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# APOLOGY ACCEPTED: HOW THE APOLOGY ACT REVEALS THE LAW'S DEFERENCE TO THE POWER OF APOLOGETIC DISCOURSE

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## INTRODUCTION

“I’m sorry” is an incredibly versatile and powerful phrase. More than an expression of simple sorrow, these words of apology are a social action, and their impact can range from resolving an accidental bump between pedestrians, to healing a deep interpersonal rift, to reconciling a divided nation. It is this power - this function of apology as a moral and social actor - which justifies its protection from interference by another powerful social and moral actor: the law. British Columbia’s *Apology Act*<sup>1</sup> safeguards apologetic discourse from the often corruptive force of law that can limit, commodify, or discourage apology. In so doing, the *Apology Act* reveals an instance of the law’s humility. By carving out a safe space for alternative methods of negotiating human disputes, we see the law’s implicit admission that there are instances in which apology has a superior ability to reinforce moral standards and reconcile damaged social relations. We see a moment of the law embracing an exception to the basic principles of evidence, in order to privilege the important social and moral work of apology over the law’s relentlessly logical quest for truth. This paper will demonstrate the ways in which apology is often superior to the law in navigating the realms of the moral and social and how it must be protected from the powerful influence of the law in order to safeguard a discursive process that is vital to a civil society.

## I. THE NATURE OF APOLOGY

Although most people may think of an “apology” as simply “being sorry”, scholars have argued that true apology contains much more than a simple statement of the speaker’s regret. Definitions of apology in the literature of sociology, psychology and law vary, but share many commonalities. Psycholinguists Scher and Darley identified four elements of

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1. *Apology Act*, SBC 2006, c 19. The *Apology Act* is a piece of provincial legislation and applies only in British Columbia, however similar legislation exists elsewhere in Canada. See e.g. *Apology Act*, SO 2009, c 3. As only the federal government has jurisdiction over criminal law, this statute would only apply to civil and regulatory matters (see Section II for a brief discussion of the law’s application).

apology that legal scholar John C. Kleefeld calls the “four R’s”:<sup>2</sup> remorse, responsibility and in some cases, resolution and reparation, with the first two “R’s” being definitional. For psychologist Janet Bavelas, apology is framed slightly differently, as entailing remorse plus responsibility for the hurtful act, which necessarily entails naming oneself as the agent of the act, and a clear description of the act.<sup>3</sup> She draws a distinction between expressions of sympathy and apology. Both involve some expression of being “sorry,” but for Bavelas, a true apology necessarily also includes a statement of responsibility.<sup>4</sup> For mediator Carl D. Schneider, the core elements of apology are acknowledgement of the speaker’s role in inflicting the injury; some display of emotion such as remorse or regret (what he terms “affect”) and opening up the offender to vulnerability, as an apology does not include a defence and thus can be refused by the receiver.<sup>5</sup>

From this diversity of perspectives, the definition that can be culled for the purposes of this paper is that a full apology consists of an acceptance of responsibility for a specific act (which necessarily includes agency), acknowledgement of the injury caused by that act, and an expression of remorse or regret. A true apology will expose the offender to some form of vulnerability as a true apology is offered without a defence<sup>6</sup> and thus the offender will, at the very least, face the possibility that the apology offered will be refused. Other vulnerabilities may include shame, embarrassment, social consequences (such as ostracism) and, where legislation does not preclude it, legal liability. Apologies that are missing any of these key elements will be considered “non-apologies”: mere expressions of either sympathy, which lack agency, or explanation, which denies wrongdoing. Explanations are often attached to apology but are not part of the apology itself<sup>7</sup> and thus a true apology does not allow escape from responsibility via justification. An apology might also contain an explicit resolution to not commit such acts again or an offer of reparation, but these will not be considered definitional for the purposes of this discussion.<sup>8</sup>

In his extensive work on the sociology of apology, Nicolas Tavuchis recognizes that apology is more than just an expression of feeling; it is a “speech act”<sup>9</sup> that does social and moral work. As Bavelas articulates, apology is “a social action that can only be done with words, and, by corollary, if it is not done in words, it has not been done.”<sup>10</sup> The act of apology is “quintessentially social”<sup>11</sup> and does more than assuage the guilt of the offender; it does important social work in maintaining or repairing relationships and restoring the offender’s place in the social order.<sup>12</sup> Further, Lee Taft recognizes apology’s

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2. Steven J Scher & John M Darley, “How Effective Are the Things People Say to Apologize? Effects of the Realization of the Apology Speech Act” (1997) 26 *J Psycholinguistic Research* 127, cited in John C Kleefeld, “Thinking Like a Human: British Columbia’s *Apology Act*” (2007) 40: 2 *UBC L Rev* 769 at 789-790 (HeinOnline).
  3. JB Bavelas, “An Analysis of Formal Apologies by Canadian Churches to First Nations” (2004) Occasional Paper No. 1, Centre for Studies in Religion and Society (Victoria: University of Victoria) at 2-3 online: Publications: Janet Beavin Bavelas <<http://web.uvic.ca/psyc/bavelas/Publications.html>>.
  4. *Ibid* at 2.
  5. Carl D Schneider, “What it Means to Be Sorry: The Power of Apology in Mediation” (2000) 17:3 *Mediation Quarterly* 265 at 266.
  6. *Ibid* at 267.
  7. Kleefeld, *supra* note 2 at 789.
  8. Tavuchis considers these elements to be necessarily implied by the expression of remorse. Nicolas Tavuchis, *Mea Culpa: A Sociology of Apology and Reconciliation* (Stanford: Stanford University Press, 1991).
  9. *Ibid* at 22.
  10. *Supra* note 3 at 1.
  11. Tavuchis, *supra* note 8 at 14.
  12. For further discussion of the social import of apology see below, Section IV.

place in not only healing social and emotional rifts, but also restoring “moral balance – more specifically...an equality of regard.”<sup>13</sup> The restorative act of apology is a critical element of a socially harmonious and moral society. As this paper will show, through apology legislation such as the BC *Apology Act*, the law admits its own weakness in repairing social rifts. It protects the moral and social nature of apologetic exchange from the influence of the law’s blunt and often clumsy attempts to remedy moral and social transgressions.

