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Recommended Citation

Lee Taft, *On Bended Knee (with Fingers Crossed)*, 55 DePaul L. Rev. 601 (2006)
Available at: <https://via.library.depaul.edu/law-review/vol55/iss2/14>

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ON BENDED KNEE (WITH FINGERS CROSSED)¹

Lee Taft

My heart is in anguish within me,
the terrors of death have fallen
upon me.

Fear and trembling come upon me
and horror overwhelms me.²

INTRODUCTION

These words could have been written by the woman who lost her husband and all of her children when a detached trailer ran headlong into her family's car as they returned from a Texas Rangers baseball game. They could have been written by a single mother whose only son was left permanently brain impaired when anesthesiologists administered the wrong medication during a simple and routine procedure. They are words the children of a young man burned to death after his gas tank exploded would understand; words that a young boy might speak if doctors charged with his care had not failed to detect the metal blade in his neck. They are words that echo across the centuries to describe a human condition all too familiar to modern tort claimants and the lawyers who represent them.

In the wake of tragedy, the tort lawyer's primary responsibility is to obtain compensation for the injured party. While the lawyer may offer counsel and solace regarding a client's suffering, his or her explicit professional task is to locate that suffering within the context of the lawsuit. In Texas, for example, a claimant's suffering is not an independent element in a wrongful death claim, but is, rather, lumped into the jury's consideration in its award of mental anguish.³ To recover for mental anguish, the claimant "must show more than mere worry,

1. Copyright Lee Taft © 2005. All rights reserved. Lee Taft, J.D., M.Div., is an ethicist who provides solutions to businesses, organizations, and individuals facing crisis in the wake of error by focusing on the ethical opportunities crises offer. Mr. Taft is grateful to Robert Clifford and Professor Stephan Landsman for organizing the Clifford Symposium, and to Professor Ellen Pryor for inviting him to participate in the symposium. He would also like to thank Dan Lombard and the editors of the *DePaul Law Review* for their editorial direction. Mr. Taft can be contacted at leetaft@earthlink.net.

2. *Psalms* 55:4-5 (New Revised Standard Version).

3. For example, in considering the claim of a surviving spouse for wrongful death damages, the Texas Pattern Jury Charges define mental anguish as "the emotional pain, torment, and

anxiety, vexation, embarrassment, or anger.”⁴ Defined, mental anguish is “a high degree of mental suffering” and must be established by such “painful emotions as grief, severe disappointment, indignation, wounded pride, shame, despair, or public humiliation.”⁵ So, while injury clearly has nonpecuniary effects, the tort system as presently constructed is not designed to routinely provide noncash relief to those who suffer. Anita Bernstein recently observed that “[n]o constituency presses seriously for apology, therapeutic jurisprudence, medical monitoring . . . the criminal prosecution of injury-causing malefactors, or other remedies without cash attached.”⁶ After all, she concluded, “money makes tort liability go round.”⁷

But there is more to the story than Ms. Bernstein reported. There is, in fact, a growing body of scholarship that addresses the suffering of litigants in nonpecuniary terms. I refer here to the writings on apology and its role in the legal environment. The interest in the subject has been gaining momentum ever since 1986 when the seminal work of Hiroshi Wagatsuma and Arthur Rossett was published.⁸ Since then, scholars have analyzed apology in economic, biological, psychological, and moral terms and have considered its reparative benefits, its utility in settling lawsuits, and its ability to keep suits from being filed at all.⁹ Within this body of work, a debate has evolved about whether an apology should be “protected” from traditional rules of evidence that would consider a fault-admitting statement an admission against interest.¹⁰ The debate has extended beyond the academe into the public sphere. Several states have passed laws protecting limited expressions of sympathy, and some have enacted statutes that protect apologies even when they include complete

suffering experienced by *Mary Payne* because of the death of *Paul Payne*.” 1 TEX. PATTERN JURY CHARGE § 9.2(e) (2003).

4. *Star Houston, Inc. v. Shevack*, 886 S.W.2d 414, 418 (Tex. App. 1994).

5. *Id.*

6. Anita Bernstein, *The Enterprise of Liability*, 39 VAL. U. L. REV. 27, 31 (2004).

7. *Id.*

8. Hiroshi Wagatsuma & Arthur Rossett, *The Implications of Apology: Law and Culture in Japan and the United States*, 20 LAW & SOC'Y REV. 461 (1986).

