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# CONFLICTS AS INNER TRIALS: TRANSITIONS FOR CLIENTS, IDEAS FOR LAWYERS

*Jonathan R. Cohen*<sup>1</sup>

## ABSTRACT

As times of transition, conflicts often produce significant inner trials for parties. This paper categorizes some of the more common inner trials parties in conflict face (e.g., coping with loss, strong emotions, uncertainty, etc.) and suggests that, as liminal times in people's lives, some conflicts may also hold within them important opportunities for learning, growth and self-definition. This paper also offers some ideas for how lawyers might best assist clients during such transitions.

## INTRODUCTION

I recently had the pleasure of reading a book by one of my teachers, a teacher of many who study legal aspects of conflict resolution, Robert Mnookin. The book is titled, "Bargaining with the Devil: When to Negotiate, When to Fight."<sup>2</sup> In it, Professor Mnookin expertly explores the issue of whether people should bargain with those whom they perceive to be the "Devil." Should Churchill have bargained with Hitler? Should Mandela have negotiated with Botha? Along with famous political conflicts, Mnookin analyzes cases from ordinary life, such as child-custody battles, estate feuds, and business disputes, in which the parties fiercely hate one another, at times viewing their counterparts as demonic.<sup>3</sup>

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<sup>2</sup> ROBERT H. MNOOKIN, *BARGAINING WITH THE DEVIL: WHEN TO NEGOTIATE, WHEN TO FIGHT* (2010).

<sup>3</sup> Is it fair to put cases such as business disputes and child custody battles in the same category (i.e., negotiations with the Devil) as interactions with Hitler or the apartheid regime? Mnookin recognizes that there are significant differences among these cases. As he writes, "I do believe that Hitler and Eichmann were evil, as were the KGB and apartheid regime. By con-

Mnookin defines the “Devil” as “an enemy who has intentionally harmed you in the past or appears willing to harm you in the future[; a]n enemy you don’t trust[; a]n adversary whose behavior you may even see as evil.”<sup>4</sup> “Should you bargain with the Devil?” asks Mnookin. “Not always,” is his answer, “but more often than you feel like it.”<sup>5</sup>

Mnookin is a law professor and not a theologian, and though he titles his book, “Bargaining with the Devil,” he does *not* actually believe in the Devil “in the religious sense.”<sup>6</sup> So, too, I (also a law professor) should disclose from the start that I am quite skeptical about whether the Devil exists as some kind of supernatural being. That said, sometimes exploring a question can be fruitful, even if one does not accept all of its premises. As I read Mnookin’s book, such a question went through my mind. Suppose, *arguendo*, that the Devil truly does exist, and suppose further that he has chosen to bargain with you. Instead of asking Mnookin’s question (“Should you bargain with the Devil?”), my question was this: Why does the Devil choose to bargain with you?

Two basic reasons come to mind.

The first reason the Devil might choose to bargain with you is that he needs you to achieve something that he cannot achieve on his own. In this respect, the Devil is a bargainer much like any other bargainer. The reason we negotiate is that we want or need other people to do things for us, and negotiation is the process of exploring whether an agreement can be reached to effectuate our ends. Sometimes that process results in an agreement and sometimes it does not. Either way, our motivation to negotiate arises from our desire to have another person do our bidding. In theory, that motive applies to the Devil just like anyone else.<sup>7</sup> The Devil may be evil, but, when he offers you a deal, as with most negotia-

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trast, none of the antagonists in our private disputes were evil . . . although they were demonized and in some cases *perceived* as evil by their adversaries.” *Id.* at 5.

<sup>4</sup> *Id.* at 1.

<sup>5</sup> *Id.* at 261.

<sup>6</sup> *Id.* at 5.

<sup>7</sup> The “fact” that it is the Devil with whom you are bargaining may of course give you pause: even if the deal is good for you individually, it must somehow also be advancing the Devil’s evil ends. Yet the fact that the deal may advance the Devil’s ends is a factor for your consideration, not a matter of the Devil’s motivation *per se*. I am reminded of what social psychologists call “reactive devaluation” in negotiation, i.e., discounting a negotiation proposal one had originally thought acceptable simply because the other side made the proposal. See Lee Ross, *Reactive Devaluation in Negotiation and Conflict Resolution*, in BARRIERS TO CONFLICT RESOLUTION 27-42 (Kenneth Arrow et al., eds., 1995).

tors, he does so because you are a possible means of reaching his ends.<sup>8</sup>

Yet the Devil, if he exists, is not just like any other party, and when he negotiates it may well be for a second reason: *to test you*. The Devil constructs tests in our lives, traps to get us to act upon base impulse, to undermine our belief in God, or perhaps even to capture our soul. In religious literature, that test may come by ordeal, as when the Devil prods God to allow him to make Job suffer to see if Job will curse God.<sup>9</sup> That test may also come through temptation, as when the Devil offers Jesus all of the kingdoms of the world if Jesus will worship him rather than God,<sup>10</sup> or when the Devil offers Faust unlimited knowledge and earthly pleasures in exchange for his soul (the “Faustian bargain”).<sup>11</sup> Unlike the first goal of getting another to do one’s bidding, in this second way the Devil is more distinctly, well, devilish. The Devil’s ultimate goal is to test you. His hope is that you will fail that test and choose the lesser moral path, thereby betraying something of what you are.

