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Apology, Forgiveness, Reconciliation & Therapeutic Jurisprudence

Susan Daicoff*

“It’s a sad, sad situation and it’s getting more and more absurd. Why can’t we talk it over Sorry seems to be the hardest word . . .”
—Elton John¹

I. INTRODUCTION

In 2010, public apologies underscored the power of contrition. Professional golfer Tiger Woods apologized for his marital unfaithfulness by saying, “I want to say to each one of you simply and directly I am deeply sorry for my irresponsible and selfish behavior I engaged in.”² The chairman of BP Oil Company apologized for referring to local individuals and businesses as “small people” and said, “I spoke clumsily this afternoon, and for that, I am very sorry.”³ Toyota Motor Corporation’s president apologized for the braking defects in the company’s cars by saying, “First, I want to sincerely apologize to Toyota owners. I know that our recalls have caused many of you concern and for that I am truly sorry.”⁴ One reporter in 2004 asserted

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1. ELTON JOHN, *Sorry Seems to be The Hardest Word*, in BLUE MOVES (MCA Records 1976). See Ed Hogan, *Sorry Seems to Be the Hardest Word*, ALLMUSIC, <http://www.allmusic.com/song/sorry-seems-to-be-the-hardest-word-mt0015784503>. Written by Elton John and his long-term collaborator, Bernie Taupin, the song was a hit in 1976. *Id.*

2. Tiger Woods, *Tiger Wood’s apology: full transcript*, CNN (Feb. 19, 2010, 12:20 PM) <http://www.cnn.com/2010/US/02/19/tiger.woods.transcript/index.html>.

3. *BP Boss Sorry About His ‘Small People’ Remark*, MSN (June 16, 2010, 8:55 PM), http://www.msnbc.msn.com/id/37739658/ns/disaster_in_the_gulf/t/bp-boss-sorry-about-small-people-remark/.

4. Ishita Sood, *Toyota Issues Public Apology; to Restart Production of 8 Models*, THE MONEY TIMES (Feb. 2, 2010), <http://www.themoneytimes.com/featured/20100202/toyota-issues-public-apology-restart-production-8-models-id-1099124.html>.

that “[t]he power of the words, ‘I’m sorry’—too little heard in daily life and all but forgotten in modern politics—may be stronger than we know.”⁵

Apologies are not only becoming more common; they are good business practice.⁶ Author Martin Lasden reports that, in 1987, after the Veteran Affairs hospital in Lexington, Kentucky adopted an apology policy, its malpractice claims fell below that of other veterans’ hospitals.⁷ He claims that, in 2001, Johns Hopkins Hospital adopted a policy strongly encouraging its doctors to admit errors and apologize, even if it caused a risk of legal exposure.⁸ In 2003, its expense payments related to legal claims dropped by thirty percent.⁹ Finally, Lasden reports that, in 2002, when the University of Michigan Health System adopted an apology policy, its malpractice lawsuits dropped by half.¹⁰ Colorado surgeon Dr. Michael Woods has been credited with the idea that “a doctor’s attitude is often more of a trigger for litigation than the actual instance of malpractice.”¹¹ One writer concluded, “There is growing conviction in medical circles that the malpractice issue can be assuaged by two simple words, ‘I’m sorry.’”¹²

Further, the law is developing to encourage apology. The website of the Sorry Works! Coalition reports that thirty-six states have statutes preventing expressions of sympathy from being introduced as evidence in court, including California, Florida, Massachusetts, Tennessee, Texas, and Washington.¹³

5. *The Hardest Word*, FOLIO WKLY., Nov. 16, 2004 [hereinafter *The Hardest Word*].

6. Michael B. Runnels, *Dispute Resolution & New Governance: Role of the Corporate Apology*, 34 SEATTLE U. L. REV. 481, 484 (2011) (“the use of corporate apologies is both good business and good ethics”). See, e.g., Jonathan R. Cohen, *The Culture of Legal Denial*, in THE AFFECTIVE ASSISTANCE OF COUNSEL 295–96 (Marjorie A. Silver ed., 2007) [hereinafter SILVER] (reporting the experience of the Toro Corporation in handling lawsuits against it: “By 1999, Toro had saved over \$75 million by switching from a combative to a conciliatory approach”).

7. Martin Lasden, *Saying You’re Sorry*, CALIFORNIA LAWYER MAG. (June 2005), available at <http://www.callawyer.com/story.cfm?eid=718449&evid=1>.

8. *Id.*

9. *Id.*

10. *The Hardest Word*, *supra* note 6. See also Douglas Wojcieszak, *Sorry Works!: The Disclosure and Apology Movement* (unpublished essay).

11. *The Hardest Word*, *supra* note 6 (citing MICHAEL S. WOODS, M.D. & JASON ISAAC STAR, HEALING WORDS: THE POWER OF APOLOGY IN MEDICINE (2007)).

12. *The Hardest Word*, *supra* note 6.

13. See Runnels, *supra* note 7, at 499 (citing *States with Apology Laws*, SORRY WORKS!, <http://sorryworkssite.bondwaresite.com/apology-laws-cms-143>). See also ARIZ. REV. STAT. ANN. § 12-2605 (2005); CAL. EVID. CODE § 1160 (West 2001); COLO. REV. STAT. § 13-25-135 (2003); CONN. GEN. STAT. ANN. § 52-184d (West 2006); DEL. CODE ANN. tit. 10, § 4318 (2006); FLA. STAT. § 90.4026 (2001); GA. CODE ANN. § 24-3-37.1 (2006); HAW. REV. STAT. § 626-1, Rule 409.5 (2007); IDAHO CODE ANN. § 9-207 (2006); Ill. Pub. Act 094-0677 Sec. 8-1901, 735 ILL. COMP. STAT. 5/8-1901 (2005); IND. CODE ANN. 34-43.5-1-1 to 34-43.5-1-5 (West 2006); IOWA CODE ANN. § 622.31 (2006); LA. REV. STAT. ANN. § 13:3715.5 (2005); ME. REV. STAT. § 2907 (2005); MD. CODE. ANN. CTS. & JUD. PROC. § 10-920 (2005); MASS. GEN. LAWS ch. 233 § 23D (1986); MO.

In federal cases, Federal Rule of Evidence 408 makes apologies made in the course of settlement negotiations generally inadmissible to prove liability.¹⁴

The more frequent use of apologies reflects an ongoing change in today's legal profession from adversarialism to collaboration,¹⁵ from individualism to collectivity, interdependence, and interrelationships,¹⁶ from a focus on rights to an inclusion of needs,¹⁷ and from fault finding and assignments of blame to healing and reconciliation.¹⁸ Since at least 1990, a number of emerging developments have embodied these shifts, in many substantive ar-

ANN. STAT. § 538.229 (West 2005); MONT. CODE ANN. § 26-1-814 (2005); NEB. REV. STAT. § 27-1201 (2009); N.H. REV. STAT. ANN. § 507-E:4 (2005); N.C. GEN. STAT. § 8C-1, Rule 413 (2004); N.D. CENT. CODE § 31-04-12 (2007); OHIO REV. CODE ANN. § 2317.43 (West 2004); OKLA. STAT. tit. 63, § 1-1708.1H (2004); OR. REV. STAT. § 677.082 (2011); S.C. CODE ANN. § 19-1-190 (2006); S.D. CODIFIED LAWS § 19-12-14 (2005); TENN. CODE ANN. § 409.1 (West 2003); TEX. CIV. PRAC. & REM. CODE ANN. § 18.061 (West 1999); UTAH CODE ANN. § 78-14-18 (2008); VT. STAT. ANN. tit. 12, § 1912 (2005); VA. CODE ANN. § 8.01-52.1 (2005); WASH. REV. CODE § 5.66.010 (2002); 63 W. VA. CODE § 55-7-11a (2005); WYO. STAT. ANN. § 1-1-130 (2004).

14. FED. R. EVID. 408 (statements or conduct made in compromise negotiations not admissible to prove liability or to impeach through a prior inconsistent statement). The full rule states: "(a) Prohibited uses. Evidence of the following is not admissible—on behalf of any party—either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction: (1) furnishing, promising, or offering—or accepting, promising to accept, or offering to accept—a valuable consideration in compromising or attempting to compromise the claim; and (2) conduct or statements made during compromise negotiations about the claim—except when offered in a criminal case and when the negotiations related to a claim by a public office in the exercise of its regulatory, investigative, or enforcement authority. (b) Exceptions. The court may admit this evidence for another purpose, such as proving a witness's bias or prejudice, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution." *Id.*

15. *See, e.g.*, MICHAEL S. KING, *NONADVERSARIAL JUSTICE* (2009) (documenting the rise of nonadversarial law); J. KIM WRIGHT, *LAWYERS AS PEACEMAKERS* (2010) (overviewing the entire comprehensive law movement in the United States, with special emphasis on practicing lawyers' perspectives).

16. *See, e.g.*, Thomas D. Barton, *Troublesome Connections: The Law and Post-Enlightenment Culture*, 47 EMORY L.J. 163 (1998) (arguing that a sea change has occurred in society's philosophies).

17. *See, e.g.*, PAULINE H. TESLER, *COLLABORATIVE LAW* (2001) (indicating the importance of focusing on needs as well as legal rights in resolving family law disputes "collaboratively" rather than adversarially).

18. *See, e.g.*, SILVER, *supra* note 7 (collecting writings on how to practice law as a healing profession) and DENNIS P. STOLLE, DAVID B. WEXLER & BRUCE J. WINICK, EDS., *PRACTICING THERAPEUTIC JURISPRUDENCE* (2000) (an earlier work collecting writings on how to practice law as a healing profession in various contexts, such as litigation, criminal law, family law, etc.) [hereinafter PTJ] (both works document the rise of a healing, peacemaking approach to practicing and adjudicating law).

eas of the law.¹⁹ I have argued that these are evidence of a greater, overall movement towards a more humanistic form of practicing, adjudicating, and making law: the “comprehensive law movement.”²⁰ One of the most influential of these developments is “therapeutic jurisprudence,” which seeks to make law a healing profession by exploring its potential to heal individuals, relationships, and society.²¹

I have been researching these developments, or “vectors,” for just over a decade, asserting that together they form a single, comprehensive law movement.²² Its guiding principles ask: (1) how can law be a positive force in individuals’ lives and in society; (2) how can law be practiced, adjudicated, and enforced in a way that promotes human wellbeing; (3) when should law focus on more than simple legal rights (for example, how can it take into account the psychological or relational needs of the parties involved as well); and (4) when should legal matters be resolved by collaboration, dialogue, interaction on an equal playing field, mutual understanding, and empathy, rather than by traditional adversarial trials, fact finding, and judicial decision making?²³

Apology, forgiveness, and reconciliation are relevant to many of the individual vectors, or disciplines, making up the comprehensive law movement. As a result, these vectors may benefit from placing a more explicit focus on apology, forgiveness, and reconciliation. Practitioners and teachers of these disciplines can benefit from learning more about how to make them most effective and how to foster and facilitate their occurrence.

This article will briefly define the apology, forgiveness, and reconciliation processes and their benefits. It will then examine the relationship between these concepts and several of the comprehensive law movement’s disciplines or vectors—those most relevant to the use of apology, forgiveness, and reconciliation in the law. It will explore the practical use of apologies and propose a framework for the essential elements of an apology. Finally, a concrete example of a recent apology will be analyzed using this framework, demonstrating the potential utility of the framework for lawyers and judges seeking to assist litigants in crafting apologies, as they practice and adjudicate comprehensively.

19. See Susan Daicoff, *Law as a Healing Profession: The “Comprehensive Law Movement,”* 6 PEPP. DISP. RESOL. L.J. 1, 1–4 (2006) (introducing the concept of the integration of these vectors into a movement) [hereinafter Daicoff/Pepperdine].

20. *Id.* at 5–9.

21. INTERNATIONAL NETWORK ON THERAPEUTIC JURISPRUDENCE, www.law.arizona.edu/depts/upr-intj (therapeutic jurisprudence is described in over 1500 law review articles and books listed on this website.).

22. Daicoff/Pepperdine, *supra* note 20, at 3.

23. *Id.* at 5–10.

II. BRIEF DESCRIPTION OF APOLOGY, FORGIVENESS, AND RECONCILIATION

Apology,²⁴ forgiveness,²⁵ and reconciliation²⁶ can be three steps or components of a successful healing experience between individuals, groups, or institutions in dispute or conflict.²⁷ While the three disciplines are not necessary to conflict resolution, they can facilitate it or, at the least, be helpful. The field of apology-forgiveness-reconciliation research and literature is vast,²⁸ and the brief treatment in this article does not do it justice. However, below are some basic, perhaps oversimplified definitions.

A. Apology

Apology occurs when one person who has done something wrong expresses remorse for what he has done, takes responsibility for the action, and expresses that he is “sorry.”²⁹ He may also acknowledge the harm done to others by his actions and those actions’ impact on others’ lives.³⁰ He may

24. Jonathan R. Cohen, *Advising Clients to Apologize*, 72 S. CAL. L. REV. 1009, 1009–1011 (May 1999) (arguing for the importance and benefits of apology in legal matters).

25. See Frank D. Fincham, *Forgiveness: Integral to Close Relationships and Inimical to Justice?*, 16 VA. J. SOC. POL’Y & L. 357, 358–59 (2009) (citing Everett L. Worthington, *Initial Questions About the Art and Science of Forgiving*, in HANDBOOK OF FORGIVENESS 1, 3 (EVERETT L. WORTHINGTON, JR. ed., 2005) to support the concept that “the definition of forgiveness is the major issue facing the new science of forgiveness.”).

26. See, e.g., Maya Sosnov, *The Adjudication of Genocide: Gacaca and the Road to Reconciliation in Rwanda*, 36 DENV. J. INT’L L. & POL’Y 125, 143 (Spring, 2008) (defining reconciliation).

27. Erin Ann O’Hara, *Group-Conflict Resolution: Sources of Resistance to Reconciliation*, 72 LAW & CONTEMP. PROBS. i, i–ii (Spring 2009) (apology can help deescalate disputes and forgiveness and reconciliation can lead to better psychological and physical health and lives for victims, for example).

28. See, e.g., Jonathan R. Cohen, *The Immorality of Denial*, 79 TUL. L. REV. 903 (2005); Jonathan R. Cohen, *The Culture of Legal Denial*, 84 NEB. L. REV. 247 (2005); Jonathan R. Cohen, *Apology and Organizations: Exploring an Example from Medical Practice*, 27 FORDHAM URB. L.J. 1447 (2000); Jonathan R. Cohen, *Legislating Apology: The Pros and Cons*, 70 U. CIN. L. REV. 819 (2002); Jonathan R. Cohen, *Encouraging Apology Improves Lawyering and Dispute Resolution*, 18 ALTERNATIVES TO HIGH COST LITIG. 171 (October 2000); Jonathan R. Cohen, *Apologizing for Errors*, 6 NO. 4 DISP. RESOL. MAG. 16 (Summer 2000); Jonathan R. Cohen, *Advising Clients to Apologize*, 72 S. CAL. L. REV. 1009 (May 1999); and Jonathan R. Cohen, *Nagging Problem: Advising the Client Who Wants to Apologize*, 5 NO. 3 DISP. RESOL. MAG. 19 (Spring 1999).

29. Cohen, *supra* note 25, at 1014–15 (defining apology with three elements: admitting one’s fault, expressing regret for one’s behavior, and expressing sympathy for the other’s injury).

