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TOLERANCE OF INCOHERENCE IN LAW, GRADED SPEECH ACTS AND ILLOCUTIONARY PLURALISM

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Abstract
One of the most difficult challenges of mature legal systems is the need to balance the conflicting demands of stability and flexibility. The demand for flexibility is at odds with the principle of impartiality, which is considered a cornerstone of the rule of law. In the present article, I explore the way in which the law copes with this dilemma by developing the idea of tolerance of incoherence. I argue that tolerance of incoherence emerges from the interplay between the inferential and lexical-semantic rules that determine the meaning of legal speech acts. I base this argument on an inferential model of speech acts, which I develop through a discussion of graded speech acts, and on the idea that the use of speech acts is governed by multiple and potentially conflicting conventions. I show how this tolerance allows the law to resolve the tension between dynamism and traditionality, and discuss its sociological and moral implications.

I. INTRODUCTION

One of the most difficult challenges of mature legal systems is the need to balance the demands of stability and flexibility. Flexibility is required to achieve justice in individual cases and to cope with unforeseen contingencies; stability is considered essential both to achieve predictability and to ensure impartiality in the application of the law.[1] There is a fundamental tension between flexibility and fairness or impartiality. Impartiality is considered a key feature of the rule of law: "[f]aithfulness to the Rule of Law

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1. *McLough/in v. O'Brian* [1983] 1 AC 410, 430; Mireille Hildebrandt, *Law as Information in the Era of Data-Driven Agency*, 79 Mod. L. Rev. 1 (2016); Lutz-Christian Wolff, *Law and Flexibility—Rule of Law Limits of a Rhetorical Silver Bullet*, 11 J. Juris. 549 (2011).

calls for avoiding any frivolous variation in the pattern of decision-making from one judge or court to another."[2] An impartial legal system is one "that does the same justice to everyone, regardless of who are the parties to a case and who is judging it."[3] Because flexibility can lead to increased variation, it is at odds with the ideals of fairness and impartiality.[4] The tension between stability and flexibility presents the law with an antinomian dilemma,[5] which has both a sociological aspect (concerning the capacity of the law to retain its functionality despite the existence of these conflicting demands) and a moral one (concerning the claim of the law to impartiality). In the present article, I explore the way in which the law copes with this dilemma by developing the idea of tolerance of incoherence.

I argue that tolerance of incoherence emerges from the interplay between the inferential and lexical-semantic rules that determine the meaning of legal speech acts. I base this argument on an inferential model of speech acts, which I develop through a discussion of graded speech acts, and on the idea of speech act pluralism (which claims that illocutionary games are governed by multiple and potentially conflicting conventions). This argument assumes that legal acts—the various moves that legal actors (judges, lawyers, plaintiffs, regulators) make in the context of legal interactions (e.g., appoint, hold, object, dissent, charge, enact, marry, enter into a contract)—constitute a *species of speech acts*.[6] My thesis is that this tolerance of incoherence explains the capacity of legal systems to maintain stability, despite the fluid and incoherent nature of their doctrinal and conceptual apparatus.

The article proceeds as follows. I start with a brief exposition of speech act theory, as developed by John Langshaw Austin and John Searle, and explain how my approach, which is based on a conventionalist conception of speech acts, differs from theirs. I examine the binary doctrine of infelicities, which Austin and Searle have adopted to distinguish failed speech acts from successful ones (Section II). In contrast to Austin and Searle, I argue that speech acts have a graded structure. The intuition underlying my thesis is that a failure to satisfy part of the conventional rules that regulate the use of speech acts does not necessarily lead to their complete failure. Rather, such infelicities may have an attenuating effect on the illocutionary force

2. Neil MacCormick, Rhetoric and the Rule of Law: A Theory of Legal Reasoning (2005). For more on this point, *see* Margaret Jane Radin, *Reconsidering the Rule of Law*, 69 B.U. L. Rev. 781, 785 (1989); Lawrence M. Solan, *Why It Is So Difficult to Resolve Vagueness in Legal Interpretation*, *in* Vagueness and Law: Philosophical and Legal Perspectives 231 (Geert Keil & Ralf Poscher eds., 2016).

3. MacCormick, *supra* note 2, at 143.

4. Robert A. Kagan, Adversarial Legalism: The American Way of Law (2001), at 29, 128.

5. Hildebrandt, *supra* note 1, at 6; Wolff, *supra* note 1, at 562.

6. Marianne Constable, Our Word Is Our Bond: How Legal Speech Acts (2014), at 21; Adolf Reinach, 8 The Apriori Foundations of the Civil Law: Along with the Lecture "Concerning Phenomenology" (2012), at 8–9; Iwona Witczak-Plisiecka, *Speech Actions in Legal Contexts*, *in* Pragmatics of Speech Actions 613 (Marina Sbisà & Ken Turner eds., 2013).

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of the relevant speech act. This indirect form of attenuation can be combined with more direct linguistic mechanisms that provide speakers with a variety of ways to either attenuate or amplify the force of their speech acts. The conventional framework explicated by Austin and Searle should not be interpreted as establishing rigid prototypical schemas, but rather as setting out focal inferential structures that interlocutors can work around (with appropriate deontic consequences). In Section III, I demonstrate this thesis through an inferential analysis of graded speech acts. I consider first examples from informal, thinly institutionalized settings, then move to examples from the more formal setting of the law. In Section IV, I develop the argument that speech acts should be conceptualized as moves in an inferential game. I argue that we can understand the meaning of speech acts in general, and of graded ones in particular, only by studying the inferential consequences of using speech acts in a dialogue (an illocutionary game). I conclude, in Section V, by introducing my argument regarding the evolution of tolerance of incoherence in law. I link this thesis with the idea of speech act or illocutionary pluralism and with the earlier discussion of graded speech acts. I show how this tolerance allows the law to resolve the tension between dynamism and traditionality, and discuss its sociological and moral implications. In particular, I discuss how my thesis differs from recent work in cognitive moral psychology, which explores the role of consistency judgments in practical morality.[7]

II. SPEECH ACTS AND INFELICITIES: A NORMATIVE-CONVENTIONALIST VIEW

In *How to Do Things with Words*, J. L. Austin introduced a distinction between constatives and performatives: constatives connote statements of fact that can be true or false; performatives refer to sentences that do not describe, report, or constate anything, but their utterance "is, or is a part of, the doing of an action."[8] Examples of performatives are the acts of marrying, betting, bequeathing, christening, etc.[9] Austin eventually replaced the distinction between constatives and performatives with a more general framework, which distinguishes between locutionary, illocutionary, and perlocutionary acts.[10] A *locutionary act* refers to the uttering of a sentence with a certain *meaning*, which Austin characterizes as "sense and reference." An *illocutionary act* refers to the uttering of a sentence with a certain *conventional force*.[11] I interpret the idea of conventional force as the capacity of an

7. Richmond Campbell, *Learning from Moral Inconsistency*, 167 COGNITION 46 (2017).
8. JOHN LANGSHAW AUSTIN, HOW TO DO THINGS WITH WORDS (2d rev. ed. 1975).
9. *Id.* at 5.
10. *Id.* at 94–103. In the following, I use the terms "speech act" and "illocutionary act" synonymously.
11. AUSTIN, *supra* note 8; John R. Searle, *Austin on Locutionary and Illocutionary Acts*, 77 PHIL. REV. 405 (1968). Austin provides a detailed list of rules for the successful execution of speech

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illocutionary act to create or modify institutional or deontic facts, such as the attribution of commitments, obligations, rights, and powers.[12] A *perlocutionary act* refers to the performance of an illocutionary act that has "certain consequential effects upon the feelings, thoughts, or actions of the audience."[13]

A good way of distinguishing between the locutionary and illocutionary aspects is to note that the same sentence can be used to perform distinct illocutionary acts.

(1) I will call a lawyer.

The above sentence can be used to make a promise, deliver a warning, or make a prediction.[14] If this sentence is taken as a promise, its utterance creates a new deontic fact, endowing the addressee with the right to have the promise fulfilled, and potentially hold the utterer liable otherwise. Depending on its particular illocutionary meaning, this sentence is expected to produce a different perlocutionary effect on the addressee.

The doctrine of infelicities focuses on cases in which something goes awry in the execution of a performative utterance. Austin described such failed speech acts as unhappy or infelicitous.[15] Austin and Searle developed *a binary* approach to infelicities, according to which a speech act either succeeds or fails entirely.[16] When a speech act is infelicitous, Austin argued, "the procedure which we purport to invoke is disallowed or is botched, and our act (marrying, etc.) is void or without effect . . . ."[17] Two examples given by Austin are someone saying "I appoint you" without being entitled to appoint, and someone performing a conventional procedure (e.g., marrying) incorrectly or incompletely.[18] In both cases, the action is *void*. According to this approach, for a speech act to be successful it must satisfy a minimal (threshold) subset of the relevant felicity conditions, which then ensure the realization of the deontic consequences associated with the

acts. Austin, *supra* note 8, at 26–45. The most important rule is A(I), which states: "[t]here must exist an accepted conventional procedure having a certain conventional effect, the procedure to include the uttering of certain words by certain persons in certain circumstances." *Id.* at 26.

12. Mark Lance & Rebecca Kukla, *Leave the Gun; Take the Cannoli! The Pragmatic Topography of Second-Person Calls*, 123 Ethics 456, 459 (2013); Marina Sbisà, *Uptake and Conventionality in Illocution*, 5 Lodz Papers in Pragmatics 33, 45 (2009); Maciej Witek, *Mechanisms of Illocutionary Games*, 42 Language & Commc'n 11, 12 (2015).

13. Austin, *supra* note 8, at 101.

14. Kent Bach, *Speech Acts and Pragmatics*, *in* The Blackwell Guide to the Philosophy of Language 147, 152 (Michael Devitt & Richard Hanley eds., 2003).

15. Austin, *supra* note 8, at 14–15.

16. *Id.* at 17.

17. *Id.* at 16. My focus here is on the way in which Austin and Searle conceptualize the consequences of infelicitous performance of an illocutionary act; I do not discuss their detailed taxonomy of infelicities.

18. *Id.* at 14–15.

particular speech act.[19] If these are not satisfied, the illocutionary act fails entirely.

The following quote from Searle and Vanderveken illustrates the binary approach. The authors distinguish between completely successful and successful but defective speech acts on one hand, and unsuccessful (failed) acts.[20] Despite its tripartite structure, this framework *maps any speech act into the binary categories of successful/unsuccessful acts.*[21]

> A speaker might actually succeed in making a statement or a promise even though he made a mess of it in various ways. He might, for example, not have enough evidence for his statement or his promise might be insincere. An ideal speech act is one which is both successful and nondefective. Nondefectiveness implies success, but not conversely. In our view there are only two ways that an act can be successfully performed though still be defective. First, some of the preparatory conditions might not obtain and yet the act might still be performed. This possibility holds only for some, but not all, preparatory conditions. Second, the sincerity conditions might not obtain, i.e., the act can be successfully performed even though it be insincere.[22]

Searle and Vanderveken did not consider the possibility that a defective or failed speech act may possess a reduced degree of illocutionary force.[23]

The success of an illocutionary act is realized by the achievement of certain deontic effects, which correspond to the illocutionary point of the act.[24] Being conventional, this deontic transformation depends on the conformity of the illocutionary act to the relevant convention.[25] Consider the speech act of apology. A valid (successful) apology can be associated with the following deontic transformations. First, it can establish a duty on the part of the addressee to forgive the person issuing the apology, thereby freeing the speaker from a debt owed to the addressee;[26] second, it can entitle third parties (but not obligate them) to sanction an addressee who refuses

19. JOHN R. SEARLE & DANIEL VANDERVEKEN, FOUNDATIONS OF ILLOCUTIONARY LOGIC (1985), at 16–17; *see also* ERNIE LEPORE & MATTHEW STONE, IMAGINATION AND CONVENTION: DISTINGUISHING GRAMMAR AND INFERENCE IN LANGUAGE (2014), at 92.

20. SEARLE & VANDERVEKEN, *supra* note 19, at 120.

21. This approach can be traced back to Searle's earlier work. JOHN R. SEARLE, SPEECH ACTS: AN ESSAY IN THE PHILOSOPHY OF LANGUAGE (1969), at 54. It also appears in Vanderveken's more recent work. Daniel Vanderveken, *Towards a Formal Pragmatics of Discourse*, 5 INT'L REV. PRAGMATICS 34, 40–43 (2013).

22. SEARLE & VANDERVEKEN, *supra* note 19, at 22–23.

23. Marina Sbisà, *Illocutionary Force and Degrees of Strength in Language Use*, 33 J. PRAGMATICS 1791, 1795 (2001).

24. Marina Sbisà, *Some Remarks About Speech Act Pluralism*, *in* PERSPECTIVES ON PRAGMATICS AND PHILOSOPHY 227, 233–234 (Alessandro Capone, Franco Lo Piparo & Marco Carapezza eds., 2013).

