

## The Value of Apologising within a Moral Community: Making Apologies Work

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### Abstract

Apologising is part of civil society and vitally important for maintaining social fabric. Many jurisdictions in Australia, Canada, the USA and UK have enacted apology-protecting legislation in the hope that the process of apologising might reduce civil litigation, particularly litigation about medical negligence. The apology is also significant in restorative justice and may operate in mediation or as a remedy. This article focuses on how the social and psychological process of apologising and being apologised to is affected by the moral communities within which the apology takes place. It argues that the failure to take this process seriously may impact adversely on the achievement of the aims of restorative justice and the apology protecting laws.

### Key words

Apologies; moral communities; restorative justice; medical negligence

### Resumen

Las disculpas forman parte de la sociedad civil y son de una importancia vital para mantener el tejido social. Muchas jurisdicciones de Australia, Canadá, EEUU y el Reino Unido han promulgado legislaciones de protección de las disculpas, con la esperanza de que el proceso de disculpa reduzca el número de litigios civiles, sobre todo litigios motivados por negligencias médicas. La disculpa es significativa, además, en la justicia restaurativa, y podría tener efecto en una mediación o como remedio. Este artículo se centra en la forma en que el proceso social y psicológico de pedir y de recibir disculpas queda afectado por las comunidades morales en las cuales se produce la disculpa; no tomar en serio este proceso podría tener consecuencias adversas en la consecución de los objetivos de la justicia restaurativa y de las leyes que protegen la disculpa.

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**Palabras clave**

Disculpas; comunidades morales; justicia restaurativa; negligencia médica

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## 1. Introduction

Apologising has now been fashionable for some fifteen years and we have all become used to apologies being made in public for public wrongs such as for treatment of the stolen generation in Australia by Prime Minister Rudd (2008), for the Tuskegee experiments in syphilis (carried out without the consent of the participants in the US) by President Clinton in 1997 and so on. This public use of apology has arisen partly because of the general recognition, albeit a naive one, that apologies are a fundamental part of most societies' ordinary social processes. In this article I argue that the apology is being used in a number of legal arenas without taking proper account of a major factor in the process, the moral community within which the apology occurs, and that apologies are most likely to be effective where the moral communities of the apologist and its hearer are the same or compatible.

Apologies are now recognised and used within the legal system in a number of ways. They may be remedies or used to mitigate damages as in defamation or some anti-discrimination law. They may affect the likelihood that a victim will sue the perpetrator of some harm and for this reason legislation protecting apologies exists in many common law jurisdictions (especially for medical negligence) (Vines 2008, Kleefeld 2017). Apologies may also be used in mediation. (Carroll 2005) The use of apology as a remedy in civil justice is still relatively rare outside defamation and discrimination but is beginning to be discussed. (Carroll 2010) In this article I will concentrate on two areas –civil liability (especially medical negligence, where legislation to protect apologies has developed) and restorative justice, in which apologies, although they have a central place, have been relatively understudied. In civil liability the legislation referred to protects apologies from being admissible and/or from being deemed to be an admission in most jurisdictions where it applies. (In this article I call these 'protected apologies'). This legislation has been developed mostly in the hope that it will reduce the propensity to sue and much of it has developed in the context of medical malpractice. In particular a number of empirical studies show that people often say they wanted an apology and that those who receive an apology seem less likely to want to consult a lawyer (Mazor *et al.* 2006, Gallagher *et al.* 2003). This has had significant attention paid to it in the academic literature. In restorative justice, the apology is also central, but it has had much less specific attention so that in the literature reference is made to an apology often without detailed examination of the exact type of apology, how appropriate or acceptable it was in the circumstances and how the apology itself affected proceedings. In both these contexts this article argues that consideration of the moral community within which the apology is made is not just useful but actually critical to its effectiveness.

## 2. The importance of definition

The definition of apology is critical to its use in legal contexts. This is because apologies can be defined in different ways, according to their characteristics, and these different characteristics may have significant consequences for the interaction between apologies and personal and social psychology. For legal analysis this means the definition of apology used must take these characteristics into account.

The definition of apology that I prefer has as its central element an acknowledgement of fault by one person (the wrongdoer), communicated to the person who has been wronged. That is, it goes beyond sorrow or regret to acknowledging fault. It may also have other elements: Nicholas Tavuchis (1991, p. 39) emphasises that an apology is part of an interactive sequence –'event, call, apology, forgiveness, reconciliation'. Another way to put this is to say that apologies are usually part of a sequence beginning with a wrong. Then follows acknowledgement of harm, acknowledgement of fault or responsibility, an expression of regret – 'I'm sorry', an offer of reparation or that it won't happen

again; and then hopefully an acceptance of the apology leading to forgiveness and reconciliation.

Nick Smith adds further elements such as possession of appropriate standing, reform, and redress to his description of the 'categorical apology'. Nick Smith's (2005, 2008, 2014, p. 17-19) categorical apology has up to thirteen elements which he sees as necessary for the apology to be truly meaningful. Not all of these elements will exist in every sequence, but that will not always invalidate the apology, particularly in the mind of the person who receives it.