This brings me to the subject of this paper: conflicts as inner trials. Whether framed in religious or non-religious language, many external conflicts and the events that underlie them do test parties “on the inside.” After 9/11, when the United States declared its war against terrorism, it faced both external *and* internal challenges. What is torture, and would we be justified in employing it if terrorists in our custody possessed knowledge which, if we could extract it, would help us save lives? And would the standards for what searches of our own citizens were “reasonable” now change? Many ordinary conflicts (i.e., the type of conflicts which generate ordinary lawsuits) also pose significant internal trials to parties. Even if I get compensation, what will my life be like after this injury? What will my life become if a court sends me to jail? What will my relationships be like when this is through? How can I handle the anger I feel? Do I have enough courage to bring this suit? What if the world ostracizes me in response? Why, some parties may ask, is God doing this to me?

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<sup>8</sup> The fact that the other party in a negotiation is a means to one’s ends gives rise to basic ethical issues. Should they be treated merely as a means or as a person deserving of respect too? See Jonathan R. Cohen, *When People Are the Means: Negotiating with Respect*, 14 GEO. J. LEGAL ETHICS 739 (2001) (arguing for the latter).

<sup>9</sup> *Job* 1:11, 2:5.

<sup>10</sup> *Matthew* 4:9-10.

<sup>11</sup> On the development of the Faust legend, see J.W. SNEED, *FAUST IN LITERATURE* (1975).

Whether due to the trauma of the underlying events giving rise to the conflict, or the stress of being in conflict, or perhaps most basically to the significant life transitions that often accompany conflict, parties in conflict often face inner trials. Indeed, in some cases, how clients handle those inner trials may in part define who they are—or who they become—as human beings. Recognizing the depth of the inner trials parties in conflict may face is also relevant for professionals, such as attorneys, who assist them. How can I as an attorney best counsel clients undergoing such inner trials? Are particular approaches helpful in working with such clients? If I believe a client is undergoing an inner trial, should I attempt to discuss it with him, or is that a topic I should avoid?

The structure of this paper is as follows. Part I (“Some Common Inner Trials”) categorizes various inner trials parties in conflict commonly face. For example, parties in conflict often must cope with underlying loss and trauma, uncertainty about the future, and major relational transitions. While the specifics of each party’s inner trials are unique, the experience of facing significant change and adjustment is not. Part II (“Conflicts as Liminal Times”) develops the idea that, as conflicts often represent times of crisis and transition in people’s lives, how people face the inner trials inherent in their conflicts may at a deep level both reflect and define who they are. Inner trials are not only arduous. They may also hold within them important opportunities for learning, growth, and self-definition. Part III (“Some Ideas for Lawyers”) briefly offers some suggestions for lawyers representing and counseling clients undergoing inner trials. These include using empathic listening to help clients express their emotions, engaging clients in conversations about their inner trials and their long-run values, and when appropriate referring clients to other professionals (e.g., psychologists, clergy, etc.) who can assist them.

Let me mention three prefatory points before entering the analysis proper. First, parties to conflicts come in many different sizes. Nations may be involved in conflict, groups (e.g., religious or ethnic) may be involved in conflict, organizations may be involved in conflict, and individual persons may be involved in conflict. Below, I focus my remarks primarily, though not exclusively, on individuals in conflict, for (a) much conflict does occur at the individual level and (b) that level is the easiest level at which to discuss the concept of conflicts as inner trials. That said, larger parties to conflicts do face inner trials when they engage in external conflicts. The Cold War produced not only external hostilities be-

tween the United States and Russia but also the internal inquisition of McCarthyism. What it means for an organization, group or nation to experience an inner trial may of course be different from what it means for an individual person to experience an inner trial. The Supreme Court's recent holding that corporations are to be treated as natural persons for free speech analysis notwithstanding,<sup>12</sup> corporations are not actually persons. Hence, for those who focus upon conflict involving larger parties, I recommend both that they think seriously about what inner trials those parties may face and that they use judgment and avoid applying by rote ideas discussed below. For example, corporations, like persons, do often face internal ethical challenges when engaged in external conflicts, but the form and content of those challenges may well be different.

Second, the subject matter of this paper is a large one, and by no means can I treat it fully here. My goal is not so much to provide "answers" as to raise questions, i.e., to offer some ideas to spur others' thinking, and I hope that readers will take these ideas in that spirit.

Third, in developing these ideas, as with the discussion of the "Devil" above, at times I will make use of religious ideas and Biblical imagery. In part I do this because this paper was written in conjunction with a conference examining the interplay between religion and dispute resolution. At a deeper level, however, I do this because such ideas and imagery fit well the task at hand. Biblical stories are well known, making them expedient vehicles for developing concepts, and the spiritual or religious dimension is often explicit within them, which too is helpful. Further, the fact that such ancient stories can be used to illustrate these concepts shows how enduring these issues have been. That said, I do not believe the ideas developed here are tied to any one religion or belief system, and I hope that readers from different backgrounds, religious or otherwise, will still benefit from them.

## I. SOME COMMON INNER TRIALS

What are the more common inner trials parties in conflict face? Before categorizing those inner trials, it should be noted that what is difficult for one person may be very different from what is difficult for another. For one criminal defendant, going to jail may

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<sup>12</sup> See *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876 (2010).

be a tragic, devastating event. For another criminal defendant, jail may offer a well-ordered refuge from the chaotic outside world. In thinking about people's inner trials, it is important to respect such variation.<sup>13</sup> Nevertheless, some inner trials do regularly arise for those engaged in conflicts, and below I list what I see as some of the more common ones. By "inner trial" I do not mean, of course, that the people involved necessarily engage in an inner trial or discourse in a literal sense, though sometimes they may.<sup>14</sup> Rather I simply mean that those people are facing a personally significant and challenging time. In considering this list, keep in mind that no sharp lines exist between the different categories, for these different inner trials are often deeply interwoven with one another. Moreover, this list is not intended to be exhaustive. Indeed, I encourage readers to think about what other inner trials parties in conflict may face.

