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## COMMENTARY

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# The Penitent and the Penitentiary: Questions Regarding Apologies in Criminal Law

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### I The Many Meanings of Apologies

In early 2008 I published *I Was Wrong: The Meanings of Apologies*.<sup>1</sup> Discussing numerous apologies from ancient and recent history, *I Was Wrong* argues that we suffer from considerable confusion about the moral meanings and social functions of these complex interactions. Rather than asking whether a speech act “is or is not” an apology, I offer a nuanced theory of apologetic meaning and argue that apologies have evolved from a confluence of diverse cultural and religious practices that do not translate easily into pluralistic secular discourse. In an attempt to provide a compelling theoretical framework for the meanings of apologies that synthesizes relevant knowledge from any discipline that lends insight to the issues, I engage not only philosophers but also sociologists, psychologists, criminologists, linguists, political scientists, feminists of various disciplines, law faculty, anthropologists, theologians, and just about anyone who has written on contrition.

I devote much of *I Was Wrong* to the inexact science of identifying the distinct

spheres of apologetic meaning. After describing several varieties of apologies between individuals and collectives, I make the case for a robust core of moral meaning in what I name a “categorical apology.” The book considers the many nuances and gritty details of apologetic meaning, but the following benchmarks guide my standards for categorical apologies:

1. Corroborated Factual Record: A categorical apology will corroborate a detailed factual record of the events salient to the injury, reaching agreement among the victim, offender, and sometimes the community regarding what transpired. The parties will also agree regarding what amounts to such salient events, leading them to share an understanding of the relevant aspects of the context in which the injury occurs. Rather than providing general and vague descriptions of the events (“I acted badly”), the record will render transparent all facts material to judging the transgressions. Such a record will often include honest accounts of the mental states of the apologizer at the time of the offense when such information would prove relevant, for example by describing the offender’s intentions when committing the transgression.

2. Acceptance of Blame: In accordance with notions of proximate causation, the offender accepts causal moral responsi-

bility and blame for the harm at issue. We can distinguish this from expressing sympathy for the injury or describing the injury as accidental or unintentional.

3. Possession of Appropriate Standing: The categorical apologizer will possess the requisite standing to accept blame for the wrongdoing. The offender can and does accept proximate responsibility for the harm and she – rather than a proxy or other third party – undertakes the work of apologizing described herein.

4. Identification of Each Harm: The offender will identify each harm, taking care not to conflate several harms into one general harm or apologize for only a lesser offense or the “wrong wrong.”

5. Identification of the Moral Principles Underlying Each Harm: The offender will identify the moral principles underlying these harms with an appropriate degree of specificity, thus making explicit the values at stake in the interaction.

6. Shared Commitment to Moral Principles Underlying Each Harm: The offender will commit to the moral principles underlying these harms (again with an appropriate degree of specificity), vindicating the value at issue and finding the victim’s offense at the apologiz-

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er's breach of this value justified. Here the phrase "I was wrong" will better convey this meaning than the traditionally favored "I am sorry," as the former accepts personal blame for wrongdoing while the latter may provide no more than an expression of sympathy or a displeasure with a state of affairs.

7. Recognition of Victim as Moral Interlocutor: Through this process the offender comes to recognize and treat the victim as a moral interlocutor. With this, the offender treats the victim as a moral agent worthy of engaging in moral discourse and abandons the belief that she can disregard the victim's dignity, humanity, or worth in pursuit of her own objectives.

8. Categorical Regret: The offender categorically regrets the actions in question, meaning she believes that she has made a mistake that she wishes could be undone. We can distinguish this from continuing to endorse one's decisions but expressing sympathy regarding what the offender perceives as the justifiable consequences of her actions.

9. Performance of the Apology: The offender expresses the apology to the victim rather than keeping her thoughts of contrition to herself or sharing them only with a third party such as a judge or member of the clergy. She addresses the apology to the victim as a moral interlocutor. She expresses the content required of a categorical apology explicitly. The apology reaches the victim. The victim may exercise reasonable discretion regarding whether the offender must present the apology only to the victim or also to a broader community. The determination whether the apology must be committed to writing and conferred to her also lies within the victim's reasonable discretion.