## II. THE APOLOGY ACT

The BC *Apology Act* came into force in May of 2006. It is a relatively strong and comprehensive piece of legislation compared to its counterparts in other jurisdictions. This is because it protects not only expressions of sympathy or remorse<sup>14</sup> but also statements that indicate or imply an admission of fault. Section 1 of the Act states that,

‘Apology’ means an expression of sympathy or regret, a statement that one is sorry or any other words or actions indicating contrition or commiseration, whether or not the words or actions admit or imply an admission of fault in connection with the matter to which the words or actions relate.<sup>15</sup>

This definition clearly goes beyond statements of sympathy to cover full apologies, where responsibility for the act is taken. Also unlike legislation in many other jurisdictions, the *Apology Act* is not limited to certain kinds of civil liability<sup>16</sup> but covers “an apology made by or on behalf of a person in connection with *any matter*.”<sup>17</sup> An apology cannot be used as an admission of fault or liability in connection with that matter,<sup>18</sup> nor can it be considered a confirmation of a cause of action under section 5 of the *Limitation Act*.<sup>19</sup> It “cannot void, impair or otherwise affect” insurance coverage that would be available to the apologist, but for their apology<sup>20</sup> and it “must not be taken into account in any determination of fault or liability in connection with that matter.”<sup>21</sup> Finally, the Act strongly and vigorously protects apologies from being used as evidence of legal liability in section 2(2) which states,

Despite any other enactment, evidence of an apology made by or on behalf of a person in connection with any matter is not admissible in any court as evidence of the fault or liability of the person in connection with that matter.<sup>22</sup>

The Act thus appears to widely cover any manner of apology, including admissions of fault, from being used as evidence in any civil proceeding. As provincial legislation, it cannot apply to criminal law, which belongs to the federal realm according to the

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13. Lee Taft, “Apology Subverted: The Commodification of Apology” (2000) 109: 5 Yale Law J 1135 at 1137 (JSTOR).

14. Legislation covering only sympathy but not fault can be found in California, Florida, Hawaii, Indiana etc. See Kleefeld, *supra* note 2 at 779.

15. *Apology Act*, *supra* note 1, s 1.

16. See legislation limited to health care such as in Arizona, Colorado, Delaware, Georgia, Illinois etc. See Kleefeld, *supra* note 2 at 779.

17. *Apology Act*, *supra* note 1, s 2 (1), [emphasis added].

18. *Ibid*, s 2(1)(a).

19. *Ibid*, s 2(1)(b).

20. *Ibid*, s 2(1)(c).

21. *Ibid*, s (2)(1)(d).

22. *Ibid*, s 2(2).

Canadian Constitution;<sup>23</sup> however, as it applies to “any matter” it would appear to apply to regulatory and quasi-criminal matters within provincial jurisdiction. The *Apology Act* has been only mentioned in passing by the court,<sup>24</sup> so the analysis that follows is dependent on it being judicially interpreted as broadly as it would appear to apply from the wording of the legislation: to exclude all expressions of apology, including admission of fault, from admission as evidence of fault in all civil matters. This broad coverage of admissions of both sympathy and fault protects the important social and moral work of apology, but in so doing flies in the face of foundational principles of evidence law.

### III. PRINCIPLES OF EVIDENCE LAW

The discourse of apology is in many ways antithetical to the adversarial system, which pits the parties against each other and rewards a successful individual rather than aiming to repair the relationship between them. This same adversarial system both underwrites and runs through elements of the rules of evidence. In the context of evidence law, apology legislation very clearly contradicts Irving Younger’s lawyer’s “rule of thumb” for the party admissions exception to hearsay: “anything the other side ever said or did will be admissible, as long as it has something to do with the case.”<sup>25</sup> Party admissions are a categorical exception to the rule against hearsay that allows statements by a party to the proceeding to be offered by the opposing party for the truth of their contents.<sup>26</sup> In the common law, a statement of apology would be considered a party admission, and as true apologies by necessity require an acceptance of responsibility,<sup>27</sup> they would appear to be very useful to the court in proving fault. An apology in relation to a material matter at trial would seem to clearly meet two of the most basic concerns of evidence law: reliability and relevance. Using logical reasoning, there appears to be little reason to take responsibility for that which you did not do,<sup>28</sup> and an apology is clearly relevant if it relates to the alleged offence itself. Unless it is somehow irrelevant, highly prejudicial or covered by another exclusionary rule, it is likely to be admitted under common law.