9. See, e.g., Jonathan R. Cohen, *Advising Clients to Apologize*, 72 S. CAL. L. REV. 1009 (1999); Erin Ann O'Hara & Douglas Yarn, *On Apology and Consilience*, 77 WASH. L. REV. 1121 (2002); Jennifer K. Robbennolt, *Apologies and Legal Settlement: An Empirical Examination*, 102 MICH. L. REV. 460 (2003); Daniel W. 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) [hereinafter Taft, *Apology Subverted*].

10. For a review of the scholarship, see Elizabeth Latif, *Apologetic Justice: Evaluating Apologies Tailored Toward Legal Solutions*, 81 B.U. L. REV. 289 (2001); Robbennolt, *supra* note 9; Lee Taft, *Apology Within A Moral Dialectic: A Reply to Professor Robbennolt*, 103 MICH. L. REV. 1010 (2005) [hereinafter Taft, *Apology Within*].

admissions of fault.¹¹ Indeed, as I write, the U.S. Senate is considering legislation that would protect the apologies of healthcare providers even when the standard of care was not followed.¹²

I was invited to join this panel considering the impact of the tort system on the pain and suffering of claimants because I have contributed to the scholarship on apology. I am a proponent of the full, unprotected apology.¹³ This is the apology that admits wrongdoing, accepts responsibility for that wrongful act, and promises future acts of compensation, including acts of reparation. I believe that when someone causes harm to another and wishes to apologize for the harm caused, he or she should offer the apology without being protected from the consequences that are attached to his or her wrongdoing, even when those consequences have legal import. From my perspective, it is the full, unprotected apology that will alleviate suffering—at least the kind of suffering that is relieved by reparative, spiritual processes like forgiveness. If I were suffering as the psalmist describes, and my suffering was due to harm inflicted by another, only the full, unprotected apology would alleviate the spiritual dimension of my angst.

Mine is a moral perspective from which I view the *telos* of apology as one of reparation. Not everyone shares this viewpoint, a fact I was reminded of a few years ago during a panel discussion at Southern Methodist University's Dedman School of Law. Justice Albie Sachs, a justice on the Constitutional Court of South Africa and former freedom fighter, was in the audience. Addressing the issue of the protected apology, he opined that he would rather have his enemy "on bended knee" than not at all. The experience of witnessing his enemy's humiliation was what he wanted, what he suggested would alleviate his suffering. But what if while on bended knee Justice Sachs's enemy's fingers were crossed? Could what appeared to be a bended knee be a Trojan horse instead?

In this essay I will explore that question in the context of tort litigation. I will show how apology has been misidentified and its qualities overstated, and how in my own writing I have contributed to that confusion. In this discussion it will become clear that apology has limits, and that there is danger in overlooking its parameters. My thesis is

11. *E.g.*, COLO. REV. STAT. ANN. § 13-25-135 (West 2005); MASS. GEN. LAWS ANN. ch. 233, § 23D (West 2000); TEX. CIV. PRAC. & REM. CODE ANN. § 18.061 (Vernon 1997 & Supp. 2004).

12. The National Medical Error Disclosure and Compensation Act, S. 1784, 109th Cong. (2005).

13. For the full text of my arguments, see Taft, *Apology Subverted*, *supra* note 9; Taft, *Apology Within*, *supra* note 10; Lee Taft, *Apology and Medical Mistake: Opportunity or Foil?*, 14 ANNALS HEALTH L. 55 (2005) [hereinafter Taft, *Apology and Medical Mistake*].

that if we fail to understand the limits of apology, what it is and what it is not, we risk contributing to a tort claimant's suffering, potentially compounding suffering rather than reducing it. This is what can happen when we mistake apology for, or conflate it with, related reparative processes, assign attributions to apology that it does not have, or fail to understand its role in the dialectical process of reconciliation.

II. APOLOGY DEFINED

To understand the role of apology in alleviating a tort claimant's suffering, we must first consider what is meant by apology. In 2005, Harvard President Lawrence Summers suggested that innate differences might make women less capable than men in science and math careers.¹⁴ When confronted by the outrageousness of this claim, he published a letter to Harvard's standing committee on women, in which he wrote: "I apologize for any adverse impact the comments might have had."¹⁵ If you were one of the women on that committee, would you define this response as an apology? Would these words help you heal? When Prince Harry attended a costume party wearing a Nazi uniform and swastika armband, he issued a statement in which he said "it was a poor choice of costume and I apologize."¹⁶ Is this expression what we intend when we talk about apology?