In the case of assertives, the notion of "probative value" may replace that of deontic force; *see* the discussion of hearsay evidence below.

25. Lance & Kukla, *supra* note 12, at 460; Witek, *supra* note 12, at 14.

26. Espen Gamlund, *The Duty to Forgive Repentant Wrongdoers*, 18 INT'L J. PHIL. STUD. 651 (2010).

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to forgive the person issuing the apology. The former transforms the deontic statuses of the speaker and the addressee; the latter transforms the deontic statuses of third parties.

Note that my account differs in some respects from Austin's original view. According to Austin, the "performance of an illocutionary act involves the securing of *uptake*"; it "amounts to bringing about the understanding of the meaning and of the force of the locution."[27] Thus, an apology succeeds not if the addressee accepts it (the perlocutionary aspect) but if the addressee *recognizes* it as such. By contrast, I distinguish between the normative and psychological aspects of uptake.[28] The *normative aspect* refers to the question of whether the speaker has conformed to the relevant (nonlinguistic) conventions governing apologies (or other speech acts).[29] The *psychological aspect* concerns the question of whether a particular addressee has reached the appropriate cognitive state of recognition.[30] For a speech act to be successful, it is sufficient for it to conform with the relevant conventions. The recognition of the addressee is therefore not a necessary condition for the success of a speech act. The psychological aspect should further be distinguished from the *perlocutionary* one, which focuses on whether the speech act has triggered a behavioral reaction that corresponds to the illocutionary point of the speech act (e.g., forgiveness in the case of apology).

III. INFERENTIAL ANALYSIS OF GRADED SPEECH ACTS

A. Graded Speech Acts in Informal Contexts

I propose to replace Austin and Searle's all-or-nothing approach to infelicities with the more nuanced concept of graded speech acts. According to this concept, the conventional schemas that Austin and Searle explicate for different types of speech acts operate only as *prototypical signposts*: failing to meet the requirements of these schemas does not necessarily lead to the complete failure of the given speech act. A graded speech act may succeed in achieving part of the deontic consequences of a fully successful one, depending on the extent of its divergence from the *prototypical schema*. This argument conceptualizes speech acts as moves in an inferential

27. Austin, *supra* note 8, at 116.

28. As Sbisà noted, it is somewhat unclear whether Austin referred to "actual uptake or just the speaker's reasonable effort to produce it." Therefore, my interpretation possibly aligns with Austin's framework. Marina Sbisà, *Locution, Illocution, Perlocution*, *in* Pragmatics of Speech Actions 25, 31–32 (Marina Sbisà & Ken Turner eds., 2013). Further support for my interpretation of the "conventional effect" of illocutionary acts can be found the text of paragraph (2) in Austin, *supra* note 8, at 11; *see also* Marina Sbisà, *How to Read Austin*, 17 Pragmatics 461, 464 (2007).

29. Ernie Lepore & Matthew Stone, *supra* note 19, at 92; John R. Searle, *How Performatives Work*, 12 Linguistics & Phil. 535, 549 (1989). My approach is consistent with Robert Brandom's model of linguistic rationalism. Robert Brandom, Articulating Reasons (2009), at 189, 197.

30. Austin, *supra* note 8, at 116.

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game. Replacing the binary model of Austin and Searle with a more open-ended, inferential framework extends the combinatorial possibilities for linking the felicity conditions associated with a particular speech act with deontic consequences.[31] Another important feature of the inferential model is the defeasible structure of speech acts. Graded speech acts either may need additional support to achieve the deontic or conventional results associated with a fully successful speech act, or may be defeated by arguments that a successful speech act can overcome.

Below are several examples that illustrate my thesis regarding the inferential structure of graded speech acts. I start by considering the way in which graded speech acts are used in informal contexts.[32]

My first example focuses on apologies, which belong to the family of *expressives*. The illocutionary point of apologies is to convey the psychological state of the speaker with respect to a concrete state of affairs specified in the propositional content of the speech act (e.g., thanking, praising, apologizing). The speech act of apology is governed by multiple conventions that vary across social contexts.[33] The rules that govern apologies for major corporate wrongdoing[34] differ from those that govern minor everyday infractions,[35] which in turn differ from those that regulate communicative transgressions in online communication (e.g., blogging).[36]

To illustrate my thesis, I focus on apologies in the case of serious social wrongdoings, using the concept of categorical apology, proposed by Nick Smith. Smith characterized his project as both descriptive and normative. The concept of categorical apology constitutes, on one hand, "a regulative ideal for acts of contrition";[37] on the other hand, the elements underlying this concept are also "implicit in our commonsense expectations of apologies."[38] According to Smith, a categorical apology should include the following elements: a detailed description of the events salient to the injury, acceptance of causal moral responsibility for the harm (distinguishing

31. Hyejin Youn, Deborah Strumsky, Luis M. A. Bettencourt & José Lobo, *Invention as a Combinatorial Process: Evidence from US Patents*, 12 J. ROYAL SOC'Y INTERFACE 20150272 (2015).

32. In contrast to the approach of some authors in the field, I believe that the conventional model of speech acts is also applicable in thinly institutionalized settings. For a review of speech act theories and a critical discussion of the conventionalist view, *see* Daniel W. Harris, Daniel Fogal & Matt Moss, *Speech Acts: The Contemporary Theoretical Landscape*, *in* NEW WORK ON SPEECH ACTS 1 (Daniel Fogal, Daniel W. Harris & Matt Moss eds., 2018).

33. MATS DEUTSCHMANN, APOLOGISING IN BRITISH ENGLISH (2003); Andreas H. Jucker, *Speech Act Attenuation in the History of English: The Case of Apologies*, 4 GLOSSA: J. GEN. LINGUISTICS 45 (2019); Ursula Lutzky & Andrew Kehoe, *"Oops, I Didn't Mean to Be So Flippant". A Corpus Pragmatic Analysis of Apologies in Blog Data*, 116 J. PRAGMATICS 27 (2017).

34. Taryn Fuchs-Burnett, *Mass Public Corporate Apology*, 57 DISP. RESOL. J. 26 (2002); Ben Gilbert, Alexander James & Jason F. Shogren, *Corporate Apology for Environmental Damage*, 56 J. RISK & UNCERTAINTY 51 (2018).

35. Jucker, *supra* note 33, at 16.

36. Lutzky & Kehoe, *supra* note 33.

37. NICK SMITH, I WAS WRONG: THE MEANINGS OF APOLOGIES (2008), at 17; Nick Smith, *Just Apologies: An Overview of the Philosophical Issues*, 13 PEPP. DISP. RESOL. L.J. 35, 53 (2013).

38. Nick Smith, *The Categorical Apology*, 36 J. SOC. PHIL. 473, 474 (2005); SMITH, *supra* note 37.

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between each moral wrong), performance of an apology, and reform and redress.[39] This account of apology is not applicable to every type of wrongdoing. For example, a minor everyday infraction, such as accidentally bumping into somebody on a crowded platform of a railway station, is probably not serious enough to warrant the type of apology described by Smith.[40]

Consider the apology issued by Donald Trump for the crude comments he made about women in 2005:[41]

> (2) I've never said I'm a perfect person, nor pretended to be someone that I'm not. I've said and done things I regret, and the words released today on this more than a decade-old video are one of them. Anyone who knows me knows these words don't reflect who I am. I said it, I was wrong, and I apologize.

Trump's statement clearly includes some of the elements of categorical apology. He said that he was wrong (indication of moral responsibility) and he performed the act of apology (by publicly stating that he apologizes). But his statement also falls short of a complete apology in several key elements. Trump did not offer a factual record of his wrongdoing, did not endorse the moral principles that were harmed (women's dignity), and did not offer any kind of redress to the victims. Finally, he did not seem to change his attitude toward women after issuing the apology.[42]

The concept of graded speech acts suggests that partial apologies, such as the one offered by Trump, may be able to achieve some of the conventional

39. Mitchell Simon, Nick Smith & Nicole Negowetti, *Apologies and Fitness to Practice Law: A Practical Framework for Evaluating Remorse in the Bar Admission Process*, J. Pro. Law., March 31, 2011, at 11; Smith, *supra* note 37, at 24; Smith, *supra* note 37. For other definitions *see, e.g.*, Erving Goffman, Relations in Public (2009); Aaron Lazare, *Apology in Medical Practice: An Emerging Clinical Skill*, 296 JAMA 1401 (2006); Lee Taft, *Apology Subverted: The Commodification of Apology*, 109 Yale L.J. 1135 (2000). Smith emphasized that not all apologies must be categorical. Some circumstances may call for apologies in which only some of the criteria included in the categorical definition are salient, reflecting, for example, differences in the severity of the offense or in the cultural context in which it was committed. Nick Smith, Justice Through Apologies: Remorse, Reform, and Punishment (2014), at 19–20.

40. The use of apologetic speech (e.g., "sorry") probably reflects a highly attenuated form of apology, which may be better understood as a token acknowledgment of a minor mishap. Jucker, *supra* note 33, at 17.

41. *See* Jenna Johnson, *Trump Apologizes for 'Foolish' Comments About Women, then Attacks the Clintons*, Wash. Post, Oct. 8, 2016, https://www.washingtonpost.com/news/post-politics/wp/2016/10/08/trump-apologizes-for-foolish-comments-about-women-then-attacks-the-clintons/?utm_term=.c85b4b2ebee3.

42. *See Donald Trump Sexism Tracker: Every Offensive Comment in One Place*, Daily Telegraph, http://www.telegraph.co.uk/women/politics/donald-trump-sexism-tracker-every-offensive-comment-in-one-place/. The reform and redress condition raises a practical dilemma as it suggests that the felicity status of the apology may depend on the speaker's future actions for an indefinite time. This concern can be addressed in two ways. The first is to assume the existence of a time limit on the period in which the "reform and redress" condition can be applied. The second is to consider felicitous apologies as inherently contingent. This interpretation should also change the normative statuses of the addressee, allowing him, for example, to retract his forgiveness in the appropriate circumstances. I thank one of the anonymous reviewers for pointing out this problem.

effects associated with complete apologies. Although Trump's apology may be "too incomplete" and thus void, other types of partial apologies that satisfy additional conditions may be able to produce some consequences. Thus, depending on our view of the deontic consequences of a complete apology, we can argue that a partial apology may turn the act of forgiveness from obligatory into supererogatory, or from supererogatory to merely permissible.[43] Given that a partial apology does not produce an obligation to forgive, the deontic consequences of a failure to forgive are also likely to change. For example, unlike in the case of a complete apology, the imposition of sanctions for refusal to forgive will not be appropriate in this case; third parties, however, may still be entitled to express disappointment with the decision of the addressee not to respond with forgiveness.

Figures 1 and 2 provide a schematic description of an inferential understanding of graded speech acts, using apologies as a test case. Figure 1 describes the inferential structure of a complete apology, and Figure 2 describes the structure of a partial apology.

My second example focuses on the family. We tend to think about the family as the antithesis to a formal organization because it is associated with intimacy and love rather than formal rulebooks. But family life is rife with rule-like structures.[44] Such rule-like structures are either set up unilaterally by the parents or are the product of contractual negotiations between parents and children, what Aronsson and Cekaite call "activity contracts."[45] But if life in the family is governed, at least partially, by rules, we should also be able to find cases of infelicitous speech acts with a graded structure. Consider the following family interaction. In a certain family, there is a practice that both parents must vet unusual requests by the kids. The son returns from school and asks his father whether he can sleep over at his friend's house on Friday. The father approves the request without consulting his wife. What is the status of his promise? Is it valid, given that not all the preparatory conditions have been satisfied (joint parental approval)? I suspect that in most families this faulty promise nevertheless carries some normative weight. In practice, such partial weight means that the parents can back down from the promise, but would have to provide some additional justification to defeat the normative expectation that was created by the infelicitous promise (e.g., "we have to leave early on Saturday, I forgot to mention it earlier").

43. Paul M. Hughes & Brandon Warmke, *Forgiveness*, *in* THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., Summer 2017), https://plato.stanford.edu/archives/sum2017/entries/forgiveness/.

44. Frederick R. Ford, *Rules: The Invisible Family*, 22 FAM. PROCESS 135 (1983); CHRIS SEGRIN & JEANNE FLORA, FAMILY COMMUNICATION (2011), at 29. Ford gives the following example of a family rule: all children have a right to be heard. Ford, *supra*, at 7. For other examples, *see* SHOSHANA BLUM-KULKA, DINNER TALK: CULTURAL PATTERNS OF SOCIABILITY AND SOCIALIZATION IN FAMILY DISCOURSE (2012); SEGRIN & FLORA, *supra*, at 29.