Furthermore, its admittance is supported by the adversarial system. The party admission exception rule is clearly motivated by the adversarial trial process. As the Court stated in *R. v. Evans*,<sup>29</sup> “its [an apology’s] admissibility rests on the theory of the adversary system that what a party has previously stated can be admitted against the party in whose mouth it does not lie to complain about the unreliability of his or her own statements.” As Orenstein articulates it, this has less to do with rationality, and more to do with the “law of the sandbox” that comes with an adversarial system, where the guiding principle is, “ha, ha, you said it, now you’re stuck with your own admission.”<sup>30</sup> It is exactly this principle that the *Apology Act* works against. It protects apologizers from having their expressions of apology used against them at trial. To exclude what is potentially very

23. *The Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 91(27), reprinted in RSC 1985, App II, No. 5.

24. See *Danicek v. Alexander Holburn Beaudin & Lang*, 2010 BCSC 1111, 8 BCLR (5th) 316.

25. Irving Younger, *Irreverent Introduction to Hearsay* (American Bar Association, 1977) at 23-24, as cited in, Hamish Stewart *et al.*, eds *Evidence: A Canadian Casebook*, 2nd ed (Toronto: Edmond Montgomery Publications Ltd, 2006) at 196.

26. Stewart, *ibid* at 196.

27. See above, Section I.

28. This assumption of reliability has not gone unchallenged. Orenstein argues in favour of apology legislation from a feminist perspective and points out that people have many motives to apologize beyond belief in their own wrongful conduct, such as expressing sympathy, acknowledging another person’s pain, or to smooth over social relations. Aviva Orenstein, “Apology Excepted: Incorporating a Feminist Analysis into Evidence Policy Where You Least Expect It” (1998 - 1999) 28: 2 Sw U L Rev 221 at 250 - 251 (HeinOnline).

29. *R v Evans*, [1993] 3 SCR 653, 108 DLR (4th) 32 as cited in Stewart, *supra* note 24 at 197.

30. Orenstein, *supra* note 28 at 249.

valuable evidence, there must be a powerful motivation. By carving an exception for apology in evidence law, despite the relevance and reliability of party admissions, the law is recognizing the unique importance of the moral and social processes apology facilitates and its own fallibility in these arenas. The moral and social aspects of apologetic discourse are intricately intertwined and it is often difficult to parse out one from the other. Apologies are clearly relational, but even when given in private, take place in a complex social sphere and raise questions about the moral order they seek to sustain.<sup>31</sup> Here, moral and social effects of apologetic discourse are explored separately only for ease of discussion; however, in reality, they are deeply interrelated and mutually informing.

#### IV. APOLOGY AND MANAGING THE MORAL

An apology acknowledges right and wrong and confirms that a moral norm has been violated.<sup>32</sup> It is what Tavuchis calls “the middle term in a moral syllogism... a process that commences with a *call* [for apology] and ends with *forgiveness*.”<sup>33</sup> The moral aspect of apology is both interpersonal and more broadly communicative of moral standards: “it is not easily contained because it inevitably touches upon the lives and convictions of interested others while raising both practical and moral questions that transcend the particular situation that prompted it.”<sup>34</sup> The two broad functions of apology then are: upholding moral standards on an interpersonal level, and communicating more broadly to society what constitutes moral or immoral behaviour.

##### A. Apology and Restoration of Moral Balance – Law as Safeguard or Threat?

Taft articulates the interpersonal work of apology as a restoration of moral balance<sup>35</sup> between the offender and the offended. The offender, by admitting her wrong, puts herself in a vulnerable position, opening herself up to the potential social consequences of admitting that she violated a societal norm. She may be harmed by the refusal of her apology, humiliation, or other consequences.<sup>36</sup> If an apology is successful, on the other hand, this reconciliation results in what Taft calls a “restoration of equality of regard.”<sup>37</sup> Taft explains that the offender demonstrates regard in her willingness to apologize, and the offended in turn demonstrates regard in her willingness to forgive. In performing this moral act, they embrace each other’s humanity. The moral standards of conduct in the relationship have been reaffirmed and both parties have acknowledged the importance of these standards.

In his criticism of apology legislation, Taft seems to believe that this kind of moral process is only possible with legal consequences there to buttress it. He decries protecting the offender from the legal consequences attached to apology, calling this a subversion of the moral process of apology.<sup>38</sup> He argues that the law acts as a moral safeguard for the integrity of apology<sup>39</sup> and that authentic apology, as an unequivocal acceptance of responsibility for wrongdoing, requires the offender to accept all of the potential

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31. Tavuchis, *supra* note 8 at 14.

32. Taft, *supra* note 13 at 1142.

33. Tavuchis, *supra* note 8 at 20.

34. *Ibid* at 14.

35. Taft, *supra* note 13 and accompanying text.

36. See above, Section I.

37. Taft, *supra* note 13 at 1137.

38. *Ibid* at 1156.

39. *Ibid* at 1139.

consequences of the wrongful act, including legal liability. He suggests that if the offender is not willing to accept all consequences of his wrong, including exposure to legal liability, this somehow vitiates the morality of the apology.<sup>40</sup> This proposition that apologetic discourse becomes morally corrupt without the attachment of legal liability is problematic in a number of ways.

