

SHOWING REMORSE AT THE TRC: TOWARDS A CONSTITUTIVE APPROACH TO REPARATIVE DISCOURSE

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The author argues that, despite explicit declarations by the architects of the Truth and Reconciliation Commission in South Africa expressions of remorse or apology would not constitute a requirement for amnesty, a review of the transcripts of hearings from 1996-2000 shows numerous occasions in which the persons who appeared before the tribunal gave statements to those assembled or directly to their victims in which they claimed remorse or apologized for their actions. This paper analyzes these instances of what may be called reparative discourse in terms of how they are used to mobilize feelings in support of a particular vision of community, how expectations for remorse or apology were contested or resisted by persons who had conflicting visions of community, and how participants decided whether a particular expression of remorse or an offer of apology was credible and real. The purpose of the analysis is to develop an approach to remorse and apology that shows how members decide when reparative discourse is to be expected and how this process of building expectations helps to constitute the moral boundaries of community.

L'auteur soutient que, malgré des déclarations explicites par les architectes de la Commission sud-africaine de la vérité et de la réconciliation à l'effet que les expressions de remords et d'excuses ne constitueraient pas une exigence pour l'amnistie, un examen des transcriptions d'audiences de 1996 à 2000 font voir de nombreuses occasions où les personnes qui ont comparu devant le tribunal ont fait des déclarations aux gens réunis ou directement à leurs victimes prétendant des remords et faisant des excuses pour leurs actions. Cet article analyse ces cas de ce que l'on pourrait appeler un discours réparateur du point de vue de comment on s'en sert pour mobiliser des sentiments d'appui à une vision particulière de communauté, comment des personnes ayant des visions contraires de communauté contestaient et résistaient aux attentes de remords ou d'excuses et comment les participants décidaient si une expression particulière de remords ou une offre d'excuses était crédible et réelle. Le but de l'analyse est de développer une approche aux remords et aux excuses qui démontre comment les membres décident de quand on peut s'attendre à un discours réparateur et comment ce processus de cultiver des attentes aide à constituer les frontières morales de communauté.

I. INTRODUCTION

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In one of the most highly publicized and poignant moments of the hundreds of public hearings conducted by the Truth and Reconciliation Commission in South Africa, Bishop Desmond Tutu is sitting center stage with Winnie Madikizela-Mandela after eight days of harrowing testimony involving allegations of torture, murder, and assault perpetrated by a group of young men. All of these young men had been closely associated with Ms. Madikizela-Mandela and were members of what came to be known as the Mandela United Football Club. Just prior to this encounter, several members who had already been charged and convicted of murder had testified before the Commission that they had acted in accord with her instructions. With cameras recording and in front of hundreds of persons in attendance on December 4, 1997, in an amphitheatre in Johannesburg, with the mother of Stompie Seipei, one of the victims, present in the audience, Bishop Tutu leans forward and addresses the ex-wife of the President of South Africa and ends his speech with the following words:¹

There are people out there who want to embrace you. I still embrace you because I love you and I love you very deeply. There are many out there who would have wanted to do so if you were able to bring yourself to say something went wrong. Because all these leaders couldn't have been so agitated and say I am sorry. I am sorry for my part in what went wrong and I believe we are incredible people. Many would have rushed out in their eagerness to forgive and to embrace you. I beg you, I beg you, I beg you please – I have not made any particular finding from what has happened here. I speak as someone who has lived in this community. You are a great person and you don't know how your greatness would be enhanced if you were to say sorry, things went wrong, forgive me. I beg you.

Ms. Madikizela-Mandela: Thank you very much – Save to say thank you very much for your wonderful, wise words and that is the father I have always known in you. I am hoping it is still the same. I will take this opportunity to say (to) Stompie's mother, how deeply sorry I am. I have said so to her before a few years back, when the heat was very hot. I am saying it is true, things went horribly wrong. I fully agree with that and for that part of those painful years when things went horribly wrong and we were aware of the fact that there were factors that led to that, for that I am deeply sorry.

In this paper, I want to dwell on these moments of what I shall call reparative discourse that arose in the public hearings, held between 1996-2000 throughout South Africa, including the amnesty hearings in which applicants sought amnesty for 'gross violations of human rights', the special hearings in which representatives of key financial, legal, and military institutions were interrogated for their participation in human rights abuses, and the special investigations such as the one involving the Mandela United Football Club undertaken to determine the veracity of allegations of human rights violations arising from earlier submissions. By reparative discourse, I am referring to those exchanges in which an expression of remorse was demanded, invited, or entreated – and in which the alleged wrongdoer responded in kind by showing remorse or by explicitly or implicitly refusing to show remorse.

My purpose in this paper is to use the TRC to illustrate the contribution that reparative discourse makes in constituting the moral boundaries of a society. In contrast to other approaches to the study of apology and remorse that focus on the form and adequacy of these communications within a normative order that is presumed to be stable, I want to show how

¹ Truth and Reconciliation Commission, "Amnesty hearings decisions oral transcripts," online: Truth and Reconciliation Commission [http:// www.doi.gov.za/trc/trc_frameset.htm] > [Commission Hearings]. See Special Hearings – Mandela United Football Club, day 9, December 4, 1997, unpaginated. See also, Antjie Krog, *Country of My Skull* (New York: Three Rivers Press, 2000) at 338 for contemporary reaction to this encounter.

these communications become occasions for the confirmation, disconfirmation, or transformation of a normative order that is itself undergoing change. I refer to this as a constitutive approach to reparative discourse because it seeks to show how the process by which expressions of remorse are requested, and then accepted, negotiated, or resisted itself generates or constitutes the rules regarding what kinds of actions should be accompanied by feelings of remorse, and how these feelings and expressions should be communicated. The comparative informality and public character of the TRC as well as its explicit project of social reconstruction recommend it as an ideal site to examine constitutive processes that are less visible in more formal judicial settings.