Nicholas Tavuchis, a sociologist whose detailed work on apology and its cultural implications is frequently cited by scholars, held that there are two essential ingredients for an apology: "The offender has to be sorry and has to say so."¹⁷ In his popular new book, *On Apology*, psychiatrist Aaron Lazare expanded this definition. Lazare defined apology as "an encounter between two parties in which one party, the offender, acknowledges responsibility for an offense or grievance and expresses regret or remorse to a second party, the aggrieved."¹⁸ According to Lazare, this apologetic encounter has four distinct movements: (1) acknowledging the offense, (2) communicating remorse, (3) offering explanations, and (4) making reparations.¹⁹ Yet, in extrapolating the expression of remorse for harm caused to the

14. *Harvard Chief Backs Off Remark Seen As Sexist*, WICHITA EAGLE, Jan. 20, 2005, at A4, available at 2005 WLNR 870508 (internal quotation marks omitted).

15. *Id.*

16. *Harry Learns History the Hard Way*, GREENSBORO NEWS & RECORD, Jan. 21, 2005, at A13, available at 2005 WLNR 889626.

17. NICHOLAS TAVUCHIS, *MEA CULPA* 36 (1991).

18. AARON LAZARE, *ON APOLOGY* 23 (2004).

19. *Id.* at 107. Legal scholars recognize similar elements. See, e.g., O'Hara & Yarn, *supra* note 9, at 1133-36.

activities that correct it, Lazare broadened the definition of apology so that it closely approximates the religious concept of repentance.

He is not unaware of this. As he observed, "The discussions in religion that refer to apology are most often found under the topic of 'repentance,' a subject closely related to and often used synonymously with apology."²⁰ This is an important observation because it helps us see why it is that the meaning of apology—in our culture generally and in legal scholarship particularly—has become confused. I think that confusion is tied to the unwillingness of secular, intellectual culture to borrow religious language, even when that language is more accurate. Using religious language is risky business in any academic setting outside of a divinity school. After all, many in the academe find "the term 'religious nut' a redundancy."²¹

Lazare is not alone in conflating apology with the related but distinct concept of religious repentance. I, too, have contributed to the confusion between these terms. In an earlier essay on apology and its role in mediation, I described it as "the centerpiece in a moral dialectic between sorrow and forgiveness."²² More recently, I described apology "as the voice of repentance."²³ But I fear that I still have failed to clearly articulate the material distinction between apology and repentance, a distinction that is relevant to the role of apology in the alleviation of a tort claimant's suffering.

It is true that apology falls between harm and forgiveness, but it is not apology that is the centerpiece in that dialectic as I originally thought. I see now that repentance is the real link between harm and reconciliation. As the voice of repentance, apology plays an important role, but does not in and of itself complete the task of repentance. While apology gives repentance voice, it does not do something as does the performance of repentance. This calls into question a second observation I made in that first essay, and that was my agreement with J.L. Austin that apology is a performative utterance.²⁴

Austin presented his now famous argument as a William James lecture at Harvard in 1955. His argument challenged the philosophical assumption "that to *say* something" is "simply to *state* something."²⁵ Austin distinguished between constative utterances and performative

20. LAZARE, *supra* note 18, at 229.

21. Randall Sullivan, *Between Doubt and Faith*, DALLAS MORNING NEWS, Mar. 27, 2005, at P1, available at <http://www.dallasnews.com>.

22. Taft, *Apology Subverted*, *supra* note 9, at 1143.

23. Taft, *Apology and Medical Mistake*, *supra* note 13, at 66.

24. Taft, *Apology Subverted*, *supra* note 9, at 1139 & n.15.

25. J.L. AUSTIN, HOW TO DO THINGS WITH WORDS 12 (J.O. Urmson & Marina Sbisa eds., 1975).

utterances. A constative utterance can be objectively judged true or false, like “the cat is on the mat”²⁶ In contrast, there are times when “to say something *is* to do something, or *in* saying something we do something, and even *by* saying something we do something.”²⁷ Perhaps the best example of a performative utterance is the statement “I do” by the bride or groom in a marriage ceremony. Austin considered “I apologize” as paradigmatic of a performative utterance and I agreed with him.²⁸

Whether apology is a performative utterance was not material to the central argument I made in that essay. There I argued in favor of the moral dimension of apology and against its subversion through strategic and instrumental tactics.²⁹ But defining apology as a performative utterance contributes to the modern cultural trend that conflates apology with repentance because it suggests that apology invites forgiveness as effectively as “I do” cements a marriage. As the voice of repentance, apology expresses remorse, one of the four elements of repentance, and it may include a promise to repent. But apology does not do the work of repentance. There is a distinction between “I do” in a marriage ceremony and “I apologize” when spoken in the wake of serious injury, and that distinction makes a difference when we consider apology and its role in alleviating a tort victim’s suffering. When I say “I am sorry” I may be sincerely communicating remorse, but that alone, uncoupled from the remaining elements of repentance, does not really address the harm inflicted. If you have caused me to fall into a well, what does an expression of remorse really do to alleviate my suffering? What will alleviate my suffering is your providing a ladder and a light.³⁰