First, this view of the law as maintaining apology's morality assumes that the offender's sense of moral culpability, and the victim's sense of the moral wrong, is matched by the law's remedy. In reality, the remedies in law are limited and often inappropriate to rectify the damage done. It is almost absurd how the law's remedies must try to put a dollar figure on incredible emotional pain, or even the value of human life itself. Even Taft admits that financial compensation leaves something wanting:

The payment of large verdicts of settlement monies failed to heal the deep wounds of many clients; they continued to suffer and express lingering feelings of anger and resentment. I began to think that the missing, necessary piece for healing was an apology from the offender.<sup>41</sup>

There are many cases where a full and heartfelt apology can do much more to heal the offended person and restore moral balance than the forced payment of compensation. The literature contains many anecdotal examples<sup>42</sup> and it is not difficult to imagine others. The magic of apology, as Tavuchis articulates it, is that, “no matter how sincere or effective, [an apology] does not and cannot *undo* what has been done. And yet, in a mysterious way and according to its own logic, this is precisely what it manages to do.”<sup>43</sup> By requiring an acknowledgement of wrong, and prompting an exchange of power between the offender and offended, apology can restore moral balance in a way that financial compensation cannot. As Taft admits, “while commodified concepts of compensation may provide financial redress, such concepts do not necessarily restore moral balance.”<sup>44</sup> Law cannot be the moral safeguard of apology when its remedies are often so inappropriate for addressing the actual harm, restoring moral balance and bringing healing to the offender. The restoration of moral balance and the adequate resolution of dispute cannot be found in law when the offended, having exhausted the law's remedies, are still left wanting something more.

Taft's view of the relationship between law and morality also assumes we live in an ideal world, where legal remedies affect all individuals equally. Even if legal remedies were always morally appropriate, Taft's proposition ignores the complex moral web of multiple human relationships. In order to accept that the law is necessary to correct the moral balance between the parties and therefore maintains the moral righteousness of apology, we would have to assume one of two things: either that the chief moral duty owed by the offender is to the offended, or that all offenders have the means to provide financial remedy for their wrongs.

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40. *Ibid* at 1157.

41. *Ibid* at 1136.

42. See e.g. Attorney General Wally Oppal's recounting of two women who were surrounded by armed officers and ordered to the ground in a case of mistaken identity, and offended when the officers made light of their mistake. All they wanted in recompense was an apology. (Kleefeld, *supra* note 2 at footnote 26); Former BC Ombudsman Howard Kushner's description of the importance of apologies by public agencies to complainants to the Ombudsman's Office (Kleefeld, *supra* note 2 at 784); Taft's description of a Massachusetts former senator who pioneered apology legislation after his daughter was killed by a car while riding her bicycle and the driver did not apologize for fear litigation (Taft, *supra* note 13 at 1151).

43. Tavuchis, *supra* note 8 at 5.

44. Taft, *supra* note 13 at 1137.

To discount this second assumption, we can examine how, by relying on financial compensation, the civil law has difficulty accounting for the disparate impact of legal remedy. A punishment of \$1000 in damages to one is pocket change, but to another may be a fortune. This discrepancy in the true cost of civil law remedy to different offenders can hardly be viewed as a morally balanced resolution. If apology necessitates legal liability, we can end up with a situation where the poor, taking exactly the same moral actions as the rich, suffer greater hardship for their transgression. This hardly seems to safeguard morality; rather it seems to warp it into producing unequal suffering for equivalent transgression. The law, by using financial redress as its remedy in areas such as torts, may upset rather than restore moral balance by using a blunt tool like financial compensation. Such a tool causes some transgressors to suffer more, merely for their poverty, rather than for the actual significance of their transgression to the offended.

To examine the fallacy of the first assumption, take, for example, the situation of a single mother with low income who causes an accident, where she is at fault. She may be incredibly sorry for the damage she caused, but may not be willing to face the financial implications of legal responsibility, especially if doing so would affect the well-being of her child. The woman in this situation has, like all of us, multiple moral relationships to be maintained. If her apology is not protected under law, then she cannot restore moral balance with the offended party by apologizing for fear of upsetting another moral balance: her obligation to provide for her child. If, however, her apology is protected from legal liability, she can apologize as she may strongly desire to, without fear of violating her other moral obligation to her child. This legal protection, or lack thereof, may actually shape her social behaviour. She has a strong disincentive to apologize if she fears it will lead to legal consequences, no matter what ethical desire she might have to do so.

Finally, regardless of whether legal liability attaches, an apology opens up the offender to a wide range of vulnerabilities.<sup>45</sup> Legal liability is far from the only variation. Essentially, the root of vulnerability is that the offended party can ignore or reject the offender's apology, or punish him for it.<sup>46</sup> Legal consequence then, is but *one* method of punishment, and as discussed previously, often an ill-fitting one. There are others such as shame, social ostracism, expulsion from a particular group, or whatever other reparations the offended might demand. As such, even if we assume that in order to uphold moral standards, a transgression requires some consequences to follow, legal liability is not the only option.

In the end, law is only one arbiter of social values. We determine what is moral through both individual and collective expressions of moral consciousness. The law is one instance of this expression, but although it strives to represent society's collective conscience, it often struggles to tailor its remedies to the myriad of complex moral situations that arise. Apologetic discourse similarly outlines the bounds of moral conduct, but allows the offended to set parameters based on the individual situation, with a number of possible responses available to the offered apology. The offended party's possible responses may be restricted to an extent by social norms; however, there is still great flexibility and individual freedom in choosing how to respond. The common law on the other hand, often charges ahead with crudely crafted remedies on behalf of the offended party and society as a whole, leaving in its wake both morally over-punished offenders and morally under-compensated offended. Thus, in the *Apology Act*, we see an effort in statute law to make up for the frailties of common law, by providing a space for socially and morally critical social exchange. The statute may be used to protect the important work of apology from the common law's interference.

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45. Schneider, *supra* note 5 at 267.