My analysis of these processes will consist of three sections. In the first section, I will give examples of how reparative exchanges help constitute what Arlie Hochschild has called the “feeling rules” of a society² by instructing both the perpetrator and the larger community how one should feel about one’s “gross violation of human rights.” Here I will be focusing on interventions by officials of the TRC and their responses to various applicants or subjects of investigation on their willingness or unwillingness to show remorse. In the second section, I will look at how resistance to these “feeling rules” either through direct confrontation or unwillingness to acknowledge “gross violations” as wrongful actions also contributes to the shaping of moral boundaries. In this section, I want to show how the refusal or reluctance to express remorse exposes to public view the presence of competing or conflicting moral communities and that reparative discourse is one site of contestation over how the moral boundaries of the larger society will be constituted. Finally, in the third section, I want to suggest that what is constituted in reparative exchanges is not just what one should feel remorseful for but how these feelings should be demonstrated. Reparative discourse is important not only in terms of how it defines a moral community but in the conditions it establishes for reinclusion into the moral community. How and in what form remorse and apology should be expressed in order to be perceived as believable is also a guide for what those who acknowledge wrongdoing must do to reconcile with the victim.

But, before undertaking this analysis, I will define more precisely what is meant by reparative discourse and how it was incorporated into the regime of the TRC. The examples of reparative discourse that are the object of this analysis were drawn from a scanning of the transcripts from all of the public hearings of the TRC. This involved first of all a simple word search of all terms and their truncations that might refer to the expression of remorse by the speaker. The words searched were “remorse,” “apology,” and “sorry”.³ Those usages that did not refer to wrongs that were committed, such as the chairperson apologizing for a delay in the proceedings or an applicant saying he was sorry for forgetting a date or a name, were excluded. Out of a total of 268 public hearings into amnesty applications, there was at least one instance of reparative

² Arlie Hochschild, *The Commercialization of Intimate Life* (Berkeley: University of California Press, 2003) at 97.

³ In other articles, I have argued that there are important differences between the showing of remorse and the offering of apology both phenomenologically and in how they are deployed in law. See *infra* notes 10 and 13. At the TRC, however, the concepts were used so interchangeably as to render impractical any efforts to treat them as separate categories for purposes of analyzing reparative discourse. The literature on the subject is divided, albeit inadvertently, over whether the apology and remorse are conceptually distinct with the major sociological theorists merging the two – see *infra* notes 4 and 5 – while other scholars make a clear separation – see Antony Duff, *Punishment, Communication, and Community* (New York: Oxford University Press, 2001) at 95 and Sharon Lamb, “Symposium: Responsibility and Blame: Psychological and Legal Perspectives” (2003) Brooklyn L.R. 929 at 954-55.

discourse as defined above in 170 or 63% of the hearings. In the 20 special hearings, there was at least one instance of reparative discourse in all of them.

II. THE USES OF REPARATIVE DISCOURSE IN LAW

Among the earliest but still useful formulations of the social form of expressions of remorse is that of Erving Goffman who viewed both the showing of remorse and the offering of an apology as remedial exchanges that served to re-establish relations between a person who offends and who otherwise might remain offended.⁴ As Goffman conceived it, both forms of communication entailed a splitting off of the self into a part that has offended and a part that agrees that the offending act was morally unacceptable. But it was the later work of Nicholas Tavuchis that addressed the important but unanswered question of how the offender or rule-breaker demonstrated his/her alignment with the victim in mutual rejection of the offending act as members of a shared moral community.⁵ Tavuchis stipulated that there were three major components to the contemporary use of the apology. The first element is an unconditional acknowledgement of responsibility, for if an account tries to explain or justify the offending act, he result is an excuse rather than an apology.⁶ Second, the apology conveys not merely acknowledgement but sincere self-condemnation for the harm caused by the wrongdoing.⁷ The offender shows through the apology that the victim(s) have suffered because of their wrongdoing. Finally, the apology or show of remorse explicitly or implicitly entails a plea for forgiveness or reinclusion in the moral community. We shall have occasion later to apply these criteria to the communications that emerged from the TRC hearings.

Although both Goffman and Tavuchis envisaged the private, dyadic encounter as the primary site for expressions of remorse and apology, there has been increased scholarly interest in the past ten years in the public manifestations of reparative discourse in contemporary legal systems.⁸ Recent major investigations such as the National Capital Jury Project have documented the significant role that expressions of remorse play in jurors' decisions over whether to apply the death penalty to persons who have been convicted of capital crimes.⁹ Other studies have pointed out how designations as remorseful or unremorseful are used to sort transgressors into those whom it is believed can be reintegrated back into society from those who

⁴ Erving Goffman, *Relations in Public: Microstudies in the Public Order* (New York: Basic Books, 1972) at 113-118.

⁵ Nicholas Tavuchis, *Mea Culpa: A Sociology of Apology and Reconciliation* (Stanford: Stanford University Press, 1991).

⁶ See *ibid.* at 8.

⁷ See *ibid.* at 17.

⁸ See especially, Yanrong Chang, *Culture and Communication: an Ethnographic Study of Chinese Courtroom Communications* (Ph.D. thesis, University of Iowa, 2001) [unpublished]; David T. Johnson, *The Japanese Way of Justice: Prosecuting Crime in Japan* (New York: Oxford University Press, 2002); and Martha Komter, *Dilemmas in the Courtroom: A study of the trials of violent crime in the Netherlands* (N.J.: Erlbaum Associates, 1998) for discussions of the role of remorse in criminal justice systems in China, Japan, and Netherlands, respectively.