The reason I offer this clarification is because “I am sorry” has attained new value in our culture generally, as well as in the legal arena. In the language of popular culture, there has been a “dumbing down” of repentance, so that in the wake of error we accept “I am sorry” with no expectation of further acts of reparation. We see this in political contexts routinely—think Bill Clinton and Monica Lewinsky, or Donald Rumsfeld and George Bush and the Iraqi prison scandal. We also see it in the legal arena, exemplified in the statutory movement to

26. *Id.* at 146.

27. *Id.* at 6.

28. Taft, *Apology Subverted*, *supra* note 9, at 1139 & n.15.

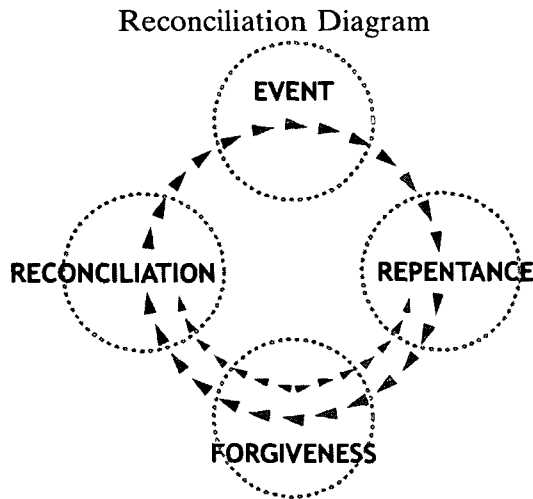
29. *See generally id.*

30. This example highlights a theological tension between those who accept the idea of a God who suffers with us and those who reject “the notion of a suffering God who is powerless.” ELIZABETH A. JOHNSON, *SHE WHO IS: THE MYSTERY OF GOD IN FEMINIST THEOLOGICAL DISCOURSE* 267 (1996).

protect apologies. I do not want to contribute to this moral backslide and so it is important to clarify the difference between “I am sorry” and “I repent.”

III. REPENTANCE

The religious concept of repentance “unites two linguistic and theological traditions” by combining the Greek *metanoia* with the Hebrew *shuv*.³¹ *Metanoia* suggests a fundamental change of mind in the same way metamorphosis suggests a fundamental change in form.³² *Shuv* is a Hebrew root word meaning “to turn” or “to return,” as in turning away from wrong conduct and returning to right pathways.³³ The elements of repentance are remorse, apology, restitution, and a restructuring of life. Repentance is the centerpiece in the dialectic between harm, forgiveness, and reconciliation, a process illustrated below:³⁴



Apology, then, is an integral part of repentance—apology is the voice of repentance. Yet, in the wake of serious injury, apology is

31. Malcolm David Eckel, *A Buddhist Approach to Repentance*, in *REPENTANCE: A COMPARATIVE PERSPECTIVE* 129 (Amitai Etzioni & David E. Carney eds., 1997) (citing *THEOLOGICAL DICTIONARY OF THE NEW TESTAMENT* 978 (Gerhard Kittel ed., 1967)).

32. *Id.* See also *THEOLOGICAL DICTIONARY OF THE NEW TESTAMENT*, *supra* note 31, at 978, 984.

33. *THE BROWN-DRIVER-BRIGGS HEBREW AND ENGLISH LEXICON* 996 (Francis Brown et al. eds., 1996); *NEW INTERNATIONAL DICTIONARY OF THE OLD TESTAMENT THEOLOGY & EXEGESIS* 55 (Willem A. VanGemeren ed., 1997); *THEOLOGICAL DICTIONARY OF THE NEW TESTAMENT*, *supra* note 31, at 984. The Biblical story of the Prodigal Son is paradigmatic of the Christian view of repentance.

34. See Taft, *Apology and Medical Mistake*, *supra* note 13, at 65.

often launched with an expectation that it will in and of itself invite forgiveness.³⁵ From my perspective, much more than a statement of "I am sorry" should be required before one grants forgiveness. I am not prepared to say that forgiveness in the absence of repentance is morally wrong, although I believe forgiveness granted unilaterally or too quickly can complicate a claimant's suffering by encouraging a claimant to relinquish valuable legal rights. At the same time, I do not think I have the capacity to forgive as generously or as quickly as did a speaker I heard several years ago at a legal conference on forgiveness.