10. Reform and Redress: The apologizer will reform and forgo from reoffending over her lifetime and will repeatedly demonstrate this commitment by resisting opportunities and temptations to reoffend. Thus a categorical apology allows the victim to isolate the cause of her suffering, apportion blame for

her injury, and take some security in the offender's pledge never to repeat the offense. The apologizer accepts legal sanctions for her wrongs, though she may protest these penalties to the extent that she finds them unjustifiable as disproportionate to her offense. The offender takes practical responsibility for the harm she causes, providing commensurate remedies and other incommensurable forms of redress to the best of her ability. The offender provides a proportional amount of redress, but she need not meet excessive demands from victims with unreasonable or inappropriate expectations. I leave questions regarding what constitutes unreasonable or excessive demands to be determined in consideration of cultural practices, and I appreciate that such deliberations will often be contentious.

11. Intentions for Apologizing: The categorical apology also requires certain mental states. Rather than promoting the apologizer's purely self-serving objectives, the offender intends the apology to advance the victim's well-being and affirm the breached value.

12. Emotions: As a result of her wrongdoing, the apologizer will experience an appropriate degree and duration of sorrow and guilt as well as empathy and sympathy for the victim. I leave questions regarding what constitutes the appropriate qualitative and quantitative emotional components of categorical apologies to be determined or in consideration of cultural practices and individual expectations.

Conceived as such, categorical apologies are demanding ethical acts indicating a kind of transformation that resonates with thick conceptions of repentance within religious traditions. We should recognize when apologies fall short of this standard and pursue their full meaning or understand them as less than categorical, but this is not to say that all apologies must be categorical or that all noncategorical apologies are meaningless. There are many kinds of apologetic meaning, and the categorical apology offers but one possible arrangement of such meanings.

As a philosophy professor with a law degree and some experience in the legal

profession, I undertook this research with the ultimate goal of creating a framework for apologetic meaning that would illuminate the role of apologies within the legal system. If religion and its practices of repentance once provided the backdrop that framed our understandings of apologies, law increasingly plays that role in modern life. Apologies in both civil and criminal law pull in opposite directions. On the one hand, certain kinds of apologies admit guilt. Whether in criminal hearings, corporate settlement negotiations, or malpractice litigation, admitting guilt is often equivalent to accepting complete defeat. Providing what I describe as a categorical apology can amount to legal suicide within an adversarial justice system. On the other hand, some apologies provide an astoundingly successful means of mollifying disputants. A strategically timed and worded apology can prevent litigation altogether, reduce damage payments and jury awards by considerable amounts, or shave years from prison sentences. An apology can accomplish nearly all of the objectives of reconciliation, redress, and punishment, but only if it rises to the level of what I describe as a categorical apology.

To this end I am working on *Apologies in Law*, which extends my arguments about the meanings of apologies to civil, criminal, and international law. If so many of our moral conversations occur in the context of apologizing and if so many offenses within modern culture become legal disputes, we can appreciate the complexities of finding these highly nuanced rituals of contrition within the labyrinths of modern legal institutions. *Apologies in Law* attempts not only to make explicit the various kinds of hidden meaning in acts of contrition by legal actors, but also to empower legal actors with tools to evaluate the apologies given and received in law and law-like environments. In this regard, I aim to write this book with the theoretical precision expected by philosophers while offering the type of practical analysis that speaks to judges, legislators, attorneys, advocates, and litigants.

*Apologies in Law* will consider apologies in various legal contexts, but for the remainder of this commentary I will

outline what I consider the most significant questions arising in relation to expressions of contrition within criminal justice. I find these issues immensely important for offenders, victims, and communities and I should warn from the outset that I am only beginning to appreciate the complexity of these moral questions and their ramifications for criminal justice systems.

## II Court-ordered Apologies

Although it may seem like a progressive alternative to incarceration when we find it in modern penal institutions, the practice of ordering convicts to apologize for their deeds has a dark history. Various religious traditions routinely tortured subjects until they confessed and repented and authoritarian states have long coerced public statements of “rehabilitation” from dissidents. Thus when a contemporary judge requires a convict to publish a letter in the newspaper apologizing for a sexual assault or a drug offense, should we understand this as a innovative form of restorative justice, an additional deterrent for future offenders, a retributive attempt to humiliate convicts, or some confused hodgepodge of punishment theory?