⁹ See e.g. William Bowers, "The capital jury project: Rationale, design, and preview of early findings"(1995) 70 Ind. L.J. 1043 for scope of project, and Scott E. Sundby, "The capital jury and absolution: the intersection of trial strategy, remorse, and the death penalty" (1998) 83 Cornell L.R 1557 for one of many articles from this project that discuss the role of remorse in sentencing for capital trials.

can not.¹⁰ Such designations function as factors in mitigation or aggravation of criminal sanctions,¹¹ as indicators of a wrongdoer's progress towards rehabilitation and their suitability for parole or other privileges,¹² or as ways of designating persons with regard to the risk they pose to the community.¹³ Without going into detail about the use of reparative discourse in contemporary law, what is relevant for present purposes is that the search for expressions of remorse and genuine apology is a component of all three major contemporary theories of penology. Retributionists, just desert theorists, and others who defend punishment as valid in itself as a form of moral rebalancing valorize remorse as justifiable pain and suffering rightfully experienced by the perpetrator for the harm done to the victim.¹⁴ Deterrence theorists view remorse or its absence as factors related to risk and rehabilitation – a position that has become conventional wisdom in sentencing regimes in many jurisdictions.¹⁵ The most recent of these approaches, notwithstanding its pristine origins, is that of restorative justice in which expressions of apology and remorse are accorded major significance as one of the central dynamics in the reconciliation of victim and offender.¹⁶

Since the Truth and Reconciliation Commission modeled itself explicitly on this latter approach to justice, it is important to identify two important ways in which its approach to reparative discourse differs in theory and practice from that of both retributionist and deterrence models of penology. First, because restorative approaches emphasize movement in the relationship between victim and offender as the catalyst for transformation in both – ideally, among other processes, the victim is given recognition by the offender who acknowledges the suffering and pain that resulted from the wrongdoing in return for which the offender may receive forgiveness and acceptance – there is an emphasis on direct exchange between the parties to the conflict. What this has meant in practice is the implementation of processes of deprofessionalization and informalization in which victim and offender are allowed far greater opportunity for unmediated contact, albeit with witnesses or facilitators present, in contrast with formal legal procedure in which typically no unmediated encounters between victim and offender are allowed.¹⁷ As we shall see below, it can be said that the restorative justice model far more closely approximates the reparative processes envisaged by Goffman and Tavuchis in

¹⁰ See Richard Weisman, "Detecting remorse and its absence in the criminal justice system" in Austin Sarat and Patricia Ewick, eds. *Studies in Law, Politics, and Society* (Greenwich, Conn.: JAI Press, 1999) 121.

¹¹ Michael O'Hear, "Remorse, cooperation, and 'acceptance of responsibility': The structure, implementation, and reform of section 3e1.1 of the Federal Sentencing Guidelines" (1997) 91 Nw. U.L.Rev. 1507.

¹² See e.g. David Tidmarsh, "Necessary but not Sufficient – The personal view of a Psychiatric Member of the Parole Board" in Murray Cox, ed., *Remorse and Reparation* (London: Jessica Kingsley Publishers, 1999) at 49.

¹³ Richard Weisman, "Showing Remorse: Reflections on the Gap between Expression and Attribution in Cases of Wrongful Conviction" (2004) 46 (2) Can. J. Crim. & criminal justice. 121 at 127-128.

¹⁴ This stance is well expressed in Robert Blecker, "Haven or Hell: Inside Lorton Central Prison: Experiences of Punishment Justified" (1990) 42 Stanford L.R. 1149 at 1241: "Full retribution, full pain, must act not only on the body of the criminal but on his soul. It must act not only to produce regret, but remorse."

¹⁵ O'Hear, *supra* note 10. For entrenchment of this approach in trials involving genocide, see Nancy Amoury Combs, "Copping a Plea to Genocide: Plea Bargaining of International Crimes" (2002) 151 U. Pa. L. Rev. 1 at 84, 111, 116, 118, 123, 132, 136.

¹⁶ See Allison Morris, "Shame, Guilt, and Remorse: Experiences from Family Group Conferences in New Zealand" in Ido Weijers and Antony Duff, eds., *Punishing Juveniles: Principle and Critique* (Portland, Oregon: Hart Publishing, 2002) 157 for discussion of central role of remorse in restorative justice mediations.

¹⁷ For extended discussion of how expressions of remorse and apology are discouraged in criminal law, see Stephanos Bibas and Richard A. Bierschbach, "Integrating Remorse and Apology into Criminal Procedure" (2004) 114 Yale L.J. 85.

which a person who is perceived as having transgressed is invited to apologize or show remorse to the person who has been harmed by the transgression.

The second point of difference is as consequential as the first. One of the fundamental dilemmas in retributionist and instrumentalist approaches to remorse is that the amount of punishment is made conditional on its presence or absence. This poses a dilemma because the offering of an apology or the showing of remorse cannot be credited as real if either is perceived as strategic rather than spontaneous – that is, offered in expectation of reward rather than as a sincere expression of inner feelings. Yet, if the outcome of such expressions of reparation is the mitigation of punishment, how do we distinguish appearance from reality since both may result in same favourable outcome. Restorative justice purports to resolve this dilemma by decoupling expressions of remorse or apology from punishment – that is, by making the outcome of the encounter between victim and offender independent of the administration of punishment. Whatever benefits accrue to the victim and/or offender, are expected to inhere in the encounter itself. Ideally, then, in light of this decoupling, the offender’s overt expressions of remorse or the offering of the apology are more likely, it is suggested, to correspond to genuine inner feeling.

III. INCORPORATING REPARATIVE DISCOURSE INTO THE TRC

How then was reparative discourse mobilized in the setting up of the Truth and Reconciliation Commission? In theory, the TRC was intended to comprise two discrete and non-overlapping processes. On the one hand, the preconditions for a successful application for amnesty were full disclosure of the gross violations of human rights and clear evidence that the act(s) was committed for political purposes rather than for personal reasons or private gain.¹⁸ In numerous commentaries on the amnesty provisions of the Promotion of National Unity and Reconciliation Act – including writings by Desmond Tutu,¹⁹ who served as chair of the entire Commission, but most authoritatively in the final report of the TRC – it was declared after what the authors described as a “controversial feature of the legislation,” that expressions of contrition would not be a precondition for amnesty in order to “save the process from lies and faked apologies.”²⁰ And, indeed, in none of the published decisions either granting or refusing amnesty are the presence or absence of remorse or apology mentioned as factors for or against a favourable outcome.

On the other hand, the architects of the TRC crafted another sequence in which victims and perpetrators would have an opportunity for relatively direct communication albeit mediated by officials at the hearing. Rules regarding hearsay and relevance were relaxed in order to give maximum opportunity for both the victim and perpetrator to express themselves in their own words. In this portion of the hearings, the hope was that through dialogue, in which the perpetrators would be confronted with the impact of their actions on the victim or their families, those who had committed these deeds would be moved to apologize or show remorse and those who had suffered might similarly be open to forgiving those who had harmed them.²¹ If the first sequence of disclosure and avowed political purpose were offered clearly in expectation of

¹⁸ See *Promotion of National Unity and Reconciliation Act*, 1995, online: Policy and Law Online News <<http://www.polity.org.za>> C. 4, ss.20 (2)(a) and (b) for definition of political act and s. 22(b) for criteria for deciding whether an act is political or personal.