46. *Ibid.*

Apology can not only restore moral balance where the law cannot, but in many instances will also require protection from the law in order to perform this important function. Far from morally safeguarding apology, even Taft admits that the law often corrupts the morality of apology. He states that “apology is frequently commodified in the legal arena, where a moral process can become a market trade.”<sup>47</sup> That is, where apology legislation does not exist, apologies will be crafted to avoid or limit liability.<sup>48</sup> What results are not true apologies, as they are missing a key component: admission of wrong-doing. Without this admission, there can be no restoration of moral balance - in fact, there is no apology at all. At best, there may be sympathy, at worst, only excuse or explanation. Although in an ideal world a person might be willing to apologize fully and accept the possibility of legal liability, as argued earlier with the example of the single mother, this assumes that people are in a unilateral moral exchange, rather than the complex social reality that exists. It assumes that there are no incentives to avoid legal liability other than lack of true contrition, when in fact there may be numerous reasons why a person who is truly contrite still wishes to avoid legal consequences. Apology legislation, by removing the threat of legal liability, allows apologies to be more freely and naturally made.

Taft fears, however, that such legislation will lead to an increase in insincere apologies, which will instead move apologetic discourse from “potential to actual corruption.”<sup>49</sup> This corruption however, is already happening with the use of purely sympathetic or explanatory non-apologies. Apology legislation merely opens up the door to more apologies, and of course some insincere apologies are bound to step in, along with the stampede of sincere apologies previously impeded by fear of legal liability. Rather than corrupting the morality of apology, apology legislation recognizes that this realm of moral exchange is better served by existing safely apart from a legal system that only encourages the use of apology as a tool to reach self-serving ends.

What I propose instead of Taft’s view of the law as the moral safeguard of apology, is that the defence against corruption of moral apology can be found within apologetic discourse itself. The final term in Tavuchis’ moral equation - forgiveness<sup>50</sup> - is the ultimate arbiter of whether justice has been done by an apology. It is the offended who must decide whether the apology is sufficient and moral balance has been restored, and not the law. An insincere or undeserving apology can always be rejected. Forgiveness, then, is essential to the effectiveness of apology’s moral action. Compensation, on the other hand, is not a prerequisite for the moral resolution of dispute. In the realm of morality, there is clearly something more to be said for an apology freely given than financial compensation wrested from a tightly closed fist. As discussed previously, treating the law as the final arbiter of morality is deeply problematic and oversimplifies the complex moral situations civil society creates. Further, apologies, whether sincerely meant or not, have value beyond the interpersonal as communicative devices of moral standards.

## B. Apology as Morally Communicative – The Power of Institutional Apology

Both apology and the law are communicative of moral standards. The law does so both proscriptively, via legislation, and by making examples of those it views as stepping outside the boundaries of morally and socially acceptable conduct. However, apology can be communicative of moral standards in a way that the law cannot. The law can only

47. Taft, *supra* note 13 at 1146.

48. See e.g. Taft, *ibid* at 1148. See also section IV. ii. for discussion of equivocal institutional apologies.

49. Taft, *ibid* at 1156.

50. Tavuchis, *supra* note 8 at 23.

represent *the law's* acknowledgement of violation of a moral axiom. It cannot speak for the offender and force his acknowledgement of his violation, and in fact, the adversarial system encourages him to vigorously deny it.<sup>51</sup> Meanwhile, apology, by definition, includes an acknowledgement from the offender that he violated a social norm.<sup>52</sup> This discrepancy is particularly important in the case of institutional apologies for historical wrongs. There is a massive communicative difference between a court chastising an institution for violating human rights and ordering them to compensate those harmed, and the institution itself coming out and offering a full apology, thereby acknowledging and taking responsibility for the wrong. It is particularly striking in the case of government apologies, because we expect the government, as our democratically elected representatives, to uphold societal norms and moral values. There is great restorative power in the exchange that occurs when a government acknowledges its own wrongs via apology. On the other hand, when an institution fiercely denies wrongdoing for fear of legal liability, it must necessarily bring into question either its own moral integrity, or the moral standards it has declined to meet.

One example of the discrepancy between freely made apology and the delayed and reluctant apology that often comes as a result of the fear of legal liability is seen in the Canadian tainted blood scandal. The former CEO of the Canadian Red Cross testified before the Krever Inquiry that one reason the Red Cross refused to apologize to people who had been infected by blood products was that it could be construed as an admission of liability, which would have affected the Red Cross's access to insurance. The liability that the Red Cross was facing would render it insolvent, making such concerns understandable.<sup>53</sup> As discussed earlier, offending parties often face competing moral obligations, and the spectre of legal liability may cause them to neglect the obligation to apologize in order to live up to another obligation, such as to their employees or to people benefitting from the Red Cross's other programs who would suffer if the organization failed. In 2005, 12 years after the Krever Commission investigation into the tainted blood scandal began, the Red Cross finally apologized after pleading guilty to charges of distributing a contaminated drug.<sup>54</sup> James Kreppner, a lawyer who had been infected with HIV and Hepatitis C by the tainted blood products reacted to this outcome by saying, "I wasn't looking for a huge fine. I was looking for them to accept responsibility, which they've done, finally."<sup>55</sup> It was not the law's censure that this victim wanted, but that the institution itself would admit responsibility. The power of the law in condemning institutional action is simply not as reconciliatory, nor as reaffirming of moral precepts, as is an institution itself freely admitting wrongdoing. This is because an apology confirms to both parties that a transgression occurred and validates their shared moral values. Legal condemnation on the other hand, while it may communicate the moral standards of society as a whole, does nothing to confirm that the transgressing institution itself voluntarily approves of and agrees to adhere to those standards.

