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FINDING THE RIGHT TIME AND PLACE: A CASE STUDY COMPARISON OF THE EXPRESSION OF OFFENDER REMORSE IN TRADITIONAL JUSTICE AND RESTORATIVE JUSTICE CONTEXTS

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I. INTRODUCTION

Much has been written to extol the virtues of restorative justice, often at the expense of the traditional criminal justice system. In such comparisons, restorative justice is generally cast in a positive light while the limitations of the traditional criminal justice system are often presented in a more negative light. For example, restorative justice is often characterized as victim-centered and focused on offender accountability and restoration. Traditional criminal justice is viewed

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1. An earlier version of this Article was presented at the National Communication Association's Convention in Chicago, Illinois, in November 2004. The research contained in this document was coordinated in part by the Texas Department of Criminal Justice (Research Agreement #238-R02). The contents of this report reflect the views of the authors and do not necessarily reflect the views or policies of the Texas Department of Criminal Justice.

2. Howard Zehr and Harry Mika provide a typical comparison between the criminal and restorative justice systems:

Where conventional justice is law and punishment oriented, we conceive of restorative justice as a harm-centered approach: the centrality of victims, the obligations of offenders (and the meaning of accountability), the role of the community, and the active engagement of all parties in the justice equation are distinctive elements, we believe, of such an approach.

primarily as offender-focused, punitive, and unable to deal with victims' needs following a criminal act. While these distinctions have some merit, especially when speaking in general terms, they may also create unrealistic and unfounded characterizations of these two systems. In response to the tendency to compare and contrast restorative and traditional justice in rather sweeping statements, a view that recognizes the importance of both systems working to support each other in a complimentary fashion is warranted.

Given both the worldwide influence of restorative justice programs and the increased media attention to United States programs, empirical studies that explore the relationship between the traditional criminal justice system and restorative justice programs are necessary. Two important research projects that explore this relationship in some depth include Mark Umbreit's descriptive work on the process of victim-offender mediation programs involving severe crime in Texas and Ohio, and Barton Poulson's small but insightful meta-analysis of victims' and offenders' psychological evaluations of both criminal and restorative justice programs. We do not seek to replicate the important findings of such studies designed to assess the impact of the programs. Rather, we extend our work to examine communication in these contexts through a close examination of one offender's journey through the criminal justice system and his eventual participation in a restorative justice program.

6. For a general overview of the program discussed in this Article, we direct readers to one particular publication that deals specifically with mediations involving violent crime: see MARK S. UMBREIT ET AL., FACING VIOLENCE: THE PATH OF RESTORATIVE JUSTICE AND DIALOGUE (2003).
7. Barton Poulson, A Third Voice: A Review of Empirical Research on the Psychological Outcomes of Restorative Justice, 2003 UTAH L. REV. 167, 189 (2003). The studies used for the meta-analysis included crimes ranging from minor offenses to severely violent crime. From this comparison of victims and offenders in restorative and traditional criminal processes, Poulson concludes, "If outcomes such as fairness, accountability, satisfaction, contrition and forgiveness, emotional well-being, and feelings of safety are important, then restorative justice is the clear choice." Id. at 201.
Specifically, this Article addresses the offender’s communication of remorse in a courtroom setting, through an op-ed written by the offender after being convicted and sentenced for a drunk driving collision that killed two people, and in the offender’s meeting with the mother of one of his victims through a victim-offender mediation program. In each context, the offender’s explicit apology is examined. The data explored here illustrates the subtle but critically important distinctions in the quality of remorse found in these contexts. This research suggests that the context of restorative justice offers a qualitatively different communicative environment where remorse might be most successfully employed and received. Implications for offender sentencing and legal communication are discussed.

Part II provides an overview of the rationale for this project. In particular, we focus on the communication of remorse in legal, public, and restorative settings that influence offender expressions of remorse. Part III details the data and analysis procedures for this case study. This section also summarizes the restorative justice program that forms the basis of our research. Part IV describes each communicative context in which the offender offers an apology to the victims in the case. Part V examines the implications of these findings. We hope to reveal the complicated implications of an offender’s expressions of remorse and the context in which he offers them as an important site for continued development of the restorative justice paradigm. Part VI summarizes the study.

Finally, we note that the anonymity of the offender, his victims, and other related parties is only partially preserved in this Article for the purposes of satisfying the ethical research standards of our scholarly fields and the Texas Department of Criminal Justice. However, because the victims’ families and the offender voluntarily identify themselves in several media outlets referenced in this Article, it is impossible to perfectly preserve their anonymity or that of the offender. Accordingly, we remind our readers to respect the privacy of the individuals involved in the case.  

II. COMMUNICATING REMORSE FOR CRIMINAL ACTIONS

One goal shared by both the traditional criminal justice and
restorative justice models is the effort to get offenders to take responsibility for their actions. In American culture, the expression of remorse for one’s failings is a crucial part of the rhetoric of “taking responsibility” both in the legal and social sense of that phrase. The expression of remorse is a communicative act that requires what communication scholars Robert Heath and Jennings Bryant call “communicative competence.” This widely accepted concept suggests that effective communicators must have both “cognitive and interaction skills needed to exert personal control” and the “ability to adjust to and affect the [communicative] environment.” As we will show, it is difficult for offenders to express remorse in traditional and restorative contexts. However, we illustrate in this Article that the restorative context offers the potential for genuine expression of remorse more fully than in the traditional justice context.