30. *Id.*

also describe his plan or intention not to engage in the behavior again.³¹ The apology should be expressed directly to the person or persons harmed by the apologizer's actions.³² If a face-to-face encounter cannot be accomplished, a letter, video, or public statement may be substituted.³³ Philosophy professor Nick Smith suggests even a social networking internet site, such as Facebook or Twitter, may be used for the apology's expression.³⁴ To be well received, the apology should be sincere, and the apologizer should take personal responsibility for his actions, avoiding excuses, justifications, rationalizations, arguments, and defensive statements.³⁵ Finally, apologizing without changing one's behavior in the future can be entirely meaningless, for both the apologizer and the audience.³⁶ Such an apology is not likely to have a rehabilitative or sanative impact on the apologizer, can have an embittering effect on the audience, and is not likely to be viewed as sincere.³⁷ Smith makes a poignant analogy on this point: if an offender apologizes and reoffends right afterwards, it is like someone saying "I love you" on a first date.³⁸ One cannot evaluate the sincerity of this statement until one observes the speaker's subsequent behavior.³⁹ Similarly, one cannot evaluate the

31. Thio Li-ann, *Contentious Liberty: Regulating Religious Propagation in a Multi-Religious Secular Democracy*, 2010 SING. J. LEGAL STUD. 484, at text accompanying nn.134–142 (Dec. 2010) (highlighting the listener's need to know that the act would not occur again and the apologizer's promise that it would not recur).

32. See, e.g., Gail Pellet, *Facing the Truth with Bill Moyers* (Public Affairs Television documentary broadcast on PBS Mar. 30, 1999) [hereinafter *Facing the Truth*] (on file with the author) (in which a murder victim's mother complains that the offenders' apology was not made "to me.")

33. Nick Smith, Associate Professor of Philosophy, University of New Hampshire, and Charles Griswold, Professor of Philosophy, Boston University, Speech at the Interdisciplinary Study of Conflict and Dispute Resolution Symposium: Forgiveness: What, When, Why? (Apr. 10, 2009) (discussing the elements of an effective apology); see also Nick Smith, *Apologies in Law: An Overview of the Philosophical Issues*, 13 PEPP. DISP. RESOL. L.J. 1 (2013).

34. *Id.*

35. Based on the author's experience in an informal mediation conducted by the author, circa 2003. See also Li-ann, *supra* note 32, at text accompanying n.133, noting an apologizer's "responsible, repentant attitude" as "worthy of note" because it helped deescalate tensions between the factions in conflict.

36. Nick Smith, *Against Court-Ordered Apologies*, 16 NEW CRIM. L. REV. 1, 43 (2013) [hereinafter Smith, *Court-Ordered*], citing *Ma Bik Yung v. Ko Chuen*, CACV 267/99, 9 (2000) (stating "the Hong Kong Court of Appeals explained in the context of a disability discrimination claim that if a defendant is not 'contrite or repentant,' requiring him to apologize 'would be nothing more than a meaningless and empty gesture and it should not have been ordered as it would not . . . have constituted redress to the plaintiff's loss and damage . . .").

37. See generally the discussion at Smith, *Court-Ordered*, *supra* note 37, at 40-49 (arguing that a voluntary apology has potential for "far greater benefits" to the offender, society, and the victim, in comparison to court-ordered, coerced apologies).

38. Smith, *supra* note 34.

39. Smith, *supra* note 34. See also Smith *Court-Ordered*, *supra* note 37, at 15 (discussing what he views as "what seems most absent from and needed in current criminal processes: the genu-

quality of an apology until one observes how the offender behaves afterwards.⁴⁰

Most of these elements are illustrated in the following example provided by law professor Thio Li-ann.⁴¹ After official complaints regarding the actions in Singapore of Christian pastor Rony Tan denigrating Buddhism and Taoism in three videos posted on his church's website and later reposted on other internet sites such as Facebook and Youtube, Pastor Tan made a personal apology in personal visits to the Singapore Buddhist Foundation (SBF) and the Taoist Federation.⁴² In his apology, he exhibited a "repentant, responsible attitude," "publicly admitted wrongdoing," expressed "remorse that his comments had saddened and hurt Buddhists and Taoists," and "promised it would never happen again."⁴³ He also removed the offensive material, reviewed the church's remaining materials and removed any other potentially offensive material, urged his congregants not to circulate past sermons that might be offensive, and took responsibility in a statement to his congregation, stating that he would "redeem [him]self by promoting religious harmony, while still doing the good works of Christ effectively."⁴⁴ Li-ann notes the efficacy of this apology and its ability to "decelerate tensions" between the groups.⁴⁵

B. Forgiveness

Forgiveness occurs when persons harmed by the apologizer's actions accept the apology, express that they are no longer angry with the apologizer, or extend mercy to the apologizer.⁴⁶ Often, the person harmed first wants a chance to describe the harm that was done to him by the apologizer's ac-

ine moral transformation of offenders"); Douglas H. Yam & Gregory Todd Jones, *A Biological Approach To Understanding Resistance To Apology, Forgiveness, And Reconciliation In Group Conflict*, 72 L. & CONTEMP. PROBS. 63, 70 (2009) (arguing that assurances that the offender will not repeat the offending behavior are related to perceptions of the sincerity of the apology, which both can then lead to the parties' reconciliation).

40. Smith, *supra* note 34.

41. Li-ann, *supra* note 32; *see infra* at text accompanying nn.128–146.

42. Li-ann, *supra* note 32; *see infra* text accompanying nn.128–146.

43. Li-ann, *supra* note 32; *see infra* text accompanying nn.133–140.

44. Li-ann, *supra* note 32; *see infra* text accompanying nn.139–140.

45. Li-ann, *supra* note 32; *see infra* text accompanying n.133.

46. Cohen defines it as "cessation of resentment against the offender." Cohen, *supra* note 25, at 1015. *See also* Fincham, *supra* note 26, at 362 (noting that "a defining feature of forgiveness is the forswearing of resentment").

tions.⁴⁷ The person harmed may also want an opportunity to ask questions of the actor, such as “Why me?” or “Why did you do what you did?” and receive answers from the apologizer.⁴⁸ It is more than simply listening to or hearing the apology; forgiveness involves some expression of acceptance of the apology by the victim.⁴⁹

When the apology–forgiveness exchange occurs between the wrongdoer and the wronged person(s), there can be a palpable shift in the atmosphere of the room, encounter, or relationship between them.⁵⁰ Initially, the atmosphere can be fraught with tension, anger, and resistance. After a successful apology–forgiveness exchange, this may be replaced with calm, peace, and a sense of “flow.”⁵¹ There can be humor, a more lighthearted exchange, and even collaboration between the parties to solve the problem of how to repair the harm done and prevent recurrences of the behavior in the future.⁵²

In response to Pastor Tan’s apology described above, the president of the SBF said, “We accepted his apology, but we also hope these things will not happen in the future.”⁵³ The SBF and the Taoist Federation issued a joint statement accepting his apology, hoping “he has learnt a lesson from this experience,” and promising to “stay in touch to work on promoting mutual understanding between us.”⁵⁴ The government needed no further action, and commentator Li-ann concluded, “Accepting a public apology is indeed a responsible, if not graceful response, standing in sharp contrast with post-apology irate demands of certain netizens to arrest and jail the pastor.”⁵⁵

47. HOWARD ZEHR, *THE LITTLE BOOK OF RESTORATIVE JUSTICE* 14–15 (2002) (explaining that victims need four things: information, truth-telling, empowerment, and restitution or vindication).

48. *Id.*

49. Li-ann, *supra* note 32; *see infra* at text accompanying nn.142–143 (where the victims issued a joint public statement accepting the offender’s apology and promising to work together in the future to “promote mutual understanding.”)

50. Thomas J. Scheff, *Community Conferences: Shame and Anger in Therapeutic Jurisprudence*, 67 REV. JUR. U.P.R. 97, 103–04 (1998) (noting that, after this shift, the tension in the room is decreased and the settlement that develops is mutually satisfactory to both parties; it does not feel arbitrary, punitive, or lenient).

51. *See* O’Hara, *supra* note 28, at i–ii (noting that apologies can deescalate the conflict between parties).

52. Regarding this “shift,” *see* Scheff, *supra* note 51, at 103–04 (the offender’s heartfelt apology “drained away the tension in the room, so that the settlement that was reached seemed satisfying and inevitable”). Scheff reports that in three of nine cases that he observed, the shift occurred after the formal end of the conference, while the parties were departing the building or waiting to sign forms. *Id.*

53. Li-ann, *supra* note 32; *see infra* at text accompanying nn.141–142.

54. Li-ann, *supra* note 32; *see infra* at text accompanying nn.142–143.

55. Li-ann, *supra* note 32; *see infra* at text accompanying n.148.

C. *Reconciliation*

After apology and forgiveness, reconciliation may or may not occur. Reconciliation is present when the apologizer and the person harmed move away from an adversarial stance of anger, blame, shame, and resentment, towards a mutual appreciation of each other and perhaps a sort of peace, or harmony, between them.⁵⁶ Notre Dame Law School Dean Emeritus David T. Link has described “vertical harmony” and “horizontal harmony” as possible outcomes of dispute resolution processes. Horizontal harmony refers to harmony between disputing parties, between people in a community, or between a criminal offender and the relevant community; vertical harmony refers to the offender or apologizer being reconciled with and to his Creator or God.⁵⁷

In the Singaporean example described above, Li-ann references reconciliation as a possible outcome of the apology–forgiveness exchange in claiming that the “reconciliatory posture” adopted by the Buddhist and Taoist leaders may promote “empathy and reconciliation” and is “essential to long-term or durable peace.”⁵⁸ Li-ann asserts that their tolerance and forgiveness towards an offender who shows “genuine contrition . . . paves the path towards genuine reconciliation”⁵⁹ and notes the particular importance of these concepts in conflicts between religious groups in a multi-religious environment.⁶⁰

56. See, e.g., Sosnov, *supra* note 27, at 143 (defining reconciliation as anew relationship of acceptance and trust or a process by which parties in conflict “move to attain or to restore a relationship that they believe to be minimally acceptable”).

57. Definition attributed to Dean Emeritus David T. Link, former dean of Notre Dame Law School and former president of the International Centre for Healing and the Law (personal communication with author, circa 2003). See David Link, FORBES, <http://people.forbes.com/profile/david-t-link/72392>. See also James M. Cooper, *Jurist Voices* (McGill Center for Creative Problem Solving, California Western School of Law, 2000) (citing Judge Robert Yazzie, *Hozho Nahasdlit—We Are Now In Good Relations: Navajo Restorative Justice*, 9 ST. THOMAS L. REV. 117, 124 (1996) (the title means “may the good way be restored”)) (includes comments by the Hon. Ray Austin, former justice on the Navajo Nation Supreme Court, and by the Hon. Robert Yazzie, Chief Justice of the Navajo Nation, describing the Navajo peacemaking process).

58. Li-ann, *supra* note 32, see *infra* at text accompanying nn.177–82.

59. *Id.*

60. See generally *id.*; see also *infra* nn.177–82 and accompanying text.

D. The “Core Sequence”

Sociology professor Thomas Scheff calls apology and forgiveness the “core sequence”⁶¹ of resolving conflicts, suggesting that dispute resolvers should learn how to facilitate it. He explains that material reparation—the payment of money or compensation, for example—and symbolic reparations are both important goals of mediations in criminal cases in Australia.⁶² For symbolic reparation to occur, the two steps of apology and forgiveness, or core sequence, must occur.⁶³ The core sequence should be relevant in both civil and criminal cases. In civil cases, however, there could be reciprocal apologies made and accepted between the parties. In criminal cases, an apology is usually only sought from the offender.⁶⁴ While conflict resolution usually proceeds most smoothly when this entire sequence is present,⁶⁵ the entire sequence is not required in order to resolve conflict. Conflict resolution can occur without any of the following: apology, forgiveness, or reconciliation. For example, conflicts often resolve without an apology.⁶⁶ Apologies may be given without forgiveness received in return and without reconciliation between the parties.⁶⁷ Reconciliation may or may not occur after apology is given and forgiveness extended. Because of the optional

61. Scheff, *supra* note 51, at 102–04.

62. *Id.* at 101–02.

63. *Id.* at 102.

64. See, e.g., Jennifer K. Robbenolt, *Apologies and Reasonableness: Some Implications of Psychology for Torts*, 59 DEPAUL L. REV. 489, 493 (2010) (apologies can “elicit favorable reciprocal responses” and cause more positive perceptions of the other party); Amy L. Lieberman, *The Driving Force of Desires*, 44 AUG ARIZ. ATT’Y 18, 20 (2008) (stating that “[a]pologies typically generate reciprocal behavior” such as “[d]eep gratitude” or a “reciprocal apology”). In restorative justice, apology is usually only sought from the criminal offender. ZEHR, *supra* note 48, at 8–18.

65. Lieberman, *supra* note 65, at 20 (providing an example where apology opened the door to resolution).

66. Deborah L. Levi, *The Role of Apology in Mediation*, 72 N.Y.U. L. REV. 1165, 1196 (1997) [hereinafter Levi] (for example, Levi relates a divorce mediation that was settled without “full formal apology;” the parties did, however, express regret for the impact of their actions on the other but did not experience remorse for their actions. They did not submit “to alien norms”).

67. See, e.g., Matthew Kekoia Keiley, *Ensuring Our Future by Protecting Our Past: An Indigenous Reconciliation Approach to Improving Native Hawaiian Burial Protection*, 33 U. HAW. L. REV. 321, 352 n.281, 353 (2011) (noting that insincere or hollow apologies are ineffective in bringing about, and do not alter the parties’ relationship sufficiently to bring about, enduring forgiveness); Olivera Simic, *Bringing “Justice” Home? Bosnians, War Criminals and the Interaction Between the Cosmopolitan and the Local*, 12 GER. L.J. 1388, 1401–02 (2011) (reconciliation is “one of the most challenging parts of peace building” and may not result if the apology does not contain sincere remorse).

character of reconciliation,⁶⁸ in the remainder of this article, “core sequence” shall refer to apology and forgiveness, where reconciliation may or may not thereafter occur.

E. Something Intangible

In addition to all of the elements and components listed above, there is something intangible that seems to be present in a good core sequence. One might imagine that fostering a core sequence in a particular case is like making soup: anyone can boil all of the listed ingredients of the soup (e.g., chicken, water, salt, onion, celery, carrots, and rice) in a pot on the stove, but different people’s chicken soups taste differently. Some say it is because they include a special ingredient, some say they boil it a certain way for a certain time period, and others say their soup is made with good intentions or love.⁶⁹ There seems to be an intangible element in an effective exchange of apology and forgiveness between a plaintiff and defendant or between victim and offender, relating perhaps to the sincerity of the parties, the humble attitude in their interactions with each other, the expressed, nonverbal emotions displayed by both, the eye contact between them, and the like. There is a distinct shift in the interchange between the parties, or in the “climate”⁷⁰ in the room, when the core sequence works and an apology is accepted.⁷⁰ The climate of interaction between the parties changes and becomes warmer, less adversarial, and more relaxed.⁷¹

For example, in one mediation observed by the author, the victim refused to accept the offender’s apology until the offender broke down, crying, and tearfully and believably explained why the offender committed the offense, admitting to very vulnerable and tender feelings of fear and inadequacy in the process. After that, the dispute resolved very quickly as the victim

68. For example, Sosnov, *supra* note 27, at 143, notes that reconciliation is not easy to achieve, between parties in conflict, and proposes a more realistic definition of reconciliation; *see also* Sosnov, *supra* note 57.

