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2-15-2013

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### Recommended Citation

Nick Smith, *Just Apologies: An Overview of the Philosophical Issues*, 13 Pepp. Disp. Resol. L.J. Iss. 1 (2013)

Available at: <https://digitalcommons.pepperdine.edu/drlj/vol13/iss1/3>

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# Just Apologies: An Overview of the Philosophical Issues

Nick Smith\*

## I. INTRODUCTION

### A. *The Meanings of Apologies*

In 2008, I published *I Was Wrong: The Meanings of Apologies*.<sup>1</sup> I originally intended to both establish a conceptual framework for apologetic meaning and apply that framework to law in *I Was Wrong*. That proved naively ambitious. One book became two as I realized the richness and nuances of the subject. The first book would develop a framework for apologetic meanings. The second book would apply and expand that framework to law. This article provides an overview of the issues addressed in that second book, titled *Just Apologies: Remorse, Reform, and Punishment*.

*I Was Wrong* provides a theoretical framework for the meanings of apologies from individuals and collectives. Discussing numerous examples 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 the binary question of whether a speech act “is or is not” an apology, I attempt to account for the many ways that acts of contrition succeed or fail to achieve diverse objectives. Guided by a philosopher’s sensibilities, I lead readers through a series of interdisciplinary questions, arguing that apologies have evolved from a confluence of diverse cultural and religious practices that do not translate easily into pluralistic secular discourse. After distinguishing several varieties of apologies between individuals, *I Was Wrong* makes the case for a robust core of moral meaning in what I name a “categorical apology.”

*I Was Wrong* considers the many gritty details of apologetic meaning, but in general, I find that asking a few simple questions can take us to the

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1. NICK SMITH, *I WAS WRONG: THE MEANINGS OF APOLOGIES* (2008) (providing a theoretical framework for apologies from individuals and from groups).

heart of the significance of an apology: did the offender explain what she did with an appropriate degree of specificity? Does she accept blame rather than merely expressing sympathy? Does she resist casting the offense as an accident or otherwise denying that it was her intention to harm? Does she make clear why her actions were wrong and identify the principles she violated? Does she promise not to do it again? Does she keep that promise? Does she provide appropriate redress? These concerns lead to further questions about any given apology, but these issues indicate whether the gesture of contrition in question conveys thick moral meaning. I then turn to collectives. Although apologies from corporations, governments, and other groups can be profoundly significant, I note the kinds of meaning that collective apologies often do not convey, and I warn of the dangers of collective acts of contrition that allow individual wrongdoers to obscure their personal blame.

In addition to my home disciplines of law and philosophy, I consider interdisciplinary literature on causation and moral responsibility, moral incommensurability, the normative status of emotions, feminist phenomenology, forgiveness, speech act theory, collective responsibility, collective intentionality, collective mental states, and other occasionally technical fields bearing on the moral meanings of apologies. My attempt to provide a holistic theoretical framework for the meanings of apologies that synthesized all relevant knowledge from any discipline led me to engage not only philosophers but also sociologists (Nicholas Tavuchis was a primary interlocutor), psychologists, linguists, political scientists, feminists of various disciplines, law faculty, anthropologists, theologians, and anyone who has written on contrition. I attempted to engage all scholarship available in English that I could find on apologies from any discipline, including empirical research from various social sciences. At times, this work felt impossibly interdisciplinary.

### *B. The Two Faces of Just Apologies*

I undertook the research in *I Was Wrong* with the ultimate goal of providing the sort of conceptual precision that might illuminate the role of apologies within legal systems. This became especially important to me after I spent time digesting empirical research on apologizing and I realized that many of these studies operated with—and perpetuated—deeply problematic definitions. In many cases, a study would simply stipulate a controversial definition without attempting to explain, for instance, why an apology did not require an acceptance of responsibility or a demonstrated commitment not to reoffend. Some researchers simply “count” every utterance of “sorry” as an apology, even in cases of “I’m sorry your grandmother passed away” or “I’m sorry you feel that way.” Though I am deeply inter-

ested in empirical questions related to apologies—such as whether women apologize more frequently than men or whether apologies track recidivism rates in juvenile criminal offenders—I realized that a philosopher’s analysis of these complex conceptual issues might be useful for social scientists. While *I Was Wrong* attempted to provide a comprehensive interdisciplinary theory of the meanings of apologies for researchers, from various perspectives interested in issues related to reconciliation, *Just Apologies* aims to synthesize research from the humanities and social sciences into a unified account of the role of apologies in law that might serve as a conceptual framework for further research in legal apologies across disciplines.