¹⁹ Desmond Tutu, *No Future Without Forgiveness* (London: Rider Books, 1999) 48.

²⁰ *Truth and Reconciliation Commission of South Africa Report*, 1998, Vol. 5, c. 9. at 391[*TRC Report*]

²¹ See Jacques Derrida, *On Cosmopolitanism and Forgiveness* (Routledge: New York, 2001) for thought-provoking critique of how forgiveness was deployed at the TRC.

benefit, the second sequence of contrition from the offender and possibly forgiveness from the victim was intended to be voluntary and without ulterior motive.

In practice, there can be little doubt that there was, first, strong encouragement in the hearings for perpetrators to show remorse or apologize to their victims and second, high praise for those victims who responded with forgiveness. If the daily work of the amnesty committee was to press perpetrators to fully disclose their actions – to provide an accurate record of the horrors of Apartheid in return for the obvious benefits of amnesty – what was written about in the media or shown by the South African Broadcasting Commission in its weekly highlights or emphasized in such films as *Long Night's Journey into Day*, the most widely distributed film to date on the TRC as well as in the TRC's final report of its findings from its various hearings were those few occasions when the movement from remorse to forgiveness to reconciliation were most fully realized.²² Whether the strong public approval by those who presided over the hearings for those who did show remorse and those who were able to forgive made these expressions less than voluntary has been the subject of much commentary both by supporters and critics of the proceedings.²³

Accordingly, despite the relatively frequent reminder voiced by advocates, defense lawyers, and applicants that showing remorse was not a requirement for amnesty, invitations to show remorse or offer an apology, on the one hand, or to forgive, on the other hand, are present in a majority of the hearings as mentioned above. Sometimes it is the advocate and other times it is the defense lawyer who will introduce the subject. The following sequence illustrates the manner in which expressions of remorse or apology were elicited. Here the lawyer asks his client:²⁴

(Lawyer-L): Do you see Mrs. Bengu (mother of the victim)- in court today?

(Applicant-A) Yes- I see her.

L: Where is she seated?

Do you want to tell her anything, Mr. Manqele?

A: Yes- there is something I would like to say to her.

L: What would you like to say?

A: I would request her to forgive me for what I did. I cannot explain it. I request you Mrs.

Bengu: I know that this is painful for you. I do not have the words to express myself but I am sorry for what I did. Please forgive me.

Similarly, the following is an example in which the victim is invited to forgive in response to the applicant's apology and show of remorse:²⁵

²² For example, see *TRC Report*, *supra* note 20 at Vol. 5, c. 8 at 306: "The Commission also listened to perpetrators describing in awful detail the acts of terror, assassination, and torture they inflicted on so many over so long a period. Here the mood was very different. Encouraging, though, were the expressions of remorse and seeking for forgiveness on the part of some of those who applied for amnesty."

²³ For antithetical views on the role of the victim in the hearings, see Analise Acorn, *Compulsory Compassion: A Critique of Restorative Justice* (Vancouver: UBC Press, 2004) at 72 on Archbishop Tutu's 'excessive' expectation regarding the obligations on the victim to forgive: "His expectations about the returns of (apology) are high. We expect nothing less than joy when the sinner repents." On the other hand, see Elizabeth Kiss, "Moral Ambition within and Beyond Political Constraints" in Robert. J. Rotberg and Dennis Thompson, *Truth v. Justice* (Princeton, N.J: Princeton University Press, 2000) 68 at 76 who writes that " victims had a right to confront their abusers during amnesty hearings, holding them accountable in an especially powerful way."

²⁴ *Commission Hearings*; *supra* note 1 – amnesty hearing held on February 1, 1999 at Pietermartizburg, unpaginated.

²⁵ *Ibid.* See amnesty hearing held at Pietermartizburg, February 9, 1999, unpaginated.

Chairperson: You are the mother of the deceased?

Mrs. Ndlovu: That's correct.

Chair: You have heard a number of these young people giving evidence before us today?

Mrs. N: Yes, I heard.

Chair: Each one of them says that he's very, very sorry for what has happened and they're asking forgiveness from the family of the deceased, did you hear that?

Despite their formal irrelevance to decisions about amnesty, participants at the hearings, including chairs, advocates, and defense counsel, undertook to facilitate expressions of remorse and forgiveness.

But the mobilization of reparative discourse – both its facilitation and its expression – can only be understood in the context of the overarching moral framework within which the TRC operated and the specific circumstances that led victims and perpetrators to apply for amnesty. While both defenders and opponents of the former government were equally eligible for amnesty if they could demonstrate that their actions were committed in order to achieve a political purpose, the Commission report is explicit in its denunciation of Apartheid as an unqualified wrong and a crime against humanity. If, for purposes of obtaining information on the 'gross violations of human rights' that were committed, it were necessary to exempt from legal culpability both the National Party (NP) and their allies, the Inkhata Freedom Party (IFP), on the one hand, and the forces of liberation such as the ANC (African National Congress) and their allies – the Pan-Africanist Congress (PAC) and the Azanian People's Liberation Army (APLA) – the report makes clear that, from the standpoint of the new government, the greater burden of responsibility belongs with those who acted in support of the state: "Violence of the powerful does not equal the violence of the powerless – the disenfranchised, oppressed, and relatively voiceless black majority."²⁶ In the moral community envisaged by the architects of the TRC, complicity with Apartheid, even if the perpetrator qualified for amnesty, was something over which to express contrition – participation in the operations of the ANC or its political allies was not. Reparative discourse at the TRC must thus be understood as occurring within a moral framework that had to this extent already pre-determined for which actions expressions of remorse or apology would be expected and for which actions these would not be expected. Through all the hearings and investigations, no one was ever asked nor did any one volunteer to show remorse for having fought against apartheid while there are a number of instances of applicants expressing remorse for having fought for apartheid.²⁷

The circumstances under which applicants for amnesty and other participants came forward are equally important for an understanding of the uses of reparative discourse in the TRC. With respect to the amnesty hearings, the commission report acknowledges that the bulk of perpetrators submitted applications either in order to challenge a pre-existing criminal conviction or to forestall a future conviction. This was particularly true of applicants on the government side where one of the key breakthroughs for the commission occurred as a result of the appearance of Colonel Eugene de Kock, one of the key operatives among the security personnel

²⁶ See *TRC Report*; *supra* note 20, Vol. 5, c. 7 at 276.