If an offender recognizes her transgressions as a moral failure, as I argue is required of a categorical apology, something like a sense of duty will motivate her apology. Surely such voluntary apologies hold very different sorts of meanings from expressions of contrition ordered by courts. Even without apologies from offenders, the legal process can establish a factual record, assign blame, excuse accidents, identify and affirm the values breached, recognize the victims as members of the moral community, levy penalties, and oversee the completion of sentences and redress. What, then, does a court-ordered apology add?

Might court-ordered apologies advance primarily retributive, rather than restorative or rehabilitative, justifications for punishment? I argued in *I Was Wrong* that categorical apologies convey various forms of emotional meaning for victims and offenders—we can appreciate the obvious shortcomings of emo-

tionless apologies for serious offenses—and therefore we can ask if our intuition that the apologizer deserves to suffer some emotional pain is retributive in nature. Do those who wrong us *deserve* to suffer negative emotions, and are court-ordered apologies a legitimate means of achieving this end? Rather than reintegrating offenders into the moral community, do such punitive measures risk dehumanizing them?

Kant supports the retributive justification for court-ordered apologies, explicitly claiming that law should require wealthy offenders to apologize to their “socially inferior” victims so that this “humiliation will compensate for the offense as like for like.”<sup>72</sup> In some cases, Kant argues, a court-ordered apology is the only punishment of the correct kind and proportion to balance the scales of retributive justice. This raises several questions. It seems that Kant operates with the sort of binary conception of apologies that I resist, but what are his necessary and sufficient conditions for court-ordered apologies? If he includes, as I do, an acceptance of blameworthiness, how can a court require an offender to internalize moral responsibility? Courts may lead us to the troughs of virtue in this respect, but they cannot make us drink from them.

Kant also appears to appreciate the role of emotions in apologetic meaning in his acceptance of the importance of humiliation in the retributive use of apologies, but notice how the emotional component of apologetic meaning adds to the difficulties facing binary theories of apologies: which emotions, what intensity, and for what duration must they be experienced? Just how much humiliation must the apologizer experience for her punishment to be proportional to her offense? How can we account for divergent cultural attitudes toward displays of emotions? Given that we would expect Kant to minimize the role of emotions in apologetic meaning, his emphasis on humiliation here is also surprising. Surely within a Kantian framework one’s motivation for apologizing should not be to reduce her negative emotions or minimize her sentence. In addition, we can ask how Kant—the great advocate of truth-telling—could imply that

the state can punish an unrepentant offender by requiring her to lie about her beliefs, values, or feelings in a court-ordered apology. The source of the humiliation, therefore, may be twofold: not only must you admit your wrongdoing publicly, but you are required to participate in your degradation by publicly lying and denouncing your private views to comply with court orders.

If a convict continues to assert her innocence or refuses to accept blame for the harm, ordering her to apologize seems like a display of the state’s authority rather than a stage in the convict’s moral transformation. If an offender disagrees with the statute under which a court convicts her, for instance if the state finds an advocate for marijuana legalization guilty of possession, should a judge increase her punishment unless she apologizes? We can ask the same of a political protestor who finds her prosecution an example of the state’s illegitimacy—requiring such a person to contradict her beliefs under the threat of punishment recalls the most primitive examples of forced conversions.

From more utilitarian perspectives, we can wonder if court-ordered apologies provide value as an additional form of deterrent. Although prison sentences may not successfully deter offenders who view serving time as a means of enhancing their street credibility, for instance, the threat of being subjected to the shaming of a court-ordered apology may provide a different kind of disincentive to a certain demographic of offenders. As some have argued, court-ordered apologies could also create opportunities for the sort of moral reflection that triggers personal transformation and reduces recidivism. Claims of this sort merit further empirical analysis before we can judge their full moral value.

## III Voluntary Apologies in Criminal Law

Leading penological theories once imagined the penitentiary as refuge where the offender could be removed from the temptations of criminal life and shepherded back to her true conscience when left to study her bible. Setting aside the religious underpinnings of such policies

while appreciating that modern secular conceptions of apologies have evolved from a confluence of traditions of repentance, one can make a compelling argument that a categorical apology as I describe it achieves all of the meanings and functions of effective punishment. A categorically apologetic criminal has undergone, according to my account, a verifiable moral transformation that re-orientes her behavior. This raises numerous questions regarding how we should punish such a person.

