CAN EFFECTIVE APOLOGY EMERGE THROUGH LITIGATION?

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I

INTRODUCTION

The Williams family was sitting quietly in the car waiting for the minister to open the church, Victory Gospel Temple, in Lockland, Ohio. It was December 4 and time to decorate for Christmas.[1] A white van screeched to a stop in front of the Williams' car. Men with automatic weapons and ski masks jumped from the van, screaming at Donna Williams, her young daughters, and her nephews to get out of the car and lie prone on the cold sidewalk. Donna and the children were terrified and thought they were being robbed. Eventually the family was permitted—still at gunpoint—to sit on a ledge. After twenty minutes they were released. They were in disbelief when the men identified themselves as police officers, regional drug-task-force members following instructions to "detain any person standing on or near" the corner of Locust and Maple. The family sued.[2]

Several months later, members of the Williams family, who are African American, sat with their lawyer on one side of a federal courtroom, and the task-force officers, police chiefs, and defense lawyers—all of whom were white—assembled on the other side. The U.S. Magistrate Judge explained the purpose of mediation. Each side would be permitted to state its position while everyone was in one room and then the groups would be separated for the actual negotiations.

The Village Administrator of Lockland spoke first. He stood, turned, and faced the Williams family. He explained that if his daughter had been held at gunpoint by strangers wearing ski masks he would be angry and extremely upset. He was very sorry the Williams family had had this terrible experience in his city. He did not want any citizens subjected to this treatment in the future. He hoped the Williamses would accept his apology.[3] Donna Williams wept as the administrator spoke. The case settled quickly with agreement on compensation for the family and a training program to be instituted for the task

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1. Complaint and Jury Demand at 6–7, Williams v. Village of Lockland, Ohio, No. 1:06-CV-465 (S.D. Ohio 2006).

2. *Id.*

3. Telephone Interview with David Krings, Adm'r, Vill. of Lockland, Ohio (Feb. 9, 2009).

force to prevent any such further violations of the law. The apology by the village administrator was critical to the resolution. He had not been administrator at the time of the incident, but now, on his watch, it was clear that he was not going to let it happen again.

II

OPPORTUNITIES FOR APOLOGY

Most civil-rights plaintiffs have two goals—fair compensation and some assurance that the abuse will not happen again. But conventional litigation strategies are very limiting. A jury trial ends with a verdict form that allows the jury to take only one action if it finds liability—award money to the plaintiff. Injunctions are often precluded by rules regarding standing to sue and jurisdiction. When civil-rights lawsuits drag those in power to the conflict-resolution table with people they normally ignore, opportunities for problem-solving strategies—including apology—open up. Here are four examples:

1. Responding to Domestic-Violence Death. An Ohio family agreed to reduce a $3.75 million jury award after the City of Blanchester apologized to the family, permitted a statue dedicated to all victims of domestic violence to be erected at the police station, and helped implement a regional domestic-violence prevention program.[4]

2. Responding to Jail Suicide. Karen Nutter's son Chris was a known suicide risk in the Clark County, Ohio, jail at the time he hung himself. Karen sued and hoped to prevent such lapses of care in the future.[5] The parties were having trouble resolving the case until the Clark County Sheriff agreed to implement revised suicide policies and training at the Clark County Jail and to install a plaque on the wall of the nurse's station at the jail. The plaque has Chris's picture, and it daily reminds the staff to remain "forever vigilant."

3. Responding to Wrongful Conviction. Michael Green served thirteen years in Ohio prisons for a rape that he did not commit.[6] He was eventually exonerated based on DNA evidence.[7] The actual rapist was identified and convicted.[8] Michael Green sued.[9] Eventually the law director and mayor of the City of Cleveland agreed that the evidence had been falsified in Michael's case.[10]

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4. Culberson v. Doan, 65 F. Supp. 2d 701 (S.D. Ohio 1999); Culberson v. Doan, 72 F. Supp. 2d 865 (S.D. Ohio 1999); Culberson v. Doan, 125 F. Supp. 2d 252 (S.D. Ohio 2000); Settlement Agreement at 2–7, Culberson v. Doan (2001), *available at* http://www.gbfirm.com/litigation/documents/Culberson%20settlement%20agreement.pdf; Culberson Memorial Photos, http://www.gbfirm.com/culberson_photos.php (last visited Oct. 8, 2008).