²⁷ See *Commission Hearings*, *supra* note 1, amnesty hearing held on May 3, 1999 at Pretoria for apology for fighting for apartheid. But see hearing held on May 10, 1999 at Klersdorp in which Eugene Terreblanche, head of the extreme right wing Afrikaner Resistance Movement stated "...do not expect false evidence from me by saying I am sorry."

and commander of the notorious security unit at Vlakplass that carried out numerous raids, tortures, and killings of suspected ANC and PAC guerrillas. By the time de Kock applied for amnesty, he had already been convicted of 89 charges of murder, attempted murder, and other crimes and sentenced to two life terms plus 212 years. When he began to give evidence to support his claim for amnesty, many security personnel followed with their own applications in order to forestall prosecution on the basis of de Kock's evidence.²⁸ While participation rates were clearly affected by the support or opposition to the proceedings as articulated by the different political parties, the vast majority of applications for amnesty from all political parties were submitted by persons facing prosecution or by those already incarcerated.

Where applicants had so much at stake in the outcome of their hearing – liberty, on the one hand, or continued or possible future incarceration, on the other – the much vaunted decoupling of the requirements for amnesty with the expression of remorse and apology began to break down. By exempting political acts from legal culpability, the Truth Commission wittingly or unwittingly supplied applicants with a distinctive language within which to frame their violent deeds. To be eligible for amnesty, applicants were obliged to characterize their actions as more the product of political imperatives than personal choice. This recasting of motives as political rather than personal could not help but affect the ways in which apology and remorse were expressed. Perhaps the primary result of this recasting was the tendency for applicants to attribute responsibility for their gross violations of human rights to membership in political organizations rather than to their own voluntary choices. Such politicization of motives extended even to acts that would ordinarily have been classified as crimes against the person. For example, in one of the more extreme instances of force-fitting a violent act into the political template, a husband who had murdered his wife in a relationship characterized by prolonged physical abuse, claimed in his application for amnesty that he was acting in a political capacity because of her sympathies with the ANC.²⁹ Hence, the strategic considerations that the TRC had sought to banish from reparative discourse cannot be discounted as factors influencing the form in which remorse or apology was expressed.

It is within the context of these constraints on expression that the constitutive role of reparative discourse can be best understood.

IV. REMORSE AND THE CONSTITUTING OF NEW MORAL BOUNDARIES

As Tavuchis and others have suggested, expressions of remorse and apology incorporate multiple meanings all of which come to signify in moments of public performance the fit or lack of fit in values among victim, offender, and the community in which they are engaged. The perpetrator who acknowledges responsibility for his or her transgressive act, who admits the wrongfulness of the act, and who shows through her/his feelings of pain and self-condemnation not just her/his empathy but her/his internalization of the values of community, does more than merely create the possibility for reconciliation with the victim. Because of the epistemological privileging of feelings over words – that feelings more than words reveal the true identity of the person – such performances help constitute the moral boundaries of community by confirming their validity at what are perceived as the deepest levels of personal commitment. Correspondingly, the willingness to defy these expectations when expressions of remorse or

²⁸ See *TRC Report*, *supra* note 20, Vol. 5, c. 6 at 202: “Whatever his motives, the Commission acknowledges that it was largely he (de Kock) who broke the code of silence.”

²⁹ *Commission Hearings*; *supra* note 1 – from amnesty hearing held at Pretoria, January 25-29, 1999, unpaginated.

apology are invited can convey not merely a rejection of the standpoint of the victim but also a challenge to the moral authority of the community as a whole. There is much at stake in these demonstrations especially when the gap between victim and perpetrator is the result of the extreme levels of physical and psychological violence incorporated within the category of ‘gross violations of human rights’ at the public hearing of the TRC.

The following sections are intended to illustrate an approach to analyzing how reparative discourse is used to constitute a moral order, how what is constituted is always subject to contestation, and how the criteria for recognizing remorse and apology become established through interaction among participants.

A. Feeling Rules

The following excerpt will provide a reference point for the discussion below. It is taken from the cross-examination of Janusz Walus – a member of the South African Defense Forces – who was applying for amnesty for the assassination of Chris Hani, an ANC activist who later became secretary-general of the South African Communist Party.³⁰

Adv. Bizos: What is your present feeling Mr. Walus, did you achieve anything by murdering Mr. Hani either politically, personally, or for your cause or was it a wasted life? The waste having been caused by you, which of the two do you feel?

Walus: Mr. Chairman, I can’t answer this question because history can show, further history, what happened as also we cannot foresee what could have happened if Mr. Hani would still be alive. We also cannot foresee what would be, so it is difficult to say anything. Surely the feelings of killing are not pleasant and nothing positive comes from that.

Adv. Bizos: *I would have expected you to show some remorse in answer to that question and not leaving it for history to possibly justify your act.* (My emphasis)

Walus: Mr. Chairman, I would like to ask Mr. Bizos why he expects from me remorse?

In one of her earlier contributions to the sociology of affect, Hochschild designates as “feeling rules” those prescriptions, recipes, or directives that inform members of a community how they should feel in different situations and different contexts.³¹ For present purposes, I refer to these interventions as constitutive because they do not merely invoke a pre-existing ‘feeling rule’ as to when remorse or apology should be expressed but also inform both the offender and the community that henceforth these are actions or events for which feelings of remorse or expressions of apology will be expected. In effect, such interventions involve rule-making in which, for example, acts of violence that may have been implemented without feelings of remorse and without requiring an expression of apology are now redefined as actions for which perpetrators should feel remorse. Both the above excerpts as well as the entreaty of Bishop Tutu at the outset of this paper are offered as illustrations of this constitutive role played by reparative discourse. What links the two exchanges is that in each there is a communication to the persons under interrogation that they have committed acts for which they should feel and express remorse regardless of how they may have felt about these acts before. Much of what I have designated as reparative discourse at the TRC can be similarly interpreted as constituting new feeling rules for the larger community.