We focus on offender remorse as a combination of several communicative elements including apology, regret, and sorrow. Of these elements, apologies are perhaps the most studied, especially in the legal context. It is not our intent to discuss the legal liabilities of apologies in this Article, nor do we address the current discussion of apologies and expressions of sympathy that may affect settlement decision-making in civil suits. The offender in the case we examine had already admitted guilt at the time of his sentencing in his criminal proceedings. Moreover, it is not our goal to suggest that this offender may have reduced his sentence by expressing a complete or genuine expression of remorse in the courtroom. Rather, our aim is to look closely at the notion of remorse in a case study involving severe crime in order to provide a descriptive comparison of an offender’s voice in traditional and restorative justice contexts.

10. See id. Additionally, the offender discussed in this Article pled guilty to the charges before him after firing his first team of lawyers who suggested a different legal approach. This particular offender admitted that he did not want to “get off” with a lighter sentence. We recognize that this is a rare occurrence in the American legal world today.
12. See Stephanos Bibas & Richard A. Bierschbach, Integrating Remorse and Apology into Criminal Procedure, 114 YALE L.J. 85, 93 (2004) (suggesting that sentences ought to be reduced in cases where genuine remorse is expressed).
A. Remorse as Apology, Regret, and Sorrow

Although we focus on explicit apologies in this Article (phrases that contain the word "sorry"), apologies take many forms. Erving Goffman, widely cited in both legal and communication studies of apology, defines apology as "a gesture through which an individual splits himself into two parts, the part that is guilty of an offense and the part that dissociates itself from the delict [sic] and affirms a belief in the offended rule." The apology must recognize both the harm done as well as make amends for causing the harm through expression of regret. According to Goffman, the fully formed apology includes the expression of embarrassment and chagrin; clarification that one knows what conduct had been expected and sympathizes with the application of negative sanction; verbal rejection, and disavowal of the wrong way of behaving along with vilification of the self that so behaved; espousal of the right way and an avowal henceforth to pursue that course; performance of penance and volunteering of restitution.

Goffman goes on to suggest that apologies may differ in length depending on the nature of the offense. We might expect a "brief apology" for a minor offense and a longer apology for a more serious offense. Yet, an apology is not composed solely of certain component parts. Apologies also recognize relationships between the offender and those who have been harmed. Karen Tracy, a communication scholar who frequently writes on communication in sensitive contexts like

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13. Other formulations of colloquial or non-explicit apology might include "pardon," "excuse me," or even the more colloquial "my bad." For further discussion of apologies and their organization in naturally occurring speech, see Jeffery D. Robinson, The Sequential Organization of Explicit Apologies in Naturally Occurring English, 37 RES. ON LANGUAGE & SOC. INTERACTION 291, 321 (2004).


15. Id.

16. Id. at 116.

17. Id.

negotiation or crisis situations, points out that remorse and sorrow are integral to the apology process because these emotions build upon our relational and personal identities with those we have harmed.\textsuperscript{19} Remorse can be expressed through the emotion of sorrow. Sorrow is a component part—"the energizing force"—of an apology.\textsuperscript{20} As Nicholas Tavuchis, a sociologist, explains, "[A]pology expresses itself as the exigency of a painful re-membering [sic], literally being mindful again, of what we were and had as members and, at the same time, what we have jeopardized or lost by virtue of our offensive speech or action."\textsuperscript{21}

\textbf{B. Context and Communication}

Along with identity work described in the section above, context is another integral element of the expression of remorse. Context involves several dimensions including the social setting, the institutional setting, roles, relationships, location, and even the grammatical structure of our comments.\textsuperscript{22} We argue that most legal discussions of apologies do not take into consideration the context in which the apologies or the expression of remorse are offered. Instead, the legal process assumes that the offender's ability to express remorse is straightforward, often occurring at the sentencing phase of a trial. However, offenders may be unlikely to show remorse because it may adversely affect their punishment or not be construed as genuine. For example, a Vermont offender who was convicted of kidnapping and murder had his lawyer read aloud the following statement to the jurors in his case upon receiving the death penalty: "He [the offender] respects your decision. He appreciates your hard work and wants to tell you and the family of his sincere remorse. He did not want to do it at any other time publicly as it would be construed to be less genuine."\textsuperscript{23} In this case, the offender, or at least his lawyer, recognized that there was an appropriate time to offer sincere remorse, which was at the end of the sentencing phase. This implies that, at other times during the court proceedings, the expression of remorse could be seen as "out of context" or designed for

\begin{itemize}
\item \textsuperscript{19} See \textit{KAREN TRACY, EVERYDAY TALK: BUILDING AND REFLECTING IDENTITIES} (2002).
\item \textsuperscript{20} See \textit{TAVUCHIS, supra note 18, at 122.}
\item \textsuperscript{21} See \textit{id. at 8.}
\item \textsuperscript{22} \textit{HEATH \\& BRYANT, supra note 9 at 84-85.}
\end{itemize}
purposes other than the sincere expression of remorse.\textsuperscript{24}

It may be that offenders are unlikely to express apology and remorse because they are simply unable to communicate these emotions in a public setting. Writing on apology in criminal proceedings, Bibas and Bierschbach argue that "the genuinely remorseful offender who wishes to apologize to his victim and make amends usually has no readily available way to do so" in the courtroom.\textsuperscript{25} Legalistic settings do not support this high degree of self-disclosure because of the highly structured communicative environment. The way that the courtroom communication environment is set up does not lend itself to direct expression from any one party. Lawyers serve as intermediaries in the process speaking on behalf of the offender or the state. Both prosecutor and defense counsel become zealous advocates because they are required to do so, not necessarily because they feel like it. Interaction in the courtroom is highly ritualistic with "[c]onflict[] channeled into adversary proceedings with two combatants in every legal ring."\textsuperscript{26} The goal of the traditional legal system is punitive; punishment is meant to inflict pain for the person who loses the adversarial contest.\textsuperscript{27} The "assembly line" view of criminal proceedings, with highly ritualized communication coupled with the volume of offenders going through the process, makes expressions of apology and remorse rather rare occurrences.\textsuperscript{28}