In order for government or institutional apologies to have reconciliatory power, however, they must be full and unequivocal. The *Apology Act* removes legal liability as a disincentive to apologize fully, thus safeguarding the important communicative work of apology. There is enormous value in allowing governments or other powerful social groups to apologize unequivocally. As Janet Bavelas describes in her analysis of the

51. For more discussion see below, Section V.ii. on moral community.

52. See above, Section I.

53. *Commission of Inquiry on the Blood System in Canada: Final Report*, vol 3 (Ottawa: Minister of Public Works and Government Services Canada, 1997) at 1038 as cited in Kleefeld *supra* note 2 at 804.

54. "Tainted Blood Scandal" *CBC News* (25 July 2006), online: CBC News <<http://www.cbc.ca/news/background/taintedblood>>.

55. Tracey Tyler, "Red Cross Admits Guilt" *The Toronto Star* (31 May 2005) A1.

linguistics of church apologies to First Nations, many institutions, seeing negatives in both fully apologizing and refusing to apologize at all, face an avoidance conflict and seek to equivocate.<sup>56</sup> In her analysis of six church apologies between 1986 and 1998, she found that most of the churches avoided adopting agency in reference to offenses.<sup>57</sup> In other words, they acknowledged that wrongs occurred, but did not take responsibility for them. She found that above all else, the threat of legal liability appeared to be the greatest factor in prompting churches to make these non-apologies.<sup>58</sup> The *Apology Act* removes this obstacle, offering a smoother path towards healing, and allowing institutional apologies to be morally communicative to their fullest extent. Although it would be presumptuous to guess what First Nations thought of the equivocal church apologies, it is easy to see how unequivocal apologies, as they accept full responsibility for wrongdoing, are more likely to both promote individual healing and more strongly articulate the moral boundaries of society. The difference between full apologies and those that try to duck responsibility is often as clear to you and I as it is to a psychologist like Bavelas. According to analysis from a historian's perspective, "the coupling of remorse with recognition of one's responsibility distinguishes the apology from simple regret, and it can make expressions of regret seem less heartfelt than outright apologies."<sup>59</sup> We can recognize the difference between an apology that assumes agency and an expression of sympathy that does not. Archbishop Desmond Tutu, at the conclusion of South Africa's Truth and Reconciliation Commission, recognized the wide chasm between equivocal and unequivocal apologies. His anger at the vacant nature of equivocal apologies was made clear when he said,

Is there no leader of some stature and some integrity in the white community who won't try to be too smart, who is not trying to see how much he can get away with, but who will say quite simply, 'We had a bad policy that had evil consequences. We are sorry. Please forgive us,' and not then qualify it to death?<sup>60</sup>

Unequivocal apologies more strongly communicate to those who have been historically wronged, and to the rest of society, that what happened in the past has not been forgotten, that responsibility is being taken, and that the injury of the transgression is recognized: "that the past is not erased, but the present is changed."<sup>61</sup> The more serious the past transgression, the greater the importance of the *free* ability to apologize becomes for healing. As Weyeneth emphasizes, "when issues are especially intractable or a society fundamentally divided, an apology can offer a starting point for healing, even if reconciliation itself is not possible at the time."<sup>62</sup> Conversely, equivocal apologies can cause further injury, as the anger in Tutu's words indicates. In these scenarios, where the past harm was grave, it is even more vital that the apology be seen as coming from the institution itself. It is critical that the offender, or those who represent offenders of the past, reconfirm to the offended that a moral wrong occurred, and that it will not be repeated.

Apology legislation recognizes that this moral communicative power of apology is in some instances superior to that of the law, but can only be utilized to its full potential

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56. Bavelas, *supra* note 3 at 6-7.

57. *Ibid* at 12.

58. *Ibid* at 13.

59. Robert R Weyeneth, "The Power of Apology and the Process of Historical Reconciliation" (2001) 23:3 *The Public Historian* 9 at 17 (JSTOR).

60. "Tutu Says Most White Leaders Lied to Truth Panel" *Washington Post* (5 August 1998), A20, as cited in Schneider *supra* note 5 at 277-278.

61. E Kastor, "The Repentance Consensus: A Simple Apology Just Doesn't Cut It." *Washington Post* (19 August 1998), D5, as cited in Schneider *ibid* at 277.

62. Weyeneth, *supra* note 61 at 24.

when it can be unequivocal, when the inhibiting influence of legal liability is removed. Although authors like Taft might hope for a world in which individuals, corporations and government entities would offer full apologies for the harms they have committed, regardless of what legal consequences might follow, this is not the world in which we live. As Kleefeld articulates, we require “a framework that gets the most out of a second-best world.”<sup>63</sup> The moral values that an unequivocal apology communicates are necessary facets of the moral work of apologetic discourse, not only to aid in individual healing and restore moral balance, but also to reconcile present society with its past wrongs, or, in other words; to maintain social relationships and the accompanying social order that would otherwise be threatened if the transgression is ignored.

## V. APOLOGY AND THE SOCIAL SPHERE

As was first articulated in the section on the moral nature of apology, apology also plays a significant role in managing social order, and restoring social relationships. Apology acts in two main ways in this context: first, to heal the individual relationship and second, to manage membership in a moral community. As Tavuchis articulates it, apology is “quintessentially social, that is a *relational* symbolic gesture occurring in a complex interpersonal field.”<sup>64</sup> In other words, just like apology’s moral work, its social function takes place both interpersonally, and in the wider social sphere.