45. Karin Aronsson & Asta Cekaite, *Activity Contracts and Directives in Everyday Family Politics*, 22 DISCOURSE & SOC'Y 137, 139 (2011).

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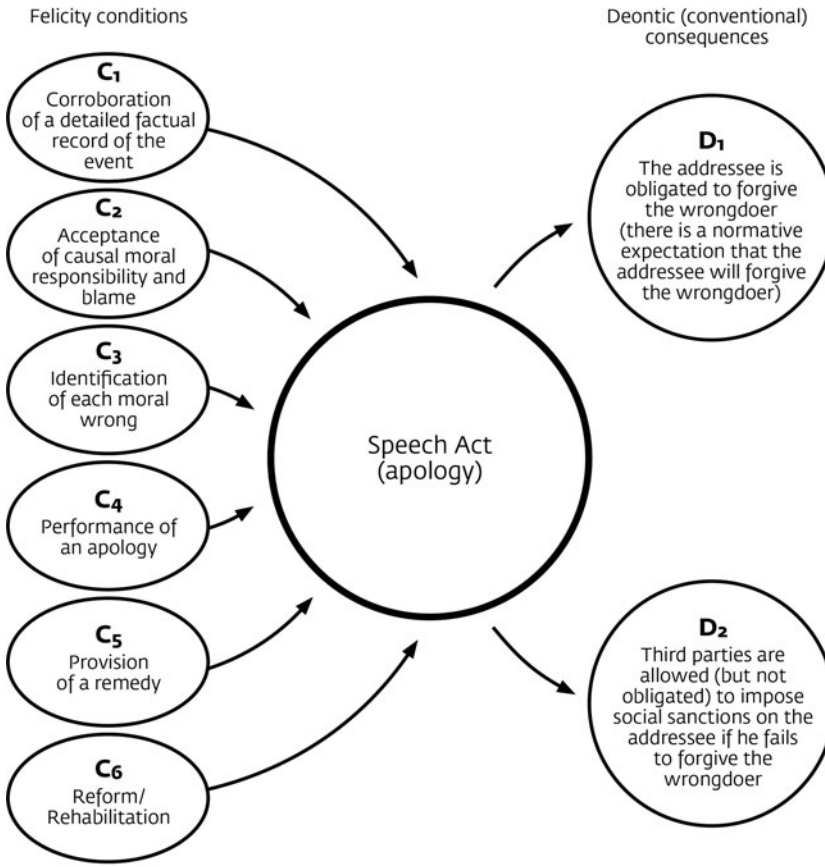

FIGURE 1 Inferential analysis of a complete apology

The last example draws on Rebecca Kukla's recent work on discursive injustice.[46] Kukla argued that in some circumstances, when a woman deploys standard discursive conventions to produce a speech act with a certain performative force (e.g., directive), her utterance can turn out to have less force than it would have had had it been performed by a man. One way to understand the illocutionary attenuation of directives issued by women, as described by Kukla, is to consider it as a *breach* of the governing discursive convention, because presumably all the felicity conditions for issuing a directive have been met.[47] Yet, it can also be interpreted as an *outcome* of

46. Rebecca Kukla, *Performative Force, Convention, and Discursive Injustice*, 29 HYPATIA 440 (2014).

47. For example, we can imagine an organization with a chauvinistic culture, which is incompatible with external social conventions regarding gender equality. Catherine W. Ng & Ann-Sofie Chakrabarty, *Women Managers in Hong Kong: Personal and Political Agendas*, 11 ASIA PAC. BUS. REV. 163 (2005). I thank one of the anonymous reviewers for raising this point.

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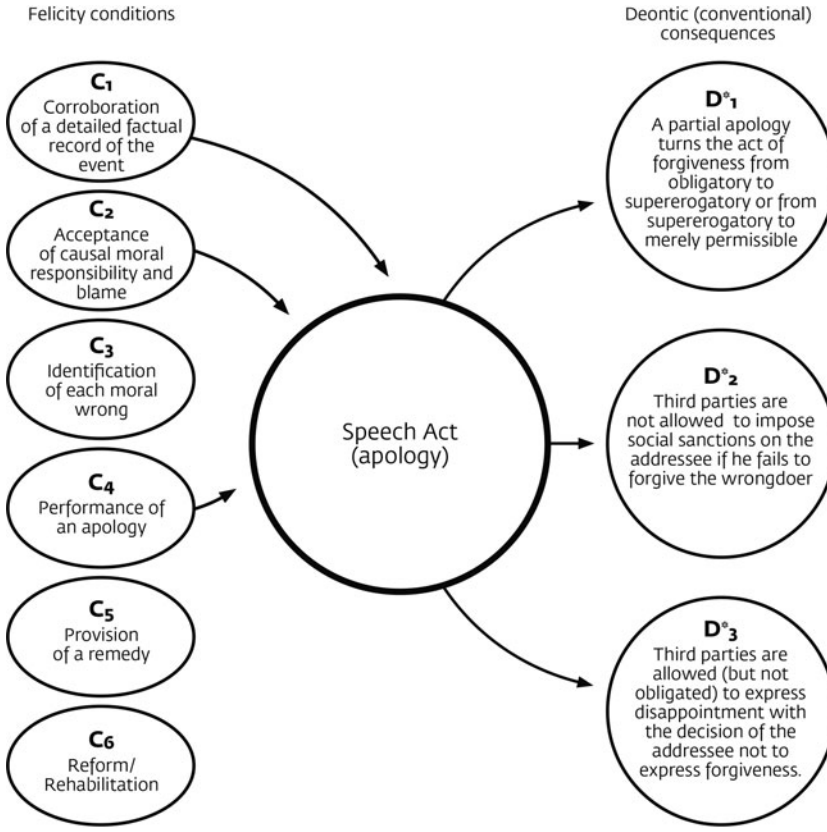

FIGURE 2 Inferential analysis of a partial apology

a discursive convention that limits (by including a gender-attenuating rule) the capacity of women to issue certain directives. Most people would consider such convention, to the extent that they exist, morally obnoxious, but as Kukla and others[48] have convincingly argued, their structure reflects the same graded pattern I described in the context of apologies.

B. Graded Speech Acts in Formal Settings: The Case of Law

Because legal acts can be viewed as a species of speech acts, law offers a particularly apt setting for the study of speech acts.[49] In this section, I argue that law has developed nuanced doctrinal structures that follow a similar inferential pattern to that of graded speech acts. My first example focuses

48. Angela Grünberg, *Saying and Doing: Speech Actions, Speech Acts and Related Events*, 22 EUR. J. PHIL. 173 (2014).

49. AUSTIN, *supra* note 8, at 7, 19; Hildebrandt, *supra* note 1, at 8; Witczak-Plisiecka, *supra* note 6, at 615–616.

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on the doctrines of *voidability* and *relative voidance*. These were developed by courts in view of their dissatisfaction with the classical doctrine of *absolute voidance*, which takes a binary approach to the question of legal validity. A law that fails to satisfy the meta-rules of legal validity has no legal force: it is considered void from the outset (*ab initio*), as if it had never existed.[50] Under the absolute voidance doctrine, a ruling that a certain statute is invalid applies retroactively, from the moment of the flawed enactment of the law, automatically nullifying all the acts and legal measures whose validity depends on it.[51] Legal acts can fail to be valid in three main ways. First, the person or institution that attempts to perform the legal act may lack the authority to do so. A lack of authority could be due, for example, to invalid appointment or to lack of subject-matter or personal jurisdiction.[52] Second, a legislative act is considered invalid if its enactment process failed to adhere to legislative procedures.[53] Finally, in a constitutional regime, a law enacted by the parliament may be deemed null and void if it is inconsistent with the provisions of the constitution.

Austin's concept of "making undone," which he outlined in the preparatory notes to *How to Do Things with Words*, has a similar structure to that of the legal doctrine of absolute voidance.[54] Marina Sbisà noted this similarity, pointing out that although the effects of our actions are usually irreversible, illocutionary acts appear to be an exception, because they may turn out to be null and void if certain conditions are found not to be satisfied:

> This does not mean that what was actually done did not really take place, or that nothing at all was done by the performer of the infelicitous act . . . the discovery of infelicity may make the illocutionary act undone insofar as the bringing about of its *conventional effect* is concerned. The words were uttered, the conventional effect was supposed to be there, it was even acted upon for a while; but once we discover the infelicity, we realize that the conventional effect never really came into being.[55]

50. Will Bateman, *Legislating Against Constitutional Invalidity: Constitutional Deeming Legislation*, 34 Sydney L. Rev. 721, 721–722 (2012). *See, e.g.*, South Australia v Commonwealth (1942) 65 CLR 373, 408 (Latham CJ).

51. Oliver P. Field, *Effect of an Unconstitutional Statute*, 1 Ind. L.J. 1 (1926); HCJ 6652/96 The Association for Civil Rights in Israel v. Minister of Interior [1998] IsrSC 52(3) 117 125; Norton v. Shelby County 118 U.S. 425, 442 (1886).

52. Dan B. Dobbs, *Beyond Bootstrap: Foreclosing the Issue of Subject-Matter Jurisdiction Before Final Judgment*, 51 Minn. L. Rev. 491 (1966); Dan B. Dobbs, *The Validation of Void Judgments: The Bootstrap Principle. Part I. The Rationale of Bootstrap*, 53 Va. L. Rev. 1003 (1967). *See, e.g.*, Re M.T.B. Motors Ltd (in administration) [2010] EWHC 3751 (Ch).

53. *See, e.g.*, the legislative procedures of the Israeli Knesset (https://www.knesset.gov.il/description/eng/eng_work_mel2.htm) and the European Parliament (http://www.europarl.europa.eu/aboutparliament/en/20150201PVL00004/Legislative-powers), as well as HCJ 5131/03 MK Litzman v. Speaker of the Knesset [2004] IsrSC 59 (1) 577 (which discusses the consequences of a procedural breach).

54. Rae Langton, *Blocking as Counter-Speech*, *in* New Work on Speech Acts 144, 156 (Daniel Harris, Daniel Fogal & Matt Moss eds., 2018); Sbisà, *How to Read Austin*, *supra* note 28, at 465–466.

55. Sbisà, *How to Read Austin*, *supra* note 28, at 465–466.

Sbisà noted further that "what Austin's remarks on 'making undone' attribute to illocutionary acts, namely that which I have called 'defeasibility,' goes beyond the *cancellability* of achieved effects, *since it affects the conventional effect in its making, and therefore the act which brings it about.*"[56]

Despite its allure of precision and clarity, the absolute voidance doctrine creates both logical and pragmatic difficulties. First, since validity is considered a function of multiple criteria,[57] it is not obvious why a failure to satisfy *only part* of these criteria should necessarily lead to the complete voidance of the legal act. These criteria can be procedural in nature (reflecting, for example, various requirements pertaining to parliamentary procedures),[58] or can have a more substantive nature (reflecting constitutional considerations).[59] Second, the absolute voidance doctrine seems to assume that void legal acts are furnished with a self-destruct mechanism that cause them to disappear the moment they emerge into the world. This image is misleading, however. In most common law systems, voiding a legal act requires a declaration by a court. Because invalid legal acts do not automatically disappear, third parties may rely on them. A decision to invalidate a primary or secondary legislative act that is already in force is liable to cause grievance to a large number of "innocent" parties.[60]

In response to these logical and pragmatic difficulties, courts have developed more nuanced conceptions of voidance, which have challenged the binary interpretation of validity (law can be either valid or invalid) and have offered instead alternative interpretations based on a graded understanding of validity.[61] These nuanced interpretations have not been considered by either Austin or Sbisà in their discussion of "making undone."[62]

56. *Id.* at 466 (my emphasis).

57. DENNIS KURZON, IT IS HEREBY PERFORMED . . . : EXPLORATIONS IN LEGAL SPEECH ACTS (1986), at 12–15.

58. The Israeli case of HCJ 5131/03 MK Litzman v. Speaker of the Knesset [2004] IsrSC 59 (1) 577 deals with a circumstance in which some members of the Knesset)MKs) voted instead of other MKs who were not present at the time of voting. The "improper" votes would not have changed the result because there was overwhelming support for the statute in question. Based on a relative voidance doctrine, the Supreme Court held that this procedural defect did not undermine the validity of the statute.

59. DAVID M. OLSON, DEMOCRATIC LEGISLATIVE INSTITUTIONS: A COMPARATIVE VIEW (2015); Robert F. Williams, *State Constitutional Limits on Legislative Procedure: Legislative Compliance and Judicial Enforcement*, 17 PUBLIUS: J. FEDERALISM 91 (1987); Norton v. Shelby County 118 U.S. 425, 442 (1886).