The speaker, an expert on forgiveness, told of his mother's brutal murder and how he began a process of forgiveness of her murderers within twenty-four hours of her death.³⁶ His testimony is evidence that forgiveness is possible regardless of repentance, even in the most heinous of circumstances. Still, I wondered what his mother would say of such forgiveness. If I were she, I think I would want my son to hold on to a sense of outrage at least for some extended period of time. I would also want him to remember the limits of his forgiveness.

In Dostoevsky's *The Grand Inquisitor*, Ivan tells the story of a young serf boy who injured the landowner's dog.³⁷ As punishment, the boy was stripped naked and forced to run. The dogs were released and the child was mauled, shredded limb from limb. In examining the boundaries of forgiveness, Ivan concludes that the mother, if she chooses, can forgive the loss she herself suffered, but "she has no right to forgive the suffering of her child who was torn to pieces"³⁸

How we think about apology and repentance in relation to forgiveness matters in the context of the alleviation of suffering. We need to be self-conscious about what we, and our clients, demand in exchange for forgiveness. Lazare believes that forgiveness "is a process by which the offended party or victim relinquishes grudges, feelings of hatred, bitterness, animosity, or resentment toward the offender. *In addition, the person who forgives forgoes wishes and plans for retaliation, revenge, and claims for restitution.*"³⁹ I see things differently. I do not believe forgiveness demands that an injured party relinquish a claim for compensation. I believe that I can forgive and still maintain

35. See discussion, *infra* notes 40–45.

36. The speaker was noted forgiveness expert Everett L. Worthington, Jr. who made remarks at a symposium presented by the *Fordham Urban Law Journal* and The Louis Stein Center for Law and Ethics on January 28, 2000.

37. FYODOR DOSTOEVSKY, *THE BROTHERS KARAMAZOV* 243–45 (Alfred A. Knopf ed., Richard Pevear & Larissa Volokhonsky trans., 1990) (1880).

38. Taft, *Apology Subverted*, *supra* note 9, at 1155–56 n.99 (citing and quoting DOSTOEVSKY, *supra* note 37, at 243–45).

39. LAZARE, *supra* note 18, at 230–31 (emphasis added).

a claim for restitution. That is, I do not see forgiveness and justice disjunctively, but rather in the framework of “both-and.” For me, justice and forgiveness are interdependent. It is not my intention in this essay to argue the merits of either view, but rather to show that how one views forgiveness matters, particularly in a discussion about alleviating suffering for a tort claimant.

The above discussion makes clear that forgiveness work is, as Jeffrie Murphy noted, “risky business.”⁴⁰ This is particularly true when moral processes are transcribed into an adversarial system. Over the past several years, there have been a variety of studies demonstrating that many claimants do not pursue tort remedies if they have received an apology.⁴¹ After apology many “meritorious claims tend to drop out of the pool.”⁴² Results like these have been applauded and furnish the fuel for further research on the specific kinds of apologies that are most efficacious in influencing claimants to forgo litigation.⁴³ The efficacy of apology is so expected that researchers assume that a victim who forgives his transgressor “will accept less than full compensation for his injury.”⁴⁴ Indeed, scholars seem surprised when they observe that “[v]ictims sometimes demand at least partial compensation even when they accept apologies.”⁴⁵

The idea that apology, not repentance, is traded for a meritorious claim raises a concern for me. I worry that claimants are being duped by communication strategies into relinquishing valuable legal rights, which can actually exacerbate the economic dimension of suffering. But it is not my intention to engage in a polemic against strategic or protected apology. I have already said much on that topic.⁴⁶ Instead, I want to consider the implications the data suggest for those whose goal it is to see their enemy on bended knee.

40. JEFFRIE G. MURPHY, *GETTING EVEN: FORGIVENESS AND ITS LIMITS* 115 (2003).

41. See, e.g., Gerald B. Hickson et al., *Factors that Prompted Families to File Medical Malpractice Claims Following Perinatal Injuries*, 267 JAMA 1359 (1992); Charles Vincent et al., *Why Do People Sue Doctors? A Study of Patients and Relatives Taking Legal Action*, 343 LANCET 1609 (June, 1994). See also O'Hara & Yarn, *supra* note 9, at 1124. Of course, the data may be dependent on who is doing the reporting. See Taft, *Apology and Medical Mistake*, *supra* note 13, at 82 n.182.

