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APOLOGY WITHIN A MORAL DIALECTIC: A REPLY TO PROFESSOR ROBBENNOLT

Lee Taft*

Over the last several years, much has been written about the role of apology in facilitating the resolution of legal disputes.¹ Within this body of work a debate has developed among legal scholars, practitioners, and legislators. Under traditional rules of evidence an apology which acknowledged fault would enter evidence as an admission against interest. Now there is a movement to legislatively “protect” apologies from the effects of the traditional rule in order to facilitate apology without evidentiary encumbrance. Scholars who have argued in favor of the relaxation of the traditional rule have largely relied on anecdotal evidence to support their arguments. Now, in her recent article *Apologies and Legal Settlement*, Professor Jennifer K. Robbennolt makes a long-overdue empirical contribution to analyses of the role of apology in settlement.² Robbennolt concludes that fault-admitting apologies will indeed enhance the likelihood of settlements, and that this is true regardless of whether or not the apology is “protected.” This conclusion matters not only because it provides an empirical basis for the efficacy of fault-admitting apologies, but also because of its attraction to legislators who like to see empirical studies before changing long-standing rules of law like the evidentiary rule in question here.

While I appreciate Professor Robbennolt’s useful insights, I also have two sets of concerns about her suggestion that policy discussion focus on the appropriateness of statutory protection of the full apology. First and primarily, her empirical results — even if interpreted by policymakers as showing the efficacy of the protected

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1. See, e.g., Jonathan R. Cohen, *Advising Clients to Apologize*, 72 S. CAL. L. REV. 1009 (1999); Daniel Shuman, *The Role of Apology in Tort Law*, 83 JUDICATURE 180 (2000); Lee Taft, *Apology Subverted: The Commodification of Apology*, 109 YALE L.J. 1135 (2000); Deborah L. Levi, Note, *The Role of Apology in Mediation*, 72 N.Y.U. L. REV. 1165 (1997).

2. Jennifer K. Robbennolt, *Apologies and Legal Settlement: An Empirical Examination*, 102 MICH. L. REV. 460 (2003).

full apology in promoting settlement — do not by themselves make an adequate case for legislation protecting apology. Rather, those who favor legislation protecting full apology must take into account the moral dimension of apology, and the implications of giving this moral dimension short shrift. As I explain, even a solid empirical case showing a high increase in settlement due to apology would not adequately address the moral harm of legislative protection for apology. More than utility is at stake when a legislature tailors a moral process to fit within a system that is primarily adversarial.

A second concern relates to Professor Robbennolt's findings. Her findings, she suggests, show that participants, while aware of the different evidentiary rules, "did not adjust their assessments of the apologies received in response to those rules."³ Thus, to the reader of this finding, the suggestion is that, to the injured person, the efficacy of apology is not dependent on its admissibility or whether the party offering the apology will face consequences tied to it. Robbennolt suggests a variety of factors that might explain this finding. I offer a different view of this finding, a finding that is crucial to the argument in favor of protected apology.

Robbennolt's study participants visited a website in order to read an accident scenario.⁴ The participants were assigned the role of the injured party and then asked to evaluate a settlement offer from the other party.⁵ Robbennolt introduced numerous control variables into this two-part study which enabled her to monitor how different kinds of apologies impacted settlement, whether the protection of the apologies was of significance to these participants, and how the severity of the injury affected the participants' perception of the apologies.⁶

Robbennolt adopted the language that has emerged in recent scholarship to identify the different kinds of apologies she was evaluating. A "partial apology" is one in which the offending party expresses sympathy and hope for a rapid recovery, but does not accept responsibility for the accident causing the injury.⁷ A "full apology" includes the expression of sympathy contained in the partial apology but, importantly, adds an acknowledgment of responsibility: "I am sorry you were hurt. The accident was all my fault. I was going too fast and not watching where I was going until it was too late."⁸

3. *Id.* at 491.

4. *Id.* at 483.

5. *Id.*

6. *Id.* at 483-92.

7. *Id.* at 484 n.112.