5. Complaint at 3–6, Nutter v. Clark County Sheriff, No. 3:01-CV-00214 (S.D. Ohio 2001).

6. Case Profiles: Anthony Michael Green, http://www.innocenceproject.org/Content/163.php (last visited Oct. 8, 2008).

7. *Id.*

8. *Id.*

9. Amended Complaint and Jury Demand at 2–3, Green v. City of Cleveland, No. 1:03-CV-0906 (N.D. Ohio 2004).

10. Case Profiles: Anthony Michael Green, http://www.innocenceproject.org/Content/163.php (last

In addition to monetary compensation, the mayor held a press conference and publicly apologized to Michael and agreed to a forensic audit reviewing all similar cases handled by the Cleveland crime lab.[11] Many other exonorees have won large sums of money but have not found any peace; but for Michael Green, the city's admission of wrongdoing and the action it took to make sure there were no other cases like his assisted him in making a successful reentry to life in the community.[12]

4. Responding to Abuse in Morgue. In January 2001, Hamilton County, Ohio, was rocked by the revelation that a commercial photographer had been permitted to roam the county morgue for the previous four months taking photos of the deceased, placing props on their bodies, opening their body bags, and adjusting the hair, arms, and other parts of the corpses for his posed photographs.[13] The county commissioners ultimately issued an apology as part of a well-publicized comprehensive settlement that included compensation to the families of the deceased and reforms at the morgue.[14] The families also presented the current coroner with a plaque that hangs at the entrance to the autopsy suite where the abuses occurred, reminding staff that "The Bodies Entrusted to the Hamilton County Coroner are Sacred and Shall be Treated with the Utmost Respect."

These examples seem consistent with the argument by Conner and Jordan that the circumstances in which apologies can be expected are quite limited. Each example included a "ritualized public-speech act" that went beyond mere words (plaques and statues that remain in public spaces after the controversy is settled). Each involved a discrete issue that allowed the leader to bracket the scope of the apology. Finally, each involved a "window of opportunity" created by the litigation, by a change in leadership, or by both.

But these opportunities are rare only because they have not been the focus of advocacy. Conner and Jordan let powerful public figures like mayors and police chiefs off too easily. Advocates must not let public officials simply buy their way out of controversy with a monetary settlement, often paid by an insurance company. These examples and the Cincinnati police-reform case demonstrate that advocates can and should manufacture "windows of

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visited Oct. 8, 2008).

11. Connie Schultz, *City to pay $1.6 million for man's prison time*, PLAIN DEALER, June 8, 2004, at A1, *available at* http://www.truthinjustice.org/cleveland-review.htm; Settlement Agreement at 2–4, Green v. City of Cleveland, No. 1-03-CV-0906 (N.D. Ohio 2004), *available at* http://www.gbfirm.com/litigation/documents/Anthony%20M.%2024%20%20Forensic%20Audit%20of%20Cleveland%20Crime%20Lab.pdf.

12. Telephone Interview with Michael Green (Feb. 8, 2009).

13. Chesher v. Neyer, 392 F. Supp. 2d 939, 956 (S.D. Ohio 2005), *aff'd* 477 F.3d 784 (6th Cir. 2007).

14. Travis Gettys, *County Settles Morgue Photos Suit for $8 Million*, WLWT CINCINNATI, Aug. 21, 2007, http://www.wlwt.com/news/13940224/detail.html; *County to Pay $8M in Morgue Photo Case*, BUS. COURIER CINCINNATI, Aug. 21, 2007, http://cincinnati.bizjournals.com/cincinnati/stories/2007/08/20/daily21.html.

opportunity"[15] rather than wait for them.

III

POLICE AND RACE: THE CINCINNATI COLLABORATIVE ON POLICE–COMMUNITY RELATIONS

Conner and Jordan opine that the Cincinnati conflict was too complicated and too raw for a sweeping, simplistic apology from the police or the mayor; and they imply that the incremental steps represented by the Collaborative Agreement were, perhaps, all that reasonable observers should expect.[16]

What is known in Cincinnati as "The Collaborative" started as fourteen separate lawsuits against the Cincinnati police alleging wrongful death, excessive force, and racial profiling. The separate cases were consolidated and amended in early 2001 to state a class action.[17] The class—essentially the entire African American community—distrusted the police. Every crisis since the riots of 1967 had been followed by a blue-ribbon panel—thirteen in all—that would hold hearings until the mood calmed and then make recommendations that were quietly shelved and unheeded. The status quo always won out. That status quo was perceived by most African Americans as excessive force by the Cincinnati police and little accountability for wrongful acts by officers.

The plaintiffs' attorneys had drafted a motion for preliminary injunction and were ready to litigate their request to end excessive force when a confluence of circumstances—including an unexpected source of funding and a five-to-four vote in the city council—led the parties to undertake an elaborate collaborative process.[18] This process took over six months and involved more than 3500 people, culminating in a wide-ranging consent decree.[19] The purposes of the Collaborative Agreement were

> to resolve social conflict, to improve community–police relationships, to reduce crime and disorder, and to fully resolve all of the pending claims of all individuals and organizations named in the underlying litigation, to implement the consensus goals identified by the community through the collaborative process . . . , and to foster an atmosphere throughout the community of mutual respect and trust among community members including the police.[20]

The class-action settlement was approved by a federal court on August 5, 2002.[21] The parties agreed on a five-year period for court-supervised

15. 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, 236, 256–57 (Spring 2009).

16. *See id.* at 255–56.

17. Collaborative Agreement at 2, In re Cincinnati Policing, No. C-1-99-317 (S.D. Ohio 2001), *available at* http://www.gbfirm.com/litigation/documents/In%20re%20Cincinnati%20(Collaborative%20Agreement).pdf [hereinafter Collaborative Agreement].