69. For example, my son says his mother’s soup tastes better than canned soup or soup from a boxed mix.

70. Levi, *supra* note 67, at 1196 (noting that *accepted* apologies will shift the adversarial climate between parties, change the parties’ demeanors, and result in a warmer, more relaxed interaction between them) (citing JOSEPH FOLGER & MARSHALL SCOTT POOLE, WORKING THROUGH CONFLICT: A COMMUNICATION PERSPECTIVE 99 (1984) (for the term “climate” to describe the parties’ interaction)).

71. *Id.* (citing FOLGER & POOLE, *supra* note 67, at 99).

easily worked with the mediator and offender to create a mediated resolution of the offender's sentence.⁷² Lieberman relates a similar example. She says:

In a recent case, I sensed that the parties could not move on until they believed the other truly realized the impact on each other's lives of the events of the underlying case. With the lawyers' permission, I asked both parties to meet with me alone, without their lawyers, for a facilitated discussion. Though anxious about doing so, they agreed. Both cried for a good hour, while they explained the impact the other's actions had on their lives. They communicated the frustrations they felt, and each volunteered that in hindsight they would have handled it differently. One apology led to a reciprocal apology, and this allowed the negotiations to begin.⁷³

A shift may occur in both parties. In the victim, the shift is from anger to acceptance to openness.⁷⁴ In the offender, the shift is from defensiveness and shame to openness, humility, and acceptance of responsibility.⁷⁵ There is often an underlying, explicit or implicit, mutual recognition: "We are both human, no one is perfect, we are co-members of the human race, we are both human beings worthy of value, and there is some commonality between us." Perhaps the victim would not have done what the offender did, but he now understands why it was done and has some empathy for the offender; similarly, the offender has empathy for what the victim has experienced as a result of the offense.⁷⁶

On the other hand, this intangible component may be as simple as an examination of the apologizer's sincerity,⁷⁷ which may be further deconstructed into his motives for making the apology. Sincerity may appear to be present when the apologizer is truly sorry for what he has done and how

72. Based on the author's experience observing an informal mediation, circa 2003.

73. Lieberman, *supra* note 65, at 20 (also stating that "[o]nce that need [for acknowledgement] is met, the door is opened for resolution.")

74. See R. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION* 8-13 (1994) [hereinafter BUSH & FOLGER (1994)] (in the "Sensitive Bully" case, illustrating this awareness of the other's plight as "recognition" and depicting similar shifts that occur in successful transformative mediations).

75. Scheff, *supra* note 51, at 109 (the offender needs to "be in a state of 'perfect defenselessness'").

76. BUSH & FOLGER (1994), *supra* note 75, at 89-94, refer to this mutual understanding as "recognition" and propose it as one explicit goal of transformative mediation.

77. See, e.g., David Hoffman, *Mediation, Multiple Minds, and Managing the Negotiation Within*, 16 HARV. NEGOT. L. REV. 297, 300 (2011) (relating a story in which a party in mediation responded to the mediator's inquiry about what might fulfill her desire for vindication, which was blocking her willingness to settle an intrafamily dispute ("'An apology might do it,' she said, 'if it was sincere.' She pondered a moment longer and said, with a wry smile, 'Yes, a totally abject apology might do it.'").

he has harmed others, and when he expresses those sentiments.⁷⁸ If, however, this motive is absent or is mixed with self-serving motives, the apology may be less successful for both the apologizer and the audience, though this is debatable; some believe even insincere apologies can have a positive effect.⁷⁹ Self-serving motives might include apologizing for the purposes of gaining leniency in court from a third-party decision-maker, persuading the other party to drop the lawsuit or settle it on terms favorable to the apologizer, appearing more noble or rehabilitated to others, or generally gaining any kind of favor or praise for the apologizer.⁸⁰

III. BENEFITS OF APOLOGY, FOREGIVENESS, AND RECONCILIATION

Guilt, shame, anger, and grief are often present in civil and criminal legal matters.⁸¹ Wrongdoers in legal matters often can benefit from rehabilitating or not recidivating.⁸² Apology, forgiveness, and reconciliation can have great benefits by reducing these negative emotions and improving the potential for individual reform. Thus, they can maximize the therapeutic aspects of legal matters and minimize the anti-therapeutic ones for wrongdoers and affected persons alike.⁸³ This section will examine several social science findings in each of these areas and explore how the use of apologies can be beneficial to the parties involved.

78. Jeffrie G. Murphy, *Well Excuse Me!—Remorse, Apology, and Criminal Sentencing*, 38 ARIZ. ST. L. J. 371, 383 (2006) (describing the elements of a sincere apology).

79. See, e.g., the lively discussion of sincerity in Murphy, *supra* note 79, at 383–84 (exploring what makes a sincere apology and the possible constructive effects of insincere apologies, such as public admission of and acceptance of accountability for the harm done or action taken and vengeance fulfillment in the public shaming of the offender).

80. See, e.g., Simic, *supra* note 68, at 1401 (apology can be used to maneuver towards dropped charges and may not be motivated by true remorse); Levi, *supra* note 67, at n.11 (while advocating for the use of apology: “This is not to suggest that lawyers should tutor their clients in manipulating opponents’ emotions—sincere regret is different from tactical apology”).

81. Marjorie A. Silver, *Emotional Competence and the Lawyer’s Journey*, in SILVER, *supra* note 7, at 14–15, 29–35 (discussing grief, anger, shame, humiliation, and denial and the need for lawyers to respond appropriately thereto).

82. See generally David B. Wexler, *Relapse Prevention Planning Principles for Criminal Law Practice*, in PTJ, *supra* note 19, at 237–43 (exploring how lawyers and courts can assist criminal clients in avoiding recidivism).

83. See, e.g., Bruce J. Winick & Alina M. Perez, *Aging, Driving, and Public Health: A Therapeutic Jurisprudence Approach*, 11 FLA. COASTAL L. REV. 189, n.242 (2010) (noting that an apology can foster healing for victims and offenders in criminal actions).

A. *Fostering Therapeutic Guilt (Reintegrative Shame)*

Mental health professionals often differentiate between guilt and shame as follows: guilt is an expression that “I have done something wrong”; shame expresses, “I am wrong, and there is something wrong with or defective about me.”⁸⁴ Guilt allows for the possibility that the wrongdoer is a good person, worthy of esteem, who has committed a wrong act that can be avoided in the future.⁸⁵ Guilt, therefore, can be therapeutic in that it may motivate one to change, when one has committed a wrong. In contrast, shame suggests that the wrongdoer is not worthy of esteem or not capable of changing. John Braithwaite refers to the difference between guilt and shame as the distinction between two types of shame: shame that condemns offenders’ behavior but motivates them to change, or “reintegrative shame,” and shame that stigmatizes offenders, perhaps causing them to feel alienated and outcast and thus to re-offend.⁸⁶ Reintegrative shame is linked to accepting personal accountability, responsibility, and willingness to change; and it can be therapeutic, if used properly or facilitated in criminal law, as it can motivate the wrongdoer to change.⁸⁷ Sociology professor Thomas Scheff explains that apologies facilitate “reintegrative shame,” which is sanative, as opposed to unhealthy shame.⁸⁸

This is particularly true when apologies are made publicly.⁸⁹ Scheff asserts that they have the greatest effect on offenders and victims when there is a public commitment or apology made by the offender directly (in person) to the victims, the affected community, or both.⁹⁰ This is consistent with other social science research by Meichenbaum and Turk demonstrating, in the

84. Popular psychologist and author John Bradshaw explained in 1988 that “[g]uilt says I’ve *done* something wrong; shame says there *is* something wrong with me . . . Guilt says I’ve *made* a mistake; shame says I *am* a mistake . . . Guilt says what I *did* was not good; shame says I *am* no good.” JOHN BRADSHAW, *BRADSHAW ON THE FAMILY: A REVOLUTIONARY WAY OF SELF DISCOVERY* (Health Communications: Deerfield Beach, Florida 1988) (emphases in original).

85. Scheff, *supra* note 51, at 104–06. Victoria Pyncheon, *Shame by Any Other Name: Lessons for Restorative Justice from the Principles, Traditions, and Practices of Alcoholics Anonymous*, 5 PEPP. L. REV. 299, 304 (2005) (providing a chart differentiating guilt from shame).

86. See Pyncheon, *supra* note 86, at 300 (citing John Braithwaite, *Shame and Criminal Justice*, 42 CANADIAN J. CRIMINOLOGY & CRIM. JUST. 281, 281–82 (2000)).

87. Scheff, *supra* note 51, at 104–06; Pyncheon, *supra* note 86, at 307 (noting the positive effect of guilt, or reintegrative shame, on the offender).

88. Scheff, *supra* note 51, at 104–07.

89. Murphy, *supra* note 79, at 383–84 (noting that even a public apology is a public admission of responsibility, even if it is insincere).

90. Scheff, *supra* note 51, at 104–10; see also Li-ann, *supra* note 32, at 503–04 (noting the public aspects of Pastor Tan’s apology).

context of patient health care compliance, that changed behavior is more likely to result when the actor makes a public commitment.⁹¹

B. Reducing Anger

Anger is often present in litigants, whether the case is criminal or civil.⁹² Further, the traditional legal system's emphasis on adversarialism may tend to prolong or foster hostility between parties.⁹³ While anger may be beneficial as a motivator for action and change,⁹⁴ it can also be countertherapeutic in legal matters.⁹⁵ Robin Wellford Slocum explains that "anger becomes a problem when it is not released after it has served its limited purpose but is instead allowed to simmer and fester," leaving the client with resentment, suffering, and bitterness.⁹⁶ For example, law professor Solangel Maldonado has documented at length the deleterious effects of anger on children, post-

91. David B. Wexler, *Therapeutic Jurisprudence and the Criminal Courts*, in DAVID B. WEXLER & BRUCE J. WINICK, EDs., *LAW IN A THERAPEUTIC KEY* 167 (1996) [hereinafter KEY], citing DONALD MEICHENBAUM & DENNIS C. TURK, *FACILITATING TREATMENT ADHERENCE: A PRACTITIONER'S GUIDEBOOK* (1987). Bruce Winick discusses the application of this research in criminal lawyering in Chapter 10 of PTJ, *supra* note 19.

92. See generally Paul A. Batista, *Civil RICO Practice Manual*, Chapter 1: Introduction and Overview, Current through the 2011 Supplement, Section 1.05, Overview of the Defense Perspective (RICO defendants often react with anger to complaints involving racketeering allegations); Thomas F. Villeneuve and Robert V. Gunderson Jr., *Corp. Partnering: Structuring and Negotiating Domestic and International Strategic Alliances*, Part I: Corporate Partnering/Strategic Alliances, Current through the 2010 Supplement, Chapter 1: Structuring and Negotiating Corporate Alliances (discussing how the "heat of anger" can instigate litigation and corporate deadlocks); Aspen Publishers, *Handbook of Intellectual Property Claims & Remedies*, Chapter 1. Deciding Whether To Bring An Intellectual Property Lawsuit, Current through the 2011 Supplement, § 1.02, The Decision to Litigate (acknowledging that clients in commercial disputes may litigate because of "frustration or anger" rather than "commercial business realities").

93. See, e.g., Connie J. A. Beck & Bruce D. Sales, *A Critical Reappraisal of Divorce Mediation Research and Policy*, 6 PSYCHOL. PUB. POL'Y & L. 989, 1021 (2000) (the competitive atmosphere of litigation may foster "anger, depression, frustration, and worry" in divorcing parents, as compared to mediation).

94. Robin Wellford Slocum, *The Dilemma of the Vengeful Client: A Prescriptive Framework for Cooling the Flames of Anger*, 92 MARQ. L. REV. 481, 488 (2009) (observing that anger can be positive and healthy, as it can motivate individuals to change and action, for example, to "right a social injustice," and also noting the potential for lawyers to help "clients use the legal system to effect such change").

95. *Id.* at 488.

96. *Id.* at 488 (noting also that angry clients can be found in any lawyer's office, not just in family lawyers' offices).

divorce.⁹⁷ Similarly, Katherine Maxwell summarizes empirical research finding that interparental conflict is one of the top three causes of poor post-divorce functioning and mental health among children.⁹⁸ Anger in divorcing spouses likely contributes to interparental conflict. However, it is not only children and parents in divorce who may experience deleterious anger, during and after litigation. All civil and criminal litigants (and crime victims) may experience deleterious anger (and also, possibly, dissatisfaction with their legal counsel), leading to their poor functioning and mental health, post-litigation.⁹⁹

Scheff asserts that this grief and anger are often unacknowledged emotions and may appear in the form of moral indignation and lecturing behavior.¹⁰⁰ He explains that individuals who are experiencing great fear or grief often transmute those tender, vulnerable feelings into anger and indignation at others, which they may express in the form of “lecturing.”¹⁰¹ For example, the victim of a traffic accident might lecture the other driver (e.g., “You need to learn how to be more careful. You can’t keep tearing around town with no regard for others!”). Scheff suggests that a skilled mediator might gently question the angry person to allow the underlying feelings of fear, betrayal, and loss to surface, instead (e.g., perhaps, “I was terrified when your car hit mine and I don’t know when I’ll ever be able to go back to work again”).¹⁰²

Working through and letting go of this anger may be therapeutic for many clients. For example, Slocum argues that “[t]here is, within every vengeful client, a longing for healing . . . [and] to be freed of the anger that is poisoning his quality of life.”¹⁰³ Slocum counsels lawyers to learn to assist clients in releasing such vengeful anger, in order to assist their clients in gaining the quality of life they desire.¹⁰⁴ She relates “letting go of anger” to the concept of forgiveness, noting that they may be the same or similar, but clarifies that the client need not “condone the other party’s conduct, forget

97. Solangel Maldonado, Professor of Law, Seton Hall University Law School, Speech at the Interdisciplinary Study of Conflict and Dispute Resolution Symposium: Forgiveness in the Context of Family Law: “Healing Divorce” (Apr. 10, 2009); see also Solangel Maldonado, *Facilitating Forgiveness and Reconciliation in “Good Enough” Marriages*, 13 PEPP. DISP. RESOL. L.J. 102 (2013).

98. Kathryn E. Maxwell, *Preventive Lawyering Strategies to Mitigate the Detrimental Effects of Client’s Divorces on Their Children*, 67 REV. JUR. U.P.R. 137 (1998).

99. See *supra* notes 92–94.

100. Scheff, *supra* note 51, at 112–14.

101. *Id.*

102. *Id.* at 111.

103. Slocum, *supra* note 95, at 508.

104. *Id.* at 508–33 (exploring at length strategies for lawyers in this situation).

what happened, or seek to reconcile with the other party.”¹⁰⁵ This echoes the assertions above that apology may occur with or without forgiveness and reconciliation; they are not necessarily companions. Further, Slocum summarizes studies establishing physiological and psychological benefits of releasing anger through forgiveness.¹⁰⁶ Therefore, to the extent that apologies and forgiveness, if given, assist litigants in releasing anger, they are likely to be helpful.