42. Erin Ann O'Hara, *Apology and Thick Trust: What Spouse Abusers and Negligent Doctors Might Have in Common*, 79 CHI.-KENT L. REV. 1055, 1079 (2004).

43. This study is presently being conducted at Johns Hopkins, according to Dr. Albert Wu who is leading this study. Communication on file with author.

44. See O'Hara & Yarn, *supra* note 9, at 1178.

45. *Id.* at 1175.

46. See, e.g., Taft, *Apology Subverted*, *supra* note 9; Taft, *Apology Within*, *supra* note 10.

IV. HUMILIATION

In his examination of the psychology of tort compensation, Daniel Shuman reminded us that “[m]odern tort law is rooted in the legal system’s search for an alternative to the blood feud.”⁴⁷ He noted the power of these origins and underscored “a primal need of injured persons to seek vindication for their injury beyond mere compensation for the monetary value of their loss.”⁴⁸ Murphy saw value in vindictive passions because, as the above data regarding relinquished claims suggests, in hasty forgiveness we risk relinquishing valuable legal rights.⁴⁹ He noted, too, that vindictive emotions cut against a “morally flabby worldview wherein wrongdoing is not taken seriously and in which wrongdoers are given insufficient incentives to repent, atone, and repair.”⁵⁰

In my work on apology, I have not focused on the role of apology within a ritual of humiliation. My focus has been on apology within the process that leads from harm inflicted through repentance inviting forgiveness and reconciliation. This is why I was interested when Justice Sachs presented the view that what mattered was that apology brought his enemy to bended knee. Our views of the teleologies of apology and repentance seemed to be at odds. Yet, in reflection, I see there is resonance between my view of apology within a ritual of reparation and those who see apology as a ritual of humiliation. That resonance is our shared view that there must be some marker of authenticity of the sincerity of apology, whether the ritual is seen as one of humiliation or one of reparation.

In his recent book, *Faking It*, William Ian Miller devoted a chapter to apology and concluded that apology is always suspect because remorse is such an easy emotion to fake.⁵¹ To get around “apology’s easy fakeability,” Miller suggested that we either “hone our detection radar to unmask the false heart” or make “sure the apology hurts the person giving it.”⁵² Miller settled on the latter.

He described a ritual from the thirteenth century to show how bloodfeuding cultures resolved the issue of false remorse. Miller’s description begins with *X* and *Y* playing a game in which poles were used to goad horses into fighting each other. In the course of the

47. Daniel W. Shuman, *The Psychology of Compensation in Tort Law*, 43 U. KAN. L. REV. 39, 40 (1994).

48. *Id.*

49. MURPHY, *supra* note 40, at 115.

50. *Id.*

51. WILLIAM IAN MILLER, *FAKING IT* 77–78 (2003).

52. *Id.* at 83.

game, *X* accidentally hits *Y* with a pole. *X* calls time out and says, “I am sorry, I did not mean to hit you.”⁵³ Then *X* adds what Miller described as “the crucial addendum”: “*I will pay you sixty sheep so that you will not blame me and will understand that I did not mean it.*”⁵⁴

The stakes would have been higher had *X* intended to hit *Y*.⁵⁵ According to Miller, in bloodfeud cultures, intentional misconduct would trigger “elaborate ceremonies of reconciliation and peacemaking, usually after, not before, a few people lost their lives.”⁵⁶ These ceremonies might conclude with *X* having to lay his head on *Y*’s knee and plead with *Y* to give it back.⁵⁷ In these cultures there was an inseparable link among apology, humiliation, compensation, and forgiveness. And, from Miller’s perspective, considering how easy it is to fake apologies, this is exactly as it should be.

Miller insisted, then, on some punitive element attached to the apology, something that causes pain to the party offering it. This is tied to his original premise that remorse is easily faked, so there must be some measure of sincerity, even if what is measured is the pain in having to turn over sixty sheep. Miller insisted that apology contain an element of satisfaction, a term St. Thomas Aquinas described as “compensation for injury inflicted.”⁵⁸ Miller argued that even when apology is insincere there is still this element of satisfaction: “Q: What is the substance of satisfaction to the wronged person in an unfelt apology? A: The pain it costs the apologizer to give it.”⁵⁹

This is where Miller and my views converge, even though he saw apology within the context of a ritual of humiliation and I see it as an integral element in a process of reparation. We both seek indices of authenticity within a process we see as easily subjected to subversion. Miller’s satisfaction, his sixty sheep, is my demand that one who offers an apology accept the consequences that flow from it. So even though we see the *telos* of the ritual differently, we both demand evidence of authenticity. Miller’s focus on humiliation is especially helpful when we turn back to Justice Sachs and his desire to see his enemy on bended knee.