In this article the term 'full apology' means one acknowledging fault, and 'partial apology' means a mere expression of regret without such an acknowledgement. This terminology is more common than the way Nick Smith uses the terms. Smith regards his 'categorical apology' as a 'full apology'. This is not a threshold but the fullest possible moral apology. In the legal context the fullest moral apology is rarely achievable, because length of legal proceedings may damage timeliness, the victim may not be capable of hearing the apology, the perpetrator may be unwilling to apologise or not think they are in the wrong, and so on. Because the categorical apology may not be possible in many situations I argue that the threshold or minimum valid apology is what the legal system can practically and morally require. In the next section I discuss what I think that minimum valid apology can be.

An essential feature of an apology is that it must be communicated by the wrongdoer to the victim— it is not merely a feeling. This distinguishes it from remorse. Remorse can be thought of as the feeling of shame for which an apology may be given. It is thus very closely connected to the concept of apology, but does not have to include communication. Of course, the expression of remorse as used in the criminal context usually does involve communication, since without it being expressed to the court it cannot be taken into account when sentencing (Bibas and Bierschbach 2004, Weisman 2014).

In most cases an apology is dyadic – two parties, two people or two groups - but the presence of others as witnesses may be necessary to authenticate the apology and to help with issues arising from the community's ideas of meaning or the authenticity of the apologiser and the ability of the wrongdoer to come back in to the community. As will be seen the concept of the moral community is significant to the determination of what is meaningful or authentic as an apology, even in the dyad, and is therefore vital for the effectiveness of an apology. The yardstick for the effectiveness of apology which is most useful is whether the victim accepts it.

The communication of the apology needs to be done by a person who is seen as having the authority or authentic right to make this apology. Authentic in this context means that person who is regarded as having the moral authority and/or connection to the wrong to be held to be responsible for it and therefore to also acknowledge that responsibility and make an apology. This is particularly important where large organisations, corporations or governments are perpetrators. For example, where an Indigenous American administrator for the Bureau of Indian Affairs made an apology on its behalf, this was not seen as an authentic apology by the Bureau nor by the Indigenous Americans it was directed to. Indeed the administrator himself said he could not speak for the United States (Celermajer 2009, p. 32). Heads of state or government may have this authority because the state remains the same even though the head of state at the time of a wrong is not the same person as the head of state who apologises. This is one reason Kevin Rudd's apology to Aboriginal Stolen Generations was regarded as authentic. He was head of the Commonwealth of Australia's government and as Prime Minister of Australia was in line from those who had been in government at the time of the removals. In other situations only the person who perpetrated the wrong will normally be regarded as the proper person to apologise. (There may be exceptions where, for example, the wrongdoer is very ill and has asked for the apology to be made for them etc). Although as a version of verbal shorthand and in some legal

areas the word apology means merely saying 'I'm sorry', few people actually regard that as a real apology. Apologies' moral or ethical dimension is an important part of their function for whichever community is determining the need for the apology. The evidence from psychology (Robbennolt 2003, 2006, Korobkin and Guthrie 1994, Scher and Darley 1997) and philosophy (Davis 2002, Gill 2000, Smith 2005, Kort 1975) is that both the acknowledgement of fault and the expression of regret are regarded by the majority of people as essential elements of an apology. A mere expression of regret is not regarded as an apology. Because of the moral dimension the element of acknowledgement of fault is what makes the expression of regret into an apology (a 'full apology'); otherwise it is merely an expression of sympathy (in this article, a 'partial apology').

The question of whether an apology cannot be real unless it is accompanied by compensation is important. Apologies can be perceived as cheap if they are mere words: 'Apologies absolve the conscience of the group making the apology. They can be given at little cost, as they invariably involve a disclaimer of particular conduct no longer engaged in...' (Sweeney 1995, p. 5). But reparation may not always have to include monetary compensation: many victims are above all concerned that the wrong should not happen again; indeed the quote above went on to say, '... unless an apology is accompanied by action designed to address the underlying causes, it will not prevent similar harm being occasioned by different means' (Sweeney 1995, p. 5).

Thus the minimum valid apology in the legal context might be defined this way. It is a communication by the wrongdoer to the victim which includes an expression of regret with an acknowledgement of fault and either compensation or some action indicating that the apology is serious and that the intention is for the wrong not to recur. Sometimes the acknowledgement of fault is sufficient to create this indication and for this reason I see the expression of regret and the acknowledgement of fault as the two essential elements of apology. For the remainder of this article I will call this a 'full apology'. Where there is a mere expression of regret I refer to it as a 'partial apology'. These two elements of acknowledgement of fault and expression of regret are particularly important within the legal context where wrongness in the form of guilt or liability is the major issue.

In this article I discuss the interaction of apologies with moral communities. Tavuchis (1991, p. 3) writes that there is a 'fundamental sociological question of the grounds for membership in a designated moral community. Such membership claims...must be acknowledged or certificated by others who, in addition to various other markers use visible social compliance (or its absence) as a sign of moral commitment. Thus the validity and stability of our relationships and group affiliations are predicated upon our knowledge, acceptance, and conformity to specific and general norms'. By 'moral community' I mean a community which develops an identity and sense of membership for its members and in doing so also develops a sense of ethics and what is right and wrong for that community and its members. In doing so, it is determining what is worth apologising for. A moral community can be big or small, but it has the right to exclude or include its members which gives it power over them. Members of the community identify with it and accept its values and maintain them over time. Individuals may be members of multiple moral communities, which may or may not conflict. For legal issues one relevant moral community will be constituted by the legal system or the state, but in order to make apologies effective often another moral community will be relevant.