Even if an apology is given and accepted, it may have deficiencies. For example, the importance of direct apologies is underscored in a poignant interview of the mother of a victim tortured and killed as a result of apartheid in South Africa. In the 1999 documentary titled *Facing the Truth With Bill Moyers*, about the public hearings held by the South African Truth and Reconciliation Commission, she says justice was not done.¹⁰⁷ Even though the hearings brought the offenders before the victims in a public forum to take responsibility for their actions, she was dissatisfied. When asked why, she emphatically expressed, “[T]hey should have apologized to me, to me, . . . first to me, and then to God.”¹⁰⁸ There was something too impersonal about the large, public hearings for this victim’s mother.

Apology, forgiveness, and reconciliation, if elicited carefully, can dramatically reduce litigation-related anger.¹⁰⁹ This reduction in anger may thus improve the post-litigation functioning of the involved persons, particularly civil plaintiffs and criminal victims who felt harmed by the acts leading to litigation or those who will suffer from prolonged anger in the litigants, such as the children of divorcing spouses.¹¹⁰

105. *Id.* at 529.

106. *Id.* at 531–32 (documenting health benefits such as decreased stress and improved cardiovascular and nervous system functioning; psychological benefits such as regaining one’s personal power).

107. *Facing the Truth*, *supra* note 33.

108. *Facing the Truth*, *supra* note 33.

109. *See* Slocum, *supra* note 95, at 529–32.

110. *See* Maldonado, *supra* note 98; Maxwell, *supra* note 99. *See also* Slocum, *supra* note 95, at 529–32.

C. *Moving Through The Grief Process: "DABDA"*

Anger is one of the five stages of the grief process as documented by the psychologist Elisabeth Kübler-Ross: denial, anger, bargaining, depression, and acceptance.¹¹¹ As I have elsewhere observed:

Almost every litigant engaging an attorney has suffered a loss of some sort. Thus, a litigant is likely to be experiencing one or more of Elisabeth Kübler-Ross' famous five stages of grief: denial, anger, bargaining, depression, and acceptance.

Litigation can facilitate or suspend the grief process—the process of dealing with and resolving the loss that resulted in the legal problem. For example, in wrongful death actions, litigation can interrupt the process of grieving if it focuses too long on the cause of or responsibility for the death. On the other hand, "litigation . . . facilitate[s] the . . . grief process" when it helps the survivors sort out the events leading to the death or "fulfill[s] their sense of duty to the deceased" person and is begun and concluded in a timely way after the death.¹¹²

In every lawsuit, something has been lost, torn, ruptured, or broken, whether it involves a criminal charge or offense, civil wrong, personal injury, or even breach of contract. The loss may be a physical loss, economic loss, the loss of a relationship, or the loss of the person's status in society and inclusion with others. Attorneys need to be aware that their clients are likely experiencing one of the five stages—civil plaintiffs perhaps most often "anger" and criminal defendants perhaps often "denial," "bargaining," or "depression."¹¹³ As attorneys, we can prolong these stages and hamper an individual's progression through them, intensify the manifestations of each stage (particularly anger or denial) or help facilitate the process of resolving grief for our clients.¹¹⁴ By its emphasis on assigning blame, finding fault,

111. ELISABETH KÜBLER-ROSS, ON DEATH AND DYING 34–99 (1969) (discussing the five stages of coping in terminally ill patients).

112. Daicoff/Pepperdine, *supra* note 20, at 54–55 (quoting Daniel W. Shuman, *The Psychology of Compensation in Tort Law*, in KEY, *supra* note 92, at 452–53) (citations omitted).

113. The criminal defendant has experienced a loss of social status, in being charged with a crime, and either denies it ("I didn't do it, I'm not to blame, and if I did do it, I'm not responsible") or bargaining ("Maybe this won't turn out that badly for me") or depression ("This is the worst thing ever to happen to me!"). If the criminal defendant is engaged in a life of crime, the charges end that spree, so to speak, so it is a loss of the unfettered ability to engage in criminal activity. I am particularly thinking of criminal defendants whose crimes are fueled by their own substance abuse. See, e.g., Abbe Smith, "I Ain't Takin' No Plea": *The Challenges in Counseling Young People Facing Serious Time*, 60 RUTGERS L. REV. 11, 28–30 (2007) (noting the widespread awareness among criminal defense attorneys that their clients are progressing through Kubler-Ross's five stages of grief).

114. See, e.g., Smith, *supra* note 114, at 28–30 (noting that criminal defense counsel must know that defendants must reach the acceptance stage before a guilty plea can be entered); Bruce J. Win-

and appearing personally blameless, the adversarial process encourages litigants to remain angry with others and may prolong or arrest the natural process of grief resolution for them. This may, in turn, result in deferring the litigants' resolution of the loss, or "closure."¹¹⁵

In contrast, allowing litigants or crime victims to be heard¹¹⁶ and to express anger, and allowing offenders to express shame, remorse, and ask for forgiveness¹¹⁷ may facilitate the parties' movement through the grief process towards acceptance and resolution. It may provide or foster "closure" for both parties, for the events of the past.¹¹⁸

D. Making Restitution to Those Harmed

Apology alone can begin to restore to the harmed person what was taken away by the apologizer's acts. For example, a criminal offense can be analogized to the offender taking a figurative "bite" out of the victim. Due to the offense, the victim can be disfigured and the offender can be shamed, outcast, and alienated from society, labeled as a "biter." A restorative justice process¹¹⁹ focused on apology cannot restore the original flesh to the wound—nothing can ever do that, and a scar will always remain—but it can begin to fill the hole left by the offender's bite. It fills this void with a prosthesis—something new—an exchange between the victim and the offender that can improve the victim's state, repair some of the damage done to the victim by the event, and leave the offender with reintegrative shame rather than guilt. Ultimately, the process aims to allow both to re-enter society as whole people. It fills what Julie Exline calls the "injustice gap"—the gap

ick, *Client Denial and Resistance in the Advance Directive Context: Reflections on How Attorneys Can Identify and Deal With a Psycholegal Soft Spot*, in PTJ, *supra* note 19, at 330–49 (discussing the psychological concepts of denial and resistance in clients dealing with end-of-life issues and how attorneys can assist clients to move through those stages into a more productive mode).

115. Daicoff/Pepperdine, *supra* note 20, at 54–55.

116. Procedural justice demonstrates that litigant satisfaction with legal processes depends in large part on whether they are given a chance to be heard. Tom Tyler, *The Psychological Consequences of Judicial Procedure*, in KEY, *supra* note 92.

117. Zehr, *supra* note 48, at 8–12 (noting offenders' needs in restorative justice processes).

118. Cf. Elizabeth M. Schneider, *Grief, Procedure, and Justice: The September 11th Victim Compensation Fund*, 53 DEPAUL L. REV. 457, 466–67 (2003) (noting that litigation or settlement of the lawsuit or claim alone does not always provide closure).

119. HANDBOOK OF RESTORATIVE JUSTICE 27–29 (GERRY JOHNSTONE & DANIEL W. VAN NESS eds., 2007).

between what actually happened and what seems fair¹²⁰—by providing symbolic and material restitution to those harmed by the wrongdoing.¹²¹ The offender's apology can be an important part of that process, where the offender takes full responsibility for the offense and acknowledges the impact of the offense on the victim. Scheff explains this as follows:

[In the core sequence,] two separate movements of shame should occur. First, all shame must be removed from the victim. The humiliation of degradation, betrayal, and violation that has been inflicted on the victim must be relieved. This step is a key element in the victim's future well-being; it is the shame component—the victim's feeling that if only he or she had acted differently, the crime wouldn't have occurred or would have been less painful—that leads to the most intense and protracted suffering. . . . The removal of shame from the victim is accomplished by the second move: making sure that all of the shame connected with the crime is accepted by the offender. By acknowledging his or her complete responsibility for the crime, the offender not only takes the first step toward rehabilitation, but also eases the suffering of the victim. For the shaming of the offender to be reintegrative, however, the facilitator must take care that it not be excessive, as already indicated. Humiliating the offender in [a victim/offender] conference makes it almost impossible for him both to accept responsibility and to help remove shame from the victim. By recognizing and encouraging the core sequence of emotions, as described below, an effective facilitator can direct the offender toward rehabilitation and help relieve the victim's suffering.¹²²

E. *Summary of Therapeutic Aspects of Apology, Forgiveness and Reconciliation*

Apology serves many purposes. It can begin to restore or heal the wound or loss visited upon the victim of crime.¹²³ It can place all blame for the event on the offender and remove all blame from the victim.¹²⁴ It can be part of the offender's responsibility-taking actions, fostering healthy guilt or reintegrative shame in the offender, ultimately allowing him to be reintegrat-

120. Julie Exline, Associate Professor, Case Western Reserve Univ., Panel Discussion at the Interdisciplinary Study of Conflict and Dispute Resolution Symposium: The Thorny Issue of Forgiveness: A Psychological Perspective (Apr. 10, 2009).

121. JOHNSTONE & VAN NESS, *supra* note 120, at 27–29.

122. Scheff, *supra* note 51, at 105–06 (also noting that the usual court process does little to relieve the victim's suffering).

123. *Id.* at 105.

124. *Id.*

ed into society.¹²⁵ It is often the one thing civil clients say they want in litigation.¹²⁶ It can facilitate the progress of parties through the stages of grief, ultimately arriving at resolution.¹²⁷ Perhaps most importantly, many litigants and crime victims will not be satisfied or be at peace with the legal outcome of a case unless and until a sincere apology is provided to them by the defendant.¹²⁸ They may accept the outcome facially, but deep peace—a deep sense of closure, healing, reconciliation, and justice—is not likely to be present without the apology.¹²⁹

While they are not necessary ingredients of many of the vectors of the comprehensive law movement, apology, forgiveness, and reconciliation further the goals of many vectors of that movement. The next section explores how.

IV. RELEVANCE TO VECTORS OF THE COMPREHENSIVE LAW MOVEMENT

A new movement in the law, towards law as a healing profession, has emerged over the last two decades.¹³⁰ Its growth is due perhaps in part to dissatisfaction with the traditional legal system but also in part to various shifts in societal, collective thought.¹³¹ For example, three such shifts are: (1) individuals, groups, and even countries now recognize their interconnectedness and the interdependence of their wellbeing (i.e., “If I hurt you, it

125. Pynchon, *supra* note 86, at 300 (citing John Braithwaite, *Shame and Criminal Justice*, 42 CANADIAN J. CRIMINOLOGY & CRIM. JUST. 281, 281–82 (2000)).

126. *A CIVIL ACTION* (Touchstone Pictures 1998) (in which the plaintiffs in a toxic tort case reiterate their desire for an apology from the defendant corporations, despite a monetary settlement, and express their displeasure with receiving a monetary amount alone). See Jennifer K. Robbenolt, *Attorneys, Apologies, and Settlement Negotiation*, 13 HARV. NEGOT. L. REV. 349, 358–59 (noting studies demonstrating the importance of apologies to civil claimants and asserting that people desire apologies when injured by another).

127. See generally KÜBLER-ROSS, *supra* note 112.

128. See Robbenolt, *supra* note 124, at 381, 391 (attorneys advising their clients against apologizing can impede settling the case to the client’s “best satisfaction”); see also Levi, *supra* note 63, at 1180 (apologies can be important to client satisfaction).

129. See *Facing the Truth*, *supra* note 33; Scheff, *supra* note 51, at 103 (the core sequence is “the key to reconciliation, victim satisfaction, and decreasing recidivism”).

130. Daicoff/Pepperdine, *supra* note 20 at 1–4.

131. *Id.* at 38–44. See generally SUSAN DAICOFF, *LAWYER, KNOW THYSELF* (2004) (documenting dissatisfaction with the legal system).

will hurt me as well”);¹³² (2) the emerging view that many legal disputes are really interpersonal failures;¹³³ and (3) exploration of the relativity of truth, that truths are different for different people and there may not always be one story or one reality in a dispute.¹³⁴ All of these ideas have influenced the way that law is being practiced as well as how legal disputes are being adjudicated and otherwise resolved. For example, restorative justice processes (such as victim-offender mediation, family group conferencing, and circle sentencing and process),¹³⁵ nonadversarial processes (such as collaborative law),¹³⁶ and therapeutic processes (such as problem solving or community-based courts)¹³⁷ have developed and continue to flourish alongside more traditional means of litigating civil and criminal matters.

Apology, forgiveness, and reconciliation are arguably relevant to all nine of the disciplines making up the comprehensive law movement. In rough order of relevance here, these are: restorative justice, therapeutic jurisprudence, preventive law, procedural justice, transformative mediation, holistic justice, creative problem solving, problem solving courts, and collaborative law.¹³⁸

132. For example, the website of Eco-Justice Ministries provides, as one of its four theological assumptions, “We live in a world of complex and interdependent relationships. Our interpersonal relationships are important, and so are our ecological and institutional relationships. The quality of all of those relationships has both practical and moral significance.” ECO-JUSTICE MINISTRIES, *Four Theological Affirmations*, <http://www.eco-justice.org/4affirmations.asp>.

133. See, e.g., 1 Corinthians 6:7 (New Int’l 1984) (“The very fact that you have lawsuits among you means you have been completely defeated already,” meaning not defeat in a legal court, but that some failure on the part of the Christian to follow Christ has occurred). An example of litigation ensuing after a failure to communicate or manage relationships well is *Nanakuli Paving and Rock Co. v. Shell Oil Co.*, 664 F.2d 772 (9th Cir. 1981) (many years’ contractual relationship broke down after a change in management and an unfortunate communication thereafter).

134. Gustave Courbet said that “[b]eauty, like truth, is relative to the time when one lives and to the individual who can grasp it.” Gustave Courbet, BRAINY QUOTE, <http://www.brainyquote.com/quotes/quotes/g/gustavecou211373.html>. See Cindy Fazzi, *Book Review, In Mediation as In Life, Truth Is Relative*, reviewing “Resolving Personal and Organizational Conflict: Stories of Transformation and Forgiveness,” by Kenneth Cloke and Joan Goldsmith, San Francisco: Jossey-Bass Inc. (2000), Cris M. Currie, *Mediating off the Grid*, 56 DISP. RESOL. J. 86 (2001) (disputing parties tell different stories about the same facts).

135. See generally Gordon Bazemore & Mark Umbreit, Office of Juvenile Justice and Delinquency Prevention, *Conferences, Circles Boards, and Mediations: Restorative Justice and Citizen Involvement in Response to Youth Crime* (1998); JOHNSTONE & VAN NESS, *supra* note 120, at 27–29; ZEHR, *supra* note 48.

136. See generally TESLER, *supra* note 18; PAULINE H. TESLER & PEGGY THOMPSON, *COLLABORATIVE DIVORCE* (2006).

137. See the innovative court developments described at the website for the Center for Court Innovation, CENTER FOR COURT INNOVATION, www.courtinnovation.org (last visited Jan. 13, 2013).

138. Daicoff/Pepperdine, *supra* note 20, at 1–2.

A. *Therapeutic Jurisprudence*

Therapeutic jurisprudence (TJ) is an approach to law, lawyering, and the resolution of legal matters that seeks to assess the effects of laws and legal rules, processes, and personnel on individuals' wellbeing, relationships, and psychological functioning. It asks whether the law's effects are therapeutic or countertherapeutic and then, without trumping legal rights, seeks to employ legal rules, processes, and personnel in ways that are the most therapeutic, sanative, ameliorative, or healing or the least countertherapeutic or damaging.¹³⁹

TJ uses social science, as Maldonado and Maxwell do,¹⁴⁰ to understand and assess the psychological impact of the law on individuals.¹⁴¹ It then proposes reforms to the law, legal processes, and legal rules in order that the law's impact might be more beneficial, ameliorative or sanative—or at least not destructive.¹⁴² TJ would encompass the use of the sequence of apology, forgiveness, and reconciliation to examine when these concepts might benefit the wellbeing or future functioning of the parties involved in the dispute. If so, TJ might recommend that resolution of the dispute include opportunities for apology, forgiveness, and reconciliation.