Presuming for the moment that we can identify those who are genuinely categorically apologetic, we face the threshold question of whether they deserve less punishment than convicts who show no remorse. The U.S. Federal Sentencing Guidelines, for example, allow judges to reduce punishments by considerable amounts for defendants who accept responsibility for their crimes and express remorse.<sup>3</sup> What do the Guidelines mean by “responsibility” and “remorse”? How does case law interpret this language? Do the Guidelines capture the sorts of meaning that they should?

Our moral compasses and policies may point toward reducing sentences for the sincerely apologetic, but these intuitions would benefit from some analysis. Is this leniency toward the contrite a vestige of some religious sentiment that one’s soul can be saved or reborn, or can we identify other compelling reasons for punishing the apologetic differently from the unapologetic?

Further questions also arise. Does a categorical apology from the offender require the victim to forgive her? What is the nature of such forgiveness? What is the relationship between forgiveness and punishment? Can one be forgiven upon providing a categorical apology yet still deserve punishment? If we take apologies to signify genuine reform, what sorts of apologetic meanings must the offender demonstrate before deserving leniency? If sentencing guidelines allow judges to consider offenders’ contrition, what sorts of meaning should they identify? How do various aspects of apologetic meaning predict recidivism rates? For example, is recognizing the victim as a moral interlocutor a

better indicator of the offender’s future behavior than the emotional content of her apology?

Alternatively, might exercising leniency toward the repentant undercut the deterrent value of some penalties if offenders believe that they will not suffer the full consequences if they can stage an adequate apology? If an offender does provide a promissory categorical apology, should she accept full punishment rather than seek to reduce her sentence?

I find arguments for reducing sentences for the contrite generally compelling, but I hope to unpack these claims so that they can be subjected to the scrutiny of social scientists as well moral philosophers. I also expect that answers to the general question about whether apologetic offenders deserve less punishment than unapologetic offenders will need to be nuanced in various ways. Should we, for instance, treat apologies from juvenile offenders differently from those from adults?

If we conclude that apologetic offenders deserve leniency of some kind, numerous morally-laden practical issues arise. The most obvious is how we might distinguish between genuine categorical apologies and staged acts of contrition. If a jurisdiction reduces punishment for convicts who express contrition, it invites a parade of purely instrumental apologies into its sentencing procedures and risks rewarding the best actors rather than the most transformed. In my view, the best apologies are like promises to change. As with promises, we cannot fully judge apologies in the moments they are spoken. We need time to search for the deepest values that orient our lives and to begin rebuilding our future with habits that honor those principles, and this seems especially important in criminal matters. I view the words “I’m sorry” with the same scrutiny as if someone said “I love you” on the first date: I would need to know much more before I could make a well-informed judgment. If we should not simply judge a convict’s apology by her statement at a sentencing hearing but should rather continually reevaluate her commitment to the gesture over her lifetime, then such a conclusion cre-

ates considerable logistical problems for a justice system.

At what stage in the proceedings should an apology occur? Must certain elements, like an admission of guilt, come during plea allocutions or otherwise early in the proceedings? Otherwise offenders would be inclined to apologize after convictions but before sentencing in order to maximize the benefit but reduce the risks of accepting blame. Perhaps truly apologetic offenders will turn themselves in to authorities and offer full confessions. Can such expectations be reconciled within an adversarial justice system, and might an attorney’s aggressive style of advocacy—by most accounts the sort of representation one should hope for in this system—cause her client to appear remorseless? How might such concerns change the practices of criminal prosecution and defense? Would this opportunity further compound the advantages of the wealthy who can afford the best attorneys and “contrition consultants” to coach them in the subtleties of apologizing?

Where and how should these apologies occur? I argue in *I Was Wrong* that meaningful apologies consist of far more than the mere utterance of a few remorseful clichés and require a rather intricate series of interpersonal interactions. Do modern criminal justice systems have time and resources for such elaborate rituals?<sup>4</sup> Considering that few convicts within the U.S. criminal justice system have the opportunity to interact with their victims after harming them, what sorts of procedural mechanisms would be required to create an opportunity for an offender to recognize her victim as a moral interlocutor and convey the various forms of meaning expected from a categorical apology?