### 1. *Coping with Underlying Trauma and Loss*

Many conflicts arise as the product of trauma and loss. A pedestrian has lost the use of a limb after being struck by a car. An employee has been fired from her workplace. A loved one has lost his life through medical error. Whatever the outcome of the suit—even if a court awards compensatory damages to make the injured party "whole"—injured parties and their loved ones will still face the challenge of coping with significant trauma and loss. Consider that many of the events psychologists characterize as the most stressful in life (e.g., divorce, imprisonment, personal injury, death of a close family member, and being fired from work) are also events commonly associated with conflicts, if not lawsuits.<sup>15</sup> Elizabeth Kübler-Ross famously described different stages of grieving (viz., denial and isolation, anger, bargaining, depression and, hope-

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<sup>13</sup> See also MARTHA MINOW, *BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE* 4, 20 (1998) (arguing dispute resolution mechanisms should respect the individuality of victims).

<sup>14</sup> For a fine analysis, see David A. Hoffman, *Mediation, Multiple Minds, and Managing the Negotiation Within*, 16 HARV. NEGOT. L. REV. 297 (2011).

<sup>15</sup> I refer to the Social Readjustment Rating Scale, also known as the Holmes and Rahe Stress Scale. Based upon empirical research, Holmes and Rahe found that the ten most stressful life events (on a 100 point scale) were: death of a spouse (100), divorce (73), marital separation (65), jail term (63), death of close family member (63), personal injury or illness (53), marriage (50), fired at work (47), marital reconciliation (45), and retirement (45). T.H. Holmes & R.H. Rahe, *The Social Readjustment Rating Scale*, 11 J. PSYCHOSOMATIC RES. 213, 216 (1967).

fully, acceptance) that people diagnosed with terminal illnesses and catastrophic losses may undergo.<sup>16</sup> Though their circumstances are usually less extreme, many parties in conflict must adjust to significant trauma and loss. For many, this factor alone makes the period surrounding the conflict a liminal time.

## 2. *Coping with Strong Emotions*

Powerful emotions like anger, fear, and jealousy frequently go hand in hand with conflict, and coping with such emotions is challenging for many. Consider three types of cases. First are those in which powerful emotions are produced by the events underlying the conflict, as for example, with category 1 above, where an injury or trauma generates the conflict. Second are cases where powerful emotions generate the conflict. In Biblical language, one might think of the story of Cain and Abel. In response to God's rejection of Cain's offering while accepting his brother Abel's, the jealous Cain becomes angry and crestfallen.<sup>17</sup> Yet the immature Cain cannot handle these powerful emotions and slays his brother.<sup>18</sup> The combination of intense emotions and the inability to manage those emotions leads to the first Biblical murder. Most parties to conflict do not of course commit murder. Still, there is an important lesson here. Strong emotions are a central aspect of conflicts, and coping with such emotions is a critical internal trial many in conflict face. Third are cases where the process of being in conflict produces powerful emotions. Many people are uncomfortable with conflict and legal processes (e.g., trials, depositions, etc.), as well as other stressful events (e.g., flaming emails, nasty stares, etc.) that conflicts may bring. I am reminded of a discussion I had several years ago with a mother whose only child, a thirteen-year-old daughter, died when struck by a motor vehicle as she crossed a road. In time, a lawsuit ensued. In a deposition, the lawyer for the motorist's insurance company began asking the mother a series of questions, presumably with the aim of limiting recovery, suggesting that the daughter was a reckless girl and the mother an irresponsible guardian. As the questioning proceeded, the attorney asked, "Was your daughter a virgin?" The mother, who was already stressed from being deposed, told me that at that point she "lost it." "What the

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<sup>16</sup> See ELISABETH KÜBLER-ROSS, *ON DEATH AND DYING* (1969).

<sup>17</sup> *Genesis* 4:5.

<sup>18</sup> *Genesis* 4:8.

hell,” she said to me (I paraphrase), “did whether or not my daughter was a virgin have to do with her getting killed when crossing the street?”

### 3. *Coping with Uncertainty about the Future*

Many parties in conflict face significant uncertainty about what the future will bring. The clearest example may be the criminal defendant awaiting trial: Will I be found innocent and stay free, or will I be found guilty and be sent to jail? Uncertainty about what would happen if the case were tried in court exists in many lawsuits. Indeed, it is a driving force behind many criminal plea bargains and civil settlements. More generally, parties in conflict may fear what the future may bring. The outcome of most conflicts does not depend upon the choices that one party makes, but upon the choices both parties make.<sup>19</sup> As I write these words, the “Arab Spring” is now fostering a civil war in Syria. The fate of many citizens hinges upon which side prevails. After the fact, it is easy to look back at an outcome and see it as clear or “inevitable.” At the time, however, the outcome of many conflicts is uncertain, and the struggle to cope with that uncertainty is real.

### 4. *Coping with Redefined Relationships*

Many conflicts occur in the context of prior relationships, and redefining the relationship may be part and parcel of the conflict. Sometimes redefining the relationship lies at the core of the conflict, as when a married couple divorces. Sometimes redefining the relationship is but a piece of the conflict, as when neighbors who have been friends for years fight over who will trim the common hedge bordering their properties. Either way, parties in conflict commonly face the prospect that their relationship will be significantly different once the conflict is resolved. Even where parties in conflict do not have (much of) a prior relationship with one another, how they relate to one another can still be a significant inner trial. I am reminded of a documentary about a mother who meets the killer of her daughter in a victim-offender reconciliation program shortly before the killer’s execution.<sup>20</sup> The murder itself was

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<sup>19</sup> See THOMAS C. SCHELLING, *THE STRATEGY OF CONFLICT* 16 (1980).