³⁰ See *ibid.* Amnesty hearing held at Pretoria, August 11, 1997 – unpaginated.

³¹ Hochschild, *supra* note 2 at 81-82.

In societies such as that of contemporary South Africa, that are engaged in what recent analysts have referred to as ‘transitional justice,’ and where there is a profound discontinuity between the ideological and moral underpinnings of the previous and current political regimes, the constitutive role of reparative discourse is more visible than elsewhere. Suddenly, the state and the community that it represents are prepared to valorize groups and categories of persons that had previously been despised and marginalized. What William Gamson has called the “universe of obligations ” – which tells us who is the we to whom specific moral obligations apply and who is the them to whom these obligations do not apply – expands or contracts or changes in particular ways such that actions that may have previously gone unnoticed are now expected to be looked upon as wrongful and to be accompanied by feelings of remorse even if retroactively.³² Reparative discourse contributes to this redefinition of community by constituting new feeling rules. If, in the previous community, membership was affirmed by not feeling remorse or by not expressing apology for certain actions, membership in the new community requires that persons will feel differently about these same actions. In this way, reparative discourse helps to define what is meant by membership in a community – a community that is defined not just by its adherence to a common body of law or codes of behaviour but also by its shared sentiments.

No public hearings better illustrate the importance attached to these exchanges than the divergent impact they had on the characterizations of two of the most well-know participants – Ms. Madikizela-Mandela and Colonel De Kock. Although both were alleged to have committed or aided in the commission of gross violations of human rights, Madikizela- Mandela was and continues to be recognized as one of the heroes of resistance to Apartheid whereas de Kock, as mentioned above, was implicated in the illicit murder and torture of scores of ANC activists. Yet their response, when prompted to show remorse or apologize for their involvements, could not have been more different. After a total of nine days accumulating evidence about the activities of the Mandela United Football Club and her role in the murder and torture of several youths, the Chair of the investigation asked Madikizela-Mandela:³³

Chair: In view of the number of people serving sentences, in view of the number of young people who have been killed, in view of the number of young people who have been tortured, in retrospect, do you think you should have handled things differently at the time?

Ms. Madikizela-Mandela: I have given an answer Mr. Chairman.

Chair: Do you have any regret or any remorse to what has happened at the time?

Ms. M: Of course I have regret to the subsequent losses of life of some of the boys and I’m deeply regretful of what has happened to some of the youngsters ... But I do not regret whatsoever for having covered for those who have protected them from the vicious system of the day.

For her defiance of the “feeling rules ” of the TRC, she is characterized in the final report as someone engaged in “ blanket denial” and as someone who “refused to take responsibility for any wrongdoing.” Moreover, her reply to the entreaties of Bishop Tutu is also viewed as

³² William Gamson, “Hiroshima, The Holocaust, and the Politics of Exclusion” (1995) 60 *American Sociological Review* 1.

³³ See *Commission Report, supra* note 1 – Special Hearing on the Mandela United Football Club, 9th day of the hearing held on December 4, 1997, Johannesburg – unpaginated.

reflecting an insufficient display of feeling – “It was only at the end of her testimony, under great pressure from Archbishop Desmond Tutu, presiding over the proceedings, that she reluctantly conceded that ‘ things had gone horribly wrong.’”³⁴

De Kock, on the other hand, participated in seven separate hearings involving over 50 days of testimony in which he was the prime witness and applicant. He is cited approvingly in the final *TRC Report* for his frequent assertions of responsibility for wrongdoing and for his impassioned accusation directed against F.W. De Klerk, the former leader of the National Party, for not admitting that he had condoned and tacitly encouraged the torturings and assassinations that the colonel had arranged.³⁵ “It is because, in that evidence (evidence given by De Klerk to the TRC) he simply did not have the courage to declare ‘yes, we at the top levels condoned what was done on our behalf by the security forces. What’s more, we instructed that it should be implemented.’”

It is no small irony that in terms of contributing to the new moral order, as envisaged by the architects of the TRC, that de Kock would demonstrate at least to the satisfaction of some members of the Commission³⁶ the contrition that was demanded while Madlikova-Mandela would be among those who were most adamant in their resistance to these demands.³⁷

B. Resistance

In a short essay written after the conclusion of the TRC, Frederik van Zyl Slabbert, former leader of the opposition in South Africa during Apartheid, imagines the kind of apology he wanted to hear from the leader of the National Party for the years of violence and degradation directed towards black South Africans and the heartfelt embrace between De Klerk and Nelson Mandela that would have followed such an offering.³⁸ Then, he awakens and compares that unrealized epiphany with what he decries as the woefully insufficient speech that De Klerk actually gave. Indeed, with few exceptions, the vast majority of applicants for amnesty either refused to apologize or show remorse even when invited to do so or, more frequently, offered statements that were so fraught with equivocation and qualification as to leave the victim and the Commission officials in doubt whether the perpetrator did feel remorse or had apologized for their gross violations of human rights. If acknowledgement of responsibility coupled with the admission of wrongdoing is the indispensable requirements for an apology or a show of remorse, then, despite official encouragement, most of the applicants for amnesty were either unable or unwilling to comply.

Probably the dominant mode of explanation in the social sciences for accounting for the reluctance among rule-breakers to accept full responsibility for their wrongdoings is still neutralization theory as articulated some fifty years ago in the classic work of Gresham Sykes and David Matza.³⁹ The primary thrust of this approach is to suggest that those who break the

³⁴ See *TRC Report*; *supra* note 20, Vol.2, c. 6 at 578.

³⁵ See *ibid*, Vol.2, c. 7 at 264.