60. Bateman, *supra* note 50, at 722, 757. For this practical dilemma, *see, e.g.*, the ruling of the Australian High Court in State of NSW v Kable [2013] HCA 26 (5 June 2013) 298 ALR 144 (Kable No. 2).

61. H. W. R. Wade, *Unlawful Administrative Action: Void or Voidable?*, 83 LAW Q. REV. 499, 512 (1967).

My argument challenges the claim, made by people such as Fredrik Schauer, that legal decision making is bivalent. Schauer argued that "'some of this and some of that' is not a permissible legal answer, however reasonable such an answer might be in most nonlegal domains." Frederick Schauer, *Analogy in the Supreme Court: Lozman v. City of Riviera Beach, Florida*, 2013 SUP. CT. REV. 405, 405 (2014).

62. Sbisà, *How to Read Austin*, *supra* note 28, at 466.

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Under *the voidability approach*, an imperfect legal act (which could be an act of parliament, secondary legislation, court ruling, or private legal instrument, such as a will or contract) is not void *ab initio*; it is only *voidable*, that is, susceptible to judicial invalidation. This means that the legal act remains valid and enforceable until declared invalid by a constitutive rather than declaratory court ruling. Under this approach, the court has the power to determine whether the invalidating decision applies *prospectively* or *retroactively*.[63] The doctrine of *relative voidance*, developed by the Israeli Supreme Court, reflects a more nuanced and flexible approach to the question of voidance,[64] granting the court wide discretion to determine the results of voiding a particular legal act, based on the circumstances of the case at hand.[65]

The inferential structure of the doctrines of voidability and relative voidance is similar to the one found in graded speech acts. Lacking some of the elements needed for a legal act to be fully valid ("happy" in Austin's terminology) does not necessarily lead to its complete failure ("nullity"). Rather, the faulty legal act loses some of its normative consequences.

The U.S. doctrine of "de facto officer" provides an apt illustration of this inferential pattern. According to the de facto officer doctrine, the "lawful acts of an officer *de facto*, so far as the rights of third persons are concerned, are, if done within the scope and by the apparent authority of office, as *valid and binding* as if he were the officer legally elected and qualified for the office and in full possession of it."[66] This doctrine allows the court to rule that a challenge to the validity of a certain legal act applies only prospectively: "the *de facto* officer doctrine provides that even if the statutory provision under which a public officer is appointed is vulnerable to constitutional challenge, official actions taken by the public officer before the invalidity of his or her appointment has been finally adjudicated may not be overturned on that basis."[67]

Courts routinely limit the results of invalidation by making a distinction between *prospective* and *retroactive* effects, but at times they do more. A

63. Nye Perram, Project Blue Sky: Invalidity and the Evolution of Consequences for Unlawful Administrative Action, Speech Delivered to the Australian Institute of Administrative Law on 20 November 2012, 2012 Fed. J. Scholarship 35 (2012), http://www.austlii.edu.au/au/journals/FedJSchol/2012/35.html. Although doctrinal details differ across jurisdictions, the rejection of absolute voidance is almost universal. *See, e.g.*, the decision of the Australian High Court in Kable No. 2, *supra* note 60 (the majority decision, text near notes 23–28), the U.S. Supreme Court in Buckley v. Valeo, 424 U.S. 1 (1976), and the Israeli Supreme Court in Cr. A. 866/95 Soosan v. the State of Israel [1996] 50(1) 793 (Justice Zamir, para. 9).

64. Ittai Bar-Siman-Tov, *Time and Judicial Review in Israel: Tempering the Temporal Effects of Judicial Review*, *in* The Effects of Judicial Decisions in Time (Patricia Popelier, Sarah Verstraelen, Dirk Vanheule & Beatrix Vanlerberghe eds., 2013).

65. The concept of "soft law," legal-like structures that lie between the poles of lawlessness and full legality, involves similar ideas. For further elaboration, *see* Oren Perez, *Fuzzy Law: A Theory of Quasi-Legal Systems*, 28 Can. J. L. & Juris. 343 (2015).

66. In re Redevelopment Plan for Bunker Hill, 61 Cal. 2d 21, 42 (1964) (my emphasis).

67. Marine Forests Society v. California Coastal Com., 36 Cal. 4th 1, n.28 (June 23, 2005).

good example is the decision of the U.S. Supreme Court in Buckley v. Valeo.[68] After concluding that the statutory provisions governing the composition of the Federal Elections Commission violated the separation of powers clause in the U.S. Constitution because four of the six voting members of the commission were appointed by members of Congress, the Court nevertheless *upheld the validity* of all past actions of the commission, according the "de facto validity" of those actions.[69] But the Court went further and permitted the *unconstitutionally* formed Federal Elections Commission to *continue to act for thirty days* after the ruling was issued. This decision is remarkable because the Court, in practice, kept alive a legal act that under the absolute voidance doctrine was considered completely "dead."[70]

Another illustration of the inferential dynamics of graded legal acts comes from the law of evidence.[71] Under the common law rule against hearsay, any assertion, other than one made by a person while giving oral evidence in the proceedings, is inadmissible if tendered as evidence of the facts asserted.[72] The rule is undergirded by a binary inferential pattern: a testimony can either be admitted in court and maintain its probative value, or if it does not meet the criteria of the hearsay rule, is excluded from the proceedings, and therefore loses its probative value completely.[73] In everyday communication people use common sense, rather than a strict hearsay rule, to evaluate the epistemic force of second-order testimonies, based on factors such as the reputation or trustworthiness of the witness and the consistency of the testimony with other evidence.[74] The risk of losing significant information has caused U.S. courts to transform the binary structure of admission/exclusion, which underlies the rule against hearsay,[75] into a weight-based framework that allows judges to assign reduced probative value to the hearsay testimony, depending on the

68. 424 U.S. 1, 142 (1976).

69. Elizabeth Earle Beske, *Backdoor Balancing and the Consequences of Legal Change*, 94 WASH. L. REV. 645, 696 (2019).

70. The Court justified its ruling by noting that "[t]his limited stay will afford Congress an opportunity to reconstitute the Commission by law or to adopt other valid enforcement mechanisms without interrupting enforcement of the provisions the Court sustains, allowing the present Commission in the interim to function *de facto* in accordance with the substantive provisions of the Act." *Buckley*, 424 U.S. at 142.

71. For another example, *see* Marianne Constable's discussion of the "Miranda warning" doctrine. CONSTABLE, *supra* note 6, at 28.

72. ADRIAN KEANE & PAUL MCKEOWN, THE MODERN LAW OF EVIDENCE (2012), at 273; David Alan Sklansky, *Hearsay's Last Hurrah*, 2009 SUP. CT. REV. 1, 12 (2009). John Wigmore defined the hearsay rule as that "which prohibits the use of a person's assertion, as equivalent to testimony to the fact asserted, unless the assertor is brought to testify in court on the stand, where he may be probed and cross-examined as to the grounds of his assertion and of his qualifications to make it." John H. Wigmore, *The History of the Hearsay Rule*, 17 HARV. L. REV. 437, 437 (1904).

73. Ronald J. Allen, *The Hearsay Rule as a Rule of Admission Revisited*, 84 FORDHAM L. REV. 1395, 1398–1399 (2015).

74. Francesco Martini, *Hearsay Viewed Through the Lens of Trust, Reputation and Coherence*, 194 SYNTHESE 4083 (2017).

75. FED. R. EVID. 802.

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circumstances.[76] The weight of the evidence hinges on various factors, such as the reason for the absence of the first-order witness from court, the trustworthiness of the hearsay witness, and more.[77]

According to the foregoing account, indirect (hearsay) testimonies, despite their imperfection, do possess some, even if reduced, probative value.[78] Consider, for example, the dying declaration exception, which refers to statements made at a time when the declarant was facing imminent death, and presented in court by secondary witnesses.[79] Various factors can reinforce or weaken the strength of a dying declaration. One of these is the trustworthiness of the declarant. We can distinguish between statements made on a declarant's own initiative, which may have given him time to plan and potentially fabricate the statement, and those made without an opportunity for planning (e.g., following an unexpected violent incident), where the likelihood of fabrication is lower.[80] Another factor is the trustworthiness of the witness testifying about the content of the testimony. The witness may be more or less sure about what the declarant said, and can use different terms to express levels of confidence, from "insist," to "presume," to "suppose," to "guess."

Similar nuanced understandings of validity have been developed by courts in other fields of law. For example, in contract law, the prevailing approach to the consequences of defects in contract formation is a nuanced one. Vitiating factors do not necessarily result in the contract being considered void, but rather tend to render the contract voidable.[81] Similarly, Delaware courts have taken a nuanced approach to the question of the validity of stock that was issued in a way that does not meet all the requirements of Delaware corporate law (rejecting an either/or interpretation).[82]

76. Allen, *supra* note 73, at 1398–1399. Eleanor Swift describes this process succinctly: "[t]he rule is not being abolished *de facto*, but hearsay practice may be at an important turning point. The categorical structure of the admission/exclusion decision may be giving way to a more flexible process that openly acknowledges the trustworthiness factor." Eleanor Swift, *Hearsay Rule at Work: Has It Been Abolished de Facto by Judicial Decision?*, 76 Minn. L. Rev. 473, 504 (1991).

77. Sklansky, *supra* note 72, at 2.

78. The following discussion takes a highly abstract view of the hearsay doctrine and does not attempt to offer an accurate description of the current approach of either English or U.S. law to hearsay evidence. *See* Michael Joseph Polelle, *The Death of Dying Declarations in a Post-Crawford World*, 71 Mo. L. Rev. 285 (2006); John R. Spencer, Hearsay Evidence in Criminal Proceedings (2014).

79. Fed. R. Evid. 804(b)(2) ("In a prosecution for homicide or in a civil case, a statement that the declarant, while believing the declarant's death to be imminent, made about its cause or circumstances"); Aviva Orenstein, *Her Last Words: Dying Declarations and Modern Confrontation Jurisprudence*, 2010 U. Ill. L. Rev. 1411, 1415 (2010).

80. Timothy T. Lau, *Reliability of Dying Declaration Hearsay Evidence*, 55 Am. Crim. L. Rev. 373, 385–386 (2018).

81. *See* Mindy Chen-Wishart, *The Nature of Vitiating Factors in Contract Law*, *in* Philosophical Foundations of Contract Law 294 (Gregory Klass, George Letsas & Prince Saprai eds., 2015).

82. A finding that a stock is voidable (rather than void) means that defects can be remedied, for example, through ratification by the board or stockholders. *See* C. Stephen Bigler & Seth Barrett Tillman, *Void or Voidable?—Curing Defects in Stock Issuances Under Delaware Law*, 63 Bus. Law. 1109 (2008).

IV. INFERENTIAL MODEL OF GRADED SPEECH ACTS

A. Exposition

My thesis is that speech acts should be conceptualized as moves in an inferential game. This approach enables us to understand also how graded speech acts may come to possess some pragmatic force. My approach is based on Robert Brandom's inferential semantics. Brandom's central thesis is that:

> for a response to have *conceptual* content is just for it to play a role in the *inferential* game of making claims and giving and asking for reasons. To grasp or understand such a concept is to have practical mastery over the inferences it is involved in—to know, in the practical sense of being able to distinguish (a kind of know-*how*), what follows from the applicability of a concept, and what it follows from.[83]

As moves in an inferential game, speech acts can realize the illocutionary potential of the inferential rules governing a particular illocutionary game.[84] By choosing a particular speech act schema (e.g., apologizing) and satisfying its relevant felicity conditions, an interlocutor can achieve a particular pragmatic purpose (a certain deontic transformation). Under this model, the meaning of a speech act is captured by a mapping from a set of felicity conditions to a set of deontic or conventional consequences.[85] I call this rule the *constitutive mapping* of the relevant speech act. This idea assumes that for any type of speech act there exists a constitutive function that maps any subset of felicity conditions associated with that speech act into a subset of the relevant set of deontic consequences.

The inferential model suggests that a graded speech act may succeed in achieving part of the deontic consequences that are associated with a perfect act; a failure to satisfy in full the felicity conditions associated with a particular speech act does not necessarily lead to its complete failure. Austin and Searle assume that the felicity conditions establish *rigid prototypes* (deontic consequences ensue only upon the satisfaction of all the relevant felicity conditions). By contrast I argue that these felicity schemas operate only as *heuristic signposts*, which interlocutors can work around while still achieving certain deontic consequences.