My interest in *Just Apologies* developed from a pair of interrelated arguments:

- 1) We often find apologies on the frontlines of contemporary practical moral discourse; and
- 2) The law and modern legal environments structure our thinking about apologies.

On this first point, I claimed in *I Was Wrong* that much of our private and public moral discourse occurs in the giving, receiving, or demanding of apologies, yet we rarely make explicit precisely what we expect from a gesture of contrition. As a result, apologizing has become a vague, clumsy, and sometimes spiteful ritual. We intuitively understand that certain kinds of apologies can be life transforming for both victims and offenders. Whether teaching our children when and how to say they are sorry, expecting contrition from our spouse when we feel wronged, or lobbying for an apology from institutions responsible for historical injustices like African slavery, apologies provide one of the most familiar and significant occasions when we think explicitly about our shared values. Apologies are the daily bread of our moral discourse. As we all know, however, some apologies can be worse than none at all. Empty gestures may masquerade as soul searching apologies, sometimes because this seems like the least burdensome means of restoring a relationship. On other occasions, an offender may intentionally wish to deceive or manipulate a victim with an apology. Such duplicity occurs not only between adversaries but also among friends, relatives, and lovers. Whether an unrepentant executive orders her attorney to feign contrition so that an injured party will settle a claim, or an abusive husband with no intention to reform says to his wife that he is “sorry that” she is upset, we can see how victims stand to suffer further injuries if they attribute more meaning to an apology than warranted.

On the second point, I have argued that if religion and its practices of repentance once provided the primary backdrop that framed our understand-

ings of apologies, law increasingly plays that role in modern life. A specific kind of legal environment, driven by adversarial procedures and oriented toward economic outcomes, increasingly structures our apologies. Whereas apologies tend to bring people together, adversarial law typically pushes legal combatants apart in what is often a high stakes competition. Thus, it might seem like apologies would play a minor role in modern legal proceedings, but the situation is decidedly more complex.

Apologies in both civil and criminal law pull in opposite directions. On the one hand—and as we might initially expect—apologies seem out of place in most modern legal contexts. What I describe as categorical apologies, for instance, admit guilt. Whether in criminal hearings, corporate settlement negotiations, or malpractice litigation, admitting guilt can amount to complete legal defeat. Providing a categorical apology within an adversarial justice system can amount to legal suicide.<sup>2</sup> For these reasons, some medical malpractice insurers will void their policies if doctors provide too many details to injured patients.<sup>3</sup> As the American Medical Association once warned physicians: “Anything you say can and will be held against you.”<sup>4</sup> Criminal defense attorneys will likewise strongly advise their clients to resist apologizing to their victims, even if they feel a moral compunction to “come clean” early in the proceedings. Corporate executives and directors of various institutions resist apologizing not only because they fear personal exposure to liability, but also because they risk breaching fiduciary duties to their constituencies.<sup>5</sup> In this respect, the sorts of morally rich apologies described in *I Was Wrong* seem antithetical to the very spirit of modern adversarial law. Legal battlegrounds hardly provide an environment conducive to reconciliation through moral transformation.<sup>6</sup>

On the other hand, current legal trends undisputedly point toward a rise in the prevalence of certain kinds of apologies in law. Building on findings in the social sciences, legal scholarship and legislation now reinforce the be-

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2. See Deborah Levi, *The Role of Apology in Mediation*, 72 N.Y.U. L. REV. 1165, 1186–87 (1997) (“If a party asks for an apology, the opposing lawyer is likely to regard that party as intransigent and to protect her client from the risk that evidence of apology could become a basis for assigning liability in a subsequent legal proceeding.”).

3. MICHAEL WOODS, *HEALING WORDS: THE POWER OF APOLOGY IN MEDICINE* 52–53 (Center for Physician Leadership 2007).

4. AMA, “MEDICAL PROFESSIONAL LIABILITY INSURANCE” 133 (1998). See also Jonathan R. Cohn, *Advising Clients to Apologize*, 72 S. CAL. L. REV. 1009, 1027 n.60 (1999) (suggesting that lawyers should consider advising their clients to apologize for harm for which they are responsible).