Once we determine the criteria for apologies that merit reductions in punishment, who should judge whether an individual offender satisfies our expectations: judges, juries, victims, or some sort of specialists in contrition? How much deference should we grant those evaluating an offender’s contrition, and what sorts of appellate processes should oversee such determinations?

I devoted nearly half of *I Was Wrong* to the intricate problems related to col-

lective apologies and collective forgiveness, arguing that collective apologies add layers of complexity to nearly every facet of apologetic meaning. They also tend to traffic in large-scale and high-stakes injuries, adding multiple loathsome offenders, scores of seriously injured victims, and a range of ultimate values to an already intricate analysis. To complicate matters further, we find many of these exchanges within ever-confounding corporate and political bureaucracies.

All of these concerns resurface in the contexts of collective acts of contrition within truth and reconciliation tribunals, international criminal courts, and various other corporate and organizational wrongdoings. If we believe that repentant individuals deserve lenience, should the same be true of apologetic corporations or nations? I generally view collective apologies with a healthy skepticism because they tend to serve as poor substitutes for categorical apologies from individual members of the group and allow individual wrongdoers to conceal their blameworthiness and deflect their personal responsibility into the abstractions of group identity. Certain forms of collective apologies, however, can provide profound meaning and relief for many people. Given my concerns about collective apologies, should an apology from a corporate ex-

ecutive or a political leader on behalf of the collective influence how we punish that leader or those who followed her orders? Should individual defendants benefit from apologies provided by the collective to which they belong, for instance if an executive cites statements of contrition offered by her corporation as evidence of her own remorse or if a general in a genocidal regime seeks leniency in a war crimes tribunal because her president has accepted blame for the atrocities? In many cases, such collective apologies serve primarily to establish an official record through testimony and particular individuals need not accept blame nor even denounce the actions in question as morally wrong. Occasionally members of a collective will directly contradict each other with their testimony, thus compromising meaning for the victim or community by providing divergent accounts of events or attributing blame to one another. Whatever conclusions we reach regarding the role of apologies in matters of criminal justice for individuals, they will require considerable analysis before they can be applied to collective acts of contrition.

If problems related to collective apologies in criminal justice systems tend to arise primarily in a small but important fraction of cases, every act of mercy or lenience authorized by the state raises concerns related to collective forgive-

ness. If an apology results in clemency, should we understand this as a kind of state-sanctioned collective forgiveness? We typically do not think that a third party can forgive an offender on behalf of the victim—for example, we can appreciate the limits of a murderer's mother forgiving her while the victim's family finds the offense unforgivable—and we should wonder if the state possesses standing to forgive or if this is a metaphor that stretches our moral concepts too thin.

#### IV Conclusion

I identified many questions in this commentary, but these represent only a small subset of the issues I am considering regarding the relationship between apologies and criminal justice. I have also not mentioned here the many difficulties related to apologies in civil law that will occupy nearly half of *Apologies in Law*.<sup>5</sup> I admit that when I began thinking about apologies I believed that I could answer my concerns in an article or two. I am now on my second book on the subject, and the questions still accumulate faster than I can address them. I invite others from all theoretical and empirical perspectives to join me in studying these issues.

#### NOTES

1 Nick Smith, *I Was Wrong: The Meanings of Apologies* (Cambridge, UK: Cambridge University Press, 2008).

2 Immanuel Kant, *The Metaphysical Elements of Justice*, trans. John Ladd (Indianapolis: Hackett, 1999), 139.

3 See 18 U.S.C.S. app. § 3E1.1 (Law. Co-op. 2000).

4 For an illuminating overview of these and related concerns, see Stephanos Bibas and Richard A. Bierschbach, "Integrating

Remorse and Apology into Criminal Procedure," *Yale Law Journal* 114 (2004): 85-148.

5 For an insightful discussion of apologies in civil law, see Lee Taft, "Apology Subverted: The Commodification of Apology," *Yale Law Journal* 109 (2000): 1135-60.