For example, imagine a civil case in which a teenage driver, carrying three of his best friends and teammates on the high school basketball team, had a serious accident while coming home one night from a game. The driver and front seat passenger were both seriously injured and had lengthy hospital stays. By the time they were released from the hospital and returned home, the passenger's insurance company had begun litigation against the driver's insurance company, and their respective attorneys had advised the teenagers not to communicate with each other while the lawsuit was pending. Not only had the teenagers lost a great deal through the physical injuries and trauma, but this legal move also resulted in the loss of the support of a best friend. In this situation, an apology from the driver to his

139. KEY, *supra* note 92, at xvii (quoting Christopher Slobogin, *Therapeutic Jurisprudence: Five Dilemmas to Ponder*, 1 PSYCHOL. PUB. POL'Y & L. 193 (1995) (reprinted in KEY, *supra* note 92, at 763)); Daicoff/Pepperdine, *supra* note 20, at 11.

140. Maldonado, *supra* note 98; Maxwell, *supra* note 99.

141. PTJ, *supra* note 19, at 7 (suggesting that the "positive and negative consequences" of law "be studied with the tools" of social science).

142. *Id.* at 7 (stating that, "consistent with considerations of justice and other relevant normative values, law [should] be reformed to minimize anti-therapeutic consequences and to facilitate achievement of therapeutic ones").

friend and the friend's family might be, at some point, an important element of possible repair of their relationship or at the least, resolution of the conflict and closure for the families involved. An apology from the teenage driver to the friend could be an important part of his own accountability-taking, personal growth, and healing resulting from the resolution of this case.¹⁴³ A TJ lawyer might build into the resolution of the legal matter an opportunity for apology, forgiveness, and reconciliation to occur between the two friends.

In another example, from family law, Maldonado argues for a "TJ move" based on forgiveness.¹⁴⁴ She says the law could require children's involvement in divorce to give them more opportunity for voice, but could also provide opportunities for children to forgive their parents for divorcing, to improve their post-divorce functioning.¹⁴⁵

In criminal law, legal processes can acknowledge the benefits of encouraging an offender to apologize and a victim to forgive, in a facilitated encounter between them.¹⁴⁶ This is precisely the process used in restorative justice, particularly in victim-offender mediation programs,¹⁴⁷ which will be explored below. Lower recidivism rates, for example, have been reported as a result of restorative justice processes.¹⁴⁸

Apology and forgiveness in both criminal and civil law may reduce unhealthy shame and anger in both wrongdoers and those harmed, increase therapeutic guilt or reintegrative shame for wrongdoers,¹⁴⁹ and assist the parties moving through the grief process instead of staying maladaptively and developmentally "stuck" in anger or denial.¹⁵⁰ These effects, in turn, are likely to reduce recidivism in the wrongdoer, reintegrate the wrongdoer into the community, and promote healing and closure for those harmed by his

143. For example, see the facts of *Spaulding v. Zimmerman*, 116 N.W.2d 704 (Minn. 1962), as set forth in RUSSELL G. PEARCE, DANIEL J. CAPRA, & BRUCE A. GREEN, PROFESSIONAL RESPONSIBILITY: A CONTEMPORARY APPROACH 775–85 (2011), quoting Timothy W. Floyd & John Gallagher, *Legal Ethics, Narrative, and Professional Identity: The Story of David Spaulding*, 59 MERCER L. REV. 941, 944–50 (2008) (detailing the dynamics of a lawsuit between the two families involved in a severe auto accident, with some deaths, in a small rural community).

144. Maldonado, *supra* note 98.

145. *Id.*

146. See generally Scheff, *supra* note 51; *supra* text accompanying notes 78–127.

147. See generally TESLER, *supra* note 18; TESLER & THOMPSON, *supra* note 137.

148. Barton Poulson, *A Third Voice: A Review of Empirical Research on the Psychological Outcomes of Restorative Justice*, 2003 UTAH L. REV. 167, 199 (2003) (in evaluation studies comparing restorative justice programs to court programs, restorative justice outperformed courts in recidivism and satisfaction measures).

149. See Scheff, *supra* note 51.

150. See Slocum, *supra* note 95, at 529–32.

acts.¹⁵¹ In 2000, Daniel Shuman listed a number of therapeutic benefits to apology; after noting the above effects, he added a few more.¹⁵² First, apology is believed to be “a vehicle to adjust an imbalance of power in a relationship that occurs when a wrong is committed by a party to the relationship.”¹⁵³ Second, it places responsibility for harm on the apologizer and removes doubt about contributory accountability from the victim (e.g., “if I had not done such and such, maybe the harm would not have happened”).¹⁵⁴ Third, it can be an “important therapeutic balm,”¹⁵⁵ and it can make parties more willing to settle.¹⁵⁶ However, he also explored empirical evidence that apologies do not have a uniformly positive effect and cautioned against over-optimism in their use, while concluding that apologies are generally useful in tort cases.¹⁵⁷

Due to the benefits and healing promoted by apology and forgiveness described above,¹⁵⁸ they are just as utile in civil dispute resolution as they are in criminal law. Because it tends to facilitate a deeper peace or resolution of the legal matter, all civil and criminal dispute resolution processes may consider incorporating opportunities for apology, forgiveness, and reconciliation where appropriate.¹⁵⁹ This includes traditional pre-trial (or even pre-filing) negotiation and settlement, mediation, arbitration, and litigation.

Law professor and TJ co-founder David Wexler has mined social science research for ways to enhance parties’ compliance with post-litigation court orders, such as when a court orders a criminal defendant to take certain preventive actions (e.g., cleanup) in an environmental case.¹⁶⁰ He argues

151. See Scheff, *supra* note 51.

152. See Daniel W. Shuman, *The Role of Apology in Tort Law*, 83 JUDICATURE 180, 183 (2000) (exploring in detail the field of apology and concluding that, despite scant empirical evidence for its benefits, apology has therapeutic potential in in tort law).

153. *Id.*

154. See *id.* at 184.

155. *Id.*

156. *Id.* at 183.

157. *Id.* at 189.

158. See *supra* text accompanying notes 82–130.

159. For example, many cases may involve parties who will not be able to meet or interact in a positive manner, despite extensive pre-meeting preparation (such as perhaps some domestic violence cases), or for whom it is meaningless (such as large corporate clients with no relational history or future between them, or tax or regulatory matters between a corporate client and a governmental agency).

160. David B. Wexler, *Therapeutic Jurisprudence and the Criminal Courts*, in KEY, *supra* note 92, at 157–167. See also Bruce J. Winick, *Redefining the Role of the Criminal Defense Lawyer at*

that this research suggests that making a public commitment to comply with a behavior plan—here a court order—can enhance the likelihood that the wrongdoer will comply with the court order.¹⁶¹ A public apology and statement of intention to change may similarly enhance the possibility that the apologizer will carry through and change his behavior in the future.

In sum, integrating apology, forgiveness, and reconciliation into the law can make the law work more sanatively. However, lawyers and judges might not accept this as a legitimate goal of the law and may wonder how to integrate this into traditional approaches to lawyering and judging. TJ provides a theoretical framework to justify integrating apology, forgiveness, and reconciliation into all dispute resolution processes (criminal and civil). TJ also explains why adjunctive processes in the law or diversionary programs in lieu of traditional adjudication should be proposed to accomplish these goals, and encourages legitimizing and coordinating similar efforts across all substantive areas of the law.

B. Preventive Law

Preventive law, founded by the late Louis Brown, is the concept that law can be used preventatively to avoid litigation.¹⁶² It is similar to preventive medicine, which seeks to prevent disease and illness. Lawyers can meet with their clients to conduct legal checkups and audits of the clients' affairs, uncover situations that might lead to litigation in the future, and put legal strategies in place or make moves to avoid such litigation.¹⁶³ In addition, litigated cases can be “rewound” to explore how the litigation might have been prevented by proactive, early-intervention legal moves.¹⁶⁴

For example, as discussed earlier, apologies by physicians and hospitals in medical malpractice situations have demonstrably reduced both the amount of medical malpractice litigation brought against those physicians and hospitals by the harmed patients and their families and the dollar amount

Plea Bargaining and Sentencing: A Therapeutic Jurisprudence/Preventive Law Model, in PTJ, *supra* note 19, at 279–80.

161. Wexler, *supra* note 161.

162. ROBERT M. HARDAWAY, PREVENTIVE LAW: MATERIALS ON A NON ADVERSARIAL LEGAL PROCESS (1997) (the “textbook” for preventive law). The PREVENTIVE LAW REPORTER has been published since 1982 (Butterworth Legal Publishers) by the National Center for Preventive Law (U.S.), University of Denver, College of Law. *See also* LOUIS M. BROWN & EDWARD A. DAUER, PLANNING BY LAWYERS: MATERIALS ON A NON-ADVERSARIAL LEGAL PROCESS (1977).

163. PTJ, *supra* note 19, at 6–7 (describing these aspects of preventive law).

164. *See* PTJ, *supra* note 19, at 75–77 (illustrating a rewind of a case). *See generally* Bruce J. Winick, *A Legal Autopsy of the Lawyering in Schiavo: A Therapeutic Jurisprudence/Preventive Law Rewind Exercise*, 61 U. MIAMI L. REV. 595 (2007).

paid out to settle those claims.¹⁶⁵ Apologies can be an excellent litigation prevention move by potential defendants. First, obtaining an apology may be one of the potential plaintiff's main purposes in suing.¹⁶⁶ Second, by reducing anger and hostility between the parties, apology (and forgiveness, if given) can minimize the potential for emotion-driven litigation, as Slocum suggests.¹⁶⁷ Apology is therefore entirely consistent with a preventive law approach to litigation, where that litigation arises from wrongdoing for which the actor can apologize.

C. *Procedural Justice*

Procedural justice (PJ) refers to robust social science findings that litigants' satisfaction and perceptions of fairness of legal processes depend not on whether they won or lost, but on three factors: (1) having a voice and participation in the decision making process; (2) being treated with respect and dignity by those in authority; and (3) perceiving those in authority as trustworthy, which in turn depends on having decisions explained by those in authority.¹⁶⁸ These conclusions are based on empirical social science findings by Lind and Tyler in the 1990s.¹⁶⁹

The most important of these findings for apology is perhaps the idea that legal participants—litigants and crime victims for example—desire a “voice,” that is, a chance to tell their story and be heard. This might be rele-

165. See examples cited *supra* text accompanying notes 8–11.

166. For example, near the end of the film, *A CIVIL ACTION*, the lawyers meet with the plaintiffs to deliver the monetary outcome of the lawsuit. One plaintiff expresses dissatisfaction, reminding her attorney that she never wanted money for the wrongful death of her son; what she wanted was an apology for what had been done. The apology was not made and the plaintiff was dissatisfied with receiving money in lieu of it. *A Civil Action*, *supra* note 124. See also Robbenolt, *supra* note 124, at 358–59; Tamara Relis, “*It’s not about the money!*”: *A Theory on Misconceptions of Plaintiffs’ Litigation Aims*, 66 U. PITT. L. REV. 341, 361 (2006) (noting that most claimants’ motives for suing are not financial); Jennifer K. Robbennolt, *Role of Apologies in Resolving Health Care Disputes*, 21 GA. ST. U. L. REV. 1009, 1018 (2005) (noting the desire of plaintiffs in medical malpractice cases for apologies, full disclosure, explanations, and plans for how similar events would not happen in the future).

167. See PATRICK J. FLINN, *HANDBOOK OF INTELL. PROP. CLAIMS & REMEDIES* § 1.02 (Supp. 2011) (suggesting that clients in commercial disputes should not litigate because of “frustration or anger” but should examine more rational purposes, such as “commercial business realities”). See also Slocum, *supra* note 91 (exploring generally the negative aspects of vengefulness in clients which apology may reduce).

168. Tom Tyler, *The Psychological Consequences of Judicial Procedure*, in KEY, *supra* note 92.

169. *Id.*

vant when crafting a process of apology; for example, forgiveness might depend on whether or not the hearer felt as if he had been given a chance to be heard by the apologizer first.

For example, in victim-offender mediations, often the victim speaks first.¹⁷⁰ The victim is encouraged to express to the offender the impact of the offense on the victim's life, describe the extent and nature of the harm done, and ask questions, if desired, about why the offensive action was done.¹⁷¹ This process can provide a "voice" for the victim that a traditional criminal court might not. When the offender speaks, the offender is encouraged to acknowledge this impact and harm, thus affirming that the victim's voice was heard by the offender.¹⁷²

Giving civil parties opportunities for apology, forgiveness, and reconciliation can, if engineered properly, provide an opportunity for both sides to have "voice" and participation in the dispute resolution process. For example, in a contract dispute between former business partners, both parties may have done and said things they regret. Having an opportunity for mutual apologies and mutual forgiveness in a mediation or settlement conference setting might afford both parties more voice, ownership of the resolution process, and a greater stake in resolving the dispute. They might become more active and collaborative with each other in crafting a plan of action for ending their partnership satisfactorily. This, in turn, should enhance their satisfaction with the process.¹⁷³ Finally, studies suggest that parties' enhanced satisfaction with a legal process may lead to greater compliance with any court order or settlement agreement resulting from the process.¹⁷⁴

D. Holistic Justice and Creative Problem Solving

These two vectors do not explicitly relate to apology, forgiveness, and reconciliation, but both generally encourage healing in parties involved in legal matters or seek to consider more than the assertion of legal rights in legal matters.¹⁷⁵ Holistic justice seeks to view legal matters from a broader perspective and to foster peace among involved parties.¹⁷⁶ It explicitly in-

170. Bazemore & Umbreit, *supra* note 136.

171. *Id.*

172. *Id.*

173. Voice and participation are important to litigants' satisfaction with legal processes, according to empirical research by Tyler, *see* Tyler, *supra* note 169.

174. *See* Wexler, *supra* note 161.

175. Daicoff/Pepperdine, *supra* note 20, at 5–10.

176. From the former website of the former (now dissolved) International Alliance of Holistic Lawyers (www.iah.org). This organization, founded primarily by and for practicing lawyers, disbanded in 2011 as it had served its transformative purpose within the legal profession. *See also*

corporates the lawyer's and client's moral and spiritual beliefs and values in the legal representation.¹⁷⁷ Creative problem solving views legal matters as problems to be solved and considers parties' needs, goals, resources, strengths, psychological functioning, and the like, in addition to their legal rights and duties, in seeking creative solutions to those problems.¹⁷⁸ The therapeutic benefits of apology and forgiveness for parties are valuable considerations for both holistic lawyers and those operating as creative problem solvers, because both approaches look outside the legal rights, obligations, and duties involved in legal matters to seek a more comprehensively satisfactory outcome.¹⁷⁹ They both take into account factors such as the client's beliefs, goals, values, needs, resources, relationships, wellbeing, and mental state in crafting a solution to the legal problem with the client.¹⁸⁰

In addition, fostering an opportunity for litigating parties to apologize and forgive one another may well be a holistic or creative solution to the legal problem as an alternative to litigation or even traditional mediation. Finally, the potential for reconciliation of the parties to each other (horizontal harmony) and for reconciliation of a wrongdoer to the Divine (vertical harmony) is likely to be particularly consonant with a holistic approach to legal matters, which explicitly allows for the integration of value- or faith-based concerns of lawyers and clients into legal representation.¹⁸¹ Forgiving one's

WRIGHT, *supra* note 16 (authored by an American lawyer, mediator, collaborative lawyer, author, and journalist, this book explores in detail the comprehensive law movement, including practicing law holistically).