Of course, jurors, victims, and the general public expect offenders to generally show remorse. However, it has been shown that genuine apologies are infrequent in the courtroom because offenders may hide behind the communicative formalities.\textsuperscript{29} Jennifer Robbenolt, discussing apologies in civil cases, explains that offenders, primarily in civil cases,

\begin{itemize}
\item \textsuperscript{24} See \textit{TAVUCHIS}, supra note 18, at 87 (further discussing the Greek expression of "kairos" as the notion that communication requires an element of appropriate timing).
\item \textsuperscript{25} Bibas & Bierschbach, supra note 12, at 97.
\item \textsuperscript{26} JEROLD S. AUERBACH, JUSTICE WITHOUT LAW 10 (1983). In a critique of the American attitude toward the legal process, Auerbach observes, "Indeed, our culture is so thoroughly legalized that it is difficult for [U.S.] Americans to imagine how any society could be otherwise organized and justified." \textit{Id.} at 11.
\item \textsuperscript{27} HOWARD ZEHR, CHANGING LENSES: A NEW FOCUS FOR CRIME AND JUSTICE 78 (1990).
\item \textsuperscript{28} Bibas & Bierschbach, supra note 12, at 125.
\item \textsuperscript{29} John Braithwaite & Stephen Mugford, \textit{Conditions of Successful Reintegration Ceremonies: Dealing with Juvenile Offenders}, 34 BRIT. J. OF CRIMINOLOGY 139 (1994). The authors note that rituals of inclusion such as "apology and its acceptance, handshaking, [and] the putting of signatures side-by-side on an agreement" are characteristic of restorative justice programs. \textit{Id.} at 153. In contrast, "common legal processes . . . sanitize such physical moments out of transactions." \textit{Id.} at 154.
\end{itemize}
are actually discouraged from expressing apologies because of the damaging legal ramifications such disclosures could have. Instead, defendants in such cases are coached to offer expressions of sympathy that stop short of showing full apology or remorse. However, an offender’s inability to express an apology or show remorse can have certain consequences. In fact, the failure of criminal defendants to express remorse may very well result in harsher and or lengthier criminal sentences.

Ironically, the courtroom and public settings in which criminal defendants are expected to show remorse are also the very fora that most citizens are incapable of communicating effectively. The courtroom is a difficult and confusing environment particularly for untrained criminal defendants. For many criminal defendants, they may be humiliated by the presence of others in the courtroom such as family members or victims. Likewise, very few citizens are capable of speaking publicly about their sins without appearing to be self-serving. Nevertheless, individual criminal defendants are expected to be proficient in communicating criminal remorse in courtroom environments, and criminal defendants as a class are expected to communicate their remorse through the media. The disconnect between expectations and their capacity is troubling.

III. THE DATA

To examine the communication of remorse in traditional and restorative justice contexts more closely, the data in this study were collected from a variety of sources. In this particular case study, the offender made three obvious efforts to communicate remorse as part of an effort to take responsibility for his actions. First, the offender took the stand at his sentencing hearing after pleading guilty to manslaughter in an alcohol-influenced car accident. Second, the offender penned a guest column for a Central Texas newspaper about the dangers of driving under the influence of alcohol. Finally, the offender met with the mother of one of the victims of the car crash in a victim-offender

30. See Robbennolt, supra note 11, at 467.
31. See id. at 468.
33. See Bibas & Bierschbach, supra note 12, at 98.
34. See infra Part IV.A.
35. See infra Part IV.B.
In this section, we provide some background information about each of these contexts and the participants. We also give a brief overview of the Texas Victim-Offender Mediation/Dialogue program to make clear how this particular restorative justice program functions as opposed to the many other types of restorative programs available in other communities.

The offender’s courtroom testimony was obtained by requesting the appellate record of his case from the state court of appeals. The entire appellate record contained transcripts from the offender’s sentencing hearing, including several graphic exhibits, and the judgment of the court. Our focus was on the offender’s testimony, which was developed through a direct examination by his attorney and cross-examination by the prosecutor. The trial record contained other testimony and the closing arguments of each attorney neither of which are referenced in this study. It is important to note that the offender’s responses to his attorney and the prosecutor’s cross-examination mainly consist of affirmative or negative responses. Attorneys at this stage of a trial are permitted to ask leading questions that leave little room for the witness to expound. However, one crucial question posed by the offender’s attorney was open-ended, and the offender’s response is the focus of our first analytical section in this paper.

The second text examined in this study is a guest editorial newspaper column authored by the offender. The column was published on New Year’s Eve in the offender’s hometown newspaper, one of the state’s major regional publications. In the column, the offender describes the drunk-driving accident, his role in it, and the consequences he faced for his actions. We obtained a copy of the newspaper column by searching publicly available newspaper indexes. The column contained a little over 1100 words and was published about three years after the offender’s crime. Several high school teachers used the column in their classrooms as a learning tool, and some classes began corresponding with the offender. It may be important to note that by the time of the column’s publication, the offender was already a well-known public figure.