The graded model extends the combinatorial possibilities of linking felicity conditions with deontic or conventional effects. This extension can be

83. BRANDOM, *supra* note 29, at 48 (emphasis in original).

84. This argument is based on a conventionalist understanding of speech acts. LEPORE & STONE, *supra* note 19, at 92; Sbisà, *How to Read Austin*, *supra* note 28, at 45.

85. *See* JAROSLAV PEREGRIN, INFERENTIALISM: WHY RULES MATTER (2014), at 22 and Giovanni Sartor, *Legal Concepts as Inferential Nodes and Ontological Categories*, 17 A.I. & L. 217, 223 (2009) for a similar framework regarding legal concepts. According to Sartor "legal norms basically work as 'inference rules': they tell the legal reasoner what legal conclusions (an obligation, a permission, a right, a normative qualification, a status, etc.) he or she should derive given certain preconditions." Sartor, *supra*, at 218.

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described mathematically. The number of subsets in a set with n elements is 2^n. Each subset of the set of felicity conditions can be linked with each of the subsets of the set of deontic consequences. The exception is the null subset and the complete set of the set of felicity conditions, which can be linked only with the null subset and the complete set of deontic consequences, respectively. Thus, the total number of potential links, with a felicity set with *n* elements and a deontic set with *m* elements is:[86]

(1) $(2^n\text{-}2)*2^m + 2$

If, however, we adopt Austin and Searle's threshold model, we have only two options: we can either satisfy all the felicity conditions (and secure all the associated deontic consequences), or fail to satisfy them, in which case we end up with nothing.

Figure 3 provides a general description of this model.

In the above account, the partial satisfaction of felicity conditions operates as a nonlinguistic mechanism that enables interlocutors to attenuate the force of illocutionary acts. An inferential account of graded speech acts also needs to consider other mechanisms by which users may modify the strength of speech acts. One such mechanism is the use of specialized *illocutionary force indicating devices* (IFID),[87] which reflect either different modes of achieving a particular illocutionary point with varying strengths or differences in the intensity of the expressed psychological state. For example, "order" and "command" are stronger than "ask" and "request," and so are, in a different way, "beg" or "plead." The greater strength of order and command derives from the fact that the speaker invokes a position of authority; the greater strength of beg and plead is due to the stronger intensity of the expressed psychological state.[88] Similarly, in making an assertion, people can vary the force of their claim by using strong expressions (swear, testify, or insist) or weaker ones (suggest, hypothesize, conjecture, guess, suppose, or estimate).[89] The difference here is due primarily to varying intensity in the relevant psychological state, except, perhaps, for testimony, whose strength may have institutional aspects as well. Speakers can also vary the degree of strength of a speech act by using special modifiers or hedges, as, for example, when a teacher tells the class, "I *really* want you to be quiet now," or when a boss tells a new employee, "I *strongly* suggest you not be late for this meeting."[90] Thus, speakers have multiple, and

86. For example, for a felicity condition set with *five* elements and a deontic consequence set with *four* elements, the total number of linking possibilities is 478. By contrast, in Austin and Searle's binary approach, there are only two possibilities of linking the two sets.

87. Lutzky & Kehoe, *supra* note 33, at 27.

88. Searle & Vanderveken, *supra* note 19, at 15, 20.

89. *Id.* at 99.

90. Janet Holmes, *Modifying Illocutionary Force*, 8 J. Pragmatics 345, 347 (1984); Searle & Vanderveken, *supra* note 19, at 99. Some institutional contexts limit the ability of speakers to

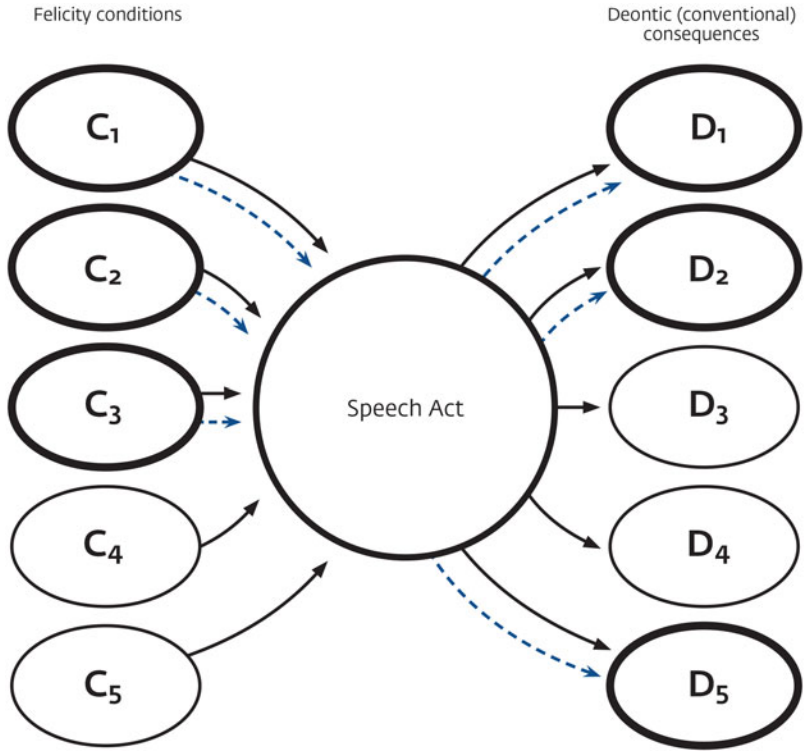

FIGURE 3 Inferential model of graded speech acts

potentially concurrent, ways of varying the strength of the speech acts they produce.[91]

One problem with the above account is that it lacks a dynamic aspect. An inferential understanding of graded speech acts requires us to analyze them as part of a conversation process, an illocutionary game, that revolves around a particular illocutionary call.[92] In the course of an illocutionary game, interlocutors seek to resolve the status of a particular illocutionary claim by exchanging arguments. Such an illocutionary game can explore, for example, whether Trump's statements involving women constitute an offensive speech that merits an apology,[93] whether his apology (example (2)) meets the relevant criteria, and what consequences should

attenuate their speech acts. Judges, for example, cannot weaken the force of their ruling by using certain words.

91. *See* Appendix A for an illustrative taxonomy of types of attenuation mechanisms.

92. Lance & Kukla, *supra* note 12, at 466.

93. *See* David A. Fahrenthold, *Trump Recorded Having Extremely Lewd Conversation About Women in 2005*, WASH. POST., Oct. 8, 2016, https://www.washingtonpost.com/politics/trump-recorded-having-extremely-lewd-conversation-about-women-in-2005/2016/10/07/3b9ce776-8cb4-11e6-bf8a-3d26847eeed4_story.html.

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ensue from it. Daniel Vanderveken distinguished four types of illocutionary games based on the goals interlocutors collectively intend to achieve: descriptive, deliberative, declaratory, and expressive. Interlocutors can engage in a descriptive dialogue, deliberate what to do, change things by way of declarations, or manifest common attitudes.[94] Each of these conversation types is supported by a unique set of speech acts.[95] In real-life situations, these conversation types intermingle. Thus, for example, deliberative dialogue is usually preceded by a descriptive one, in which participants pool their collective knowledge;[96] apology is usually seen as a condition for amnesty.[97]

We can capture the dynamic aspect of illocutionary games using the theoretical apparatus of defeasible logic, which offers a formal framework for understanding how reasons and norms can overcome conflicting reasons and norms or be defeated by them.[98] I argue that the dynamic of illocutionary games with graded speech acts is governed by two sets of rules or functions. The *first* is a set of *constitutive functions*, which link any subset of felicity conditions associated with a particular speech act with a subset of deontic effects. Such functions would also have to incorporate the use of direct linguistic attenuators (specialized IFIDs and boosters). This can be achieved by ranking the varied IFIDs according to their illocutionary force.[99] For example, an ordinal ranking for commissives can take the following form: swear (to), vow, pledge, assure, promise (the perfect form) > commit, threaten, accept, consent (the partial form). The ranking can be used to distinguish between the conventional effects associated with different verbs. Similar logic can be used to model the influence of linguistic boosters.

The *second* is a *set of priority rules* that determine how clashes between conflicting illocutionary claims (and their supporting arguments) are resolved.[100] The priority rules determine the relative strength of competing

94. Vanderveken, *supra* note 21, at 62. These goals have, respectively, a words-to-things, things-to-words, double, and empty direction of fit. *Id.* at 35.

95. *Id.*

96. Arielle Goldberg, *Civic Engagement in the Rebuilding of the World Trade Center*, *in* Contentious City: The Politics of Recovery in New York City 112, 118 (John Mollenkopf ed., 2005).

97. Christopher Bennett, *Is Amnesty a Collective Act of Forgiveness?*, 2 Contemp. Pol. Theory 67 (2003).

98. Robert A. Koons, *Defeasible Reasoning*, *in* The Stanford Encyclopedia of Philosophy (Edward N. Zalta ed., Winter 2009), http://plato.stanford.edu/archives/win2009/entries/reasoning-defeasible/; Henry Prakken & Giovanni Sartor, *A Logical Analysis of Burdens of Proof*, in Legal Evidence and Proof: Statistics, Stories, Logic 223, 229 (Hendrik Kaptein, Henry Prakken & Bart Verheij eds., 2009). I therefore reject the argument that defeasible logic can be used only in the context of propositional arguments, as maintained, for example, by Frans Van Eemeren and Rob Grootendorst. Frans H. Van Eemeren & Rob Grootendorst, A Systematic Theory of Argumentation: The Pragma-Dialectical Approach vol. 14 (2004), at 2.

99. Searle & Vanderveken, *supra* note 19, at 15, 20.

100. This distinction between the constitutive inferential links and the meta-norms regulating potential conflicts between illocutionary claims and their supporting reasons is also adopted (implicitly) by Sartor. Sartor, *supra* note 85, at 243.

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claims, which interlocutors may bring in relation to a particular illocutionary claim.[101] These two sets of rules constitute the conventional framework that determines the meaning of a particular speech act in a given social context.

To illustrate this framework, consider the University of Michigan (Medicine) Disclosure, Apology, and Offer Policy.[102] Paragraph four of the policy states:

> If we have concluded that our care was unreasonable, we say so – and we apologize. If our care caused an injury, we work with the patient and his/her counsel to reach mutual agreement about a resolution. This doesn't always mean a settlement, but if it does, we compensate quickly and fairly.

The wording of this paragraph opens up a wide conversational space in which the meaning and inferential aspects of the different elements of the policy can be contested.[103] The key elements include: (a) how to distinguish between reasonable and substandard care (e.g., can clinical practice guidelines serve as "safe harbors" for clinicians);[104] (b) did the "care" cause the patient's injury;[105] (c) how to define an appropriate apology (e.g., is a mere expression of sympathy sufficient);[106] and (d) what constitutes fair compensation (e.g., should it include compensation for noneconomic damages, such as pain and suffering).[107] Each of these contestation points has inferential aspects (e.g., the duty to apologize and compensate arises only if care was unreasonable), and each of them can serve as a focal point for an argument between the parties, whose resolution depends on the content of the applicable priority rules.[108]

101. For a somewhat similar account, *see* Lance & Kukla, *supra* note 12, at 468–469.

102. The Michigan Model: The U-M Health System Approach to Medical Errors, Near Misses and Malpractice Claims, https://www.uofmhealth.org/michigan-model-medical-malpractice-and-patient-safety-umhs#summary (last visited Nov. 22, 2019); Sigall K. Bell, Peter B. Smulowitz, Alan C. Woodward, Michelle M. Mello, Anjali Mitter Duva, Richard C. Boothman & Kenneth Sands, *Disclosure, Apology, and Offer Programs: Stakeholders' Views of Barriers to and Strategies for Broad Implementation*, 90 MILBANK Q. 682 (2012); Richard C. Boothman, Sarah J. Imhoff & Darrell A. Campbell Jr., *Nurturing a Culture of Patient Safety and Achieving Lower Malpractice Risk Through Disclosure: Lessons Learned and Future Directions*, 28 FRONTIERS HEALTH SERVS. MGMT. 13 (2012).

103. RACHEL ODELL, A THEORY OF CONTESTATION SPACE IN INTERNATIONAL REGIMES (2019).

104. Allen Kachalia & Michelle M. Mello, *New Directions in Medical Liability Reform*, 364 NEW ENG. J. MED. 1564 (2011).

105. TOM BAKER, THE MEDICAL MALPRACTICE MYTH (2011), at 14–19.

106. Bell et al., *supra* note 102, at 689.

107. Herbert M. Kritzer, Guangya Liu & Neil Vidmar, *An Exploration of Noneconomic Damages in Civil Jury Awards*, 55 WM. & MARY L. REV. 971 (2013).