<sup>20</sup> See *48 Hours: My Daughter’s Killer* (CBS News television broadcast Feb. 4, 1999).

a brutal act of random violence, so the mother and killer did not have any prior relationship. Yet the existence of the murder created a type of relationship. The mother, a devoted, Christian woman, wanted to express to the killer both her anger *and* her forgiveness before he died, and the killer wanted to offer his apology to the mother before he died. By meeting with one another shortly before his execution, each found a measure of healing.

### 5. *Facing Aspects of Reality We Would Rather Not Face, Including Ourselves*

Reality can be difficult to face, and conflicts can make vivid aspects of reality that we would rather avoid. Consider, for example, the civil rights movement. From a legal perspective, the movement was about legal equality for blacks and other minorities. Yet, on a social level, the movement, among other things, forced whites to confront their own racist attitudes. Indeed, the non-violent approach of Martin Luther King, Jr. and others was particularly effective at putting white racism in sharp relief. Conflicts can force parties to see parts of themselves they would rather not see, and to face parts of reality they would rather not face. A meek person who is confronted by a bully must learn to face not only that bully but also his own meekness. The girl who suffers abuse as a child and who later in life marries an abusive man may well need to confront not only that man, but also her abusive past, if she is to leave that relationship.

### 6. *Coping with Existential Questions*

“Why did this happen to me?” “Why did God do this to me?” Sometimes the losses and traumas underlying conflicts can be so profound that parties face deep existential questions. For several years I conducted a study of a tragic medical malpractice case in which a healthy, three-year-old boy died from a string of medical errors.<sup>21</sup> The death of their son raised profound existential questions for the parents: Did God exist? If so, why would a good God let this happen? Was their child now in heaven, or was he simply

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<sup>21</sup> See Jonathan R. Cohen, *The Path Between Sebastian's Hospitals: Fostering Reconciliation After a Tragedy*, BARRY L. REV. (forthcoming 2012).

gone?<sup>22</sup> Following the hospital's apology for the boy's death, the parents responded to the death of their son in an inspiring way, establishing a foundation to improve patient safety and create a new children's hospital for other children. Nevertheless, such deep existential questions remained.

The death of a child is, of course, an extreme situation, and I do not mean to suggest that most "ordinary" conflicts raise existential questions the way such a tragic loss does. Still, some parties in "ordinary" conflicts do face significant existential questions. The victim of a robbery may ask, "Why did the burglar rob *me*?"<sup>23</sup> A divorcing spouse may wonder, "How could I have been so wrong in marrying the person I married?" A fired employee may question, "What did I do to deserve this?"

Often people hold in their minds—indeed doing so may well be psychologically healthy—the vision of the world as a safe, well-ordered place. Conflicts, as well as the injuries that underlie them, can shatter that vision. In some ways, our legal system can be seen as a mechanism for trying to uphold that vision: when a wrong occurs, the law seeks to "make the injured party whole" in a civil case or restore "order" and keep society safe in a criminal one. While such legal responses are laudable, such efforts cannot, in many cases at least, ultimately re-establish perfect wholeness or order in a chaotic world.<sup>24</sup> As with the parents who lost their child, many civil cases involve significant non-pecuniary elements that cannot ultimately be compensated with money, and even if *this* criminal act is punished, other crimes will still occur. The law can help to make our world more ordered and more whole, but it can only do so imperfectly. Conflicts, in other words, often give rise to existential questions, questions which even a well-functioning legal system cannot obviate.

### 7. *Challenges of Communication*

Conflicts are deeply about how parties relate to one another, and how parties relate to one another is significantly shaped by how they communicate. Thus, the challenges of communication pose inner trials for many parties. Can I express the anger I feel in

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<sup>22</sup> *Id.*

<sup>23</sup> That question is often irrelevant in a legal trial but nevertheless of much concern to some victims.

<sup>24</sup> *Id.*

a constructive way, neither bottling it up nor exploding in a destructive tirade? Despite the fact that we disagree, can I still listen with an open mind to your views or will I reject out of hand what you say? Can we find ways to speak with one another that might help to solve our problem rather than escalating it?

The Biblical Exodus narrative illustrates how challenging communication can be for parties in conflict. Charged by God to go unto Pharaoh and tell Pharaoh to release the Israelites from slavery,<sup>25</sup> Moses complains that he is not “an eloquent man” but “slow of speech, and of slow tongue.”<sup>26</sup> Moses, in other words, finds it challenging to express what he must express. On the other side, when Moses repeatedly asks Pharaoh to let the Israelites go, even despite the attendant plagues, time after time Pharaoh’s heart grows “hard” and he is unwilling to listen to that plea.<sup>27</sup> Ultimately it is only an act of tremendous destruction—the death of the first-born— that leads to a breakthrough from the impasse. Conflicts profoundly implicate parties’ communication skills and profoundly test those skills as well.