### **3. The role of apology**

The roles of apologies are complex and various. These depend on the situation, but although an apology is clearly a secular remedial ritual (Bibas and Beirschbach 2004), it comes to us partly from religion. In the Western world it has come to us

partly through confession and indeed St Augustine's Confessions. What is central, though, is its moral component – that is, its appeal to societal norms. Apologies are about 'wrongness' rather than merely about harm. In civil law, where liability in negligence is the issue, we tend to equate the wrongness with the harm simply because in order to be liable in negligence one must establish the harm as well as the wrongful behaviour. The law of negligence requires harm in order to establish liability. Although in actions in trespass to the person there can be wrong without harm as in a battery which is wrongful even if the touching is slight and not harmful, the negligence model fits well with the psychological evidence, which tells us that where the wrong leads to harm this increases moral outrage. If a person throws a rock onto a road we are more outraged if the rock hits a person and injures them than we are if the rock falls harmlessly onto the road. This moral (and social) role plays itself out in a range of ways, interacting with psychological attitudes and responses.

There is a significant psychological literature on apologies (Vines 2014). Apologies operate to reduce aggression (Ohbuchi *et al.* 1989), dissipating anger in a way which is related to the severity of the harm, whether or not the level of responsibility for the harm is high or low (Bennett and Earwaker 1994). This appears to be an effect outside morality. Psychological studies have identified emotional re-balancing as an important role of apologies (Walster and Walster 1975, Walster *et al.* 1973, Goffman 2010), restoring a victim's sense of self worth. (Lazare 2004, p. 51). The emotional re-balancing of apology identified by psychologists is part of its healing quality, something drawn on quite significantly by restorative justice theorists (Strang 2002). This rebalancing can occur even if the apology is forced on the wrongdoer or is insincere. People evaluate apologies partly by their cost to the apologisee. An insincere apology which is forced on the apologisee may be costly in a different way from an apology which seems to come from a great deal of sincere remorse. Evolutionary psychologists see this as a way of showing reliability, so an apology which is costly to the maker seems more reliable both as evidence that the apologisee will not offend again and that the offence is not part of his or her 'real character' (O'Hara and Yarn 2002, p. 1163, Cohen 2002). However, in Robbennolt's (2003) studies, participants did not distinguish between statutorily protected apologies (which would seem to be low cost) and those which were not protected (which would seem to be high cost), and the difference did not affect plaintiffs' willingness to settle their case nor their attribution of responsibility.

Psychological research has established that people desire apologies when they are harmed; and that when an apology is not forthcoming the result is likely to be increased anger (Ohbuchi *et al.* 1989, Whited *et al.* 2010). In the context of civil liability, this is reinforced by the (rare) experimental studies which have considered participants' propensity to sue following apologies. Robbennolt's experiments demonstrated that the nature of the apology affects the response. Participants were far more likely to accept a settlement offer if a full apology rather than a partial apology was made. Only a full apology made it more likely that an offer of settlement would be accepted. This and other studies suggest that where injury was severe participants are less likely to accept any apology than if the injury is minor (Bennett and Earwaker 1994). Robbennolt's (2003 p. 495) study suggests that a partial apology could actually be detrimental if the injury was severe or responsibility was particularly clear. She also found other problems created by partial apologies: offenders were more likely to be seen as responsible if they offered a partial apology than if they did not apologise, and victims were more likely to regard their injury as severe if they received a partial apology than if they received no apology. Participants in three studies were more likely to think that the apologisee was a moral person who would see that the incident would not happen again and to sympathise with him or her if the apology was full rather than partial (Robbennolt 2003, Mazor *et al.* 2004, 2006). On the other hand, it seemed that if

the injury was slight or responsibility unclear, a partial apology might be more acceptable than no apology. There seemed to be no evidence that the fact that an apology was protected or not protected from admissibility affected these outcomes at all (Robbennolt 2003, p. 515).

Some psychological theories have suggested that people apologise in order to look good. That is, to enhance their image to others or their own concept of themselves (Goffman 2010), and hence, the public or witnessed apology may be important for this reason. Some moral theorists, by contrast, have argued that only private apologies can be meaningful for the same reason – that the public nature of apology makes it into a show which cannot be authentic. Taft (2000) argues that the protected apology removes the moral ‘cost’ of the apology and turns the attention of the offender towards strategy rather than morality. In my opinion, this is too simple an argument and does not take account of the complexity of the apology process, nor the evidence (admittedly a small amount of empirical evidence) that people do not distinguish between protected and unprotected apologies in the same way that they distinguish between full and partial apologies (Robbennolt 2003). I would argue further, that apologies are such a fundamental part of ordinary life that moving them into the legal domain may not be able to completely take away their moral dimension (Vines 2007).

