Furthermore, Gerhardstein believes that apology by public officials can do more to promote a healthy civic society than can mere monetary settlement.

IV

CONCLUSION

Scholars from several fields have concluded that group conflicts are in many ways similar to dyadic conflicts but that group conflicts present their own challenges for effective resolution. Group conflicts often require formal processes, from public hearings to TRCs to criminal tribunals, and they often require the intervention of third-party professionals. But leaders and advocates can play an important role in preparing the members of the group to transition

77. White, *supra* note 37.

78. Alphonse A. Gerhardstein, *Can Effective Apology Emerge Through Litigation?*, 72 LAW & CONTEMP. PROBS. 271 (Spring 2009).

from conflict back to peace. The articles and comments in this issue contribute in important ways to our understanding of the problem, but they represent only the beginning of a rich inquiry. Much more can be learned about these dynamics and the role (or lack thereof) of law and legal processes in helping to promote conflict resolution.