## 8. *Ethical Challenges*

Conflicts can test parties’ core ethical values. This person who harmed me, shall I forgive him or seek revenge? This person whom I have harmed, shall I apologize to him or avoid him? This lawsuit we are settling, should I try to reach a fair outcome or should I try to get as much as I can for myself? One of the most basic ethical dimensions of life is how we relate to other people. Conflicts profoundly test this. Can I be engaged in conflict and still remain a compassionate person? Do I see myself as solely an individual, or do I see myself as a part of us (e.g., our family, our company, etc.)? Whether through maxims like the Golden Rule or other such precepts, religious and ethical teachers throughout the ages have placed how we relate to others at the center of what it

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<sup>25</sup> *Exodus* 3:9.

<sup>26</sup> *Exodus* 4:10.

<sup>27</sup> *Exodus* 7-10. Variety exists in the Biblical text about the hardening of Pharaoh’s heart; the text suggesting that sometimes Pharaoh chooses to harden his heart, that sometimes God hardens Pharaoh’s heart, and that sometimes Pharaoh’s heart simply grows hard on its own. I note too that the Hebrew word for “heart,” *lev*, means not simply heart in the literal sense but in a broader sense, including both emotions *and* reason, closer to what we might think of as “mind.”

means to be an ethical human being.<sup>28</sup> When thinking of interpersonal relations, one of my favorite teachings is Rabbi Hillel's famous triad of questions: "If I am not for myself, who will be for me? If I am for myself alone, what am I? And if not now, when?"<sup>29</sup> A time of conflict might easily be a "now."

### 9. *Challenges to Identity*

As the above categories suggest, conflicts can deeply challenge our sense of identity. As our relationships change, as we experience significant harms and losses, as we face deep ethical questions, and as we experience healing, repair and growth too, who we are as people gets called into question. Douglas Stone, Bruce Patton and Sheila Heen examine this linkage between identity and conflict in their fine book, *Difficult Conversations: How to Discuss What Matters Most*. Often what makes an external conversation with another party difficult is that there is an internal identity conversation (sometimes articulated and sometimes not) going on *within* a party.<sup>30</sup> A spouse undergoing a divorce may wonder about the future: "What is my life going to be now? A big part of who I used to be was X's husband/wife. Who will I now be?" That divorcing spouse may also ask retrospective questions such as, "What did I do to cause our marriage to fail?" or "Was there something about me that led me to marry the wrong person in the first place?" One might think, too, of the classic adolescent struggle: the adolescent's conflict with his parents goes hand in hand with defining his own life as an adult. Conflicts not only test us, they can define us. Will I be a forgiving person? Will I be a courageous person? Will I continue to "live in the past" or will I find a new life in the future? Not all conflicts, of course, implicate such deep questions of identity. Many of the conflicts in our lives are relatively "small." However, the more significant the conflict is to us, the more likely a question of identity is implicated.

The Biblical story of Jacob's reconciliation with his older brother Esau illustrates this linkage between conflict and identity vividly. From the time of their conception, the twins Jacob and

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<sup>28</sup> For references, see Jonathan R. Cohen, *The Immorality of Denial*, 79 TUL. L. REV. 903, 927-28 (2005).

<sup>29</sup> *Pirkei Avot* 1:4.

<sup>30</sup> DOUGLAS STONE ET AL, *DIFFICULT CONVERSATIONS: HOW TO DISCUSS WHAT MATTERS MOST* 109 (1999).

Esau struggle in Rebecca's womb.<sup>31</sup> Indeed, the Bible depicts that struggle not only as the struggle between brothers, but also as the struggle between the two nations that would come through them.<sup>32</sup> When they are grown, Jacob uses his brother's hunger to his advantage, trading a bowl of pottage with Esau for Esau's much more significant birthright blessing of the firstborn.<sup>33</sup> Later, to actually obtain that blessing, Jacob masquerades as Esau before their blind, elderly father Isaac.<sup>34</sup> The Bible reports that Esau "hated Jacob because of the blessing" and contemplates killing Jacob in revenge.<sup>35</sup> Their mother Rebecca learns of Esau's murderous intent and instructs Jacob to flee to her brother Laban's home in Haran for several days lest the enraged Esau murder him.<sup>36</sup>

Jacob remains with Laban not several days but twenty years, betrothing both of Laban's daughters (Rachel and Leah) and acquiring much wealth.<sup>37</sup> He then departs and heads toward the land Seir where Esau lives.<sup>38</sup> Wary of a hostile encounter, Jacob sends messengers in advance to announce his peaceful intentions.<sup>39</sup> Those messengers return to say that Esau is approaching with four hundred men.<sup>40</sup> Jacob divides his camp in two as a defensive strategy<sup>41</sup> and sends forth to Esau many animals as a gift of appeasement prior to their meeting the next day, leaving himself (Jacob) alone for the night.<sup>42</sup>

It is during that night—the eve of his re-encounter with Esau—that a mysterious *ish* (the Hebrew word for "man") arrives and wrestles all night with Jacob.<sup>43</sup> Jacob survives the struggle, and when dawn comes Jacob declares that he will not release the *ish* unless the *ish* blesses him.<sup>44</sup> "What is your name?" asks the *ish*.<sup>45</sup>

<sup>31</sup> *Genesis* 25:22.

<sup>32</sup> *Id.* at 25:23. The zero-sum nature of their relationship from birth has long been observed. As the medieval commentator Rashi states (*ad loc*), "They shall not be equal in greatness, when one rises (to supremacy) the other shall fall." ABRAHAM BEN ISALAH & BENJAMIN SHARFMAN, *THE PENTATEUCH AND RASHI'S COMMENTARY: A LINEAR TRANSLATION INTO ENGLISH: GENESIS* 242 (1976).

<sup>33</sup> *Genesis* 25: 27-34.