To summarise the psychological findings, the factors which are significant and which interact with each other to influence a victim to accept an apology (that is, to make the apology effective so as to lead to the emotional rebalancing required) include the type of apology (full or partial), the clearness of the responsibility of the offender, and the level of severity of the injury. The complexity of the interaction means that applying this to the legal arena is multi-faceted, and needs to be considered carefully.

The apology has a role in establishing, validating and signalling moral norms for a community – that is, it helps to create meaning and educate people, so reinforcing norms of right, wrong and responsibility in the community. The central purpose of apology is to allow people to move on. This may be by a process of forgiveness and reconciliation. That is the ideal, but the victim may also withhold forgiveness and reject personal reconciliation. When there is no forgiveness by the victim, the giving and receiving of the apology may instead operate as vindication for the victim, the offender being humiliated. At the same time, the offender’s having given the apology may signify to the wider community that the offender may now be re-accepted into the community, even where there is no reconciliation with the victim. As Tavuchis (1991, p. 8) says, ‘an apology thus speaks to an act that cannot be undone but that cannot go unnoticed without compromising the current and future relationship of the parties, the legitimacy of the violated rule, and the wider social web in which the participants are enmeshed’.

In the psychological research the quality or makeup of that wider community has rarely, if ever, been discussed. I now turn to this issue.

#### **4. Moral communities and apologies as markers of norms**

##### *4.1. Apologies are creatures of the moral domain*

Apologies are civil norms which operate within societies and cultures and reflect those societies’ and cultures’ ideas of right and wrong (Wagatsuma and Rosett 1986). Because they are creatures of the moral domain they respond to the element of the law which is about wrong-ness. The wrong which the apology is ‘for’ may be qualitatively different where civil liability for negligence is concerned compared with the position when a crime is at issue. That is, a person who is regarded as liable in negligence may not be regarded as very morally wrong since we know, in the case of motor accidents, for example, that a mere moment’s inattention may be the basis of it (Waldron 1995). However, to be convicted of a



crime, one must usually intend it – that is what *mens rea* means. This means that the quality of ‘wrongness’ being addressed by an apology in restorative justice may be qualitatively different from the quality of wrongness in medical negligence, for example. Reference is often made in cases to ‘society’ or ‘the community’ and this refers to the moral community which is that of the jurisdiction. That is, there is a sense in which the law reflects a sense of what the largest moral community – the state or the jurisdiction – considers to be a wrong, or blameworthy. This moral community may not be the only or most appropriate moral community to be considered when we are considering apologies, because the quality of wrong or blameworthiness that an apology should respond to may differ in different communities, but in the legal context this particular moral community will always be present.

#### 4.2. Apologies and moral communities

Although the literature, including that from restorative justice theorists, has identified the notion of apology with the ability of a person to identify with a particular moral community, there has been little discussion of the identification and effect of moral communities in the literature. It has been recognised that apologies ‘both teach and reconcile by reaffirming societal norms and vindicating victims. As such they are concerned not just with individual dispositions but also with membership in a particular moral community’ (Bibas and Biersbach 2004). There are all sorts of moral communities, from families to whole nations (Cohen 1985). One way of saying this was by David Malouf (1998 cited in Ritchie and O’Connell 2001, p. 149):

What holds civilised societies together is the capacity to make a distinction between what belongs, in the way of loyalty, to clan, or sect or family, and what we owe to neighbourliness; what belongs to our individual and personal lives and what we owe to *res publica*, or commonwealth, the life we share with others.

The distinctions make up different moral communities – sometimes we feel part of the *res publica* and it makes up the relevant moral community – this is the general legal norm which is supposed to be made from the community of the state or jurisdiction. This moral community is the one which is often referred to in law as ‘the community’ or ‘society’. It often figures in discussion of judicial policy, but is rarely analysed further and is notoriously difficult to identify (Burns 2013). Smaller moral communities may more often be the ones which are relevant to determining what is morally wrong for the purposes of apologies. That moral community could be as small as two (two people who see themselves as identifying with each other in these terms): it could be a family, a neighbourhood; a group of colleagues. The complexity of the role of the apology is emphasised when one realises how many moral communities one person might be part of. Any moral community creates a sense of identity and membership for its members (Oldenquist 1988, p.465-466):

- (a) ‘Members have a sense of societal identity and social boundaries and are able to distinguish members from non-members. Unless alienated, their sense of who they are is partly constituted by their social identity.
- (b) There are personal virtues, traditions and ceremonies, and rules of social morality that are shared and consciously transmitted from generation to generation.
- (c) The community is, to its members, a non-instrumental value, a common good that is more than a mere protective association or interest group.
- (d) Members have group loyalty as well as interpersonal morality and are inclined to be proud when their community prospers, ashamed when it is disgraced, and indignant when it is harmed.’

It may not be easy to identify all the members of a moral community because individuals may be members of multiple moral communities, and the boundaries of

moral communities may be fluid. Some literature discusses the moral community as if it were only one, with only psychopaths outside it (Shoemaker 2007) but this fails to acknowledge the cultural and other boundaries around moral communities and their range.