18. Jay Rothman, *Identity and Conflict: Collaboratively Addressing Police–Community Conflict in Cincinnati, Ohio*, 22 OHIO ST. J. ON DISP. RESOL. 105, 114 (2006).

19. *Id.* at 105.

20. Collaborative Agreement, *supra* note 17, at 3.

21. *In re Cincinnati Policing*, 209 F.R.D.395, 396 (S.D. Ohio 2002).

implementation. A sixth year was later added.[22]

In the five years following the consent decree, significant progress was made on traditional police-reform issues. New rules and policies on police use of force, accountability, and bias-free policing were implemented.[23] But the heart of the agreement—police–community collaboration through a strategy known as Community Problem-Oriented Policing—was stalled.[24] The city and the community remained stuck in old patterns. At various times the Fraternal Order of Police and the city took steps to remove themselves from the Collaborative.[25] The primary plaintiff representing African Americans, the Cincinnati Black United Front, did withdraw from the Collaborative, leaving only the American Civil Liberties Union as a class representative.[26] At one point, the federal court held the city in breach and ordered city officials to comply with the agreement.[27] "Collaborative" often seemed a misnomer.

Finally, in year six, the parties started effectively communicating collaborative reforms to the community. This effort included a frank acknowledgement of the history of discrimination experienced by the African American community, named the progress made in understated terms, and set out the challenges that remain to earn the trust that the parties set as the primary Collaborative goal.[28] This low-key but deliberate effort to educate the public—combined with evidence that reforms had taken root—may eventually cause the trust meter to register more-favorable ratings.[29]

Pursuant to the Collaborative Agreement, the third of five reports on bias in policing was issued by the Rand Corporation in December 2007.[30] Although no systemic racial profiling was uncovered, Rand reported that Cincinnati Police requested identification from African Americans at a much higher rate than whites;[31] similarly, African American drivers tended to experience a disproportionate number of stops for technical equipment violations.[32] The

22. Order at 1, In re Cincinnati Policing, Case 1:99-CV-03170 (S.D. Ohio 2007) (Doc. 262).

23. SAUL A. GREEN ET AL., CITY OF CINCINNATI INDEPENDENT MONITOR'S FINAL REPORT 5–6 (2008), *available at* http://www.gabsnet.com/cincinnatimonitor/.

24. Joint Motion at 2, In re Cincinnati Policing, Case 1:99-CV-03170 (S.D. Ohio 2007) (Doc. 258).

25. Rothman, *supra* note 18, at 125.

26. *In re Cincinnati Policing*, 214 F.R.D. 221, 222 (S.D. Ohio 2003).

27. Decision and Recommendation at 2, In re Cincinnati Policing, Case 1:99-CV-03170 (S.D. Ohio 2005) (Doc. 200); Order Adopting Report and Recommendation at 1–2, In re Cincinnati Policing, Case 1:99-CV-03170 (S.D. Ohio 2005) (Doc. 220).

28. Telephone Interview with Iris Roley, Representative, Cincinnati Black United Front, (Feb. 9, 2009).

29. *See* Collaborative Agreement Plan at 11, In re Cincinnati Policing, Case 1:99-CV-03170 (S.D. Ohio 2008) (Doc. 280-2) [hereinafter Collaborative Agreement Plan] (explaining that trust and relationships may grow over time).

30. TERRY SCHELL ET AL., POLICE–COMMUNITY RELATIONS IN CINCINNATI, YEAR THREE EVALUATION REPORT iii (2007), *available at* http://www.cincinnati-oh.gov/police/downloads/police_pdf17955.pdf.

31. *Id.* at 61–62.

32. *Id.* at 62.

public would have been startled and reassured to hear a leader apologize for and pledge improvement in such disproportionate law enforcement; but none was forthcoming.

Conner and Jordan predict that

> an effective apology is likely to occur only after other changes have "softened up" negative attitudes between the groups—referred to here as "ripeness." Second, even with a degree of ripeness, apology is unlikely without a "window of opportunity," a confluence of circumstances that permits the leader to limit the scope of the apology so as not to concede too much. Third, even if these conditions are satisfied, words alone are not enough for an apology to be effective.[33]

One measure of success for the Collaborative will be the emergence of a leader who recognizes that circumstances are "ripe" to seize the next "window of opportunity" to make a timely apology.[34] In a large, urban city such as Cincinnati those opportunities come with every allegation of police misconduct. The public would be both startled and reassured to hear a leader apologize for conduct that does not meet expected standards. A sincere effort to make amends by those in power and an openness to accept these gestures by those who are wronged will mark a healthier civic society.

33. Conner & Jordan, *supra* note 15, at 253.

34. In 2008 City Manager Milton Dohoney created a traffic-stop advisory group consisting of various stakeholders and has agreed to personally continue to lead the police and community toward reducing bias and building more trust. *See* Collaborative Agreement Plan, *supra* note 29, at 11.