<sup>34</sup> *Id.* at 27.

<sup>35</sup> *Id.* at 27:41.

<sup>36</sup> *Id.* at 27:42.

<sup>37</sup> *Id.* at 32:6.

<sup>38</sup> *Id.* at 32:4.

<sup>39</sup> *Id.* at 32:4-6.

<sup>40</sup> *Id.* at 32:7.

<sup>41</sup> *Id.* at 32:9.

<sup>42</sup> *Id.* at 32:25.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 32:27.

“Jacob,” he responds.<sup>46</sup> “No more shall you be called Jacob but rather Israel,” answers the *ish*, “for you have wrestled with God, and with men, and have prevailed.”<sup>47</sup>

Who or what exactly was this mysterious *ish*? Commentators throughout the ages have grappled with that question. The Biblical narrative originally described Jacob as wrestling simply with an *ish* (man), yet the *ish*'s statement above (“for you have wrestled with God, and with men, and have prevailed”) strongly suggests that this mysterious *ish* was more than just an ordinary man.<sup>48</sup> Was the *ish* an angel sent by God? Was the *ish* an aspect of Jacob's own personality with which he had wrestled over the years to heal and mature?<sup>49</sup> One ancient explanation highlighting the importance of Jacob's lifelong conflict with Esau posits that this *ish* was *Esau's* guardian angel.<sup>50</sup> However one interprets the nature of this *ish*, one of the most telling dimensions of Jacob's encounter with the *ish* is when it occurs. From the time of their conception in Rebecca's womb, Jacob and Esau struggle with one another. Yet it is only upon the eve of his re-encounter with Esau after two decades

<sup>45</sup> *Id.* at 32:28.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 32:29. The Hebrew word “Israel” here derives from a combination of two words, roughly, “isra” meaning “he wrestled,” and “el” meaning “God.” I write “roughly” for there is some complexity to the use of verb tenses in Biblical Hebrew.

<sup>48</sup> Consider, too, the description of Jacob's response to the blessing: “Jacob called the name of the place ‘Peniel,’ for I have seen God face to face.” *Genesis* 32:31. Like “Israel,” “Peniel” is a combination of two words, “penei,” meaning “face of,” and “el,” meaning “God.”

<sup>49</sup> Esther Spitzer offers such an interpretation using psychologist Carl Jung's concept of “shadow”:

Jacob's struggle with the Adversary [*ish*] was a numinous confrontation with the Shadow, or the dark, selfish side of him. When the Adversary wanted to quit, Jacob said, ‘No, I will not let you go until you bless me.’ What did Jacob mean by this? He meant, ‘I will not part from this experience unless I find a meaning to my suffering.

Suffering of itself does not heal. Only suffering that has a meaning, and is accepted willingly, has the power to heal, to transform an individual into a whole person; that is, someone who is undivided, who can come to terms with himself, and even with his enemies, as Jacob did with Esau and Laban.

Jung named this process of growth from one stage of awareness to another, *individuation*. Transformation, or real change of character, can take place in a person only when, through suffering, he engages in an active struggle with the Shadow, the dark side of himself.

Esther Spitzer, *A Jungian Midrash on Jacob's Dream*, in *THE RECONSTRUCTIONIST* 22-23 (1976), as quoted in *THE TORAH: A MODERN COMMENTARY* 223 (W. Gunther Plaut, ed., 1981). In the second paragraph above, Spitzer suggests that coming to terms with oneself may be helpful in coming to terms with one's enemies. *Id.* At times, the reverse may also be true: coming to terms with one's enemies may be helpful in coming to terms with oneself.

<sup>50</sup> See *ISAIAH & SHAREFMAN*, *supra* note 32, at 330. Rashi (*ad loc*), citing to the midrashic commentary *Genesis Rabbah*, states: “Our Rabbis of blessed memory explained that it [the *ish*] was the (guardian) angel of Esau.” *Id.*

of estrangement that Jacob is renamed Israel.<sup>51</sup> Jacob's transformation of identity, signified by his change of name, occurs when he faces the most basic conflict of his life. That linkage between conflict and identity is true not only of Jacob but of many people: how we handle conflicts helps in part to define who we are.

### 10. *Other Challenges*

The categories above do not exhaust the inner trials parties in conflict may face. Parties may face challenges related to control (e.g., knowing what one can control and accepting what one cannot), balance (e.g., learning to deal with the conflict without becoming "consumed" by it), and resources (e.g., how to pay for a lawyer), to name but a few. Inner trials come in many shapes and sizes. Additionally, I suggest resisting the impulse to think of inner trials as inherently "bad." Some inner trials (e.g., coping with a severe physical injury) I would wish on no one. Yet many inner trials hold within them profound opportunities for learning and growth. Rather than being simply "good" or "bad," what inner trials are inherently is challenging. How we respond to such challenges is ultimately up to us.