8. *Id.*

Robbennolt found that the “offender who offered a full apology was seen as experiencing more regret, as more moral, and as more likely to be careful in the future than one offering a partial or no apology.”⁹ Consequently, the full apology “was viewed as more sufficient than either a partial apology or no apology.”¹⁰ As a result of these data, Robbennolt empirically established that apologies affect injured parties’ inclination to accept or reject a settlement offer.¹¹ Yet, ultimately, the type of apology was what positively influenced settlement: “Only the full, responsibility-accepting apology increased the likelihood that the offer would be accepted.”¹² By contrast, the partial apology actually created ambivalence in the injured party increasing the “participants’ uncertainty about whether or not to accept the offer.”¹³

From a moral perspective, Robbennolt’s findings make perfect sense. When one injures another, accepting responsibility requires moral courage. Yet, apology is not moral simply because of the acknowledgment that one has caused injury. What elevates it to a truly moral and corrective communication is the offending party’s willingness to accept the consequences that flow from the wrongful act. That is, the moral dimension of apology rests on both the acknowledgment of wrongful conduct and the willingness to accept responsibility for the harm caused.¹⁴ It is this moral dimension that I think led Robbennolt’s subjects to find the full apology more sufficient than the partial.¹⁵ Yet, if a willingness to accept consequences for one’s wrongful action is an essential element of a full apology, then why is it

9. *Id.* at 487 (citations omitted).

10. *Id.*

11. *Id.* at 491.

12. *Id.*

13. *Id.*

14. In his recent book, *Faking It*, William Ian Miller reaches a similar conclusion, but for different moral reasons. In Miller’s analysis, remorse is the easiest of our emotions to fake, and is therefore essentially unreliable and untrustworthy. Relying largely on his expertise of honor cultures, Miller insists that for apology to be trustworthy it must contain an element of satisfaction, a term he borrows from a religious understanding of penance. For Miller, satisfaction must include a marker of its sincerity through some punitive attendant, like the pain one sibling feels when forced to apologize to his sister. WILLIAM IAN MILLER, *FAKING IT* 77-95 (2003). I, too, insist that apology have some marker of its authenticity and, for me, that marker is the willingness to accept the consequences that flow from the wrongful act, including legal culpability. While I understand that legal consequences can be painful, I do not see the telos of the demand in the punitive way described by Miller. Rather, I see the willingness to accept consequences as an act of moral courage, which can inspire healing in both the party harmed as well as in the offender. From Miller’s perspective, apology is an act of humiliation. From mine, it is one of reparation. See *infra* text accompanying notes 21-22; see also Lee Taft, *Apology and Medical Error: Opportunity or Foil?*, 14 *ANNALS HEALTH L.* 55, 62-67 (2005).

15. Robbennolt, *supra* note 2, at 487.

that Robbennolt's subjects, while aware of the content of the different evidentiary rules, did not adjust their assessment in response to those rules?¹⁶

Robbennolt offers a variety of factors that might explain this surprising result.¹⁷ Among those is the significant fact that the participants "may have discounted the influence of the statutory protection given the specific facts of the situation with which they were faced."¹⁸ In Robbennolt's studies the apologies were offered soon after the event, involved an interpersonal communication between neighbors, and were expressed in a context in which the "offender's responsibility was judged to be relatively clear" and where the offer made was a fair offer.¹⁹ Her recognition of the uniqueness of these facts prompts her to consider whether a protected apology might be received more skeptically if the apology was offered by a stranger or accompanied by a less reasonable offer of settlement or made late in the game. These possibilities lead her to offer this caveat: "Clearly, additional research is needed to explore these boundaries."²⁰ Yet, rather than describe the kind of empirical work that needs to be done, she instead concludes "that policy discussion ought to focus on the appropriateness of statutory protection for *full* apologies."²¹

My interest in responding to Professor Robbennolt is both theoretical and practical. I am a proponent of the full, unprotected apology.²² I believe that if we do not understand apology as part of a moral dialectic we risk subverting its moral dimension. Apology is integral to repentance, itself a complex process that when authentically performed can inspire forgiveness and reconciliation between a party injured and the one causing the injury.²³ Repentance starts as feeling of remorse within the conscience of the party causing harm and is given voice in apology. This experience is, for some, a deeply religious process. Yet, for all, it should be an ethical and moral response to harm inflicted.

Legal scholars often give this moral dimension short shrift, especially when they evaluate apologies using a standard of legal

16. *Id.* at 500.

17. *Id.* at 502-05.

18. *Id.* at 504.