108. E.g., should a physician's claim that he followed approved clinical guidelines be accepted as proof that he exercised "reasonable care"? Allen Kachalia, Alison Little, Melissa Isavoran, Lynn-Marie Crider & Jeanene Smith, *Greatest Impact of Safe Harbor Rule May Be to Improve Patient Safety, not Reduce Liability Claims Paid by Physicians*, 33 HEALTH AFFS. 59 (2014).

B. Graded Speech Acts in Action: Apologies in Bar Admission Proceedings

The case of bar admission proceedings in the United States illustrates my argument about the inferential structure of graded speech acts. I focus in particular on the way in which graded speech acts extend the combinatorial links between felicity conditions and deontic effects. In some U.S. states, applicants to the bar who were involved in some misconduct must show remorse, and if the applicant's apology is judged to be appropriate by the Character and Fitness Committee ("Committee"), the applicant is accepted.[109] Similar rules are in effect for attorneys who were disbarred and apply for reinstatement. For example, under the rules of the State of Kentucky, the Committee is required to assess whether "the applicant . . . possesses the requisite character, fitness and moral qualification for re-admission to the practice of law."[110] In reaching this decision, the Committee must consider five factors, one of which is whether

> (e) the applicant has presented clear and convincing evidence that he/she appreciates the wrongfulness of his/her prior misconduct, that he/she has manifest contrition for his/her prior professional misconduct, and has rehabilitated himself/herself from past derelictions.[111]

How should the Committee approach cases where the applicant's expression of remorse did not satisfy all the elements of categorical apology?[112] One option, illustrated by the case of Doan v. Kentucky Bar Association,[113] is to consider such apology as void and without effect, reflecting an all-or-nothing understanding of infelicitous speech acts.[114] Indeed, this was the approach followed by the Kentucky Supreme Court in the case at hand. The question before the Committee was whether Doan, a disbarred attorney, was entitled to reinstatement. Doan was disbarred from the Kentucky Bar Association because of several cases of misconduct, which included misrepresenting facts to a court, fabricating documents, forging a judge's signature on a document, and misappropriating the funds of multiple clients. The Committee found that Doan should be reinstated, noting that:

> Doan testified at length concerning his continued contrition and remorse. He pointed out specific instances where he had been embarrassed by his actions and the fact that people looked at him differently. He appeared to be sincere in his feelings and testimony.[115]

109. Simon, Smith & Negowetti, *supra* note 39, at 38.
110. Doan v. Kentucky Bar Association, 423 S.W.3d 191, 195 (Ky. 2014); SCR 2.300(6).
111. *Doan*, 423 S.W.3d at 195; SCR 2.300(6).
112. Simon, Smith & Negowetti, *supra* note 39, at 74.
113. *Doan*, 423 S.W.3d. 191.
114. Austin, *supra* note 8, at 16.
115. *Doan*, 423 S.W.3d at 197.

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The decision of the Committee was not approved by the Board of Governors, and Doan appealed to the Supreme Court for review. The Supreme Court denied the motion for reinstatement, stressing the imperfections in Doan's apology. In particular, the court noted that "while Doan has stated that he was responsible for what happened, he has not completely owned up to his misconduct and was vague on the details of what he had done."[116] The court quoted a statement made by Doan in an interview with an investigator:[117]

> Investigator: Do you recall manufacturing Judge Wehr's signature?
> Doan: No, but I may well have done it. Or someone may have done it who was under my control. So . . . I am not denying it.

But what if Doan's expression of remorse, or his rehabilitation process, had been somewhat closer to the ideal apology? The inferential model of graded speech acts suggests that an imperfect apology can have some of the deontic effects associated with a full apology, rather than being entirely void. Some U.S. states offer such a midway option based on the doctrine of "conditional acceptance" or "conditional reinstatement." According to this doctrine, an applicant whose application may have otherwise been rejected may be accepted (or reinstated) into the bar through the imposition of various conditions that are relevant to the applicant's individual circumstances.[118] For example, Rule 40.075 of the Wisconsin Supreme Court states:[119]

> (1) ELIGIBILITY. An applicant whose record shows conduct that may otherwise warrant denial may consent to be admitted subject to certain terms and conditions set forth in a conditional admission agreement. Only an applicant whose record of conduct demonstrates documented ongoing recovery and an ability to meet the competence and character and fitness requirements set forth in SCR 40.02 may be considered for conditional admission.

116. *Id.* at 202.

117. *Id.* at 198 (for reasons of space I only quote part of the exchange).

118. This doctrine is inconsistent with the binary approach of Austin. For example, the Board of the District of Columbia stated in one case that it "generally does not support conditional reinstatements. Either the petitioner is fit to return to law practice or the petitioner is not fit." In re McConnell, 667 A.2d 94, 96 (D.C. 1995).

119. Para. (2) of Rule 40.075 states that the Board of Bar Examiners may impose "any reasonable conditions upon an applicant that will address the applicant's individual circumstances and the board's concern regarding the performance of essential responsibilities to a client or the public," which may include supervision, periodic reporting, and financial or business counseling. *See also* the rules of the Wisconsin Supreme Court, Admission to the Bar, Chapter 40, SCR 40.075 Conditional Bar Admission, https://docs.legis.wisconsin.gov/misc/scr/40/075.

Rule 25 the ABA (American Bar Association) Model Rules for Lawyer Disciplinary Enforcement states similarly (para. 9) that:[120]

> The court may impose conditions on a lawyer's reinstatement or readmission. The conditions shall be imposed in cases where the lawyer has met the burden of proof justifying reinstatement or readmission, but the court reasonably believes that further precautions should be taken to protect the public.

Paragraph 10 elaborates the type of conditions that can be imposed by the court, which include, for example, "limitation upon practice (to one area of law or through association with an experienced supervising lawyer)" and "monitoring of the lawyer's compliance with any other orders (such as abstinence from alcohol or drugs, or participation in alcohol or drug rehabilitation programs)."[121]

V. SPEECH ACT PLURALISM AND TOLERANCE OF INCOHERENCE IN LAW AND BEYOND

I argued above that illocutionary interactions are governed by two sets of rules: a set of constitutive mapping rules, which link felicity conditions with consequences, and a set of priority rules, which resolve clashes between conflicting illocutionary claims and their supporting reasons. By rejecting the binary framework of Austin and Searle, the inferential model extends the combinatorial possibilities of linking felicity conditions with deontic effects. One of the puzzles raised by this approach concerns the coherence of the conventions governing the use of speech acts (both in law and beyond). I argue that the use of speech acts is, at least partially, incoherent. I refer to this phenomenon as *speech act (or illocutionary) pluralism*.[122] According to this view, illocutionary interactions are governed by multiple conventions, with potentially conflicting inferential mappings and priority rules.[123] Our use of speech acts is characterized by second-level

120. Model Rules for Lawyer Disciplinary Enforcement, June 28, 2017, https://www.americanbar.org/groups/professional_responsibility/resources/lawyer_ethics_regulation/model_rules_for_lawyer_disciplinary_enforcement/. The provision there is somewhat paradoxical: if the "lawyer has met the burden of proof justifying reinstatement or readmission," why do we need "further precautions"? I interpret this paragraph as assuming that the lawyer has only partially met the required conditions.

121. For cases involving conditional admission/reinstatement, *see, e.g.*, the petition of Steven Pier for Reinstatement to the Practice of Law, South Dakota Supreme Court, Original Proceeding #19850, decided March 5, 1997; In Re: the Bar Admission of Joshua E. Jarrett. Joshua E. Jarrett, Petitioner, v. Board of Bar Examiners, Respondent, No. 2015AP1393–BA, Supreme Court of Wisconsin (May 18, 2016); In re Robinson, 705 A.2d 687, 1998 D.C. App. LEXIS 19 (D.C. 1998).

122. A somewhat different account of the notion of speech act pluralism is offered by Sbisà, *supra* note 24, and Herman Cappelen & Ernest Lepore, Insensitive Semantics: A Defense of Semantic Minimalism and Speech Act Pluralism (2005).

123. Scott Brewer, *Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy*, 109 Harv. L. Rev. 923, 994 (1996); Nicholas Smith, *Fuzzy Logic and Higher-Order Vagueness*, *in* Understanding Vagueness: Logical, Philosophical and Linguistic Perspectives 1, 8 (Petr Cintula, Christian G. Fermüller, Lluis Godo & Petr Hájek eds., 2011).

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indeterminacy: the same speech act may be invested with conflicting values of illocutionary force.[124] This second-level indeterminacy can have both *diachronic* and *spatial* manifestations. First, the use of speech acts can be *diachronically (temporally) incoherent*; a family may change its internal conventions regarding apology over time.[125] Second, the use of speech acts can be *spatially incoherent*; diverse bar admission committees may invoke different understandings of what constitutes a proper apology. Speech act pluralism can be contrasted with strong coherentism, which assumes that our use of speech acts is governed by a common set of constitutive functions and priority rules associated with different types of speech acts.[126] Robert Brandom's model of linguistic rationalism seems to lean toward this view.[127]

The idea of speech act pluralism, however, faces two challenges, touching on the foundations of social communication. First, the existence of conflicting conventions regarding what constitutes an illocutionary act of a certain type can undermine our capacity to understand each other, and consequently can weaken our ability to engage in illocutionary interactions. For example, people may fail to recognize the attempt of an interlocutor to make a promise simply because they hold a different view of how to make a promise.[128] The second challenge, which received less attention in the literature, concerns the tension between incoherence and fairness. Because speech acts are associated with various deontic consequences, there is a strong social expectation that their use be governed by a principle of fairness, or nondifferential treatment.[129] When a parent apologizes to one of his children but fails to apologize to another (for a similar incident),

124. The idea of speech act pluralism is supported by studies of meta-ethics pluralism (Thomas Pölzler & Jennifer Cole Wright, *Empirical Research on Folk Moral Objectivism*, 14 PHIL. COMPASS e12589 (2019); Jennifer C. Wright, Piper T. Grandjean & Cullen B. McWhite, *The Meta-Ethical Grounding of Our Moral Beliefs: Evidence for Meta-Ethical Pluralism*, 26 PHIL. PSYCH. 336 (2013)), mutiplistic approaches to vagueness (Matti Eklund, *What Vagueness Consists In*, 125 PHIL. STUD. 27 (2005); Giovanni Merlo, *Multiple Reference and Vague Objects*, 194 SYNTHESE 2645 (2017); NICHOLAS J. J. SMITH, VAGUENESS AND DEGREES OF TRUTH (2008)), and work on legal incoherence (Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901 (2013); Frederick Schauer, *Second-Order Vagueness in the Law*, *in* VAGUENESS AND LAW: PHILOSOPHICAL AND LEGAL PERSPECTIVES 177, 185 (Geert Keil & Ralf Poscher eds., 2016); Lawrence M. Solan, *Pernicious Ambiguity in Contracts and Statutes*, 79 CHI.-KENT L. REV. 859 (2004); Solan, *supra* note 2).

125. David Christensen, *Diachronic Coherence Versus Epistemic Impartiality*, 109 PHIL. REV. 349 (2000).

126. It is not always clear whether the coherence view also entails a meta-coherence norm, which imposes a duty on interlocutors to achieve such coherence.

127. Brandom, *supra* note 29, at 189; PEREGRIN, *supra* note 85; Vanderveken, *supra* note 21, at 63.

128. HEATHER BOWE, KYLIE MARTIN & HOWARD MANNS, COMMUNICATION ACROSS CULTURES: MUTUAL UNDERSTANDING IN A GLOBAL WORLD (2014).

129. Sarah F. Brosnan & Frans B.M. de Waal, *Evolution of Responses to (Un)fairness*, 346 SCIENCE 1 (2014); Alex Shaw, *Beyond "to Share or Not to Share": The Impartiality Account of Fairness*, 22 CURRENT DIRECTIONS IN PSYCH. SCI. 413 (2013).

or when a dean uses the "order" form toward one faculty member and the "request" form toward another, with regard to a similar task, they are failing this expectation. There is evidence of *inequity aversion* in both thinly institutionalized domains, such as the family,[130] and in more formal ones, such as organizations[131] and the judicial system.[132] By conflicting with the expectation for fairness, incoherence in the use of speech acts can incite interpersonal frictions and undermine social trust.[133]

The key to resolving both challenges lies, I argue, in the interplay between the lexical and illocutionary conventions that jointly determine the meaning of speech acts.[134] The tension between the lexical and illocutionary levels is manifested by the fact that people may use the same elementary illocutionary verbs in diverse contexts, but be subject to incompatible illocutionary conventions that diverge between use-contexts. The core elementary verbs (e.g., apologize, promise) provide the basic scaffolding for the evolution of diverse illocutionary conventions. For example, apology can be defined as an "expression of regret at having caused trouble for someone."[135] The open-endedness of the lexical definition of apology means that the term can be associated with conflicting constitutive functions and priority rules.[136]

The gap between the lexical and illocutionary conventions that govern speech acts enables society to maintain stability in the lexical (ontological) categories that are associated with distinct speech acts, while allowing meaning to be continuously adjusted through the creation of new or revised inferential links.[137] In law, these core categories manifest themselves through the emergence of a stable body of fundamental doctrinal concepts, which retain their core semantic form despite wide-ranging fluctuations in

130. Susan M. McHale, Kimberly A. Updegraff, Julia Jackson-Newsom, Corinna J. Tucker & Ann C. Crouter, *When Does Parents' Differential Treatment Have Negative Implications for Siblings?*, 9 Soc. Dev. 149 (2000). Differential parental treatment may take various forms, e.g., differences in the use of disciplinary measures or differences in affection measures. Gene H. Brody, *Sibling Relationship Quality: Its Causes and Consequences*, 49 Ann. Rev. Psych. 1, 7 (1998); Amanda Kowal & Laurie Kramer, *Children's Understanding of Parental Differential Treatment*, 68 Child Dev. 113 (1997).