5. *Id.* at 1027.

6. See Lee Taft, *Apology Subverted: The Commodification of Apology*, 109 YALE L.J. 1135, 1150 (2000) (“This competition is captured in a lawsuit, the purpose of which is to establish the fault of one party and offer relief to the other. This is hardly an atmosphere that encourages expressions of remorse.”)

lief that strategically timed and worded apologies can prevent litigation altogether, reduce damage payments and jury awards by considerable amounts, or shave years from prison sentences.<sup>7</sup> In criminal law, the U.S. Federal

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7. For discussions of the role of apologies in criminal law by legal scholars appearing in law reviews, see Cheryl G. Bader, “*Forgive Me Victim for I Have Sinned*”: *Why Repentance and the Criminal Justice System Do Not Mix—A Lesson from Jewish Law*, 31 FORDHAM URB. L.J. 69 (2003); Stephanos Bibas & Richard A. Bierschbach, *Integrating Remorse and Apology into Criminal Procedure*, 114 YALE L.J. 85 (2004); Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911, 931, 954 (2006); Ellen M. Bryant, *Section 3E1.1 of the Federal Sentencing Guidelines: Bargaining with the Guilty*, 44 CATH. U. L. REV. 1269 (1995); Charles R. Calleros, *Conflict, Apology, and Reconciliation at Arizona State University: A Second Case Study in Hateful Speech*, 27 CUMB. L. REV. 91 (1997); Sherry Colb, *Profiling With Apologies*, 1 OHIO ST. J. CRIM. L. 611 (2004) (discussing how compensation can act as a form of apology in cases of racial profiling); Richard Delgado & Jean Stefancic, *Apologize and Move On?: Finding a Remedy for Pornography, Insult, and Hate Speech*, 67 U. COLO. L. REV. 93 (1996); Theodore Eisenberg et al., *But Was He Sorry? The Role of Remorse in Capital Sentencing*, 83 CORNELL L. REV. 1599 (1998); Margareth Etienne & Jennifer K. Robbennolt, *Apologies and Plea Bargaining*, 91 MARQ. L. REV. 295 (2007); Margareth Etienne, *Remorse, Responsibility, and Regulating Advocacy: Making Defendants Pay for the Sins of Their Lawyers*, 78 N.Y.U. L. REV. 2103 (2003); Stephen P. Garvey, *Punishment as Atonement*, 46 UCLA L. REV. 1801 (1999); Stephen P. Garvey, *Restorative Justice, Punishment, and Atonement*, 2003 UTAH L. REV. 303 (2003); John H. Langbein, *Torture and Plea Bargaining*, 46 U. CHI. L. REV. 3 (1978); Elizabeth Latif, *Apologetic Justice: Evaluating Apologies Tailored Toward Legal Solutions*, 81 B. U. L. REV. 289 (2001); Candace McCoy, *Plea Bargaining as Coercion: The Trial Penalty and Plea Bargaining Reform*, 50 CRIM. L. Q. 67 (2005) (discussing remorse as one of the reasons the accused may choose to plea-bargain); Daniel S. Medwed, *The Innocent Prisoner’s Dilemma: Consequences of Failing to Admit Guilt at Parole Hearings*, 93 IOWA L. REV. 491 (2008); Erin Ann O’Hara, *Apology and Thick Trust: What Spouse Abusers and Negligent Doctors Might Have in Common*, 79 CHI.-KENT L. REV. 1055 (2004); Michael O’Hear, *Remorse, Cooperation, and “Acceptance of Responsibility”*: *The Structure, Implementation, and Reform of Section 3E1.1 of the Federal Sentencing Guidelines*, 91 NW. U. L. REV. 1507 (1997); Lisa F. Orenstein, *Sentencing Leniency May Be Denied to Criminal Offenders Who Fail to Express Remorse at Allocution*, 56 MD. L. REV. 780 (1997); Abigail Penzell, *Apology in the Context of Wrongful Conviction: Why the System Should Say It’s Sorry*, 9 CARDOZO J. CONFLICT RESOL. 145 (2007); Scott E. Sundby, *The Capital Jury and Absolution: The Intersection of Trial Strategy, Remorse, and the Death Penalty*, 83 CORNELL L. REV. 1557 (1998); Susan Szmania & Daniel Mangis, *Finding the Right Time and Place: A Case Study Comparison of the Expression of Offender Remorse in Traditional Justice and Restorative Justice Contexts*, 89 MARQ. L. REV. 335 (2005); Robert Weisberg, *Apology, Legislation, and Mercy*, 82 N.C. L. REV. 1415 (2004); Brent T. White, *Saving Face: The Benefits of Not Saying I’m Sorry*, 72 L. & CONTEMP. PROBS. 261 (2009).