### A. Repairing Social Relationships

Law also tries to navigate the social field, but in the end there are ways that it comes up short. Similar to the way in which Taft<sup>65</sup> is jealously protective of the law and the role he envisions for it in protecting morality, Dugald E. Christie defends it as a method of protection for marginalized members of the social order.<sup>66</sup> Christie expresses concerns about the potential negative effects of apology legislation. Primarily, he is concerned about victims who will quit the litigation process upon receiving an apology and so fall prey to more socially powerful actors looking to avoid litigation.<sup>67</sup> While his concerns certainly are troubling, there are other social functions of apology that the law simply cannot replicate. In painting the protection of apology as socially destructive, he ignores two important things: one, that the law is often not the best place to find healing (and so, abandoning litigation is not by necessity a bad thing), and two, the ability of unrestrained apology to mend relationships, unlike the law which promotes continued antagonism.

It is easy to sympathize with Christie’s desire to achieve justice for the socially marginalized by defeating the socially powerful in court. This is a great advantage of the law in this realm, as apologies (if accepted) seem to let wrongdoers off the hook. As Tavuchis puts it,

Contrary to the logic of the economic marketplace or conceptions of social exchange based upon exclusively rational calculation, the apology itself – without any other objective consideration – constitutes both the medium of exchange and the symbolic quid pro quo for, as it were ‘compensation’.<sup>68</sup>

Apology offers no more amends than the apology itself. The offender may choose to offer

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63. Kleefeld, *supra* note 2 at 804.

64. Tavuchis, *supra* note 8 at 14.

65. *Supra* note 13.

66. See Dugald E Christie, “Gratuitous Apologies: A Discussion Paper on Apology Legislation” (2007) 40: 2 UBC L Rev 761 (HeinOnline).

67. *Ibid* at 762.

68. Tavuchis, *supra* note 8 at 33.

reparation in addition, or the offended may demand it, but at its most fundamental level, apology has only itself to give. It is clear then, that the law can in many cases demand more severe reparation than apologetic discourse and it is tempting to cry out to the law for some sort of retributive vengeance for trespass against what is “right.” However, as I discussed earlier,<sup>69</sup> apologies are often preferred to financial compensation and have a way of righting wrong by restoring moral balance that the law cannot match.

It is also true that if we shift the emphasis from the individual to the maintenance of social relationships, we see that there is much to be gained by apology that the law cannot achieve. As Tavuchis points out, an apology is not an action focused on the individual, but a “relational concept and practice...whose meaning resides not within the individual (although its effects may), but in a social bond between the Offender and the Offended.”<sup>70</sup> Apologies necessarily privilege the *relationship* between individuals, over the individual himself. Again, as in apology’s role in the restoration of moral balance, forgiveness is a fundamental part of the work of apology. The individual offender subjugates herself, for the sake of repairing a relationship, and if successful, the offended offers forgiveness in return. It is the “forgiveness and reconciliation, which effectively transmute trespass and prevent them from becoming permanent obstructions to social relations.”<sup>71</sup> Thus, through the process of apology and the acceptance and forgiveness that follows, the relationship between the two parties is restored. The structure of the law on the other hand, generally precludes such reconciliation. By its very nature, it pits the parties against each other and discourages forgiveness by emphasizing the need for financial compensation, for payment from one to the other. The law prioritizes the individual: in every case, there is a winner and a loser. It does not seek to reconcile the relationship, only to reward the successful individual litigant. Rather than bringing people together, it forces them apart.

Further, the law attempts to stand in and apologize on behalf of the offender. As Tavuchis articulates, “an authentic apology cannot be delegated, consigned, exacted, or assumed by the principals, no less outsiders, without totally altering its meaning and vitiating its moral force.”<sup>72</sup> There is no way for the court to somehow apologize on behalf of the offender and thereby restore the social relationship. Nor can the court force a truly legitimate apology from the offender, as appellate courts have recognized in striking parts of sentences that mandate a court ordered apology.<sup>73</sup> A relationship can only be restored by the parties in it, and their full cooperation in the “social intercourse”<sup>74</sup> of apologetic discourse. Thus, if apology is hindered by fears of legal liability, then a critical pathway for mending social relationships is lost. By resisting the temptation that Christie’s article embodies, to cry out for justice in the form of financial compensation, and shifting from the focus on individuals, we can see that apology has much more to offer than the law in healing relationships and thus aiding both parties. Apology legislation privileges this healing social role of apology over the bloodlust of seeking retributive justice. The law may be much more effective in punishing an offender, but is often inadequate to repair the social relationship that has been ruined by his act.

Finally, it is important to note that the *Apology Act* in no way precludes an offended person from litigating. Christie is right that there may be times where an apology is not enough, and recourse to the courts is justified. But an apology in no way absolves an

69. See section IV.i. for discussion on the problems with financial compensation.

70. Tavuchis, *supra* note 8 at 47.

71. *Ibid* at 6.

72. *Ibid* at 49.

73. See e.g. *R v Pine*, [2002] OJ No 200 (QL) (CA); *Re Ouellet* (Nos. 1 and 2) (1976), 72 DLR (3d) 95 at 97; *R v Northwest Territories Power Corporation* (1990), 5 CELR (NWTSC) 67 at 77.