19. *Id.*

20. *Id.*

21. *Id.* at 505.

22. See Taft, *supra* note 1.

23. See Taft, *supra* note 14, at 65 (illustrating the process from harm to reconciliation).

efficacy.²⁴ Yet, when utility becomes the primary standard for legislative initiatives, there is a cost to both individuals and society. This harm rises dramatically when one extracts components of moral processes and inserts them into utilitarian schemas.

Consider a group of children throwing snowballs at passing cars. One snowball hits the side of a car and causes damage. The driver stops and confronts the thrower. The child fully apologizes to the driver: "I am sorry I hurt your car. The damage was all my fault. I should not have been throwing snowballs." If the social contract is that the apology may not be used as evidence of wrongdoing, what is the driver to do if, in a conversation with the child's parents, the child denies his part in causing harm? And what about the lesson learned by the child? If one can apologize with impunity, how is one's moral compass distorted? And what are the broader costs to human relations when utility becomes the arbiter of moral processes?

This concern now confronts the citizens of Colorado because their legislature passed a bill protecting full apologies if expressed by a health-care provider or an employee of a health-care provider to an alleged victim, a relative of an alleged victim, or a representative of an alleged victim of an "unanticipated outcome of medical care."²⁵ This statute is narrower than that contemplated by Professor Robbennolt because rather than providing statutory protection for all full apologies, it protects only those of a particular group of people. Still, it illustrates the kind of statute Robbennolt suggests policymakers ought to consider.

Recall that Robbennolt acknowledged participants in her study "may have discounted the influence of the statutory protection" because the apology was tendered "in the context of an interpersonal dispute between neighbors, where the offender's responsibility was judged to be relatively clear, and the offer was fairly reasonable."²⁶ She wondered whether her respondents would be more skeptical of protected apologies "offered in conjunction with less generous

24. See, e.g., Cohen, *supra* note 1; Aviva Orenstein, *Apology Excepted: Incorporating a Feminist Analysis into Evidence Policy Where You Would Least Expect It*, 28 SW. U. L. REV. 221 (1999); Shuman, *supra* note 1.

25. "Unanticipated outcome" means the outcome of a medical treatment or procedure that differs from an expected result." COLO. REV. STAT. § 13-25-135(2)(d) (2003). Colorado is not the only state to have a statute protecting the apologies of health-care providers. In Oregon, any apology or expression of regret will "not constitute an admission of liability for any purpose" if made by a person licensed by the Board of Medical Examiners. OR. REV. STAT. § 677.082(1) (2003). In fact, the Oregon statute is more expansive than that in Colorado since Oregon's protection extends to any civil action, not just those arising from the delivery of health care. *Id.*; see also OKLA. STAT. ANN. Tit. 63, § 1-1708.1H (West Supp. 2004) (protecting full apologies in any medical liability action).

26. Robbennolt, *supra* note 2, at 504 (citations omitted).

offers.”²⁷ I would add an additional query: What about those circumstances in which settlement negotiations fail?

Robbennolt’s study is important in showing how full apologies influence settlement, yet it does not discuss what happens when settlement fails. This is an important omission, especially when a policy change is at stake. Using the Colorado statute, I offer another hypothetical to illuminate the problem I intend to highlight.

Imagine that you have been injured in an automobile collision and you are transported to a major trauma center in Denver. There you undergo a surgical procedure and experience an “unanticipated outcome” as a result of surgical error, an error that was preventable and one that causes you to suffer much more harm than the original injury. The operating surgeon comes to your room, and in the presence of your spouse, offers a full apology, including an offer of restitution. What happens if that offer does not materialize or if the settlement otherwise fails? The injured party is left in the intolerable situation of having to file suit and prove precisely what the health-care provider has already acknowledged.

This kind of scenario has been considered by scholars other than Robbennolt, scholars who recognize that statutes like these may be problematic for plaintiffs.²⁸ After all, it would be “maddening” to be forced to prove what the physician freely admitted.²⁹ Yet, presumably because of the potential for facilitating settlements, proponents of these statutes hold that on balance “the plaintiff is better off.”³⁰ Of course, this is the dilemma. The protected full apology often increases the likelihood of settlement, yet, when settlement fails, the result is horrific. Now the plaintiff suffers not only the primary physical injury that gave rise to the claim but also suffers a secondary moral injury as a result of being re-victimized by the protected apology.