For an exchange on remorse, apology, and mercy, see CRIMINAL LAW CONVERSATIONS (Paul Robinson et al. eds., 2009). For a recent symposium on mercy in criminal law, see generally Symposium, 4 OHIO ST. J. CRIM. L. (2007).

For discussions of “shaming sanctions,” see ANDREW VON HIRSCH, *CENSURE AND SANCTIONS* 82 (1996); Stephen P. Garvey, *Can Shaming Punishments Educate?*, 65 U. CHI. L. REV. 733 (1998); Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591 (1996) (for Kahan’s revised views, see Dan M. Kahan, *What’s Really Wrong with Shaming Sanctions*, 84 TEX. L. REV.

Sentencing Guidelines permit judges to reduce punishments by considerable amounts for defendants who “accept responsibility” for their crimes and “express remorse.”<sup>8</sup> U.S. Supreme Court Justice Anthony Kennedy once claimed that expressions of remorse can be the difference between life and death in capital sentencing procedures<sup>9</sup> and several studies confirm this.<sup>10</sup> According to Robbennolt’s review, the social scientific literature has corroborated various versions of the claims that apologies or expressions of remorse

favorably influence attributions of offender responsibility, estimates of the likelihood that the behavior will recur, perceptions of the wrongdoer, expectations about the effects of the incident on the parties’ relationship, affective reactions, and behaviors such as forgiveness, aggression, and recommendations for punishment.”<sup>11</sup> Phi-

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2075 (2006)); James Q. Whitman, *What Is Wrong with Inflicting Shame Sanctions?*, 107 YALE L.J. 1055 (1998).

8. See U.S.S.G. § 3E1.1; see also *United States v. Fagan*, 162 F.3d 1280, 1284 (10th Cir. 1998); *United States v. Hammick*, 36 F.3d 594, 600 (7th Cir. 1994); *United States v. Camargo*, 908 F.2d 179 (7th Cir. 1990).

9. *Riggins v. Nevada*, 504 U.S. 127, 144 (1992) (Kennedy, J., concurring).

10. See Theodore Eisenberg et al., *supra* note 7; Chris L. Kleinke et al., *Evaluation of a Rapist as a Function of Expressed Intent and Remorse*, 132 J. SOC. PSYCHOL. 525 (1992); Randolph B. Pipes & Marci Alessi, *Remorse and a Previously Punished Offense in Assignment of Punishment and Estimated Likelihood of a Repeated Offense*, 85 PSYCHOL. REP. 246 (1999); Michael G. Rumsey, *Effects of Defendant Background and Remorse on Sentencing Judgments*, 6 J. APPLIED SOC. PSYCHOL. 64 (1976); Scott E. Sundby, *supra* note 7.