Professions are good examples of moral communities. The three original professions of law, priesthood and medicine were originally regarded as professions because they required their members to put other people first – an ethical requirement. As Sama and Shoaf (2008, p. 40) note, 'professional transactions are frequently characterised by their having high moral intensity.' Members of these moral communities not only identify with it but are 'bound to each other by a set of commonly held ethical commitments...Individual members are bound to support the moral aims of the community...Not to do so is to dissociate oneself from that community and to betray the covenant of commitments that gave birth to the community in the first place.' (Pellegrino 1990, p. 223).

This explains the vital significance of the moral community to the effectiveness of any apology. As Tavuchis (1991, p. 13) reminds us, '...apologies have to do with an ineluctable reality of human interaction – the possibility of transgression by word or deed. Because... they simultaneously represent (and reenact) consummated infractions and attempts to reclaim membership, they unequivocally enunciate the existence and force of shared assumptions that authorise existing social arrangements and demarcate moral boundaries.'

When a person apologises and acknowledges a fault, that process validates the civil norm which has been violated. That communication process adds meaning to the norm, clothes it in reality and anchors it to the people concerned. It fosters both the dyadic relationship between wrongdoer and wronged and the sense of meaning and morality of the community within which the dyad operates. Thus the apology re-invigorates and strengthens the moral community within which it is made. In this way apologies create meaning for the moral community because they are a concrete example and a re-statement of what the community thinks is morally wrong (Choi *et al.* 2003). This in turn cements the values of the community and re-affirms the connectedness of its members.

An apology can allow a victim to identify and be re-empowered as identifying with a moral community - that is, he or she is vindicated. An apology can also allow a person who is a wrongdoer to re-identify with the moral community, or it can allow the moral community to re-accept the wrongdoer's membership of their community. Such an apology cannot work unless it includes an acknowledgement of wrongness and responsibility, not just of harm (Marshall 2001 Davis 2002, Smith 2005, Gill 2000). This is one reason why the acknowledgement of fault is such an important part of apologies. An apology can amount to explicit recognition of the moral worth of a victim and thus can be empowering. At the same time the making of an apology by an offender shows the community that that person is capable of recognising the moral norms of the community and has sufficient empathy (essential for social functioning) to be allowed to belong again (Gill 2000). This moral re-balancing is connected to but separate from the emotional re-balancing which psychology shows apologies can achieve (Walster and Walster 1975). The apology connected with the attribution of responsibility will reflect the way the community makes sense of the world.

We have already seen that the acknowledgement that there has been an offence or fault on the part of the apologisee is a critical part of apology for most people, but it is also critical for moral communities because this moral dimension is a vital part of a community's creation of meaning for itself. Again, one apologises for a wrong rather than for a loss (Marshall 2001, p. 213 ff), although one may certainly express regret for any loss. The loss or harm created by the wrong may well be a problem for the victim, but the moral question to which the apology responds is whether there has been a wrong.

The question of what is a wrong could also be asked in the form 'What is it one should apologise for?' The answer to this question is mediated by culture or community and may therefore differ according to the micro- or macro-culture of the people concerned – that is, their moral community. The moral community is a critical factor in determining the wrongful nature of whatever is to be apologised for. To illustrate this at a very basic level, in my family of origin shouting was regarded as absolutely wrong and always required an apology. But the family of my friend regarded shouting as just part of communication. To them, the idea that one should apologise for shouting within the family home was so alien as to be incomprehensible.

Where an apology is relevant to a legal situation at least three moral communities may be relevant: those of the wrongdoer, the victim and the wider nation state's moral community as it has come to be embedded in the legal system.<sup>1</sup> Where all three moral communities are the same or agree on the moral quality of the 'wrong' the process is much easier than where they differ. In the examples we will discuss of apologies in medicine and restorative justice the wider state's moral standard is relatively easily identified, as it is effectively the legal standard. But the moral community of the accused in restorative justice and of the medical practitioner in medical negligence may well be quite different from the moral community of the victim or the patient. One significant issue is the tension created between the apology's operation in these three or more) moral communities. Cotterrell (2006, p. 66) divides communities into four – traditional communities (spatially related), instrumental communities (communities of interest), communities of belief and affective communities. It seems reasonable to locate moral communities within his communities of belief. Thus assumptions which underlie the legislative protection of apologies for the purposes of reducing civil litigation are likely to be assumptions about the moral community of the state or legal system, which may not resonate with the particular moral community which is thought relevant (possibly fairly unconsciously) by the person who is considering suing. The most effective apology is likely to be the apology made in a moral community which is significant for both victim and perpetrator, or as stated above, and where the moral communities agree.