177. Correspondence with William Van Zyverden, founder, International Alliance of Holistic Lawyers (Nov. 1999) (on file with author).

178. Linda Morton, *Teaching Creative Problem Solving: A Paradigmatic Approach*, 34 CAL. W. L. REV. 375, 376–78 (1998) (exploring the application of creative problem solving to traditional legal situations); THOMAS D. BARTON, *PREVENTIVE LAW AND PROBLEM SOLVING: LAWYERING FOR THE FUTURE* (2009) (the most recent and exhaustive book on preventive law, authored by the director of the National Center for Preventive Law at California Western School of Law). See generally Janeen Kerper, *Creative Problem Solving vs. The Case Method: A Marvelous Adventure in Which Winnie-the-Pooh Meets Mrs. Palsgraf*, 34 CAL. W. L. REV. 351 (1998) (exploring the application of creative problem solving to the famous *Palsgraf* case in many first-year torts classes).

179. See SUSAN DAICOFF, *COMPREHENSIVE LAW PRACTICE: LAW AS A HEALING PROFESSION* 125–131, 135 (2011) [hereinafter DAICOFF/CLP] (noting this feature of both holistic law and creative problem solving).

180. See Daicoff/Pepperdine, *supra* note 20, at 20–24 (exploring some extralegal concerns relevant in creative problem solving and holistic justice).

181. Van Zyverden, *supra* note 178. Horizontal and vertical harmony are discussed at *supra* text accompanying notes 53–54.

enemies and making amends for harms done are concepts consistent with Christianity, for example, as well as other religions.¹⁸²

E. Transformative Mediation

In civil law, some forms of mediation, such as transformative mediation,¹⁸³ tend to encourage and foster a process similar to Scheff's "core sequence."¹⁸⁴ They encourage the parties to see the situation from the other's perspective, to understand why they feel and act as they do, and to communicate this mutual understanding to each other.¹⁸⁵ They argue that without this exchange of "recognition" or empathy to the other, deep resolution or deep peace between parties will not occur.

Transformative mediation (TM) is an approach to mediation of civil and criminal disputes that explicitly focuses on improving the moral growth of the two parties.¹⁸⁶ It was conceived of by law professor R. Baruch Bush in the 1990s and has been used in a wide variety of settings, including the United States Postal Office, to resolve workplace disputes.¹⁸⁷ In TM, the mediator focuses on fostering "moral growth" in the disputing parties by centering on two things: "empowerment" and "recognition."¹⁸⁸ Empowerment refers to helping the parties realize that they have options and choices and that they are not a victim of fate but have some measure of decision making ability, personal power, and control in the dispute resolution process.¹⁸⁹ Recognition, however, is arguably the most relevant to apology. It resembles what psychologists call "empathy": the ability of one party to "stand in the shoes" of the other party and to understand the thoughts, feel-

182. See *Matthew* 6:9–13 (New International Version 2004) (mentioning forgiveness); Pynchon, *supra* note 86, at 323 (concluding with thoughts about the relevance of amends, faith, forgiveness in Alcoholics Anonymous in the restorative justice context); Shuman, *supra* note 153, at 183 (noting that the Talmud references "repentance").

183. ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: THE TRANSFORMATIVE APPROACH TO CONFLICT* (2005) [hereinafter BUSH & FOLGER (1997)].

184. See *supra* text accompanying notes 62–123, regarding Scheff's core sequence.

185. This is known as "recognition," one of two explicit goals of TM. BUSH & FOLGER (1997), *supra* note 184, at 23.

186. See generally BUSH & FOLGER (1997), *supra* note 184.

187. *Id.* at 26. The USPS transformative mediation program is known as REDRESS, which stands for Resolve Employment Disputes Reach Equitable Solutions Swiftly. *Id.*; see also UNITED STATES POSTAL SERVICE, REDRESS, <http://about.usps.com/what-we-are-doing/redress/welcome.htm>.

188. *Id.* at 22, 23.

189. *Id.* at 35.

ings, motivations, and actions of the other party.¹⁹⁰ It also encompasses the expression by one party of that understanding to the other party, which TM calls “giving recognition.”¹⁹¹ Giving recognition, according to TM, fosters moral growth in the parties involved, which is TM’s explicit aim.¹⁹²

TM might call the shift that occurs in a successful apology-forgiveness sequence a “shift to the other,” meaning that each party shifts his focus from a self-centered, narcissistic focus on his own feelings, wants, and needs to a focus on understanding the other better.¹⁹³ Further, TM would say that a party has experienced desirable moral growth when he makes this shift and that it is a mark of increased maturity.¹⁹⁴

For example, imagine a personal injury case where, through pre-trial settlement negotiations or mediation, the defendant comes to understand, for the first time, the impact of the injury on the plaintiff, her family, her self-esteem, and her future hopes and dreams. When he acknowledges this to the plaintiff, it may fulfill TM’s concept of “giving recognition.”¹⁹⁵ In turn, this “giving of recognition” by the defendant to the plaintiff might be received by the plaintiff as an apology. For example, if the defendant says, “I understand now how this affected you, and I realize it has been devastating for you,” his next statement indeed might be an expression of remorse—e.g., “and I am sorry for your pain.” The plaintiff might experience healing as a result of these statements and then might decide to forgive the defendant. If her statement of forgiveness includes her understanding of his plight as well—e.g., “Thank you. I see that it hasn’t been easy for you either, and I now understand more about why you did what you did”—it may fulfill TM’s concept of giving recognition. Therefore, the concepts of apology and forgiveness easily may relate to TM’s concept of recognition.

While recognition—the experience of one party’s expressing an understanding of the other party’s thoughts, feelings, motives, or actions—certainly can *facilitate* remorse, it may not be a necessary prerequisite for it. One might be remorseful for one’s actions without appreciating the experi-

190. *Id.* at 37. See Marjorie A. Silver, *Emotional Competence and the Lawyer’s Journey*, in SILVER, *supra* note 19, at 5–52 (describing empathy from a social science perspective and describing its utility in lawyering).

191. BUSH & FOLGER (1997), *supra* note 184, at 77.

192. *Id.* at 22–23.

193. *Id.* at 55.

194. *Id.* at 12, 95.

195. BUSH & FOLGER (1994), *supra* note 75, at 90–91.

ence of the other or the harm the other has suffered.¹⁹⁶ While apology, forgiveness, and reconciliation of the parties are not the aim of TM, they may well be by-products of a transformative mediation process.

F. Collaborative Law

Collaborative law is an innovative form of domestic relations law practice in which lawyers representing divorcing spouses eschew court in favor of resolving the legal issues of divorce and child custody and support via a series of four-way (or more) conferences between the two attorneys and two spouses.¹⁹⁷ Neutral or partisan interdisciplinary experts may also be included as part of the “team.”¹⁹⁸ The lawyers contractually agree to withdraw from legal representation of the clients if the talks break down, settlement is not reached, and the parties proceed to court.¹⁹⁹ This aligns the lawyers’ financial interests with that of the clients and facilitates movement towards a non-litigated resolution of the case.²⁰⁰ In addition, discovery is voluntary and the process is “collaborative” rather than needlessly adversarial.²⁰¹ Collaborative law and collaborative divorce are designed to promote positive interactions between divorcing spouses in order to maximize their post-

196. Perhaps one develops remorse only because one is sorry one has been caught, charged with a crime, or sued for a wrong, thus maintaining a narcissistic focus on oneself.

197. See generally TESLER, *supra* note 18 (book authored by a pioneer and trainer in the collaborative law field, speaking primarily to lawyers who wish to become collaborative lawyers). See also FORREST S. MOSTEN, *COLLABORATIVE DIVORCE HANDBOOK: HELPING FAMILIES WITHOUT GOING TO COURT* (2009); TESLER & THOMPSON, *supra* note 134; STUART G. WEBB & RONALD D. OUSKY, *HOW THE COLLABORATIVE DIVORCE METHOD OFFERS LESS STRESS, LOWER COST, AND HAPPIER KIDS WITHOUT GOING TO COURT: THE SMART DIVORCE* (2006); NANCY J. CAMERON, *COLLABORATIVE PRACTICE: DEEPENING THE DIALOGUE* (2004); Pauline H. Tesler, *Collaborative Law: A New Paradigm for Divorce Lawyers*, 5 PSYCH. PUB. POL’Y & LAW 967 (1999); Pauline H. Tesler, *Collaborative Law: What It Is and Why Family Law Attorneys Need to Know About It*, 13 AM. J. FAM. L. 215 (1999); Pauline H. Tesler, *Collaborative Law: A New Approach to Family Law ADR*, 2 CONFLICT MGMT. 12 (1996); Pauline H. Tesler, *Collaborative Law Neutrals Produce Better Resolutions*, 21 ALTERNATIVES HIGH COST LITIG. 1 (2003); Pauline H. Tesler, *Client Relations: Tips From a Collaborative Practitioner*, 21 ALTERNATIVES HIGH COST LITIG. 13 (2003). National and local collaborative law websites exist in many areas. See, e.g., INT’L ACAD. OF COLLABORATIVE PROFS., <http://www.collaborativepractice.com/>.

198. Gary L. Voegelé, et al., *Family Law: Collaborative Law: A Useful Tool for the Family Law Practitioner to Promote Better Outcomes*, 33 WM. MITCHELL L. REV. 971, 976 n.25 (2007) (describing the interdisciplinary form of collaborative divorce). See also TESLER & THOMPSON, *supra* note 134 (book devoted to collaborative divorce).

199. TESLER, *supra* note 18, at 6. See also Voegelé, et al., *supra* note 196, at 978 (noting the various names given to this feature).

200. TESLER, *supra* note 18, at 11.

201. Jennifer M. Kuhn, *Working Around the Withdrawal Agreement: Statutory Evidentiary Safeguards Negate the Need for a Withdrawal Agreement in Collaborative Law Proceedings*, 30 CAMPBELL L. REV. 363, 371 (2008).

divorce well-being and ability to work together to co-parent any children of their marriage.²⁰²

Apology and forgiveness between divorcing spouses are not explicitly part of a collaborative law process, but certainly could facilitate resolution of collaborative law cases. Given the collaborative atmosphere of this form of law, apology and forgiveness could easily occur and be fostered. For example, collaborative lawyer and trainer Pauline Tesler mentions that collaborative clients must be able to manage their negative emotions, avoid slipping into their “shadow self,” and negotiate honestly.²⁰³ Striving towards this ideal may encourage clients to consider apologizing to and forgiving each other. If this occurs, it may also facilitate a smoother resolution of the collaborative law case.

For example, imagine a collaborative case in which the wife finds the husband in an extramarital relationship that has now ended. The resolution of their dissolution in a collaborative process may proceed more smoothly if an apology is given and received. It may even prompt a mutual apology where both parties acknowledge their part in the end of their marriage, which is likely to have a significant impact on any lingering feelings of bitterness, blame, or uncertainty. It may also assist the parties in resolving the divorce emotionally, releasing anger and blame as Slocum suggests,²⁰⁴ and moving on.

Reconciliation, on the other hand, is an unknown quantity in the context of collaborative law. It could refer to the spouses becoming less hostile towards each other, or it could mean they stay married. The International Academy of Collaborative Professionals reports data showing that, of 710 collaborative cases in the United States between 2006 and 2009, 3 percent of the couples reconciled.²⁰⁵

202. Pauline H. Tesler, *Collaborative Law: A New Paradigm for Divorce Lawyers*, 5 PSYCHOL. PUB. POL'Y & LAW 967, 967–79 (1999).

203. *Id.* at 967.

204. Slocum, *supra* note 91, at 529–32 (counseling clients and lawyers to work towards releasing anger in litigation).

205. Data provided by Attorney Nicole Hahl of Jacksonville, Florida, in a collaborative law training in Jacksonville (2009) (according to Hahl, the International Academy of Collaborative Professionals reported that of these 710 cases, 87 percent completed the CL process, 10 percent terminated the collaborative process, and 3 percent of the couples reconciled).

G. Restorative Justice

Restorative justice (RJ) is a broad movement within criminal law to use an alternative process to handle criminal cases. It seeks to involve all the stakeholders in a crime—offenders, victims, and the surrounding community—in its disposition.²⁰⁶ It defines crime as an offense by the offender against others, not against the state, and it seeks restorative measures rather than retributive justice.²⁰⁷ RJ has empirically documented lower recidivism rates among criminal defendants engaged in RJ as compared to traditional criminal justice processes.²⁰⁸

RJ is the most relevant of the vectors, as it explicitly incorporates apology, forgiveness, and reconciliation of victims, offenders, and society into its resolution of criminal matters.²⁰⁹ For example, it contemplates that the offender will accept responsibility for his acts and then express that (if not fully apologize) directly to the victim, to other affected individuals, and to society. It contemplates that these individuals might then, in an ideal situation, express forgiveness to the offender, and that the victim and offender would be reconciled. It also hopes that the offender will be reconciled with and reintegrated back into his community. It provides for offenders to make *symbolic reparations* (i.e., apologies) and *material reparations* (e.g., fines, payments, community service, and other perhaps creative measures such as having a driving-while-intoxicated offender give lectures to local teen groups on the dangers of drunk driving) to the victims and the community.²¹⁰ It gives victims and the community a voice and participation in determining the outcome of the crime and the consequences to the offender. It can be used as (1) a pretrial diversion or alternative to the traditional criminal courts, such as in family group conferencing for juvenile crime, (2) an alternative sentencing measure, such as in circle sentencing in a tight-knit community, or (3) a post-adjudication, stand-alone measure with no legal effect, such as in victim-offender mediation in the United States.²¹¹

Restorative justice explicitly rests on the assumption that apology-forgiveness-reconciliation is desirable, and it provides opportunities for criminal offenders and victims to meet, face-to-face, for that express pur-

206. See ZEHR, *supra* note 48, at 64–69.

207. *Id.* at 58–59.

208. Bazemore & Umbreit, *supra* note 136, at 28, 34; see also MOSTEN, *supra* note 198, at 397.

209. See generally Scheff, *supra* note 51 (explicitly examining apology, forgiveness, and reconciliation in the context of a “core sequence” in restorative justice processes).

210. Scheff, *supra* note 51, at 102–04.

211. Bazemore & Umbreit, *supra* note 133, at 3–4 (describing four types of RJ processes: victim-offender mediation, family group conferences, circle sentencing, and reparative probation programs).

pose.²¹² If face-to-face meetings are not possible, some RJ processes can be accomplished by letter, video, or other means of communication.