## II. CONFLICT AS LIMINAL TIMES

Another way of expressing the idea that parties in conflict often experience significant inner trials is to say that many conflicts are liminal or quasi-liminal periods—threshold times in which people are transitioning from one phase to another. Now, of course, not all conflicts are threshold times in our lives. Some conflicts are minor, and even some of the major ones do not involve significant "inner work." Yet often conflicts do involve significant inner work, either because the transitions involved are, objectively speaking, major ones, or because, subjectively experienced, the transitions are major ones *for that party*. I am reminded of an experience a colleague shared with me years ago from a "role reversal" exercise

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<sup>51</sup> As Plaut describes, "The reconciliation occurs because it is Israel, not Jacob, whom Esau meets, and Jacob is a new man who asks forgiveness, if not in words then in manner, who limps with repentant air and not deceitful arrogance. . . . [So too the] essentially simple and uncomplicated Esau, who himself has matured, senses this at once and runs to kiss his newly found brother." *THE TORAH: A MODERN COMMENTARY*, *supra* note 49, at 222.

she led during a negotiation training. Her students were working professionals, many quite distinguished in their careers. The exercise called for each student to select a real-life, difficult conversation scenario to role-play, i.e., an imagined conversation that would be hard for them to undertake, but that they felt they might benefit from holding. One of her students was a Supreme Court justice from a foreign country. The conversation he wanted to have, but feared having, was with his wife. For decades his wife had selected and laid out his clothes in the morning, including his tie. He wanted to talk with his wife about selecting his own tie! To some, that may hardly seem a difficult conversation, but when I have shared this example with my students, they have often responded that this could be a very difficult conversation indeed. If the justice expressed that he wanted to pick out his tie now, what was he saying about all the times his wife had done it for him in prior years?

When we think of liminal times, usually we think of life cycle events such as birth, coming of age, marriage and death. Often we employ religious rituals at such times (e.g., baptisms, bar/bat mitzvahs, wedding ceremonies, and funerals) for rituals help mark the magnitude of what is occurring. They provide, among other things, symbolic form to an important transition. That said, such liminal times are not solely religious in nature. They are times of psychological, economic, legal, and relational transition too. Indeed, one of the defining features of liminal times is that they are multi-dimensional. The transitions people undergo at such times have to them not one part but many.

One of the courses I teach is evidence law, and when I teach it, I typically devote a class to the history of trials in the Anglo-American legal system, including trials by ordeal and trials by battle.<sup>52</sup> Some the students are skeptical of this: Why do we need to know about such “primitive” approaches? In part I do this to reinforce the message that one never really knows how a jury reached its verdict (evidence law is built, paradoxically, upon the *distrust* of juries).<sup>53</sup> In part I want the students to think about possible contemporary analogs to these ancient systems (e.g., few support the view that the results of a trial should depend upon who was

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<sup>52</sup> See THEODORE PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 113-18 (1956).

<sup>53</sup> See CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, *EVIDENCE UNDER THE RULES: TEXT, CASES, AND PROBLEMS* 1 (2011) (“[Strange though it sounds] in a republic that places great faith in the jury system . . . mistrust of juries is the single overriding reason for the law of evidence”). See also *Tanner v. United States*, 483 U.S. 107 (1987) (preventing post-verdict inquiry into jury deliberations despite evidence of much drinking of alcohol, use of illegal drugs, and even illegal drug sales during jury deliberations).

stronger in battle, but does not our current system sometimes work that way?) Yet, most fundamentally, I want the students to see that these ancient trial techniques had important ritual if not religious dimensions to them (recall that for both trials by battle and trials by ordeal, often conducted by clergy in a church,<sup>54</sup> the animating belief was that a just God determined the outcome of the trial<sup>55</sup>) and raise for students the question of what if any roles ritual and religion play in our modern trials?

We may no longer believe that a supernatural God determines the outcomes of trials, but we would be mistaken to overlook the fact that many conflicts are liminal or quasi-liminal times in people's lives. When a couple gets married, it is easy to see that they are undergoing a liminal event. The transition they are making has significant legal aspects and it also has significant non-legal (e.g., religious, psychological, social, economic, and relational) aspects. So, too, when a couple divorces, the non-legal dimensions exist hand in hand with the legal dimensions. At liminal times, the changes taking place impact life in multiple ways. Many conflicts fit that bill. We divide history "before 9/11" and "after 9/11." We tell the story of a person's life "before the divorce" and "after the divorce." Whether we accompany them with rituals or not, major transitions are the markers of our lives.

### III. SOME IDEAS FOR LAWYERS

Does the fact that many parties to conflict are undergoing significant inner trials have implications for lawyering? I repeat my disclaimer that I will not explore the subject fully here, but I would be remiss not to discuss it briefly, for, yes, I do believe the fact many clients are undergoing significant inner trials has important implications for lawyering. What are some of those implications? Here are a few ideas to consider.

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<sup>54</sup> See PLUCKNETT, *supra* note 52, at 114.

<sup>55</sup> See Angela M. Laughlin, *Learning from the Past? Or Destined to Repeat Past Mistakes?: Lessons from the English Legal System and Its Impact on How We View the Role of Judges and Juries Today*, 14 WIDENER L. REV. 357, 360 (2009). The much earlier Biblical ordeal of bitter waters (*sotah*) used for women accused of adultery (see *Numbers* 5:11-31) was animated by the same belief. Indeed, throughout history many trials by ordeal have been animated by analogous beliefs in different societies.

First and foremost, lawyers should recognize the magnitude of the inner trials their clients may be facing.<sup>56</sup> Clients may be undergoing major transitions and facing multiple stressors. The decisions clients make may help define who they will be for years to come. Lawyers should be sensitive to and respectful of that situation, doing their best to support their clients, including respecting their clients' autonomy, through such challenging times.