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36. See infra Part IV.C.

37. See Brief of Petitioner-Appellant, Appendix with Trial Transcript Excerpts at 605 [hereinafter Testimony] (case citation and docket number omitted) (redacted version of transcript excerpts on file with first author). See also supra note 8 (regarding the anonymity of the offender and victims).

figure, not only from his trial but also because of subsequent lobbying efforts by some of his victims for harsher drunk driving sentences. While we recognize that this text does not fit neatly into either the traditional criminal justice context or the restorative justice context, we believe it is an important data point to explore in this offender's progression through both systems.

The final text analyzed in this study is a dialogue between the offender and the mother of one of his victims. The dialogue was conducted and video-recorded under the auspices of the state's Victim-Offender Mediation/Dialogue ("VOMD") program for cases involving severe crime. In this case, the victim initiated the dialogue, and the offender voluntarily agreed to participate. The victim and the offender prepared for over a year for the mediation. During the preparation, they exchanged letters, some of which were later published in a local newspaper. We obtained a videotape of the offender's and victim's dialogue from the supervising state agency, after complying with university and state research protocols. The first author transcribed the mediation as part of her dissertation research.

Readers may find an introduction to the Texas VOMD program helpful to understanding the rather unique communicative environment of a restorative justice encounter. The Texas VOMD program is an initiative to bring together victims of severe crime and their convicted offenders for a daylong dialogue session. This particular program is administered by the Texas Department of Criminal Justice and is housed in the Victim Services Division. It was formally established in

39. See infra Part IV.C.

40. For the sake of clarity, the term "victim" is used throughout this Article to refer to the mother of the actual victim. This is currently the practice in the Texas VOMD program, although some have suggested the term "co-victim" more accurately captures the role of the surviving family members in these cases.

41. Background information for this mediation was also obtained from a newspaper article that chronicled the meeting between the offender and the victim. See Michael May, What is Justice?, AUSTIN CHRONICLE, Aug. 24, 2001, at F1. The same issue also published several letters sent by the offender and the victim as they prepared for the mediation session. See Equal in God's Sight, AUSTIN CHRONICLE, Aug. 24, 2001, at F1. Both articles are available at http://www.austinchronicle.com/issues/dispatch/2001-08-24/pols_feature2.html.

42. The father of the young woman killed in the crash also took part in a separate mediation. We did not view that videotape for this project.

43. See Texas Department of Criminal Justice—Victim Services Division, http://www.tdcj.state.tx.us/victim/victim-home.htm (last visited November 2, 2005) [hereinafter Victim Services Divisions] (official state Internet site for the Victim Services Division).
1993 and facilitated its first case in 1995. In this program, victims are actually co-victims of the crime; the actual victims were murdered, and a surviving family member requests the mediated dialogue with the convicted offender several years after the crime. Once victims request a VOMD session, program staff contact offenders, and their participation is both voluntary and has no impact on their sentence or parole. An important point to mention about this type of mediation is the role of the mediator at the actual mediation. While the mediator is integral to this lengthy preparation process, on the day of the mediation, the mediator has relatively little interaction at the mediation table. For the most part, the victim and offender engage in direct dialogue with one another.

IV. ANALYSIS

In this section, we detail the three discursive contexts in which the offender negotiates the communication of his remorse. First, we examine the offender's testimony in court. Second, we look at the newspaper column authored by the offender three years after his conviction. Finally, we review the mediation dialogue between the offender and the mother of one of the victims. In all three contexts, we look for evidence that the offender's voice is hindered or aided by the particular context.

A. Expression of Remorse in the Courtroom

The offender was nineteen-years-old when he took the stand at his sentencing hearing. Having already pleaded guilty to both counts of intoxicated manslaughter, the offender hoped to convince the jury to recommend a lighter sentence. On direct examination, the offender was subjected to rigorous questioning by his own attorney designed to preempt the impact of any questions asked by the county prosecutor on cross-examination. Consequently, the offender's own attorney asked

44. See UMBREIT ET AL., supra note 6, at 69.
46. See UMBREIT ET AL., supra note 6.
the offender tough questions about his previous problems with drugs and criminal actions. At the end of the battery of questions about his personal character, the offender's attorney posed this final question: "Is there anything at this time that you would, and I mean very briefly, that you feel like you should say to the people in this courtroom, the families involved here and of course to the jury?"

Important for this inquiry into the criminal voice is the attorney's desire to have the offender offer words to the victims' families. The offender responds in the following way:

Yes, there is. I would like to say that I'm sorry to the people that [sic] had to witness this. I'm sorry for the two families of [the victims and the passenger in my car] but I don't feel that this is the time or the place. I'm ready to talk to them if [sic] in every way.

The offender's response to the question indicates his discomfort with expressing his remorse to the victims' families in the courtroom setting. While the offender clearly was capable of expressing an apology, he also felt that the context was inappropriate to offer more than an expression of sympathy. The offender brings context into focus as an important factor in how and when he chooses to offer words of apology to the families of his victims by stating that he did not feel it was "the time or the place" to talk to the victims' families.

Although it is impossible to know for sure, the offender's failure to effectively communicate remorse likely harmed his appeal to the jury for leniency. Regardless of what the offender thought of the appropriateness of the courtroom setting, the callousness of his crime was amplified by his inability to speak more than just a perfunctory apology. As mentioned above, the offender's discomfort with expressing remorse in a legal discursive setting reflects some of the distinctive features of modern United States legal discourse. Legal scholar Gerald Wetlaufer details some of the specific rhetorical conventions of American legal discourse, particularly as related to trial attorneys.