More than efficacy should be considered before policymakers abandon traditional rules of evidence, rules that allow the trier of fact to consider expressions of fault on the issue of liability. Robbennolt suggests more empirical research should be conducted. I agree. It seems critical to evaluate the participants’ understanding of the effect of the evidentiary rule. Does a layperson know what it means to say that an apology could not be used against the defendant in court? This is an important question because in an experimental study like

27. *Id.*

28. *E.g.*, Orenstein, *supra* note 24, at 255.

29. *Id.* Orenstein, a proponent of broad protections like that provided by the Colorado statute, states that “though it might be maddening for a defendant . . . to deny in open court what it admitted in an apology, the plaintiff on balance is better off . . .” *Id.*

30. *Id.*

Robbennolt's, there may be a variety of factors that could contribute to a lack of understanding by the participants of the evidentiary implications of the protected apology. For example, some may lack the time and the incentive to learn enough about the law to truly understand its moral and legal implications. And for the participants who did understand the implication of the evidentiary rule, did that contribute negatively to their decision to settle? Would there be a group within the population who would capitulate and settle rather than prove what they already know?

We need also to reflect on whether we really intend to allow utility to trump other factors when policy considerations are at issue. Throughout her essay, Robbennolt was focused on those factors that "worked" or were "effective" or "beneficial" in influencing the claimant to settle. Efficacy is, of course, an important consideration yet it should be only one of many policymakers weigh. Policymakers should also consider how proposed rules distort a defendant's moral compass or even subvert the very nature of apology and its place in the dialectic between harm and reconciliation. The risk of subversion arises whenever we transcribe moral processes into systems that are primarily adversarial.

We live in a culture in which it is becoming increasingly difficult to evaluate the integrity of apologies we witness.³¹ Often, apologies are more akin to strategic communications than to expressions of heartfelt contrition. The full apology is the exception. It acknowledges harm, it expresses sorrow, it accepts responsibility for the harm caused and the consequences that follow. Yet, when it is protected, its integrity is placed in jeopardy. This is why policymakers must ask critical questions as they deliberate on issues of apology, law, settlement, and morality.³²

Is the telos of statutes like that in Colorado — the granting of impunity to full apology — what we want to teach our children? Do we want to encourage full apologies that are protected from consequences? Does protecting the full apology reflect the morals of a society that has relaxed its demands around issues of accountability or have the lines become blurred because of the utilitarian objectives the protection seeks to effect in a litigation context? That is, have we

31. As Miller observes, this is because of the ease with which remorse can be faked, "how hard it is to distinguish genuine remorse that arises as a moral response to the harm done . . . from equally genuine amoral regret that arises from the discomfort the whole fiasco is causing the wrongdoer." MILLER, *supra* note 14, at 94; *see also supra* note 14.

32. The questions of morality I raise have not been a part of the legislative debate. For example, when California passed its statute protecting partial apologies, lawmakers focused almost exclusively on utility. This was clear when its sponsor emphasized that apology is "underrated and underused as a tool in legal settings," often overlooked as a settlement tool or as a lubricant for settlement talks. *See* CAL. EVID. CODE § 1160, cmt. — Assembly Committee on Judiciary, (West Supp. 2004).

become a society that places more value on the settlement of lawsuits than on accepting responsibility for the harms we have caused?

These are not merely theoretical questions. As Robbennolt notes, six states have already enacted laws addressing apologies, and thirteen more, including Michigan, have considered or are considering such legislation.³³ So far, the majority of the enacting states protect the partial apology, but an essay like Robbennolt's could turn the tide toward the protection of the full apology.

I offer this Reply not because I wish to stand in the way of findings like those offered in Robbennolt's "Empirical Examination." Rather, I write as one who still holds the view that when someone offers a full apology they should do so with a willingness to accept the consequences that flow from the harm they have caused. I do not insist on apology. I recognize that it remains a moral option for one who has caused harm, and that there may be circumstances when one chooses not to risk apology or times when moral courage fails. Yet I believe that if one truly seeks to express a full apology, one should offer it without the protection a statute like that in Colorado provides. This is because a full apology is much more than a litigation resource; it is the voice of repentance.

33. Robbennolt, *supra* note 2, at 470 & nn.44-45.