#### *4.3. Apologies and moral community in the medical context*

To use apologies most effectively in the medical context the moral communities of both the medical practitioner and the patient need to be considered carefully. The two moral communities may be entirely distinct or they may intersect in a way which will enhance the prospects of any apology. The moral community of doctors is quite recognisable, although of course it may be sub-divided into particular groups of specialists or geographically placed entities or in other ways. For now I will discuss the wider moral community of the profession which has ethics which operate more or less as the moral standards of that community. Those ethics operate within the culture of that moral community which still has a centuries-old view that the doctor knows best (Berlinger 2005, p. 41). The evidence that doctors find it very difficult to apologise to patients after an adverse event may not be only because they are afraid of litigation, although this is clearly a significant issue for them. It may also be because of a culture which rejects acceptance and discussion of wrongdoing because it is felt to conflict with their primary goal of healing (Berlinger 2005, p. 47). It has also been argued that this is particularly difficult because of the culture of medicine which has emphasised if not the God-doctor, at least the hero-doctor (Mulcahy 2003, Gallagher *et al.* 2006, Alberstein and Davidovitch 2011). The culture of medicine seems to develop in its practitioners a strong desire to be seen to be perfect, to maintain the confidence of the patient in

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<sup>1</sup> The extent to which law and morality are the same is a matter for argument, but as a general rule law is seen as more legitimate if it has some connection to morality. Going into this issue further is beyond the scope of this article.

the doctor, and if an error occurs to keep it hidden from the patient even though it may be discussed in grand rounds (or mortality and morbidity conferences), an idea that their role is to heal patients rather than tell them about adverse events (Wei 2007, Kaldjian *et al.* 2006).

The language used to discuss error in medicine includes many passive verbs, thus dissociating the medico from the error (Berlinger 2005, p. 31) and the 'hidden curriculum' teaches medical students 'how to compose and contribute to successful narratives about mistakes' so that acknowledging wrongdoing may not happen (Berlinger 2005, p. 41). Even mortality and morbidity conferences do not necessarily contribute to a culture of openness about error, as commonly medical practitioners may simply stop speaking to patients after an error, even if they do disclose to their co-professionals. Even though medical ethics codes say that disclosure to patients after adverse events is critical, medical practitioners struggle to do so (Medical Board of Australia 2014 [3.14]; Gallagher *et al.* 2003).

This is the aspect of the medical moral community that has been sought to be turned around for the purpose of developing the open disclosure programs in Australia and similar programs elsewhere, and including apologies in them (Iedema *et al.* 2008b). In Australia, the Open Disclosure Framework is the successor to the Open Disclosure Standard which was endorsed and put into place in 2003 (Australian Commission on Safety and Quality in Health Care 2013). Similar programs include the NHS Redress program and the introduction of the 'duty of candour' by NHS Regulation 20 in the UK. These programs have multiple aims, including the disclosure of information about adverse events, apologising for the wrong and working towards ways to prevent the wrong re-occurring. Similar programs in the US exist so that there is now a quite large number of hospitals running open disclosure programs (Kraman and Hamm 1999, Cohen 2000, Australian Commission on Safety and Quality in Health Care 2012). This means that the culture of medicine is being changed, albeit slowly.

It is important to consider what the patient and his or her moral community thinks the wrong was and that the power of the medical culture (or indeed the individual medical practitioner, who might in fact be acting in a way which is not condoned by his or her moral community) is not allowed to overpower the need of the patient for healing from the right apology. One example may illustrate. In the assessments of the early Australian open disclosure pilot projects, it was quite common for the medical staff to say that they had had epiphanies, and felt wonderful after apologising, but for the patient to still feel dissatisfied because, for example, they felt they had not had enough information about what had happened coming along with the expression of regret (Iedema *et al.* 2008a, 2008b). Balancing this out became a new focus for the process (Iedema *et al.* 2008b). Both sides of the dyad have moral and healing needs and the patient should come first in this process. The success of apologies is compromised where the patient feels discounted or that the medical practitioner does not accept the same level of 'wrongness' as the patient has felt (Iedema *et al.* 2011). In an evaluation of the Open Disclosure process, Iedema *et al.* (2007, p. 128) said 'Consumers express concern about Open Disclosure in so far that: a. The patient and/or family is not always involved in determining the severity of an adverse event'. Determining the severity of an adverse event is an aspect of determining the level of 'wrongness' of the event. The fact that some patients felt that they were not involved in determining the level of wrongness of the event demonstrates that the medical moral community was not necessarily taking into account the moral community from which the patients came.

#### *4.4. Apologies and moral communities in restorative justice*

A quite different set of moral communities may arise in the context of restorative justice. In restorative justice the context may determine how valuable or effective an apology is (Strang 2003, Strang and Braithwaite 2001, Christie 1977). The

literature has shown that victims sometimes show a very strong interest in receiving an apology. For example, the Canberra Reintegrative Shaming Experiment compared the responses of victims and perpetrators of crime getting together with a facilitator in a restorative justice conference with the responses of victims and perpetrators who went through the court process. Eighty-eight per cent of victims in court and 91% of victims in conference said they should have received an apology from the offender 'to compensate... for loss and harm'. Three quarters of victims in conference and 19% of the victims who attended court actually received an apology (Strang 2002). There is also evidence that offenders also may participate in restorative justice because they want to apologise (Coates *et al.* 2006).