47. See Testimony, supra note 37, at 605.
48. Id.
49. Some may read the offender's apology as a "safe" apology because of the careful wording or because of his omission of responsibility or any other information about the crime. See Robbennolt, supra note 11, at 469.
Specifically, the attorney suppresses his personal voice in the language of authority and objective tones of "reason," "science," and "logic." The offender's attorney presented the offender with the opportunity for remorse, as if such an expression would be an important factor in the jury's calculation of an appropriate sentence. In addition, Wetlaufer notes that trial attorneys will present texts as having one singular meaning. The offender's attorney failed to suggest a polysemic reasoning for the offender's unwillingness to publicly express his remorse. When relating narratives for a persuasive purpose, attorneys obscure their roles as authors, preferring to present the moral of the story as a "simple revelation of the objective truth." Through the use of the direct examination technique, the offender's attorney suggested that the offender was telling his own story, when in fact the questions guided the offender's testimony.

Although empirical research into everyday criminal courtroom discourse is lacking, the offender's experience of isolation in the courtroom is undoubtedly typical of many offenders. Even the simplest criminal cases involve sophisticated procedural arguments and take several months to reach a conclusion. Like all offenders with legal counsel, the offender was compelled to turn over decisions regarding most elements of the trial to his attorney. While his lawyer represented his legal interests, the offender effectively became a bystander in his own trial.

B. Expression of Remorse in the Media

The offender's publication of his story in a major regional newspaper nearly three years after the crime reflects fairly unusual behavior for most offenders. Having received the maximum sentence allowable under state law, the offender faced two consecutive twenty-year sentences with no possibility of parole until 2036. Most offenders in his circumstance would rather focus on developing strategies for adjusting to prison life. However, the offender may have had particularly compelling reasons to think about his portrayal in the media. The offender's criminal trial had already attracted intense media coverage, in part because one of the victims was the son of two victims.

51. Id. at 1559.
52. Id.
53. Id.
54. Letter from Prison, supra note 38.
prominent attorneys. Less than a month after the offender’s conviction, some relatives of one victim published a full-page newspaper advertisement advocating stiffer penalties for drunken driving convictions. Accordingly, it is no surprise that the offender’s editorial draws on traditional reporting norms of journalism even as he pursues a persuasive goal.

Writing from his prison cell, the offender could never have been expected to do more than imitate journalistic practice because journalistic norms are more than simply stylistic flourishes. Media scholars Pamela Shoemaker and Stephen Reese argue that a journalist’s routines, organizational structures, and overlaying economic forces are the strongest influences on journalistic norms because the individual writer is the innermost circle in five concentric circles. Under that conception, the newsworthiness of a story is the degree to which it corresponds to the needs of the media industry, the specific media organization, the economic forces, and the journalist’s daily professional needs. Obviously, the offender faced little of those pressures. Nevertheless, the offender’s writing still reflects some journalistic norms, especially because the story exposes levels of controversy, is of an unusual nature, is timely, and is of a proximity to the journalist and the audience.

Aside from the offender’s ubiquitous adoption of some journalistic norms, analysis of the column is challenging for a variety of reasons. First, we have no real notion of how much of the offender’s column was edited by the newspaper editorial staff. Second, we have no insight into why the offender chose to write in the format, on the topic, or for that particular publication. However, we can recognize that the offender’s efforts to express his remorse in the column are arguably unsuccessful. We argue that one primary reason the article is unsuccessful is the offender’s discomfort with the journalistic context of the column. The offender’s inexperience with journalistic norms is clear from his writing.


56. Letter from Prison, supra note 38.

57. See generally PAMELA SHOEMAKER & STEPHEN REESE, MEDIATING THE MESSAGE: THEORIES OF INFLUENCES ON MASS MEDIA CONTENT (1991) (articulating a broad theory of journalism norms that are primarily influenced by the structures of journalism rather than an individual journalist’s personal biases).

58. See generally id. at 91-121 (describing the five concentric circles of influence on a newsroom).

59. Id. at 111.
In addition, he expresses his unease with the impersonal nature of newspaper writing. Despite these flaws, the offender nevertheless manages to demonstrate an emerging awareness of his new voice as a criminal offender and the vital importance of context to authentic expression.

The offender's column begins with a highly detailed description of the car wreck from the detached viewpoint of an outside observer:

Under a blue moon, the black 1991 Acura Integra I was driving made its way down a stretch of rural two-lane road. At 10:40 p.m., the Acura struck another car head-on. The teen-aged couple in that car were on their way home from a date. There was no chance for survival. Their lives abruptly ended.

But, the offender's objective journalistic posture is often overwhelmed by his representation as a wise storyteller reflecting on a personal regret. At the very beginning of the column, the offender directly addresses his readership: "I was a pretty wild 19-year-old, having fun, partying, cruising around town, drinking beer and just hanging out. I knew better, but everyone was doing it, right?" Unlike the typical journalistic posture, the offender sees his purpose as more than simply reporting on his story. Rather, he intends to affect his audience's attitudes and behavior. At the end of the column, the offender suggests some purpose for his prison sentence, "I think the only resolution is to share my experience and try to help people, like you, to stop making foolish decisions." A second deviation from the journalistic norm is the offender's effort to apologize to the friends and family of the victims. As discussed in more detail later in this section, the offender's apology suggests that he intends to do more in his column than merely lecture younger readers.