Through Miller’s lens, Sachs’s desire to witness his enemy’s humiliation—to see his enemy on bended knee—was the satisfaction that

53. *Id.* at 85.

54. *Id.*

55. *Id.*

56. *Id.*

57. MILLER, *supra* note 51, at 85.

58. *Id.* at 84.

59. *Id.* at 88.

Sachs sought. After all, “shaming sanctions, like apology, often satisfy . . . ‘retributive’ thirst by communicating . . . normative, as opposed to legal, standards.”⁶⁰ Men may be particularly susceptible to the desire to satisfy this thirst for retribution through rituals of humiliation, because “[m]en are attuned to the symbolic power of apology, especially as a signal of weakness or an advertisement of defeat.”⁶¹ And, according to Sachs, his thirst would be quenched by seeing his enemy on bended knee. But what about the sixty sheep? What if the rule was that only Sachs could see his enemy on bended knee and could not report to others what he had seen? Would contrition so limited still provide him satisfaction?

These are the questions I pondered later, the kinds of questions familiar to every trial lawyer; the ones that occur while the jury is out or immediately after the witness is finally passed, a lawyer’s *esprit de l’escalier*. I think Sachs was saying that the act of humiliation was in and of itself the satisfaction he desired, the bended knee was the sixty sheep. Sincerity was immaterial when humiliation was the goal. Sachs was a latecomer to the discussion that night in Dallas, and I do not know whether he had read my essay. I cannot imagine that Sachs, a hero in the South African fight for freedom, would find satisfaction in secret contrition. For Sachs, it seems the satisfaction would be tied to the public humiliation his enemy suffered and the political advantages that this humiliation created for those whose freedom Sachs had dedicated his life.

It is important to recall the roots of the modern tort system, especially its attempt to mollify the human inclination toward vengeance. Tort claimants are people whose lives have been turned upside down, people upon whom “the terrors of death have fallen,” people overwhelmed by horror.⁶² It is important to remember that there are dimensions to a tort victim’s suffering that make it different from the suffering each of us endures as a part of human experience—ordinary suffering that is interwoven in earth-side living. The parent who loses his or her child because another fails to obey a traffic signal suffers differently from the parent whose child dies from illness. Both grieve, but the grief of the tort claimant is compounded with powerful and complex emotions because of the relationship of their loss to another’s wrongful act.

60. Latif, *supra* note 10, at 313 (referencing Professor David Karp’s argument).

61. Donna L. Pavlick, *Apology and Mediation: The Horse and Carriage of the Twenty-First Century*, 18 OHIO ST. J. ON DISP. RESOL. 829, 852 (2003).

62. See *Psalms*, *supra* note 2.

There may be tort claimants for whom, like Sachs, humiliation is the object of his or her satisfaction, and the sole reason they pursue litigation. After all, a desire for vengeance is a legitimate and moral emotion. Some have suggested that there is even a biological component to it, that “[t]he ‘urge to avenge wrong’ . . . ‘may indeed be hardwired into the human psyche’”⁶³ Vengeance recognizes the existence of injustice and insists on its correction. From this view, a desire for vengeance expresses a particular notion of the nature of justice itself.⁶⁴ Yet, in my twenty years as a tort specialist, I never had a client who wanted only to see his or her enemy on bended knee. Each also wanted his or her sixty sheep.

As an alternative to the blood feud, modern tort law is only an experiment—what Shuman called a “civilizing effort.”⁶⁵ Yet, within this elaborate system of compensation, rituals of humiliation, repentance, and reconciliation have all but disappeared. When cases are settled, we have no rituals where the sixty sheep given in satisfaction for harm caused are formally exchanged, no elaborate displays where we lay our heads on our adversary’s knee, begging that it be returned attached. Somewhere in our evolution away from the blood feud, we lost something of value: rituals that addressed competing human desires—the inclination to seek vengeance and the desire for peace. I think we recognize something has been lost in this civilizing effort, and that recognition is what has sparked, or at least contributed to, the recent attention in legal scholarship to apology and its role in litigation.

Yet, even with that recognition, the primary focus on apology centers on its efficacy. We are more concerned with its capacity to settle lawsuits than we are with its moral dimension and the role it plays in reparative processes and rituals. It is almost as if apology has been reduced to an instrument of tort reform.