³⁶ See Pumla Gobodo- Madikizela, *A Human Being Died That Night: A South African Story of Forgiveness*, (New York: Houghton-Mifflin) 2003. The work is based on Gobodo-Madikizela’s interviews with De Kock while he was in prison and she was a psychologist who served on the TRC. See also her article that also deals with question of De Kock’s remorse- “Remorse, Forgiveness, and Rehumanization: Stories from South Africa”(2002) 42 *Journal of Humanistic Psychology*, 7.

³⁷ See *TRC Report*; *supra* note 20 – Vol. 5, c. 7 at 265.

³⁸ Frederik van Zyl Slabbert, “Truth Without Reconciliation, Reconciliation Without Truth” in Charles Villa-Vicencio and Erik Doxtader, eds., *The Provocations of Amnesty* (Claremont, South Africa: Africa World Press, Inc., 2003) 315 at 315.

³⁹ Gresham M. Sykes and David Matza, “Techniques of Neutralization: A Theory of Delinquency” (1957) 22 *American Sociological Review* at 664.

rules of their community but who remain attached to its values will seek to ‘neutralize’ or diminish social condemnation as well as self-reproach by accounting for their actions in ways that diminish their culpability. Moreover, these accounts or ‘techniques’ will pattern themselves after what are perceived as the existing repertory of socially acceptable excuses or justifications. Although the authors may not have intended it, subsequent generations of theorists and practitioners in criminology and forensic psychology have tended to construe the various techniques of neutralization as evidence of moral shortcomings or defects that enable wrongdoers to continue their transgressions without bearing the burden of guilt or self-condemnation, thus making it easier for them to transgress again.⁴⁰

But there is some doubt whether neutralization theory can be applied to a society such as the South Africa of the TRC where questions about responsibility and wrongfulness remained open to contestation. Is the refusal to accept responsibility or to admit wrongdoing a matter of guilt evasion – as neutralization theory might suggest – or is it a rejection of one version of the history of Apartheid in favour of another? As an illustration, consider the following exchange involving an applicant who was one of the persons responsible for the sensational Heidelberg massacre of December 30, 1993 in which gunmen from the APLA (Azanian People’s Liberation Army) entered a tavern and shot to death four unarmed civilians and seriously injured several others:⁴¹

Advocate Sandi: Mr. Madasi, let me put my question to you as follows – as you are sitting there today would you say you have any regrets, do you regret having followed instructions the way you described in the morning?

Mr. Madasi: First of all I joined APLA voluntarily; I was not forced to do so. I joined APLA because I could see the oppression of the AZANIAN people. Whatever effort I made towards the struggle, I see it as having contributed to a battle fighting the oppressor. As I said, no one has the right to take somebody else’s life. The people that have lost their lives or the next of kin – as far as that is concerned, I am sorry.

I was however part of the unit which attacked the tavern and which caused the death of four people. I therefore take responsibility for what happened. I deeply regret the causing the loss of life and causing grief to the families and victims involved. I am sorry and I ask for their forgiveness. *“I believe however in the cause that I was fighting through APLA because at the time the country was still being governed by a White minority.”* (My emphasis)

Now, the above statement by Mr. Madasi shares certain significant features with numerous other statements made by applicants from the APLA, the ANC, and the PAN, whose ‘gross violations’ were committed in opposition to Apartheid. First, while the offenders admit personal responsibility for their actions, they also assert their belief that what they did was justified because of the circumstances that prevailed at the time of their violent deed. Second, while there is an expression of sorrow for the effects of their actions on victims and their families, there is no self-condemnation for having caused this sorrow. In terms of the typology discussed above, such statements correspond to what moral philosophers would refer to as regret rather than as remorse or apology insofar as one can regret the effects of their actions even while maintaining that their

⁴⁰ See Shadd Maruna and Heith Copes, “What Have We Learned from Five Decades of Neutralization Research?” (2005) 32 *Crime and Justice* 221 at 271 for an important, recent critique of these assumptions.

⁴¹ *Commission Report, supra* note 1 – see amnesty hearing into Heidelberg Tavern Massacre, Part 2, Cape Town, October 8, 1997, unpaginated.

actions were necessary.⁴² From the vantage point of neutralization theory, it might be possible to view the statement as an attempt to deflect social condemnation and self-reproach through an “appeal to higher loyalties.”⁴³ While the applicant claims to share the value that the killing of civilians is wrong, he tries to neutralize his guilt and possible social condemnation by framing his act as justified because of a more compelling commitment to the political objectives of the group to which he belongs.

But to view such statements as ways of evading guilt by neutralizing the social disapproval that would otherwise result assumes a shared moral universe in which there is agreement on what acts are wrongful, how responsibility is to be apportioned, and then, on the basis of these shared understandings, when a show of remorse or an apology is to be expected. In the context of the TRC, these assumptions were open to contestation. What was at stake in the willingness or refusal to show remorse or apologize for ‘gross violations of human rights’ was the endorsement of one narrative of the history of apartheid over another. In one version, the means used to overthrow apartheid could be separated from the political objective of overthrowing apartheid so that ‘gross violations of human rights’ were acts for which an apology was expected. In the other version, the means used to achieve this objective could not be separated from the ends themselves – to apologize for these means would be tantamount to questioning the ends to which these means were directed. In the words of the commander who had directed the Heidelberg operation, “(w)e do not therefore regret that such operations took place and there is therefore nothing to apologize because we believe in the justness of our war and the correctness of our struggle.”⁴⁴

The refusal to show remorse or offer an apology can thus be understood not only as a way of protecting one’s self against social condemnation but also as a form of political resistance. As Hochschild has written:⁴⁵

One can defy an ideological stance not simply by maintaining an alternative frame on a situation but by maintaining an alternative set of feelings rights and obligations. One can defy an ideological stance by inappropriate affect and by refusing to perform the emotional management necessary to feel what, according to the official frame, it would seem fitting to feel.

To refuse to apologize or to show remorse when it is expected may signify no less than the rejection of one moral universe in favour of another. Viewing reparative discourse in these larger terms may help to make sense of why public hearings such as those in South Africa and courts in jurisdictions throughout the world take these expressions so seriously.