The introductory paragraph also demonstrates the offender's interest in developing his voice as a criminal offender. The offender's introduction is structured more like the introduction to a speech than the lead paragraph of a news story or editorial. The offender's

60. See Letter from Prison, supra note 38.
61. Id.
62. Id.
63. Id.
64. Id.
introduction reaches its dramatic apex when he declares his realization, "I was drunk." In contrast to many editorial columns, the offender's introduction offers no cohesive statement about his central argument. In addition, the offender's recollection of his story omits many important details, including the amount of alcohol he consumed prior to the accident and the names of his victims. By the end of the column, the offender is clearly identifying himself as a prisoner.

Although the balance of the offender's column revolves around the negative consequences of driving under the influence of alcohol, the most prominent feature of his column from a rhetorical perspective is his direct apology. After explaining that he will remain in prison until at least 2036, he offers an apology within an account of his relentless feelings of guilt:

I never meant to hurt anyone. I know that my words probably will not help the victims' families and friends, but I truly am so very sorry. And to write that down severely minimizes, even insults, the depth of this tragedy. I know I can't trade places with them, though I wish I could. And I know I can't bring them back no matter how hard I pray. I will never be able to restore their places in the hearts of their loved ones. I have the guilt and knowledge of those families' grief resting on my soul.

One of the many remarkable characteristics of the apology is the offender's awareness of the insufficiency of the context. The offender understands that his apology has limited value for the victims' loved ones because his expressions of remorse have no material impact on the loss. He is aware that writing an apology in public media threatens to diminish the loss. The closing to his column suggests that imprisonment has lead to a loss of his own personal voice. He details his doubts that anyone can learn from his experience:

65. Id.
66. See id.
67. Id. (noting casually that the offender imbibed in “a lot of beer, even for me” and referring to the victims as “the people in the car” and never by their names).
68. Id. (recognizing his own status as a prisoner by questioning whether his readers would “want to wake up tomorrow a murderer”).
69. Id.
As I sit here in my cell, I wonder if you are listening enough to think about this the next time you drink. Ask yourself, “Is it worth it?” “Do I want to wake up tomorrow a murderer?” “Do I want to wake up tomorrow at all?” If you do cause a tragedy like this, you will be lucky if it only kills you.\textsuperscript{20}

Arguably, the most important consequence of the offender’s tragedy was the loss of his capacity to speak and be heard. He pleads with his audience one last time, “Do yourself a favor and listen” and then offers a final threat, “If not, well, from all of us here in [name of prison], we’ll leave the light on for ya’.”\textsuperscript{21}

\section*{C. Expression of Remorse in Victim-Offender Mediation/Dialogue}

Over four years after his conviction, the offender met with the mother of one of his victims. VOMD is one of many services offered to victims of crime through a state-funded program.\textsuperscript{72} Despite the fact that restorative justice programs like the one in Texas are primarily designed to serve victims,\textsuperscript{73} VOMD often provides offenders with the opportunity to express remorse and apology for their actions. Because the offenders gain no legal advantage for their participation in VOMD, the sincerity of their remorse may even be bolstered.\textsuperscript{74}

The principles of the VOMD are based on restorative justice, which calls for the fundamental recognition that “crime violates people and relationships.”\textsuperscript{75} A guiding principle of this dialogic process recognizes that talk “cannot completely erase the trauma of crime, but it can

\begin{itemize}
  \item \textsuperscript{70} \textit{Id.}
  \item \textsuperscript{71} \textit{Id.}
  \item \textsuperscript{72} \textit{See} Victim Services Division, \textit{supra} note 43.
  \item \textsuperscript{73} \textit{See id.}
  \item \textsuperscript{74} For instance, one of the more famous Texas cases involved a convicted murderer who provided vital information about a victim’s last words to her surviving mother and daughter. \textit{See} \textit{Meeting with a Killer: One Family’s Journey} (Lucky Duck Productions 2001) (documenting the preparation for the mediation and dialogue and the resulting unexpected embrace). This case received widespread media attention in part because the mediation process ended with a dramatic embrace between offender and victims. \textit{Id.} However, it is crucial to note that no state that sponsors a victim-offender mediation/dialogue program encourages or even expects these displays of affection to take place. Moreover, forgiveness is neither expected nor required of victims to participate.
  \item \textsuperscript{75} \textit{See} Zehr & Mika, \textit{supra} note 2, at 211.
\end{itemize}
restore a sense of physical and emotional security.” 76 VOMD works for “an opening of the heart through genuine dialogue, empowerment, and a recognition of each other’s humanity despite the conflict.” 77 The face-to-face context that is characteristic of restorative programs like the Texas program is substantially different than a courtroom context. For this project, our central focus is on the offender’s dialogue with the victim during the mediation. We recognize the complexity of this intensive mediation program calls for a much broader investigation; however, we are concerned here with the offender’s use of apology in the context of the mediation session.