131. For example, favoritism is a key source of workplace conflict. Illoong Kwon, *Endogenous Favoritism in Organizations*, 6 Topics in Theoretical Econ. 1 (2006); Kathie L. Pelletier & Michelle C. Bligh, *The Aftermath of Organizational Corruption: Employee Attributions and Emotional Reactions*, 80 J. Bus. Ethics 823 (2008).

132. Jason A. Colquitt & Kate P. Zipay, *Justice, Fairness, and Employee Reactions*, 2 Ann. Rev. Org. Psych. & Org. Behav. 75 (2015); Jaya Ramji-Nogales, Andrew I. Schoenholtz & Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 Stan. L. Rev. 295 (2007).

133. Shaw, *supra* note 129, at 415.

134. Paul Horwich, *The Composition of Meanings*, 106 Phil. Rev. 503 (1997); François Recanati, *From Meaning to Content*, *in* The Science of Meaning: Essays on the Metatheory of Natural Language Semantics 113, 117 (Derek Ball & Brian Rabern eds., 2018); Sartor, *supra* note 85, at 236.

135. WordNet: A Lexical Database for English (MIT Press), https://wordnet.princeton.edu/.

136. Sartor, *supra* note 85, at 242.

137. *Id.* at 245.

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the inferential structures that undergird their application in particular cases.[138]

According to speech act pluralism, illocutionary conventions may emerge as the outcome of local negotiation between interlocutors. The capacity of interlocutors to negotiate the terms of these extralinguistic conventions depends on the relative stability of the lexical-conceptual corpus. Coherence under this view is an emergent property of local communicative interactions. Uta Lenk described this negotiation process as follows:

> I consider conversational coherence not as a text-inherent property, but instead as the result of a dynamic process between the participants in conversation . . . Through their verbal and non-verbal exchange the speaker and the hearer are engaged in a permanent, ongoing process of 'negotiation' of coherence. This 'negotiation' is achieved through mutual influencing of the participants through their contributions to the conversation.[139]

The foregoing argument still leaves open the puzzle of incoherence/fairness. I argue that *tolerance of incoherence* constitutes an evolutionary, institutional solution to this puzzle. Below I focus on the way in which this tolerance operates in the context of common law systems, although I believe that my account is relevant also to the use of speech acts in thinly institutionalized environments. I argue that the main explanation of this phenomenon lies in the *cognitive complexity* of explicating the differences between the distinct inferential schemas that operate on top of the lexical core, and of elaborating how consistency can be restored. Cognitive complexity can be defined as the number of independent conceptual dimensions that the individual brings to bear in describing a particular phenomenon.[140] The gradedness of legal speech acts further increases the conceptual complexity of legal illocutionary interactions.

Consistency judgments require observers to make explicit the inferential relations and priority rules underlying the use of a particular speech act.[141] In the legal context, making a consistency judgment requires the observer to explicate the doctrinal framework used by the legal decision maker (e.g., court).[142] One of the main difficulties facing such explication is that courts

138. Henry E. Smith, *On the Economy of Concepts in Property*, 160 U. PA. L. REV. 2097 (2012).

139. Uta Lenk, *Discourse Markers and Global Coherence in Conversation*, 30 J. PRAGMATICS 245, 246 (1998).

140. Daniel J. O'Keefe & Howard E. Sypher, *Cognitive Complexity Measures and the Relationship of Cognitive Complexity to Communication*, 8 HUM. COMMC'N RSCH. 72, 73 (1981); William A. Scott, *Cognitive Complexity and Cognitive Flexibility*, 25 SOCIOMETRY 405, 405 (1962).

141. Georg Brun, *Logical Expressivism, Logical Theory and the Critique of Inferences*, 196 SYNTHESE 4493, 4498 (2019).

142. I shall use the phrase "doctrinal scheme" to refer to the combined set of inferential relations and priority rules that constitute the conceptual space underpinning a particular legal doctrine (e.g., the precautionary principle). Jack M. Balkin & Sanford Levinson, *Legal Historicism and Legal Academics: The Roles of Law Professors in the Wake of Bush v. Gore*, 90 GEO. L.J. 173, 173–174 (2001).

may invoke the same *high-level lexical concepts* even when they use slightly different inferential schemas.[143] Furthermore, in many instances, courts do not fully explicate the inferential schema on which they rely. This means that the exact inferential structure of the doctrinal framework must be extracted from the ruling by juxtaposing its wording with its applicatory consequences in the case at hand.

Consider, for example, a case of two applicants for readmission to the Kentucky bar, who have both been involved in *forgery of court documents and misappropriation of client funds*.[144] In both cases, the applicants made a vague general statement, accepting moral responsibility for their past misconducts. Under the rules of the Supreme Court of Kentucky, to be readmitted into the bar,[145] the applicants must present clear and convincing evidence of contrition for their prior professional misconduct.[146] In the first case (**case A**) the Committee ruled that the applicant *can be readmitted*, but in the second (**case B**) it *refused readmission*, noting that the applicant's contrition has not met the standard specified by the law.

The question for an observer considering these rulings is whether the differences between the decisions are due to *distinct inferential rules* or to *differences in the factual background of the cases*. Determining whether the rulings of the Committee are coherent is made difficult by the fact that both rulings invoked the same general lexical category (contrition) but may have applied different (implicit) inferential rules. To the extent that the Committee (or any other tribunal) does not provide an explicit explanation of its reasoning, an observer must extract the inferential differences between the rulings by juxtaposing their factual basis with their deontic consequences. Consider the following options:

(1) The differences in the rulings are the product of *two incoherent doctrinal structures*. In case A, the Committee adopted a *lenient interpretation* of the contrition requirement, which does not require applicants to accept moral responsibility for each wrongdoing. In case B, the Committee adopted a *strict interpretation* of the contrition requirement, which requires applicants to accept causal moral responsibility for each wrongdoing.
(2) The difference in the rulings is the product of a *mistaken application* of the same doctrinal framework. There are two symmetrical options: (a) in both cases, the Committee adopted a *lenient interpretation* of the

143. Lauren Hartzell-Nichols, *From 'the' Precautionary Principle to Precautionary Principles*, 16 Ethics, Pol'y & Env't 308 (2013); Oren Perez, *Precautionary Governance and the Limits of Scientific Knowledge: A Democratic Framework for Regulating Nano-Technology*, 28 UCLA J. Env't L. & Pol'y 29 (2010).

144. *See, e.g.*, State of Oklahoma ex rel. Oklahoma Bar Association v. Alexander L. Bednar, Case No. SCBD-6618 (Okla. Mar. 12, 2019).

145. Doan v. Kentucky Bar Association Supreme Court of Kentucky, 423 S.W.3d 191, 195 (Ky. 2014); SCR 2.300(6).

146. *Doan*, 423 S.W.3d at 195; SCR 2.300(6).

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contrition requirement, and its different ruling in case B does not stem from a doctrinal shift but from a mistaken application of the rule; (b) in both cases, the Committee has adopted a *strict interpretation* of the contrition requirement; in this scenario, it is the ruling in case A that represents a mistaken application of the rule.

(3) There is a factual difference between the cases, which, together with an appropriately calibrated reinterpretation of the rule, can explain their apparent incompatibility. (a) Assume that the statements of the applicants in both cases, without clearly distinguishing between the two wrongdoings, differed in that applicant A clearly referred to the moral problem that underlies his behavior in both incidents (*fraud*) whereas applicant B did not. In case A, therefore, a factual feature ($\mathbf{E_1}$) was present, which did not exist in case B. It is possible to resolve the incoherence between the rulings by adding the following exception to the rule: an applicant's show of remorse is satisfactory even if it does not distinguish between the applicant's various wrongdoings, if it explicitly refers to the common moral flaw underlying his misbehavior. In this account, the presence of E_1 in case A, but not in B, together with the revised interpretation of the rule, explains the divergence between the rulings. (b) The cases may differ in the applicants' level of sincerity: applicant A being more sincere than applicant B. The difference in sincerity represents a divergent factual feature that is present in case A but not in B ($\mathbf{E_2}$). It is possible to resolve the incoherence between the rulings by adding a sincerity condition to the *lenient interpretation* of the contrition requirement. In both examples, a factual difference between the cases (E_1 or E_2), together with an appropriately reconstructed interpretation of the rule, can make the two decisions coherent.

It follows that an observer analyzing the coherence of the two decisions must choose between three mutually exclusive hypotheses for explaining the divergence between the decisions: (a) *blunt incoherence*—the different rulings in cases A and B reflect a different (implicit) doctrinal structure, hence they are incoherent; (b) *labeling one of the rulings as mistaken*—the Committee used the same doctrinal structure in both cases, and the different ruling in case A or B reflects a mistaken application of the rule; or (c) *the difference between the rulings can be explained by a factual variable (E*) that exists in case A but not in B* (together with an appropriately reconstructed interpretation of the rule).

The problem is that to the extent that (a) the Committee has used similar wording in both cases and failed to provide a complete explication of the doctrinal framework it relied on, and (b) the two cases potentially differ in multiple aspects, it will be impossible to determine which of the above hypotheses is correct. We need to collect further evidence regarding the behavior of the Committee in similar cases. To choose between the first

and second interpretations (blunt conflict or misapplication), we must compare the rulings of the Committee in the two cases with its rulings in additional (relevantly) similar cases. If we find that in most of them the applicant was admitted to the bar, we can assume that the Committee has adopted a lenient interpretation (or vice versa, for the strict option). To corroborate the third interpretation, we must find another case, relevantly similar to the original one and also having the additional feature (E_1 or E_2). If the rulings are the same, it will strongly support the interpretation suggested above. Note that in comparing the two original rulings with a third one, it is necessary also to consider the option that the difference between the cases is due to another factual variable (E_3). For example, the applicants may differ in their seniority, in the severity of the misconducts, or in the profile of the clients who were harmed by their misconduct. The presence of a third factual variable (E_3) may require a different interpretation of the rule governing the applicant's contrition.

As the above example demonstrates, determining whether apparent irregularities in the use of general concepts (remorse, apology) are due to variability in the applicable doctrinal frameworks or in the underlying social data is made difficult by the fact that courts do not always fully explain the inferential structure on which they base their ruling.[147] The appearance of univocality produced by the fact that courts invoke the same conceptual apparatus even when they apply different inferential rules could have been resolved if distinct inferential rules had been associated with distinct lexical terms (e.g., $apology_1$, $apology_2$, $apology_3$), but this sort of conceptual exactness is rather rare.[148]

The cognitive difficulty of identifying inconsistency is exacerbated by the fact that observers do not usually have complete access to the evidentiary data of the projected set of "similar cases." As I showed above, without access to this data, it is difficult to challenge the presumption, based on the univocality of the lexical core, that the differences in the use of speech acts are due to factual variations rather than to conflicting inferential conventions.[149] For example, suppose we suspect that one bar committee has adopted a criterion that categorically rejects apologies made by transgender people (what Rebecca Kukla described as cases of discursive injustice).[150]

147. John Pittard & Alex Worsnip, *Metanormative Contextualism and Normative Uncertainty*, 126 Mind 155, 167 (2017).

148. Grant Lamond has similarly referred to the inherent indeterminacy of general legal concepts. It is rare, he argued "for a case, or even a series of cases, to provide a set of necessary and sufficient conditions for classification." Grant Lamond, *Analogical Reasoning in the Common Law*, 34 Ox. J. Legal Stud. 567, 576 (2014). Lamond distinguished between "settled" and "unsettled" legal concepts, and noted that in the latter case, "there will be competing accounts of the best characterization of the cases, and of the role of that concept in its legal context." *Id.* at 576.