11. Jennifer K. Robbennolt, *Apologies and Settlement Levers*, 3 J. EMPIRICAL LEGAL STUD. 333, 339 (2006). For example of discussions of apologies in criminal law by social scientists, see SUSAN ALTER, *APOLOGIZING FOR SERIOUS WRONGDOING: SOCIAL, PSYCHOLOGICAL, AND LEGAL CONSIDERATIONS*, FINAL REP. FOR THE LAW COMMISSION OF CANADA (1999); William Austin et al., *Equity and the Law: The Effects of a Harmdoer’s “Suffering in the Act” on Liking and Assigned Punishment*, in *ADVANCES IN EXPERIMENTAL SOC. PSYCHOL.* 217 (Leonard Berkowitz & Elaine Walster eds., 1976); Gordon Bazemore & Mark Umbreit, *A Comparison of Four Restorative Sentencing Models*, in *A RESTORATIVE JUSTICE READER: TEXTS, SOURCES, CONTEXT* (Gerry Johnstone ed., 2003); Anthony Bottoms, *Some Sociological Reflections on Restorative Justice*, in *RESTORATIVE JUSTICE AND CRIMINAL JUSTICE: COMPETING OR RECONCILABLE PARADIGMS* 79 (Andrew von Hirsch et al. eds., 2003) [hereinafter *RESTORATIVE JUSTICE AND CRIMINAL JUSTICE*]; Walter J. Dickey, *Forgiveness and Crime: The Possibilities of Restorative Justice*, in *EXPLORING FORGIVENESS* 106 (Robert D. Enright & Joanna North eds., 1998); Heather Strang, *Justice for Victims of Young Offenders: The Centrality of Emotional Harm and Restoration*, in *A RESTORATIVE JUSTICE READER: TEXTS, SOURCES, CONTEXT* 286 (Gerry Johnstone ed., 2003); HOWARD ZEHR, *CHANGING LENSES: A NEW FOCUS FOR CRIME AND JUSTICE* (1990); Dana Bramel et al., *An Observer’s Reaction to the Suffering of His Enemy*, 8 J. PERSONALITY & SOC. PSYCHOL. 384 (1968); Marti H. Gonzales et al., *Victims as “Narrative Critics”*: *Factors Influencing Rejoinders and Evaluative Responses to Offenders’ Accounts*, 20 PERSONALITY & SOC. PSYCHOL. BULL. 691 (1994); Kleinke, *supra* note 10; Keith E. Niedermeier et al., *Exceptions to the Rule: The Effects of Remorse, Status, and Gender on Decision Making*, 31 J. APPLIED SOC. PSYCHOL. 604 (2001); Carrie S. Petrucci, *Apology in the Criminal Justice Setting: Evidence for Increasing Apology as an Additional Component in the Legal System*, 20 BEHAV. SCI. & L. 337 (2002); Randolph B. Pipes & Marci Alessi, *Remorse and a Previously Punished Offense in Assignment of Punishment and Estimated Likelihood of*

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philosophers now pay increasing attention to the role of apologies in punishment.<sup>12</sup>

*a Repeated Offense*, 85 PSYCHOL. REP. 246 (1999); D. Robinson et al., *Heinous Crime or Unfortunate Accident? The Effects of Remorse on Responses to Mock Criminal Confessions*, 73 SOC. FORCES 175 (1994); Michael G. Rumsey, *Effects of Defendant Background and Remorse on Sentencing Judgments*, 6 J. APPLIED SOC. PSYCHOL. 64 (1976);

Gary S. Schwartz et al., *The Effects of Post-Transgression Remorse on Perceived Aggression, Attribution of Intent, and Level of Punishment*, 17 J. SOC. & CLINICAL PSYCHOL. 293 (1978); Jerry I. Shaw & James A. McMartin, *Perpetrator or Victim? Effects of Who Suffers in an Automobile Accident on Judgmental Strictness*, 3 SOC. BEHAV. & PERSONALITY 5 (1975); Christy Taylor & Chris L. Kleinke, *Effects of Severity of Accident, History of Drunk Driving, Intent, and Remorse on Judgments of a Drunk Driver*, 22 J. APPLIED SOC. PSYCHOL. 1641 (1992); Harry S. Upshaw & Daniel Romer, *Punishment For One's Misdeeds as a Function of Having Suffered From Them*, 2 PERSONALITY & SOC. PSYCHOL. BULL. 162 (1976); Robert R. Weyeneth, *The Power of Apology and the Process of Historical Reconciliation*, 23 THE PUB. HISTORIAN 9 (Summer 2001); Howard Zehr, *Why Can't We Just Apologize?*, 11 CRIME VICTIMS REP. 38 (2007).