Restorative justice, broadly defined, includes processes which focus on victims of crime, where the victim and the offender come together in a safe environment to discuss the offence and its impact on the victim. The fact that the criminal justice system does not allow the victim to be central because they are downgraded to the status of witness seems wrong to victims. The restorative justice aim of letting the offender see the impact on the victim may be relatively rarely achieved, especially with teenagers who are likely to be at the peak of self-obsession! (Strang 2001, 2003, Christie 1977). Of course, this self-obsession may mean that they are interested in ensuring that others see them as they wish to be seen (as studies such as those of Goffman (2010) demonstrate) – this may, or may not, be likely to lead them to want to apologise, or indeed to be able to see the impact of their offence on the victim; this may depend on who they see as their moral community. Because restorative justice with juveniles may include their family members, the family may be the relevant moral community of the offender. For other juveniles their peer group may be the relevant moral community and if this peer group has a moral tone which is wildly at odds with the law this peer group may better be kept away from restorative justice processes.

Domestic violence raises particular problems with apologies. Apologising in the restorative justice context of domestic violence may be problematic since very often the pattern of domestic violence may be – go out, get drunk, beat up wife, apologise and be or feel forgiven then go out and do it all again next week; also the possibility that an apology in such a context might allow the person to re-identify themselves in a moral community may be unlikely since the constant process of apologising and reoffending undercuts the possibility that the apology can be seen as real or rehabilitative (Stubbs 2007). It may be more appropriate to look for apologies in the juvenile justice context than in domestic violence. I argue that the concept of moral community needs to be central to the practice of restorative justice in its use or achievement of apologies and reparations partly because the relevant moral communities for domestic violence and for juvenile justice may have such a significant effect on the likelihood of the restorative justice and any apology within it being effective. For example, the views of the moral community which is the state and which, for example, sees domestic violence as morally wrong, and which is trying to get a man to apologise as a means of preventing recidivism may not affect a person whose moral community is his mates who habitually beat their wives. Similarly if the moral communities of the offender and the victim are different there may be more danger for the victim rather than less if apologies are expected or coerced.

By comparison in restorative justice processes concerning juveniles the juvenile offender may also have family or community members present – these may be the moral and emotional community that the juvenile is most likely to see a need to re-connect with. Thus any apology may well be given with them in mind rather than the victim, which is not necessarily a bad thing. The presence of that moral community and their reinforcement that what the offender has done is wrong may be critical to the juvenile seeing it as wrong. Thus the choosing and management of who is to be present at the conference is critical.

#### 4.5. *The moral community, the ideal of sincerity and the coerced apology.*

Once it is clear that there has been a wrong, an apology can redress the moral balance between two parties in two ways – first, a sincere and spontaneous apology can operate to ‘bring up’ the moral ‘value’ of the offender so that it is in balance with the moral worth of the victim, because the apology amounts to explicit recognition by the community of the moral worth of the victim (Smith 2014, p. 109) and at the same time the sincere and spontaneous apology proves to the community that the offender can safely be received back into the community. A sincere and spontaneous apology, particularly one which has been delivered soon after the wrongful event, is clearly the most preferred type of apology. That is the ideal.

It is often assumed that the sincerity of an apology is critical. Sincerity means in this context that the apologiser has a subjective belief that they have done wrong and real subjective regret about the harm suffered by the victim. More briefly, did they mean it? Indeed some restorative justice literature defines the ‘full’ apology as sincere and the ‘partial’ as insincere on the not necessarily valid assumption that a sincere apology will acknowledge fault (Dhami 2012, p.47). However empirical studies such as those in South Australia suggest that even where the offender says they have sincerely apologised the victim may not perceive the apology as sincere (Daly 2002). In Robbennolt’s (2003, p. 509-510) studies the victims did not distinguish between the protected apologies and the (costly) unprotected apologies which one might hypothesise would be more likely to be perceived as sincere. It seems that the complexity of evaluating apologies may mean that certain factors do not always have the impact that might be expected. It appears that victims in many restorative justice processes are satisfied with the outcome even where apologies are only partial (mere expressions of regret), although where they were partial victims were less likely to be forgiving. Research on offender victim mediation found that where apologies were accepted (90% of cases where it was offered) the victim was satisfied with the outcome (Dhami 2012). This suggests that the apology is what was sought. In a third of cases partial apologies were offered and in only one-fifth were full apologies (acknowledging fault) given. It is also interesting to note that there was no relationship between acceptance of apology and forgiveness (Dhami 2012, p.57).

This suggests that there may also be value in a coerced apology. It is common for an apology to be requested in discrimination cases, for example (Allan *et al.* 2010). Often people have suggested that a coerced apology cannot be sincere and is therefore valueless (Van Dijck , p. 15), but sincerity is not the only relevant issue in whether a victim sees benefit in an apology. In some circumstances such an ordered apology may prove to the victim that the community is on their side so that they are buoyed up as against the offender. It may be argued that it is the order rather than the apology which is creating the healing, but if the apology is not made the order will be meaningless. The coercion of the wrongdoer to apologise by a judge, magistrate or other community member also amounts to recognition of the moral worth of the victim. Karp (1998, p. 280) has argued that a coerced apology communicates the moral condemnation of the community, separately from the legal sanction. Thus the common assumption that an apology must be voluntary to be meaningful may not apply in all situations. It may be that such apologies need to be witnessed by more people than the victim alone in order to be useful to the victim. This argument may apply to coerced apologies in general, and it is one reason why apologies for defamation have to be public. Only by having community members witnessing a coerced apology could the shame factor on the offender be sufficient to redress the humiliation of the victim so that the victim could regard the apology as sufficient even if it were not sincere. If this is successful it may amount to ‘reintegrative shaming’ (Braithwaite 1989), that is, shaming which leads to the offender being re-integrated into the community. The evidence that the fullness of an apology was positively associated with the number of participants in the meeting

may be significant (Braithwaite 1989, p. 46). That is, where there are more people in the meeting, an apology which acknowledges fault seems to be more likely. This probably reflects the social pressure to apologise and the evidence in the empirical literature that a major interest of offenders may be in rehabilitating their image (Goffman 2010).