C. Constituting Remorse and Apology

Dirk Coetzee: ...I hope to in future meet up with her (Mrs. Khondile – mother of the victim whom Coetzee and others in the covert operations unit had murdered) one day and

⁴² Gabriele Taylor, *Pride, Shame, and Guilt* (New York: Oxford Press, 1985) at 99

⁴³ Sykes and Matza, *supra* note 37 at 669. For attempt to apply the neutralization typology to genocide, see Alexander Alvarez, “Adjusting to Genocide: The Techniques of Neutralization and the Holocaust” vol. 21(2) (Summer, 1997) *Social Science History* 139.

⁴⁴ *Commission Hearings, supra* note 1 – see amnesty hearing of Heidelberg Tavern Massacre, part 7, held on October 31, 1997 at Cape Town, unpaginated.

⁴⁵ Hochschild, *supra* note 2 at 99.

look her in the eye, and the pathetic sorry all I can say, but generally one just wants to meet someone of the calibre of Mrs. Khondile.

Lawyer for Mrs. Khondile: Mrs. Khondile asks me to convey to you that this is an honour that she feels you do not deserve and that if you were really remorseful you would not have applied for amnesty, but in fact stood trial for what you did with her son.⁴⁶

The above statement was issued by the lawyer for the victim's mother in opposition to the amnesty application of Dirk Coetzee,⁴⁷ erstwhile member of Vlakplaas, for participating in the murder of her son. For Mrs. Khondile and a number of other victims and their families, the very act of asking for amnesty was enough to negate the claim that the applicant was sincere in expressing remorse. From this vantage point, a person who was truly remorseful for their gross violations of others' rights would not seek to mitigate their suffering by asking for an exemption from criminal or civil liability for the harm they caused to others. Others, of course, saw no inherent contradiction between a show of remorse and an application for amnesty. How then is it decided that an apology or a show of remorse is 'real'?

In linguistic philosophy, following J.L. Austin's pathbreaking work, the act of offering an apology or demonstrating remorse can be categorized as a performative. This category follows Austin's distinction between performative and constatives in which the former refers to utterances that change a state of affairs when spoken in the right context and in which the latter refer to utterances that merely describe the world.⁴⁸ But more recent developments in linguistics have suggested that it is not only the speaker's intention that determines whether a particular speech act has occurred but rather the joint action of all participants.⁴⁹ What is said or what is understood to have been said evolves and changes as the conversation changes. In the above excerpt, while the perpetrator appears to be showing remorse in his declaration to 'look the mother in the eye' and issue 'a pathetic sorry' for what he has done, this is not how the victim's mother conceives his statement. In her reply, she redefines his attempt to show remorse as instead a strategic move designed to escape punishment. In the words of Davies and Harre, performatives are "defeasible"⁵⁰ – they may be undone by the hearer in ways that redefine or give alternative definitions to what was originally declared.

Such an interactive approach to language seems to correspond far more fully to the actual process by which reparative discourse is constituted than approaches that assume a uniform or fixed standard for deciding whether an offer of apology or a show of remorse is validated as real or credible. In reparative discourse, there is always room for contestation even when all speakers and hearers agree over which acts should be accompanied by feelings of remorse. What remains to be negotiated is whose standpoint – that of the speaker or the hearer or a third party- will be invoked to decide whether or not a particular expression of remorse is valid.

In the context of the TRC, there were few instances in which victim and offender or all victims of the same offender agreed among each other on the meaning of a particular speech act, whether what was claimed as real was real in fact, or whether the apology or show of remorse was even

⁴⁶ *Commission Hearings*, *supra* note 1 – see amnesty hearing held in Durban, November 7, 1996, unpaginated.

⁴⁷ For contemporary reaction to this hearing, see Krog, *supra* note 1 at 79. Coetzee left South Africa to join the ANC in 1989.

⁴⁸ J.L. Austin, *How to Do Things With Words* (Cambridge, Mass.: Harvard University Press, 1962).

⁴⁹ I am indebted to an unpublished paper by my colleague, Professor Paul Antze, for introducing me to these developments: "Memory and the Pragmatics of Transference in Psychoanalysis."

⁵⁰ Bronwyn Davies and Rom Harre, "Positioning: The Discursive Production of Selves" (1990) 20 *Journal for the Theory of Social Behavior* 43 at 45.

roughly proportional to the harm. The many examples of reparative discourse at the TRC demonstrate that the constituting of remorse or apology requires the joint action of all participants who may or may not attach the same meanings to the same speech act and who together decide not just what members are expected to feel but how these feelings should be expressed.

V. REMORSE AND SOCIAL RECONSTRUCTION

The public hearings at the TRC offer an unusually strategic vantage point from which to observe the role of reparative discourse in the building of a moral community. In a society that is in the process of redefining actions that were formerly supported by the state as now morally unacceptable, reparative discourse becomes a crucial component in the project of social reconstruction. As Durkheim taught us a century ago,⁵¹ societies are bound together not just by allegiance to common values but by shared sentiments – reparative discourse mobilizes these shared sentiments in behalf of a particular imagined community. The impassioned expectation that members of the same moral community will feel remorse for the same actions and the outrage directed at those who do not tells us that adherence to ‘feeling rules’ are serious matters in terms of gauging allegiance to a particular moral community. Expressing remorse or offering apology or refusing to show remorse or offer an apology come to signify respectively the deepest levels of personal commitment or personal estrangement from community. If these processes are most visible in societies such as that of the South Africa of the TRC that are undergoing rapid political transition, this does not mean that similar constitutive processes are not occurring in other societies undergoing less marked social discontinuity. Analysis of the role of reparative discourse at the TRC alerts us to look for the effortful construction of shared sentiments in all communities.

⁵¹ The debt to Durkheim is not for his view of a well-functioning society as a monolithic order – that part of his work has been effectively critiqued for over 50 years. What is crucial for this article, however, is Durkheim’s recognition that members’ commitment or opposition to the moral order is a matter of strong, shared sentiment. Gauging or demonstrating commitment to or estrangement from a moral order through a show of remorse or its absence may be one way of uncovering the emotional substrate that Durkheim believed lay at the foundation of society. See Randall Collins, *Interaction Ritual Chain* (Princeton, N.J.: University Press, 2004) for fuller elaboration of Durkheim’s insight.