149. Tom R. Tyler, *What Is Procedural Justice? Criteria Used by Citizens to Assess the Fairness of Legal Procedures*, 22 Law & Soc'y Rev. 103, 130 (1988).

150. Kukla, *supra* note 46.

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Such a felicity condition is, naturally, morally problematic. But before we can criticize the Committee for adopting such a morally problematic approach, we must be convinced that the decision of the Committee was not due to some other case characteristics that are correlated with gender identity (e.g., results of bar examinations or criminal history).[151]

Finally, even if observers can accurately articulate the second-order indeterminacy that characterizes the doctrinal space, restoring coherence is in itself a nontrivial challenge. This difficulty is relevant both for decision makers and for third parties that have an interest in facilitating legal coherence. Coherence can be restored by singling out one of the competing interpretations as the correct one, by replacing the conflicting interpretations with a new one, or by partitioning the legal space by coining new legal concepts, each associated with a different inferential mappings.[152] Choosing between these multiple options is a cognitively complex task, which raises difficult meta-normative questions.

Up to this point, I focused on the cognitive aspects of tolerance of inconsistency. This is a general issue, not unique to the legal domain.[153] The evolution and persistence of tolerance of incoherence in the legal system is reinforced by the diverse institutionalized incentives of legal actors. Laypeople do not possess the analytical know-how to make judgments about legal consistency. Legal professionals are in a better position to identify incoherence. But their incentives are not necessarily aligned with the goal of restoring coherence. The behavior of lawyers is heavily influenced by their financial interests. It seems highly unlikely that their interests would align perfectly with either those of their clients[154] or of the legal system (restoring coherence).[155]

The incentives of judges, in both lower and higher courts, are also not entirely aligned with the goal of achieving perfect coherence. Empirical studies of judicial behavior suggest that judges' rulings may be influenced by various extralegal considerations, such as their ideological preferences,

151. David S. Abrams, Marianne Bertrand & Sendhil Mullainathan, *Do Judges Vary in Their Treatment of Race?*, 41 J. LEGAL STUD. 347, 348 (2012).

152. E.g., asserting that precautionary principle_1 applies to such and such conditions and consequences, and similarly with regard to precautionary principle_2 and precautionary principle_3. Nicholas J. J. Smith, *Undead Argument: The Truth-Functionality Objection to Fuzzy Theories of Vagueness*, 194 SYNTHESE 1, 22 (2015).

153. Bruno Galantucci & Gareth Roberts, *Do We Notice When Communication Goes Awry? An Investigation of People's Sensitivity to Coherence in Spontaneous Conversation*, 9 PLOS ONE e103182 (2014).

154. Ronald J. Gilson & Robert H. Mnookin, *Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation*, 94 COLUM. L. REV. 509 (1994); FRANK H. STEPHEN, LAWYERS, MARKETS AND REGULATION (2013), at 44.

155. Donald C. Langevoort & Robert K. Rasmussen, *Skewing the Results: The Role of Lawyers in Transmitting Legal Rules*, 5 S. CAL. INTERDISC. L.J. 375 (1996). Economists have long argued that the financial interests of lawyers may cause them to misrepresent the interests of their clients. Gilson & Mnookin, *supra* note 154; STEPHEN, supra note 154, at 44. With respect to the other forms of misalignment, Donald Langevoort and Robert Rasmussen have argued, for example, that lawyers may systematically overstate legal risks. Langevoort & Rasmussen, *supra*, at 376–377.

or by strategic considerations (the need to take into account their colleagues' policy preferences or the possibility of legislative reprisal).[156] The opacity of legal language enables judges to conceal the influence of these extralegal motivations. Barry Friedman described one aspect of this phenomenon using the idea of "stealth overruling": "the ability of justices to either diverge or overrule (in the case of the Supreme Court) precedents, while hiding the fact that they are doing so."[157] Furthermore, because of the enormous caseload that courts face, only a fraction of lawsuits end in a full trial, and many disputes are resolved by settlement (the "vanishing trial" phenomenon). This phenomenon limits the capacity of case law to weed out incoherence through deliberative refinement.[158]

It may be tempting to think that legislators and academics would be better positioned to act as guardians of legal coherence. But both face various constraints that prevent them from assuming this role. The need to make various political compromises to allow certain legislation to move ahead undermines the capacity of the legislative process to achieve coherence. In a fascinating study of the legislative drafting process in the U.S. Congress, Abbe Gluck and Lisa Bressman have demonstrated this phenomenon. They noted that although more than 93 percent of their respondents (congressional staffers) affirmed "that the 'goal' is for statutory terms to have consistent meanings throughout," the staffers have also emphasized the significant organizational barriers that the committee system, bundled legislative deals, and lengthy, multidrafter statutes pose to the realization of that goal.[159]

Changes in legal scholarship have significantly weakened the role played by legal academia in promoting the coherence of the law. Traditionally, legal scholarship has focused on doctrinal questions (studying the consistency of the use of concepts in different areas of law, exploring how different legal concepts can fit together, and extracting general principles from the existing body of law). The following quote from Lord Goff captures the spirit of traditional doctrinal legal research:

> The prime task of the jurist is to take the cases and statutes which provide the raw material of the law on any particular topic; and, by a critical re-appraisal of that raw material, to build up a systematic statement of the law on the relevant topic in a coherent form, often combined with proposals of how the law can beneficially be developed in the future.[160]

156. Arthur Dyevre, *Unifying the Field of Comparative Judicial Politics: Towards a General Theory of Judicial Behaviour*, 2 Eur. Pol. Sci. Rev. 297 (2010); Theunis Roux, *American Ideas Abroad: Comparative Implications of US Supreme Court Decision-Making Models*, 13 Int'l J. Const. L. 90 (2015).

157. Barry Friedman, *The Wages of Stealth Overruling (with Particular Attention to Miranda v. Arizona)*, 99 Geo. L.J. 1, 14 (2010).

158. Ayelet Sela, Nourit Zimerman & Michal Alberstein, *Judges as Gatekeepers and the Dismaying Shadow of the Law: Courtroom Observations of Judicial Settlement Practices*, 24 Harv. Negot. L. Rev. 83 (2018).

159. Gluck & Bressman, *supra* note 124, at 936.

160. Lord Goff, *Judge, Jurist and Legislature*, 2 Denning L.J. 79, 92 (1987).

Contemporary legal scholarship, however, has changed its nature. Current legal research is less interested in exploring purely doctrinal questions and focuses more on studying legal questions from a theoretical perspective, drawing on interdisciplinary insights from diverse fields.[161] Improving legal coherence is not part of this research agenda.

The institutional structure of the law thus contributes to the persistence of tolerance of incoherence,[162] which enables the law to maintain a facade of consistency at the top level of general concepts, while allowing meaning to fluctuate at the level of particular cases. I believe that this paradoxical situation contributes to the resilience of the law. First, it allows the legal system to economize on the costs of establishing a fully consistent doctrinal space. Second, tolerance of incoherence provides the law with the capacity to navigate the conflicting demands and expectations of diverse communities and subcultures, without undermining its claim for impartiality.[163] Sensitivity to cultural pluralism is incompatible with consistency, because achieving consistency may come at the expense of particularistic moral or cultural points of view, and may require us to abandon one of the irreducibly independent principles at the foundation of modern culture.[164] As Christopher Kutz has argued, "ineradicable conflict and divergence in a complex legal system is not a sign that things have gone awry, but that things are going well, that the legal regime is taking seriously plural claims of value."[165]

From a moral perspective, tolerance of incoherence is compatible with the idea of moral relativism, and with the position that we should tolerate, to some extent, those with whom we morally disagree.[166] Recently, Richmond Campbell and Victor Kumar[167] have outlined a different approach, by arguing that moral consistency reasoning operates as a distinctive form of moral reasoning that exposes inconsistencies between moral judgments and thus plays an important role in shaping moral thought and in driving moral progress. The idea of tolerance of inconsistency

161. Richard A. Posner, *Against the Law Reviews*, LEGAL AFFS., Nov.–Dec. 2004, at 57; Mathias M. Siems & Daithí Mac Síthigh, *Mapping Legal Research*, 71 CAMBRIDGE L.J. 651 (2012).

162. The enduring inconsistency of long-standing legal doctrines, such as hearsay and the precautionary principle, seems to support this argument. Sven Ove Hansson, *Safety Is an Inherently Inconsistent Concept*, 50 SAFETY SCIENCE 1522 (2012); GARY ELVIN MARCHANT & KENNETH L. MOSSMAN, ARBITRARY AND CAPRICIOUS: THE PRECAUTIONARY PRINCIPLE IN THE EUROPEAN UNION COURTS (2004); Martin Peterson, *The Precautionary Principle Is Incoherent*, 26 RISK ANALYSIS 595 (2006); Frederick Schauer, *On the Supposed Jury-Dependence of Evidence Law*, 155 U. PA. L. REV. 165 (2006).

163. MACCORMICK, *supra* note 2, at 143.

164. Christopher L. Kutz, *Just Disagreement: Indeterminacy and Rationality in the Rule of Law*, 103 YALE L.J. 997, 1028–1029 (1994); Joseph Raz, *The Relevance of Coherence*, 72 B.U. L. REV. 273, 310 (1992); Gunther Teubner, De Collisione Discursuum*: Communicative Rationalities in Law, Morality, and Politics*, 17 CARDOZO L. REV. 901 (1996).

165. Kutz, *supra* note 164, at 1028–1029.

166. Gilbert Harman, *Moral Relativism Defended*, 84 PHIL. REV. 3 (1975); JAMES DAVID VELLEMAN, FOUNDATIONS FOR MORAL RELATIVISM (2013).

167. Campbell, *supra* note 7; Richmond Campbell & Victor Kumar, *Moral Reasoning on the Ground*, 122 ETHICS 273 (2012).

suggests, however, that moral inconsistency may be more prevalent and exhibit stronger stickiness than is suggested by Campbell and Kumar. Their work underestimates, in my opinion, the cognitive complexity underlying consistency judgments. Tolerance of inconsistency does, however, come at a price by allowing morally problematic practices to persist. In the case of apologies, for example, legal parties have recently begun to exploit the ambiguities of apologetic language to their advantage, adopting a thin interpretation of apology that does not include an admission of fault or a commitment for redress.[168] Using the notion of apology, while implicitly weakening its felicity criteria, can serve the interests of wrongdoers, particularly in the field of medical malpractice, by putting pressure on victims to settle for less than fair compensation.[169]

Tolerance of incoherence is therefore a deep-seated feature of the law. Law is, in that sense, intrinsically and inescapably imperfect.

168. Yonathan A. Arbel & Yotam Kaplan, *Tort Reform Through the Backdoor: A Critique of Law & Apologies*, 90 S. Cal. L. Rev. 1199 (2017); Smith, *supra* note 37, at 45.

169. Arbel & Kaplan, *supra* note 168.

APPENDIX A

TYPES OF ATTENUATION MECHANISMS: ILLUSTRATIVE TABLE

General forms of attenuation Type of speech act	Graded force due to failure to meet one or more of the relevant felicity conditions	Attenuation due to the use of different illocutionary force indicating devices (IFID)	Linguistic modifiers (not ordered)
Assertives	Hearsay testimony, imperfect causal assertions due to partial satisfaction of Bradford Hill criteria*	Swear, testify, insist, assure > assert, claim, state, affirm, accuse, report, notify, inform, criticize, predict, boast, retrodict, confess, admit, remind, assure > suggest, hypothesize, conjecture, opine > guess, suppose, estimate, reckon > imagine, fathom, envision	Solemnly swear, be quite sure, probably is, forcefully describe, forcefully argue, is somewhat
Directives	Graded directive due to a failure in procedure or imperfect authority	Authority-related (the extent to which the speakers rely on their authority): command, order, require, demand, insist > ask, request > suggest, advise, recommend. Intensity of the expressed psychological state: implore, entreat, plead, beseech, beg, pray > coax, cajole, blandish	Strongly recommend, forcefully demand, humbly ask, strongly advise
Commissives	Graded administrative promise: when public officials give an administrative promise outside their authority or when their	Swear (to), vow, pledge, assure, promise > commit, threaten, accept, consent	Sincerely promise

(*Continued*)

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Continued.

General forms of attenuation Type of speech act	Graded force due to failure to meet one or more of the relevant felicity conditions	Attenuation due to the use of different illocutionary force indicating devices (IFID)	Linguistic modifiers (not ordered)
	appointment process was flawed; graded promise in other contexts (e.g., family)		
Expressives	Making an apology without satisfying all the felicity conditions	(No obvious ranking) regret, apologize, thank, congratulate, condole, deplore, frankly admit	Deeply regret, humbly apologize, quite frankly admit
Declarations	The declaratory creation of a relatively void legal act	N/A	N/A

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