74. *Ibid* at 22.

offender from legal liability. Thus, if financial compensation, punishment or deterrence is required, and it is true that the law does often play a crucial role here, the option of litigation remains available. Christie expresses concern that if offended parties drop litigation upon apology and cases are not brought to court, the offender is unlikely to change her ways - particularly in the case of government offences against citizens.<sup>75</sup> This ignores the value that apology has in a communicative role as discussed earlier<sup>76</sup> and it is always open to citizens to demand such an apology. Christie overlooks the way that public apology can also confirm that a government has contravened a social norm and provides a political motive for the institution not to repeat actions they have publicly admitted were wrong. Even if the offended accepts the apology, litigation can always proceed, and it is the attorney's option to implore her client to continue with litigation in spite of an apology. In that way, the legal rights of the offended are still protected and can still be pursued while allowing space for healing of social relationships through apology. Christie's perspective appears to view law as the ultimate tool for cornering socially powerful offenders and altering their behaviour, and perhaps this is true, but his vision neglects the powerful and unique social value of apology in healing relationships that can be sidelined by the threat of legal liability. This social value is one that the law itself, as an adversarial process, cannot replicate.

## B. Participation and Community Membership

Apology also plays a distinct social role in managing membership and participation in a moral community. After a transgression, membership in a community may be revoked, suspended or remain intact.<sup>77</sup> Both apology and the law can play a role in determining membership in a community and the consequences of a transgression that, in the mind of the offended, brings into question the offender's place in that community. Where the difference lies is while apology allows the offender an opportunity, despite his transgression, to participate in his reinstatement as a member, the adversarial system of Canadian law explicitly brands an offender as a reluctant participant in the moral community. Rather than repair their transgression themselves, offenders must be summoned to court to rectify it.

This discrepancy occurs because apologies require personal acceptance of responsibility for violation of the community's values, whereas law, while it does reinforce community values, usually does so at the protest of the offender. Authentic apologies constitute "a form of *self-punishment* that cuts deeply because we are obliged to retell, relive, and seek forgiveness for sorrowful events that have rendered our claims to membership in a moral community suspect or defeasible."<sup>78</sup> Conversely, law can be seen as an *imposition* of punishment on the offender, who is forced by the adversarial nature of the court process to deny that he committed the offense or that it was wrong enough to justify sanction. Since the law's remedy is not self-inflicted but imposed, the community is unlikely to see an offender's payment of compensation as morally cleansing, prompting forgiveness and allowing for redemption in the eyes of the community. The view of the offender in the courtroom, except where he admits the offence, is almost necessarily of him as one being held up to the community's moral standards against his will. He is painted as one whose participation in the moral community is forced, and as one who must make reparation for the damage caused, not necessarily be redeemed. The law's primary focus, particularly in areas such as contract and tort law, is on restoring the position of the offended and denouncing the offender's conduct rather than finding a way to redeem him. Apology,

75. Christie, *supra* note 68 at 764.

76. See above, section IV.ii.

77. Tavuchis, *supra* note 8 at 20-21.

78. *Ibid* at 8 [emphasis added].

in contrast, is an act of voluntarily acknowledging one's wrong, and actively confirming one's participation in the moral community. Thus, if accepted, apology has the capacity to heal both the offended and the offender,<sup>79</sup> by restoring the offender's place as a willing participant in the moral community who accepts its standards. This is something that the process of civil litigation, in its current state, does not attempt to do. Apology has an ability to heal relationships, and reconfirm an offender's place in the moral community, in a way that is very different from the law. The *Apology Act* protects this vital function of apology, implicitly recognizing that the law is often inferior in regenerating interpersonal relationships and restoring social harmony.

## CONCLUSION: THE "PRIVILEGING" OF APOLOGY LEGISLATION

Although one of the propositions of this paper has been that the *Apology Act* is in many ways contrary to principled evidence law, an analogy can be drawn between apology legislation and a well accepted rule of evidence: the rule against admitting privileged information. Privileges exist to protect communications that are essential to the maintenance of certain relationships, because of their vital importance to our social relationships or moral well-being.<sup>80</sup> Similarly, apology legislation exists to protect apologetic communications because of their integral value in *healing* relationships. This form of communication is protected not to benefit particular relationships, but rather to benefit the social and moral function of society as a whole. Apologies are to be shielded because they "bespeak a more civil and humane society"<sup>81</sup> and are in many instances superior to the law in maintaining moral balance within relationships, communicating moral values, repairing interpersonal relationships and providing for active participation in the moral community.

Thus, although at first glance apology legislation appears to be an abrupt affront to a logical approach to evidence law, the kind of considerations and values that underlie this legislation are not so alien at all. The law has recognized via privileges that there are parts of society that should be protected. It has acknowledged that there are areas into which its often awkward version of social and moral management ought not to tread. It admits that there are aspects of society that are uniquely valuable to social or moral processes, in a way that the law can only struggle to replicate. In this instance of modesty in the law, we see an appreciation that law might do so much damage to these processes if it tries to interfere that it ought to provide them with a safe space. In apology legislation, the law recognizes that because of the superiority of free apologetic discourse for the maintenance of social relationships and moral values, it needs to step back and make room for the powerful potential of that deceptively simple phrase, "I'm sorry."

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79. Taft, *supra* note 13 at 1137, articulates this in relation to restoration of moral balance, but it applies equally to reacceptance into the moral community, which is intricately linked with restoration of moral balance.

80. See generally Stewart, *supra* note 25. In particular, spousal privilege in Canada, and priest-penitent privilege in the U.S. can be seen as driven by a desire to protect the important social and moral functions of these relationships.

81. Orenstein, *supra* note 28 at 254.