In the introduction to the mediation, both the victim and the offender are asked to make opening statements. The victim begins the mediation using highly intimate language about her religious beliefs, which she shares with the offender:

I’ve waited a long time for this and I didn’t think it was going to happen. But we finally got here. And I’d like to read Psalm 139. (Reads the Psalm) You and I are very precious to God. And we were created wonderfully, fearfully, and you are precious to him. 78

The offender initially responds to the victim by telling her that he is “scared and nervous” to be in the mediation. He almost cannot believe that he is taking part in the program. The victim then begins to show the offender pictures of her daughter who was killed in the crash, and she reads several personal letters sent to her family after the car wreck. The victim’s opening dialogue shows no hostility or anger towards the offender; she even explicitly forgives him. The offender responds to these gestures with his apology:

I get so mad sometimes at the choices I made. I know in my heart that I’d never would have hurt anyone on purpose. God, I’d give anything to change what I did. I’m just sorry. God has brought me through too. But

76. Francis J. Schweigert, Moral Education in Victim Offender Conferencing, 18 CRIM. JUST. ETHICS 29, 30 (1999) (Drawing from Aristotle, philosopher Francis Schweigert argues for multiple meanings of the word “justice,” including the recognition of “complete” justice or “an overall sense of what is right and good for individuals as well as the commonwealth.”).
78. See Szmania, supra note 45, at 174-75.
when I look at y’all, I see so much goodness, and so much (offender pauses), she had so much potential. And I know that no matter how much I play “what-if” I can’t change what I did. And I know there’s been a lot of good has come out of it. I’m just sorry, [victim’s name]. Part of me just wishes that you would just get mad and beat on me and uh. It’s just so hard, you know. 79

Through this dialogue, the offender is finally able to speak with one of the victims of his crime in order to offer a direct apology. The offender admits that he made a poor choice to drink and drive, but he believes that he did not make that choice on purpose. When he does offer an explicit apology, he references God to say that he wishes he could “change” what he did, and he credits God with helping him through the aftermath. He recognizes the victim’s daughter as a young woman who died in her prime when she had “so much potential.” 80

Again, he offers his apology, and he even asks the victim to punish himself by “beating on” him. 81 At the conclusion of the offender’s statement, he does admit generally that the experience has been “hard.” Unlike the courtroom, however, he is able to express this difficulty in a context that allows him to say these words. He has regained his own voice to express his feelings to one victim of the crime by expressing an elaborate apology along with deeper expressions of remorse.

From a communication perspective, the face-to-face setting of many restorative justice programs might best be thought of as an opportunity to interact in an intimate setting. Intimacy in interaction is defined as a process in which communicators are able to get close to each other. 82 This corresponds to the Latin derivation of the word intimacy, which means to get close to a person’s innermost qualities. 83 In every sense, this apology represents a genuine expression of remorse. These remorseful apologies “constitute—in their most responsible, authentic, and, hence vulnerable expression—a form of self-punishment that cuts deeply because we are obligated to retell, relive, and seek forgiveness for sorrowful events that have rendered our claims to membership in a

79. Id. at 179.
80. See id.
81. See id.
83. Id.
moral community suspect." In the restorative justice context, this offender is able to offer a protracted apology to one of the victim's mothers.

V. DISCUSSION

The offender discussed in this Article was convicted under a state penal code that lists the following objective, among others, for the state criminal justice system: "to prescribe penalties that are proportionate to the seriousness of offenses and that permit recognition of differences in rehabilitation possibilities among individual offenders." The offender's inability to express his remorse in the courtroom context clearly made it difficult for him to demonstrate his capacity for rehabilitation. The findings of this study question whether a courtroom context is always the appropriate forum for determining whether an offender is capable of expressing remorse. Indeed, this study suggests that the courtroom may simply offer the wrong context.

Legal scholar James Elkins argues that law is certainly not the only language suitable for expression of public concern for public goods:

All too often, legal discourse and legal institutions are used for public discourse in ways that fail to recognize the limits of law as a disciplined way of talking about public life and public goods. Law does, however, constitute a developed (and developing) public language, widely shared, although never so widely as we might assume.

Perhaps the paradox of law's broad appeal and its limited discursive usefulness has unwittingly conspired to deny the criminal offender a full

84. See TAVUCHIS, supra note 18, at 8.
85. TEX. PENAL CODE ANN. § 1.02(3) (Vernon 2004).
86. In an interview, one of the offender's attorneys suggested that one important factor in the harshness of the offender's sentence was the jury's feeling that the offender failed to adequately demonstrate his remorse.
87. See James R. Elkins, Rhetoric, Disciplines, and Stories: How Will We Know When We Have Too Much Law?, 22 LEGAL STUD. F. 519 (1998) (arguing broadly for the notion that legal rhetoric does not constitute a monopoly on language that solves important societal problems).
88. Id. at 525.
opportunity to demonstrate his capacity for rehabilitation by limiting his ability to express his remorse.

Although we lack the data to make a similar argument about the inadequacies of mass mediated press as an effective context for a criminal offender's expression of remorse, we suspect that journalism norms have similar inhibiting effects on the criminal voice. The test may be to ask whether additional journalistic training would have made the offender's column any more effective as an expression of remorse or evidence of his capacity for reform. Moreover, we doubt that mass media is properly equipped to deal with either the intimate nature of any expression of remorse or the vast numbers of criminal offenders who would need such a forum.

In this case, the restorative justice setting best allowed this offender to express his full apology and show remorse to one victim's mother. Whether a restorative justice setting would work as well for other offenders is a question left unanswered. We briefly address the restrictions of this study in the next section and suggest some practical applications.

A. Restrictions

There are at least two important restrictions to the analysis presented in this Article. First, we acknowledge that we are working on the basis of one case study and that more data is needed to assess how other offenders might behave in similar situations. There are certainly important considerations that might be affected by the offender's age, sex, offense, courtroom context, relationship to victim, as well as the offender's standing in the community. We encourage a methodologically diverse approach to understanding these variables. The most profitable research might be gained from simply interviewing offenders about their capacity to express genuine remorse.