For example, Barbara Stahura gives an example of a father of three who was killed by a drunk driver one summer night as he and his wife were walking home from a community festival.²¹³ The driver was a twenty-five-year-old deputy county sheriff. The wife, also injured in the accident, found herself sympathetic to the driver and requested a lighter sentence, which the county attorney refused. Dissatisfied with the legal process, she and the driver began meeting separately with a restorative justice mediator. After a year of preparatory meetings, they were ready to meet. In the meeting, they reached an agreement by which the driver would speak to the father's three children about their father's death, and the wife and the driver would speak jointly to school and community groups and would ask the city council to build a sidewalk on the road where the accident happened.²¹⁴

Stahura does not report the following, but here is an ideal sequence:²¹⁵ This is the sort of victim-offender mediation in which the wife would speak first, describing the impact on her of the accident and her husband's death. She might also have questions for the driver (e.g., "What happened that night?"). The driver would speak next, acknowledging the harm his actions had caused, answering her questions, and apologizing to the wife. With more discussion, the wife might eventually extend forgiveness to the offender (although this is not mandatory). Together they would begin outlining a plan of reparations he could make to repair the harm and be reintegrated into their small, mutual community. In some situations, the reconciliation between the victims and offenders is so profound that they are able then to speak jointly to civic groups and others (as these two did²¹⁶) about the dangers of drunk driving.

However, reaping the full benefits of the apology-forgiveness-reconciliation sequence in criminal law would require providing more opportunities for restorative justice processes to be used in criminal cases.

212. Laura I. Appleman, *The Plea Jury*, 85 IND. L. J. 731, 740 (2010) (stating that RJ includes "moral and substantive principles, including responsibility, remorse, atonement, making amends, moral learning, forgiveness, and reconciliation").

213. Barbara Stahura, *Trail 'Em, Nail 'Em, and Jail 'Em: Restorative Justice, Spirituality & Health*, Spring 2001, at 43.

214. *Id.*

215. For an explanation and overview of this process, see ZEHR, *supra* note 48 and MOSTEN, *supra* note 194.

216. Stahura, *supra* note 214, at 43.

Americans are usually loathe to replace traditional criminal courts with restorative justice processes, most likely due to a deep societal commitment to individual freedoms and rights embodied in the Fourth, Fifth, and Sixth Amendments to the United States Constitution.²¹⁷ As such, in the United States, RJ has historically been limited to use in juvenile offenses in lieu of adjudication (such as “teen court”) and in stand-alone, adjunctive processes in adult criminal litigation (such as post-incarceration, victim–offender mediation that has no effect on the legal outcome of the case). While restorative justice processes such as victim–offender mediation or community circles can be used pre-adjudication (in lieu of traditional court adjudication) and post-adjudication (as a diversionary process in lieu of traditional sentencing), RJ may remain relegated to the post-sentencing phase as an adjunctive, non-legal process.²¹⁸ Even so, RJ could be expanded in the United States as follows: each community or courthouse could establish specialized RJ centers to provide space, personnel (including mediators trained in RJ), and other resources (such as perhaps social workers, other interdisciplinary professionals, and training for public and private lawyers to be able to conduct RJ sessions in criminal cases). These RJ-trained lawyers could serve as independent third-party RJ mediators rather than as representational advocates in the cases. Alternatively, perhaps both prosecutors and criminal defense lawyers might be trained in RJ, so they could facilitate informal RJ processes between victims and offenders in all criminal cases. The use of RJ is likely to promote healing and lowered crime incidences for victims, criminal offenders, and communities.

H. Problem Solving Courts

Apology, forgiveness, and reconciliation may also be relevant in problem solving courts, which encompass drug treatment courts, domestic violence courts, homeless courts, mental health courts, and community courts.²¹⁹ In drug treatment court, criminal offenders who are substance-dependent and otherwise eligible may volunteer for the program, which places them into court-mandated and court-supervised substance abuse treatment in lieu of traditional criminal court. Upon successful graduation and rehabilitation, the criminal charges are often dropped or avoided.

217. U. S. Const. amend. IV, V, VI (protecting against unreasonable search and seizure, protecting against double-jeopardy and self-incrimination, and protecting the right to a speedy trial).

218. DAICOFF/CLP, *supra* note 180, at 229.

219. CENTER FOR COURT INNOVATION, <http://www.courtinnovation.org> (last visited September 4, 2011) (listing these courts and others in separate webpages therein).

Many substance abuse programs rely on “twelve-step” programs such as Alcoholics Anonymous or Narcotics Anonymous as part of the rehabilitation. These twelve step programs explicitly contain a mandate for members to “make amends” with those they have harmed in the past²²⁰ and also to make amends on a routine basis.²²¹ This amends process contemplates a combination of apologizing to those persons harmed by the member and changing one’s behavior towards them in the future.²²² Therefore, indirectly, apologies may be practically mandatory for drug treatment court participants, via these court-ordered, twelve-step-based, treatment programs.²²³ Forgiveness is, of course, entirely optional on the part of those to whom amends are made, but it, as well as reconciliation with family and friends, may occur through the rehabilitative process.

I. An Expanded “Toolkit” for the Lawyer

David Wexler has suggested that the comprehensive law movement vectors fall into two groups: those that form theoretical approaches to legal matters and those that provide concrete *processes* for their resolution.²²⁴ More specifically, he explains that TJ, PL, HJ, CPS, and PJ might be seen as *lenses* through which one might view a legal dispute and assess what moves in the case would accomplish the respective goals of each lens (e.g., be therapeutic to, countertherapeutic to, provide voice for, or silence the parties).²²⁵ While CL, TM, RJ, and problem solving courts can function as *lenses*, they also provide concrete *processes* and methods (with specific skills) to resolve disputes that differ from traditional means of resolution.²²⁶ There is a great deal of overlap or combination of vectors. For example, problem solving

220. ALCOHOLICS ANONYMOUS, *Twelve Steps and Twelve Traditions*, World Services, Inc. 83–87 (1952; 2000). “Step Nine” requires members to make direct “amends.” *Id.* at 83.

221. “Step Ten” requires members to “continue . . . to take personal inventory and when we were wrong promptly admit . . . it.” *Id.* at 88.

222. Amends within “Step Nine” mean to “freely admit the damage we have done and make our apologies . . . pay, or promise to pay, whatever obligations, financial or otherwise, we owe.” *Id.* at 84.

223. See Pynchon, *supra* note 86, at 318 (exploring the relationship of twelve-step programs to restorative justice and apology-forgiveness-reconciliation).

224. Daicoff/Pepperdine, *supra* note 20, at 10 citing David B. Wexler & Bruce J. Winick, *Patients, Professionals, and the Path of Therapeutic Jurisprudence*, 10 N.Y.L. SCH. HUM. RTS. 907, 909–10, reprinted in KEY, *supra* note 92.

225. See Daicoff/Pepperdine, *supra* note 20, at 11–24.

226. See *id.* at 24–38.

court is a specific legal *process* that often references TJ as its theoretical basis (*lens*).²²⁷ Further, one can choose one or more lenses through which to approach a legal matter (e.g., divorce could be viewed through a combination of TJ, PL, and CPS lenses) and, using those lenses, one or more processes could be used to resolve it (e.g., divorce could be resolved through CL or perhaps facilitative mediation). It is likely that the approaches and combinations will vary as appropriate, on a case-by-case basis.

When practicing law “comprehensively,” it may be useful to group the vectors into an “organizational chart” containing all the possible comprehensive approaches and dispute resolution methods a lawyer or court could take when dealing with particular legal matters.²²⁸ This chart illustrates the variety of “lenses” and processes available to the modern lawyer, mediator, and judge. Where the traditional adversarial model led only to traditional court or out-of-court settlement the comprehensive law movement substantially expands the “toolkit” of lawyers, dispute resolvers, and courts.

Comprehensive lawyers therefore have at their disposal a wide array of perspectives and processes with which to handle legal matters. They may combine the various vectors of the comprehensive law movement with each other and with traditional approaches and processes, on a case-by-case basis, as appropriate. Because apology, forgiveness, and reconciliation may be relevant to most of the vectors of the comprehensive law movement, they may be employed in many comprehensive law cases.

V. MAKING APOLOGIES EFFECTIVE

Once it has been determined that apology, forgiveness, and even reconciliation might be valuable in resolving legal disputes, certain elements are required for maximum effectiveness.²²⁹

227. A joint resolution of the Conference of Chief Justices (Resolution 22) and the Conference of State Court Administrators (Resolution 4), adopted in August 2000, specifically encourages the development of courts utilizing therapeutic jurisprudence principles (such as drug treatment courts), referring to them as “problem solving courts and calendars.” CCJ Res. 22, Cong. (2000); COSCA Res. 4, Cong. (2000), <http://dcpi.ncjrs.org/pdf/Chief%20Justice%20Resolution.doc> (last visited July 8, 2010).

228. Susan Daicoff, *Afterword: The Role of Therapeutic Jurisprudence within the Comprehensive Law Movement*, in PRACTICING THERAPEUTIC JURISPRUDENCE 486–89 (DENNIS P. STOLLE, DAVID B. WEXLER, & BRUCE J. WINICK eds., 2000).

229. Smith, *supra* note 34. See also Shuman, *supra* note 153 (exploring a wide array of necessary elements for apologies).

A. *A Practical Framework for Apologies*

In 2009, the author asked her upper-level elective Comprehensive Law Practice law school class to draft victim statements and offender apologies.²³⁰ Despite variations, there were recurring themes that were common to their written products. These themes are consistent with the RJ literature and may give lawyers a road map for how to coach clients in drafting these statements. They are set forth in the following table:

| Concept | Victim's Need | Offender's Apology |
|------------------------|---|--|
| <i>Consequences</i> | To express the impact the O's actions had on the V's life, including expressing the painful emotions caused in the V by the event | To understand and acknowledge the impact the O's actions had on the V's life |
| <i>Apology/Remorse</i> | To believe; to have faith that the O really is sorry for what he did, is remorseful, and regrets what happened not solely for selfish reasons | To apologize; to say I'm sorry, express remorse; to regret that the event happened to the V, in a sincere, non-selfish, non-self-focused manner, with O being visibly ashamed of what he did and not being angry, which allows V to see O as human—forges a bond between V & O |
| <i>Responsibility</i> | To have all blame shifted entirely off the V and entirely onto the O for the event | To accept responsibility for what happened, to express awareness that the event was “wrong” and that O did wrong |
| <i>Forgiveness</i> | To forgive the O, to stop being angry with the O, to stop lecturing the O from a moral hilltop, to see the O as a fellow human being—forges bond between the V & the O NOTE: relentless anger at the O | To receive V's forgiveness |

230. This course, which is a survey skills course of the various vectors of the comprehensive law movement, has been taught by the author (since 2001) and others at Florida Coastal School of Law and at Arizona Summit Law School.

| | | |
|--|---|---|
| | is moral indignation, which is unacknowledged (projected) shame | |
| <i>Understanding</i> | To ask why, to understand more about why this happened to the V; may also include understanding the O as a fellow human being | Explains why the offense was done; may also include understanding the V as a fellow human being |
| <i>Positive Outcome/Rehabilitation</i> | To have faith that something good can come out of this event, that the O will improve as a result | To admit that O has a problem, to express O's willingness to change |
| <i>Restitution to V</i> | To receive material restitution from the O, to "make whole" the loss that arose from the event | To express willingness to make material restitution to V, to outline a plan for it |
| <i>Plan for the Future</i> | To know that this will not happen again | To describe his plan for changing and not recidivating |

Two other concepts from the apology-forgiveness-reconciliation literature may be relevant but did not appear in the students' work: restoration and reconciliation.²³¹ All of the foregoing should result in the restoration of the offender to society as a respected member without shame, restoration of the victim's status in society, restoration for the victim's wound or loss, and restoration of the social order and the balance to the society in which victim and offender live.²³² Reconciliation of the parties' relations may or may not occur, as stated above.²³³ Finally, while this table is written in terms of a criminal case, it may also be applied in situations involving civil wrongs, where there is a wrongdoer and persons harmed. A recent civil apology is analyzed, below, using this table.

B. Example: Tiger Woods' Public Apology

As mentioned above,²³⁴ professional golfer Tiger Woods, upon being discovered in marital unfaithfulness, made a public apology in 2010.²³⁵ The

231. See *supra* text accompanying notes 53–57.

232. See O. Carter Snead, *Memory and Punishment*, 64 VAND. L. REV. 1195 (2011) (referencing the reintegration of both offenders and victims into society, "often after a large-scale atrocity," and exploring restoration).

233. See *supra* text accompanying notes 53–57.

234. See *supra* text accompanying note 3.

235. Woods, *Tiger Wood's apology*, *supra* note 3.

Woods apology as set forth in Appendix 2 is quite complete, as it contains all of the elements listed above.

However, some might argue that the Woods apology lacks something “intangible”—that it seems contrived or too well-controlled. This might relate to the fact that he did not take questions in the public appearance and that it occurred several months after the events.²³⁶

Perhaps, as Mr. Woods states, time will tell and the real apology will come from his behavior in the future. Despite the cynicism of some listeners, however, the fact that Mr. Woods took pains to make this apology, along with the recent public apologies of the chairman of BP Oil Company²³⁷ and the president of Toyota Motor Corporation,²³⁸ is encouraging evidence of the importance and value of apologies when wrong-doing has occurred.

C. *Wisdom for Legal Actors*

The exhaustiveness of Mr. Woods’ apology and its fulfillment of most of the categories listed by the author’s Comprehensive Law Practice class support the validity of those categories. It further suggests that lawyers can use the categories, or framework set forth above, when counseling their clients who desire to craft an apology. For example, a client who wishes to apologize but plans to simply say, “I’m sorry,” might be counseled first to consider and then to express an understanding of the impact of the injury on the other party (if legally appropriate).²³⁹ The client might be counseled to

236. Some might feel that it came too late or that he seemed defensive when he stated:

But there is one issue I really want to discuss. Some people have speculated that Elin somehow hurt or attacked me on Thanksgiving night. *It angers me that people would fabricate a story like that.* She never hit me that night or any other night. There has never been an episode of domestic violence in our marriage. Ever . . .

Some people have made up things that never happened. They said I used performance-enhancing drugs. This is completely and utterly false. . . .

Some have written things about my family. . . . However, my behavior doesn’t make it right for the media to follow my two-and-a-half-year-old daughter to school and report the school’s location. They staked out my wife and pursued my mom. Whatever my wrongdoings, for the sake of my family, please leave my wife and kids alone.

Id. (emphases added).

237. See MSNBC, *supra* note 4.

238. See THE MONEY TIMES, *supra* note 5.

239. See *supra* text accompanying note 31 (regarding the desire of those harmed to hear this acknowledgement); see also Cohen, *supra* note 25, at 1014–15 (portraying this acknowledgement as part of three defining elements of apology).

consider including a statement (if true) of how similar injuries in the future could be avoided and the client's plans (if any) for taking steps to ensure that they are prevented, since injured parties often desire such information.²⁴⁰ Clients who are not well-versed or experienced in making apologies might find the foregoing framework, with its categories, useful in considering what to include in and exclude from their planned apology, whether written, oral, public, private, formal, or informal.

In addition to the components in the above table, there are a number of suggestions and points to remember when integrating apologies into the resolution of legal matters. The following lists a few.

1. Use by Partisan Lawyers

Partisan lawyers can coach their clients in crafting their apologies and statements of forgiveness, both in face-to-face encounters and written or recorded exchanges. They can coach harmed persons in accepting or asking for apologies. They can engage mental health experts to assist in evaluating and assessing the parties' readiness for an encounter.