If we believe that tort compensation is an appropriate form of justice, then we should find offense when those unjustly injured are in turn unjustly compensated. It should be cause for alarm when victims are revictimized with partial reparative movements that lead them to relinquish meritorious claims. In promoting the utility of apology, the economic suffering it has the capacity to inflict is often overlooked. Seeing our enemy on bended knee may alleviate suffering tied to the human inclination for revenge, but when it leads someone who has

63. James Q. Whitman, *Between Self-Defense and Vengeance/Between Social Contract and Monopoly of Violence*, 39 TULSA L. REV. 901, 906 (2004).

64. *Id.*

65. See Shuman, *supra* note 47, at 40.

suffered serious injury to relinquish a meritorious claim, it can indeed become a Trojan horse.

V. CONCLUSION

It is not simply a matter of semantics when we say apology and mean repentance. In conflating these concepts, we overstate the significance of apology and assign attributes to it that it does not possess. In tort litigation, this conflation, as the data reveals, has the capacity to contribute to a claimant's suffering. This is especially true for claimants who forgive quickly and who, like Lazare, believe forgiveness includes relinquishing valuable legal rights. To correct this, apology should be used only when we intend to describe a communication of regret or remorse, thus linguistically recognizing its limitations and disconnecting it from attributes it does not possess. If we intend to describe the process that invites forgiveness and reconciliation, we should use the word repentance and thus disrupt the conflation that has occurred between a reparative process and one of its essential elements.

With our terms defined, we should be bold in thinking about repentance and the innovative role it can play in litigation. I work with organizations, businesses, and individuals facing crisis in the wake of error, guiding and creating litigation strategies framed by a client's willingness to authentically repent. Those who have the courage to follow this path have been pleased to see that ethics and efficacy can converge. While innovative, my approach is not original. For example, the Veterans Affairs (VA) hospital in Lexington, Kentucky, tells patients whenever there has been a problem with their care, conducts face-to-face meetings where apologies can occur, and makes offers of compensation and reparation.⁶⁶ Before they introduced this policy, the "Lexington VA was among the nation's VA hospitals that paid the most in claims,"⁶⁷ and now they are among the government's hospitals that pay out the least.⁶⁸

Martha Minow noted that in the wake of catastrophic loss "Legal responses are inevitably frail and insufficient."⁶⁹ This is a good reminder that when it comes to contemplating major loss no compensation and no act of reparation will adequately address the victim's loss. Still, in spite of its limitation, the tort system is the legal vehicle we have designed to address the suffering of those upon whom "the ter-

66. See Taft, *Apology and Medical Mistake*, *supra* note 13, at 83-85.

67. *Id.* at 84 (citing *Owning Up to Ethics Saves Money*, 30 *NURSING* 53, 53 (2000)).

68. *Id.* (citing *Owning Up to Ethics Saves Money*, *supra* note 67).

69. MARTHA MINOW, *BETWEEN VENGEANCE AND FORGIVENESS* 5 (1998).

rors of death have fallen.”⁷⁰ Of course, the concept of suffering is a complex topic, interdisciplinary in its experience, with medical, philosophical, psychological, and religious associations—processes “inextricably intertwined with each other.”⁷¹ Suffering is an experience that is exacerbated when it lacks meaning to the one suffering, and so making meaning of suffering is a critical component in healing for the one harmed.⁷²

Authentic repentance alleviates suffering because it adds this critical dimension of meaning to one who suffers. In its authentic expression, it acknowledges that a wrong has occurred and that it was not the claimant’s fault. Repentance also offers compensation—Miller’s sixty sheep. And, importantly, the final element of authentic repentance, restructuring, communicates that the party who committed the wrong has learned from the mistake and has effected a change in behavior or practice so that others will not be similarly harmed. Restructuring was the nonmonetary element that was of critical importance to my clients because, to the extent it served as a catalyst for change, it injected meaning into what might otherwise have been senseless tragedy. Knowing that others will not be similarly harmed matters.

This is why it is important that we continue to explore ways to encourage authentic rituals and acts of reparation within the tort system. They alleviate suffering. This fact alone makes it worth every effort we take to explore, examine, and address the role of repentance in the tort system. Yet, efforts to encourage repentance will also contribute to systemic changes so that future, similar harm is avoided. Finally, and perhaps most importantly, authentic repentance disrupts the moral backslide we now witness in our culture where we offer expressions of remorse while simultaneously distancing ourselves from accountability for harms we cause and the consequences tied to them.

70. See *Psalms*, *supra* note 2.

71. ERICH H. LOEWY, *SUFFERING AND THE BENEFICENT COMMUNITY: BEYOND LIBERTARIANISM* 13 (1991).

72. *Id.* at 3.