Second, we also acknowledge that the offender in this study is unusual. Not only was this offender interested in trying to express remorse during his sentencing hearing, but he was also able to gain access to a major media outlet to publish his story, and he was convicted in a state that offered the opportunity for VOMD, which one victim's family requested. In each context, the offender worked hard to find a way to express remorse, and when unsuccessful, he found another outlet to try again. Surely, not many offenders take on the burden of responsibility displayed by the offender.
Despite these limitations, we believe this analysis offers an important case study to consider in further developing a comprehensive understanding of both traditional and restorative justice systems and the ways in which the two systems interconnect and diverge. In the next section, we suggest some applications for the findings of this study.

B. Applications of Findings

A primary finding from this study highlights the present lack of attention to communication and communicative context in legal discussion of remorse and apology. There are several contextual factors that would appear to affect the communication of remorse in the courtroom, in the media, or in a restorative justice setting. It is important to acknowledge that offenders are highly restricted, both procedurally and interpersonally, while attempting to express remorse in the traditional criminal justice system. Thus, even if an offender attempts to communicate remorse, the effort will likely be incomplete or inadequate. For offenders, a practical consequence is that they may receive a harsher sentence. Moreover, even if offenders want to express remorse, victims may not choose to be in the courtroom when the offender takes the stand. There is always a chance that expressions of remorse, however well crafted, will not reach their intended addressee because of circumstances beyond the offender's control. Even the most detailed instructions for apology do not take context into account. Furthermore, offenders may not be able to express remorse because of the public context in which they find themselves. Thus, context proves to be an important consideration in the communication of remorse.

We recommend that lawyers work with criminal defendants to discuss the difficulty of expressing remorse in the legal context along with a realistic discussion of how their (in)ability to express remorse may affect their sentence. Likewise, we would recommend that judges recognize the (in)ability of criminal defendants to express remorse within the context of the courtroom. This might be an important qualification judges could include in their jury directions when it appears to be an important factor in the jury's deliberations. Neither of these suggestions would require a reinvention of any legal code. We hope that they reflect a greater sensitivity by lawyers and judges to the problems of public performances of expressions of remorse.

Finally, victims should not have unrealistic expectations of how apology and remorse might be expressed in the courtroom context.
Though we did not go into much detail here, there were two young adults killed in the drunk driving accident caused by this offender. One family was willing to participate in the restorative program offered by the state, resulting in the dialogue discussed in this Article. The other family had no desire to participate in the program and sought no contact with the offender. It is likely that no amount of remorse or apology would have satisfied this particular family. We maintain that victims’ needs should always be respected, especially when restorative programs such as victim-offender mediation are considered. At the same time, victims’ needs are not served when defendants are denied a meaningful opportunity to offer a full and genuine expression of remorse.

A secondary finding from this study questions the over-arching comparisons made between traditional and restorative justice programs. This case study shows that offenders may have the opportunity to express remorse in both systems. The difference between the systems seems to lie in the quality of communication allowable in each context. In the legal context, the offender in this study recognized the difficulty of expressing remorse and requested a different context in which to express his feelings to the families of his victims. In the newspaper article, the offender explicitly calls attention to the fact that his words cannot change what happened. Here, the offender seems to be at loss for how to convey his remorse. Finally, in the restorative dialogue with a family member, the offender expresses his sorrow and acknowledges the impact of his actions.

It is important to note that the restorative justice meeting cannot change what happened no matter how “successful” a restorative program is rated. There may be criminal actions for which no expression of remorse is adequate. However, a restorative process, coupled with the traditional criminal justice process, may provide the opportunity for victims and offenders who are willing to participate to have their voices heard in an intimate setting. Understanding how different contexts—whether legal, journalistic, or interpersonal—affect the ability of an offender to express remorse is simply a recognition of

89. The mother of the other teen killed in the collision responded to criticism of her support for tougher sentencing in drunk driving cases in a letter to the editor in a local newspaper in which she stated: “Sometimes juries award maximum sentences because the evidence shows that the drunk driver isn’t willing to learn or be rehabilitated. It’s not revenge. It’s societal self-defense.” Letter to the Editor, AUSTIN AMERICAN-STATESMAN, Aug. 19, 1997, at A8.

90. See Letter from Prison, supra note 54, at F1 (The offender states, “I know that my words probably will not help the victims’ families and friends, but I truly am so very sorry.”).
the different qualities of each communicative context. Thus, we recommend the continued study of remorse as part of the communicative context in both traditional justice and restorative justice.

Future research must begin to look at the actual practice of remorse. What constitutes genuine remorse? Is genuine remorse attained only through face-to-face contact between victims and offenders? Can remorse be adequately expressed in the courtroom? Should remorse be a part of criminal procedure? These questions are only touched upon in this Article through a descriptive analysis of communication in one case study. However, continued probing of these difficult questions promises to advance our knowledge of what is possible in each context. These are the questions not only for researchers, but also for any lawyer, mediator, or other professional who assists criminal offenders to navigate both traditional and restorative justice systems.

VI. CONCLUSION

The goal of this Article has been to examine one offender's communication of remorse in traditional and restorative justice contexts. The findings add to an ongoing discussion about the differences that may be present between restorative justice programs and the traditional criminal justice system. We have shown that the restorative justice context can offer a properly prepared criminal offender the best opportunity to offer an expression of remorse in his or her own voice. While the intent of this study is not to weigh in on the policy considerations of increasing the availability of restorative justice programs, let alone reforming the criminal sentencing process, a necessary conclusion is that post-conviction mediation programs should be considered as a compliment to courtroom sentencing hearings if expressions of remorse continue to be an important benchmark of victim healing and offender rehabilitation.