In the context of juvenile justice if the apology is coerced or occurs because of shame this may create a situation where the offender's moral community is telling the offender that the victim's moral status is higher than theirs and that the offender must apologise in order to equalise this status. That is, this is what the offender must do in order to be reinstated in his or her moral community. Thus it is important that the moral community which is making this requirement is one that the offender wishes to identify with. If the offender wishes to identify with the community the coercion required may be relatively mild and the apology may have the reintegrative effect which advantages the offender as well as conciliating the victim (Braithwaite 1989). This suggests that in choosing the people to be involved in restorative justice conferencing a close look at the offender's view of their own moral community will be vitally important.

In the context of domestic violence the moral community of the perpetrator may create real problems if care is not taken. There is some evidence that domestic violence offenders who are asked or ordered to apologise may in fact be supported in their view of their 'right' to 'chastise' their own family by their family of origin or their close co-workers (Coker 2002) because their moral community does not accept the right of the court or the conference to ask for an apology. This may lead to a situation where the victim is simply further victimised by the process of restorative justice (Stubbs 2007). Finding a community which the offender values but which does not accept domestic violence may be difficult.

There is a strong sense in which an apology, as a communicative act, can allow the apologisee to create meaning for him or herself. There is a real danger in any such situation that the offender will create a meaning which enhances their own self-image (Goffman 2010) and takes away the meaning-creation process from the victim, for example, by saying that she nagged him until he had to hit her. Where a woman is a victim of domestic violence, the fact that women are often acculturated to take responsibility for relationships can create a situation where she may ultimately be made to feel morally responsible unless a facilitator is extremely skilled. As Julie Stubbs (2007, p. 174) says, 'the significance accorded apology in restorative justice may also serve to authorize the offender's management of meaning.' This is especially dangerous in the domestic violence situation.

This is not to say that apology has no place in restorative justice concerning domestic violence, but it does mean that there is a danger that for the offender apologies may be 'cheap' and insincere in this context; and possibly more so than in most other contexts. It is therefore critical to ensure that the moral community of the perpetrator is not allowed to support and endorse violent behaviour. Facilitators will need good training and extreme care in order for any such process to create any meaningful healing for the victim at all. The danger otherwise that it will only damage them more is real. The general conclusion about restorative justice that 'victims leave restorative justice meetings fearing revictimisation less than do those victims whose cases are processed by a court' (Roche 2003, p.11) may not be applicable to domestic violence. In such a situation it may be preferable to avoid restorative justice and simply use the courts whose moral community is the legal one of the state.

## 5. Conclusion

What I have tried to show is that there is very strong evidence that apologies are a vital factor in the functioning of moral communities; and that in turn the moral communities identified with by the persons involved in the apology are a vital

ingredient in the likelihood of acceptance of the apology. The evidence shows that a full apology is more likely to be accepted than a partial apology, that the kind of wrong that has been done and the extent of the harm are both important to determining whether an apology can be effective, and that the context within which the apology is given is vitally important. When that context is considered it needs to include a consideration of the relevant moral community. In the two legal contexts considered, medical malpractice and restorative justice, the exact role of the apology and its likely effectiveness needs to be thought about very carefully in the light of the moral communities surrounding the perpetrator and the victim. Where the moral communities with which the parties identify differ we may not be able to expect the same level of success in making and accepting the apology as we would otherwise. If the facilitator is able to ensure that the moral communities with which the victim and perpetrator identify both or all accept the need for the apology (that is, they agree on what is wrong) the process is much more likely to be effective. The most dangerous situation arises where only the moral community of the victim sees the need for the apology. If the moral community that the wrongdoer identifies with and wishes to belong to does not accept the need for the apology the process of re-setting community norms and healing may well backfire.

Resources need to be allocated to any such process to make it possible for a facilitator of restorative justice or open disclosure in the medical context to consider the moral community aspect of the process. This may help to determine whether a voluntary apology or a coerced apology is most appropriate, and what kind of apology, if any, is likely to be most acceptable.

The idea of apology seems to be deep seated in us. As evolutionary biology says it is primate behaviour (O'Hara and Yarn 2002). But a good apology – a fully realised acknowledgement of fault accompanied by real remorse and an offer to repay or never to repeat the wrong – is a powerful expression of some of the best aspirations of human dignity. As legislatures have been keen to introduce apologies into the legal system in various ways it is worth the effort of taking the time and resources to make the use of apologies as effective as it can possibly be. And that means giving prime consideration to the moral community context within which the apology will be given.

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