Second, lawyers should *listen empathetically* to their clients, in particular, but not exclusively, to the emotional dimensions of their client's experiences. Lawyers are confidantes, and many clients have no one else with whom they share what they are going through. Apart from the instrumental benefits of such listening (e.g., helping the lawyer learn the facts of the case, fostering the client's trust in the lawyer, allowing the client to "vent" so that later the lawyer and client may discuss the client's choices more analytically, etc.), the simple act of being heard can be profoundly healing and helpful to clients.<sup>57</sup>

Third, lawyers might at times broach with clients the subject of the clients' inner trials. "I have heard from other clients how hard it can be to go through an experience like this. How is it going for you? What about it has been most difficult? Do you have friends or family who can help support you through it?"<sup>58</sup> I am not here suggesting that lawyers "become psychologists." What I am suggesting is that, in some cases at least, lawyers consider engaging in some dialogue with their clients related to those inner trials. Perhaps the lawyer can learn something that will help her better assist the client. Perhaps the client can learn something through discuss-

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<sup>56</sup> Attorney Gail Leverett Parenti, former president of the Florida Defense Lawyers Association, describes how hard it can be for lawyers to appreciate their clients' situations. As she writes of her experience of being a *party* in an automobile accident lawsuit, "You can't have a true appreciation of the anguish, the sleepless nights, the self-doubt, the depression, the impotent rage, the frustration with the legal system, the delays and the endless nonsense that a litigant experiences until you have experienced it first-hand." Gail Leverett Parenti, *Things I Learned from Being a Defendant*, 25 TRIAL ADVOC. Q. 2 (Summer 2006).

<sup>57</sup> See Kristin B. Gerdy, *Clients, Empathy, and Compassion: Introducing First-Year Students to the "Heart" of Lawyering*, 87 NEB. L. REV. 1, 21 (2008).

<sup>58</sup> Friends and family can significantly influence how parties handle conflicts, including legal disputes. See Cohen, *The Path between Sebastian's Hospitals*, *supra* note 21. As Sukhsimranjit Singh and Pat Chew's presentations at our conference explored so well, culture may play an important role in this, for the participation of loved ones in managing conflict may be culturally-dependent. See Sukhsimranjit Singh, *Views of Marriage and Divorce from Sikh and Hindu Perspectives*, Address at the Cardozo Journal of Conflict Resolution Symposium, Culture, Religion and Conflict Resolution: What's Identity and Faith Got to Do With It? (Nov. 8, 2011); Pat K. Chew, *A Case of Conflict of Cultures: End-of-Life Decision Making Among Asian Americans*, 13 CARDOZO J. CONFLICT. RESOL. (forthcoming 2012).

ing that inner trial with the lawyer. To be unwilling to talk about such matters may be to miss a very important opportunity to assist—either directly or by way of referral—their client.

Fourth, lawyers should keep in mind the limits of their professional expertise and refer clients to other professionals when appropriate. If the client is struggling with a question like, “Why did God do this to me?” the lawyer might recommend that the client talk with his clergy person. If the client is struggling with how to cope with grief, the lawyer might recommend that he see a psychologist. If the client is trying to imagine how he will meet life’s basic needs following an injury, the lawyer might recommend that he meet with a social worker. As mentioned, clients’ problems and the inner trials they produce are often multi-dimensional. As a professional whom parties often choose to visit, or are forced to visit, when problems arise, lawyers can play a valuable role by channeling the client to other resources for help. As my late colleague Walter Weyrauch discussed, lawyers should remember that when the client decides to see an attorney, the implicit classification of the client’s problem as at root legal in nature was made *by the client*.<sup>59</sup> In some cases, the client may be wrong, or may be seeing only part of the picture.

Fifth, as the transitions their clients are making take place over time, lawyers should be sensitive to the temporal dimension of their client’s experiences and capacities. Lawyers and clients may find it helpful to think about cases through both short-run and long-run lenses. In the short run, how will the client handle the immediate challenges and decisions that need to be made? In the long run, what will the client say when he looks back upon the entire experience? What will he have learned from it, and how, if at all, will he have defined himself through it? Will his conduct have been in line with his long-run values? Indeed, the lawyer might view the act of working with clients as itself a staged process (e.g., “First, I need to simply listen to the client and allow him to express whatever he wants, including his emotions. Later, when the client is less in crisis and can think more clearly, together we can systematically examine his options for going forward.”). Perhaps some discussions with the client should take place today. Perhaps others should wait for another time.

Sixth, the fact that many clients face significant inner trials raises philosophical questions concerning the lawyer’s role. To

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<sup>59</sup> See Walter O. Weyrauch, *Foreword: Legal Counseling as an Intellectual Discipline*, 42 FLA. L. REV. 429, 432 (1990).

what extent should a lawyer see supporting processes such as client growth and self-definition as goals of legal representation? Whom should the lawyer see herself as representing: the client before he has faced his inner trial, the client after he has faced his inner trial, or simply a person in transition? If a client appears to be responding to an inner trial in a way that the lawyer does not think wise (e.g., the client's response may be expedient, but the lawyer questions whether it will serve the client well in the long run), what should a lawyer do? As mentioned, I will not here explore such matters at length. Rather, I would simply suggest that the fact that many clients are experiencing significant inner trials *does* have important ramifications for legal representation and invite readers to think further about what those ramifications might be.

### CONCLUSION

Conflicts are not only times of external strife. For many, they are also times of internal transition. Whether related to loss and trauma, powerful emotions, redefined relationships, uncertainty about the future, or some other matter, many parties in conflict experience significant inner trials along with their external ones. Put differently, many conflicts are liminal or quasi-liminal periods in people's lives, threshold times where they face not only significant legal issues, but spiritual, psychological, and relational issues, to name but a few. Lawyers should think seriously about the implications of representing people at such transitional times. In doing this, potential positive dimensions of conflict should not be overlooked. Although by definition challenging, the inner trials that come with conflict can also present important opportunities for learning, growth and self-definition.