Lawyers counseling wrongdoers and those harmed by the wrongdoer's acts may want to consider concerns, such as those raised by Smith²⁴¹ and others.²⁴² Some of these are: (1) the wrongdoer must not dispute the facts, agree he did wrong, and not believe his behavior is excused or justified;²⁴³ (2) apologies should be delivered as directly as possible, face-to-face,²⁴⁴ but if that is impossible, they may be done via performance²⁴⁵ or posting on a social network, such as Facebook, MySpace, or Twitter;²⁴⁶ (3) they must be

240. See, e.g., Stahura, *supra* note 211, at 43, in which the surviving spouse of a husband killed in a car accident wanted the offending driver to join with her in asking the city to institute preventive measures to ensure that similar accidents did not occur, in the future. *Id.* Of course, one must be mindful of evidentiary rules such as Federal Rules of Evidence 407, 408, and 409 whose parameters may circumscribe some apology language for purposes of avoiding admissibility. See FED. R. EVID. 407–09.

241. Smith, *supra* note 34.

242. See, e.g., Shuman, *supra* note 153.

243. Smith, *supra* note 34.

244. See *Facing the Truth*, *supra* note 33.

245. See Smith, *supra* note 34.

246. See *id.* Intentionally avoiding a face-to-face encounter with those harmed and making an apology on Facebook instead may be received as disingenuous, self-serving, and cowardly. *Id.*

sincere,²⁴⁷ complete, targeted, and accurate;²⁴⁸ (4) public apologies are more effective than private ones;²⁴⁹ and (5) the offender must be clearly identified.²⁵⁰

2. Use by Mediators and Dispute Resolution Facilitators

Lawyers serving as neutral, third-party mediators can be skilled with questions and moves designed to non-coercively facilitate apology, forgiveness, and reconciliation. They too should assess parties' readiness for these processes and perhaps help parties prepare for them in pre-mediation sessions with the mediator (if such sessions are consistent with the mediator's practice).²⁵¹ When parties expect apologies or forgiveness but receive none, the entire encounter can devolve into bickering, which the mediator must prevent.²⁵² In these cases, if there is resistance, Scheff says the mediator can use gentle questions to stop a party's moral indignation and lecturing.²⁵³ In addition the mediator can either refocus the parties and the process, caucus separately with the parties, or halt the process altogether until the parties are ready to come together more productively.²⁵⁴

3. Lawyer Personality Characteristics

Finally, lawyers are not trained to understand, assess, or create apologies or statements of forgiveness. Instead, they are trained to dissect and analyze facts and rules of law and make arguments to bolster the strength of one party's position.²⁵⁵ They are more experienced with partisan, positional state-

247. See *Facing the Truth*, *supra* note 33, and Smith, *supra* note 34 (calling this "staged contrition").

248. Smith, *supra* note 34. For example, Smith says incomplete apologies occur when the offender does not state the exact offenses he committed or apologizes for a different or lesser offense and he argues for more precision in apology. *Id.*

249. Smith, *supra* note 34.

250. *Id.*

251. Mark S. Umbreit, *Multicultural Implications of Restorative Juvenile Justice*, FED. PROB. Dec. 1999, at 44, 46, 48.

252. Scheff, *supra* note 51, at 112–17.

253. *Id.*

254. Smith, *supra* note 34.

255. DAICOFF, *supra* note 132, at 25–42 (2004) (containing a survey of empirical research on lawyer personality traits and finding that lawyers are generally less sensitive to interpersonal concerns and emotions, compared to nonlawyers).

ments. While mediators and judges might be more prone to have a neutral view of disputes, they also are not trained in good “core sequence” form. Mediators, judges, and lawyers alike can receive explicit training in the benefits of apology, forgiveness, and reconciliation so they can provide opportunities for these to occur, actively foster their development, and coach litigants. To this end, legal personnel can and should study the elements of effective apologies and statements of forgiveness.

Also, lawyers may view apologies differently than do non-lawyers.²⁵⁶ There is evidence that prosecutors view apologies as a display of weakness by the criminal defendant, which encourages the prosecutor to view the defendant’s legal case as weak and therefore susceptible to attack by the prosecutor.²⁵⁷ Thus, it is possible that an apology might increase a prosecutor’s confidence in his ability to convict the defendant, which decreases the likelihood of his agreement to participate in a diversionary RJ process or a lighter sentence pending the outcome of an RJ process.²⁵⁸ There is also evidence that lawyers generally do not place as much weight and emphasis on apologies as non-lawyers.²⁵⁹ When evaluating the desirability of various settlement offers in a hypothetical car accident case where both offers contained the same amount of money, non-lawyers rated the offers accompanied by an apology higher than those without an apology, and lawyers rated the two offers as the same.²⁶⁰ This suggests that the lawyers simply overlooked the value of the apology to the putative plaintiffs. As a result, lawyers, lawyer-mediators, and judges might be aware of and attempt to counteract their tendency to devalue apologies. Comprehensive lawyers and legal personnel, however, may be more sensitive to these concerns and to the value of apologies in general, given the emphasis of the comprehensive law movement on

256. Smith, *supra* note 34.

257. Margaret Etienne & Jennifer K. Robbenolt, *Apologies and Plea Bargaining*, 91 MARQ. L. REV. 295, 309–10 (2007).

258. Smith, *supra* note 34.

259. Russell Korobkin & Chris Guthrie, *Psychology, Economics, and Settlement: A New Look at the Role of the Lawyer*, 76 TEX. L. REV. 77 (Nov. 1997).

260. *Id.* The two offers were to settle the personal injury case arising from the car accident, for \$25,000 each. One included an apology by the defendant; the other did not. In addition, the researchers found that the presence of an initial “low-ball” offer by the defendant and the make of the car driven by the defendant (BMW versus Toyota) also affected the nonlawyers’ ratings—and did not affect the lawyers’ ratings—of the desirability of the offers made, where the dollar amount offered was the same. These intangible, nonpecuniary factors affected the nonlawyers but not the lawyers, highlighting the potential for a “communications gap” between lawyers and clients in personal injury cases. *Id.*

factors beyond legal rights—such as emotions, psychological wellbeing, and relationships.²⁶¹

By using frameworks such as the one provided above, heeding these suggestions, and becoming educated in the field, lawyers, mediators, and judges can perform “triage,” by determining which cases are ripe for an apology-forgiveness core sequence and which are not. If a case is ripe, these legal personnel can use these ideas to help craft and facilitate effective and meaningful apology-forgiveness exchanges between victims and offenders or plaintiffs and defendants.

VI. CONCLUSION

Because of their value and relevance to comprehensive law approaches, all comprehensive lawyers, judges, and dispute resolvers should be well-versed in the core concepts of apology, forgiveness, and reconciliation. First, they should know how apology, forgiveness, and reconciliation relate to the theory and overall goals of the vectors of the comprehensive law movement. Legal personnel should be able to determine when apology, forgiveness, and reconciliation might be helpful and should be prepared to manage or facilitate their occurrence in civil and criminal cases, when appropriate. They should know the benefits thereof and be able to communicate those effectively to clients and other involved persons. They should be able to overcome lawyers’ natural tendency to downplay the importance of these concepts and be sensitive to how important the concepts may be to non-lawyers. They should be able to coach parties in making effective apologies and statements of forgiveness or gently question parties to facilitate the same. They should know the pitfalls of apology-forgiveness-reconciliation processes and know how to sidestep them.

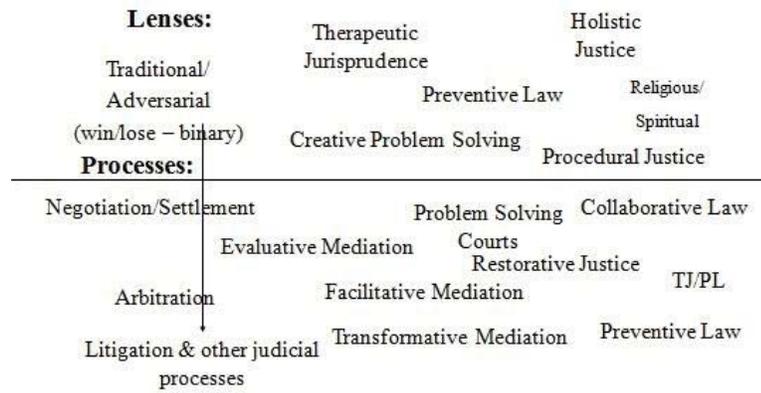
Therapeutic jurisprudence, as one of the main vectors of the comprehensive law movement, provides the perfect theoretical framework to explicitly integrate social science findings and wisdom regarding the benefits of apology, forgiveness, and reconciliation into the law. TJ’s emphasis on healing, rehabilitation, and changed lives explains why, in many legal matters, apology, forgiveness, and reconciliation may be important explicit goals. Similarly, creative problem solving and holistic justice can also benefit from the

261. Daicoff/Pepperdine, *supra* note 20, at 56–59 (noting the relevance of traits atypical for lawyers, such as cooperation and an emphasis on emotions and interpersonal relationships, to the comprehensive law movement).

effects of apology, forgiveness, and reconciliation in legal matters. Evidence shows that apologies have prevented or reduced litigation in medical malpractice situations, thus establishing apologies' relevance to preventive law. Procedural justice explains, from a social science perspective, why effective apology and forgiveness processes are so valuable to wrongdoers and those harmed by the wrongdoer's acts alike. Process-oriented vectors such as collaborative law, problem solving courts, transformative mediation, and restorative justice often inherently provide opportunities for apology, forgiveness, and reconciliation. Transformative mediation, restorative justice, and the court-ordered treatment involved in drug courts are all processes that may explicitly foster the core sequence of apology-forgiveness-reconciliation. Finally, apology, forgiveness, and reconciliation are often explicit goals of restorative justice approaches to criminal cases. Deeper exploration of the requisite components of effective apology and forgiveness exchanges can inform lawyers, mediators, and legal decision makers about how to facilitate the most effective exchanges between the parties they seek to help. Integrating appropriate opportunities for apology, forgiveness, and reconciliation into law is truly furthering "law as a healing profession."

APPENDIX 1

“Organizational Chart” of the Movement



APPENDIX 2

| Concept | Offender's Apology | Mr. Woods' Statement ²⁶² |
|------------------------|--|--|
| <i>Consequences</i> | To understand and acknowledge the impact the O's actions had on the V's life | <p><i>I am also aware of the pain my behavior has caused to those of you in this room. I have let you down. I have let down my fans. For many of you, especially my friends, my behavior has been a personal disappointment. To those of you who work for me, I have let you down, personally and professionally. My behavior has caused considerable worry to my business partners.</i></p> <p><i>To everyone involved in my foundation, including my staff, board of directors, sponsors, and most importantly, the young students we reach . . . I know I have severely disappointed all of you. I have made you question who I am and how I have done the things I did. . . .</i></p> <p><i>I hurt my wife, my kids, my mother, my wife's family, my friends, my foundation, and kids all around the world who admired me.</i></p> |
| <i>Apology/Remorse</i> | To apologize, say I'm sorry, express remorse, regret that the event happened to the V, in a sincere, non-selfish, non-self-focused manner, with O being visibly ashamed of what he did and not being angry, which allows V to see O as human—forges bond between V & O | <p><i>I want to say to each of you, simply, and directly, I am deeply sorry for my irresponsible and selfish behavior I engaged in. . . .</i></p> <p><i>I am embarrassed that I have put you in this position. For all that I have done, I am so sorry. I have a lot to atone for. . . .</i></p> <p><i>Parents used to point to me as a role model for their kids. I owe all of those families a special apology. I want to say to them that I am truly sorry.</i></p> |
| <i>Responsibility</i> | To accept responsibility for what happened, to express awareness that the event was "wrong" and that O did wrong | <p><i>Many of you have cheered for me, or worked with me, or supported me, and now, every one of you has good reason to be critical of me</i></p> <p><i>The issue involved here was my repeated irresponsible behavior. I was unfaithful. I had affairs. I cheated. What I did is not acceptable. And I am the only person to blame. . . . I knew my actions were wrong</i></p> <p><i>I was wrong. I was foolish. I don't get to play by different rules. The same boundaries that apply to everyone apply to me. I brought this shame on myself</i></p> |
| <i>Forgiveness</i> | To receive V's forgiveness | <p><i>Finally, there are many people in this room and there are many people at home who believed in me. Today, I want to ask for your help. I ask you</i></p> |

262. *Id.*

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| | | <i>to find room in your hearts to one day believe in me again.</i> |
| <i>Understanding</i> | Explains why the offense was done May also include understanding the V as a fellow human being | I know people want to find out how I could be so selfish and so foolish. People want to know how I could have done these things to my wife, Elin, and to my children. . . . I knew my actions were wrong. <i>But I convinced myself that normal rules didn't apply. I never thought about who I was hurting. Instead, I thought only about myself. I ran straight through the boundaries that a married couple should live by. I thought I could get away with whatever I wanted to. I felt that I had worked hard my entire life and deserved to enjoy all the temptations around me. I felt I was entitled. Thanks to money and fame, I didn't have far—didn't have to go far to find them. . . .</i> <i>I stopped living by the core values that I was taught to believe in . . .</i> As I proceed, I understand people have questions. I understand the press wants me to—to ask me for the details of the times I was unfaithful. I understand people want to know whether Elin and I will remain together. Please know that as far as I'm concerned, every one of these questions and answers is a matter between Elin and me. <i>These are issues between a husband and a wife.</i> |
| <i>Positive Outcome/Rehabilitation</i> | To admit that O has a problem and express O's willingness to change | <i>It is hard to admit that I need help. But I do.</i> For forty-five days, from the end of December to early February, <i>I was in inpatient therapy, receiving guidance for the issues I'm facing. I have a long way to go. But I've taken my first steps in the right direction. . . .</i> I've had a lot of time to think about what I have done. My failures have made me look at myself in a way I never wanted to before. |
| <i>Restitution to V</i> | To express willingness to make material restitution to V, outline a plan for it | Elin and I have started the process of discussing the damage caused by my behavior. As she pointed out to me, <i>my real apology to her will not come in the form of words. It will come from my behavior over time. . . .</i> <i>It is now up to me to make amends. And that starts by never repeating the mistakes I have made. It is up to me to start living a life of integrity. . . .</i> I do plan to return to golf one day. I just don't know when that day will be. I don't rule out that it will be this year. <i>When I do return, I need to make my behavior more respectful of the game.</i> |
| <i>Plan for the Future</i> | To describe his plan for changing and not | I recognize I have brought this on myself. And I know above all I am the one who needs to change. |

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| | <p>recidivating</p> | <p>I owe it to my family to become a better person. I owe it to those closest to me to become a better man. That is where my focus will be. <i>I have a lot of work to do. And I intend to dedicate myself to doing it . . .</i></p> <p><i>Part of following this path for me is Buddhism, which my mother taught me at a young age. People probably don't realize it, but I was raised a Buddhist, and I actively practiced my faith from childhood until I drifted away from it in recent years. Buddhism teaches that a craving for things outside ourselves causes an unhappy and pointless search for security. It teaches me to stop following every impulse and to learn restraint. Obviously, I lost track of what I was taught.</i></p> <p><i>As I move forward, I will continue to receive help because I have learned that is how people really do change. Starting tomorrow, I will leave for more treatment and more therapy. . . .</i></p> <p>In therapy, I have learned that looking at—the importance of looking at my spiritual life and keeping in balance with my professional life. <i>I need to regain my balance and be centered so I can save the things that are most important to me: my marriage and my children.</i></p> <p><i>That also means relying on others for help. I have learned to seek support from my peers in therapy, and I hope someday to return that support to others who are seeking help . . .</i>²⁶³</p> |
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263. *Id.* (emphases added).