12. For discussions of apologies in criminal law by philosophers, see CHRISTOPHER BENNETT, *THE APOLOGY RITUAL: A PHILOSOPHICAL THEORY OF PUNISHMENT* (2008); Christopher Bennett, *Apology and Reparation in a Multicultural State*, in *LAW AND PHILOSOPHY* 459 (Ross Harrison ed., 2007); JOHN BRAITHWAITE, *RESTORATIVE JUSTICE AND RESPONSIVE REGULATION* (2002) (note that Braithwaite's doctoral training is in sociology, but he publishes in philosophy journals as well as various other disciplines); Meir Dan Cohen, *Revising the Past: On the Metaphysics of Repentance, Forgiveness, and Pardon*, in *FORGIVENESS, MERCY, AND CLEMENCY* 117 (Austin Sarat & Nasser Hussain eds., 2007); ANTHONY DUFF, *PUNISHMENT, COMMUNICATION, AND COMMUNITY* (2001); ANTHONY DUFF, *TRIALS AND PUNISHMENTS* (1986); *FORGIVENESS, MERCY, AND CLEMENCY* (Austin Sarat & Nasser Hussain eds., 2007); FROM SOCIAL JUSTICE TO CRIMINAL JUSTICE (W.C. Hefferman & John Kleinig eds., 2000); MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* (Alan Sheridan trans., 1995); IMMANUEL KANT, *THE METAPHYSICAL ELEMENTS OF JUSTICE* 101 (John Ladd trans., 1999) (1797); KATHLEEN D. MOORE, *PARDONS: JUSTICE, MERCY, AND THE PUBLIC INTEREST* (1989); JEFFRIE G. MURPHY, *GETTING EVEN: FORGIVENESS AND ITS LIMITS* (2003); Jeffrie Murphy, *Repentance, Punishment, and Mercy*, in *REPENTANCE: A COMPARATIVE PERSPECTIVE* 143 (Amitai Etzioni & David Carney eds., 1997); LINDA RADZIK, *MAKING AMENDS: ATONEMENT IN MORALITY, LAW, AND POLITICS* (2009); RICHARD SWINBURN, *RESPONSIBILITY AND ATONEMENT* (1989); MARGARET U. WALKER, *MORAL REPAIR: RECONSTRUCTING MORAL RELATIONS AFTER WRONGDOING* (2006); ANDREW VON HIRSCH, *CENSURE AND SANCTIONS* (1996); ANDREW VON HIRSCH & ANDREW ASHWORTH, *PROPORTIONATE SENTENCING: EXPLORING THE PRINCIPLES* (2005); Andrew von Hirsch, *Punishment, Penance and the State*, in *PUNISHMENT AND POLITICAL THEORY* 69 (Matt Matravers ed., 1999); Andrew von Hirsch et al., *Restorative Justice: A 'Making Amends' Model?*, in *RESTORATIVE JUSTICE AND CRIMINAL JUSTICE*, *supra* note 11, at 21; Brenda M. Baker, *Penance as a Model for Punishment*, 18 SOC. THEORY & PRAC. 311 (1992); Christopher Bennett, *Taking the Sincerity Out of Saying Sorry: Restorative Justice as Ritual*, 23 J. APPLIED PHIL. 127 (2006); John Braithwaite, *Repentance Rituals and Restorative Justice*, 8 J. POL. PHIL. 115 (2000); Jean Hampton, *The Moral Education Theory of Punishment*, 13 PHIL. & PUB. AFF. 208 (1984); Robert Justin Lipkin, *Punishment, Penance, and the Respect for Autonomy*, 14 SOC. THEORY & PRAC. 87 (1988); Jeffrie G. Murphy, *Remorse, Apology and Mercy*, 4 OHIO ST. J. CRIM. L. 423 (2007); Jeffrie G. Murphy, *Well Excuse Me!--Remorse, Apology, and Criminal Sentencing*, 38 ARIZ. ST. L.J. 371 (2006); Wojciech Sadurski, *Theory of Punishment, Social Justice, and Liberal Neutrality*, 7 L. & PHIL. 351 (1988); Geoffrey Sayre-McCord, *Criminal Justice and Legal Repara-*



In civil law, research suggests that apologies provide an astoundingly successful means of mollifying disputants.<sup>13</sup> Many suggestive social scien-

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tions as an Alternative to Punishment, 11 PHIL. ISSUES 502 (2001); John Tasioulas, *Punishment and Repentance*, 81 PHIL. 279 (2006); John Tasioulas, *Repentance and the Liberal State*, 4 OHIO ST. J. CRIM. L. 487 (2007); Steven K. Tudor, *Accepting One's Punishment as Meaningful Suffering*, 20 L. & PHIL. 581 (2000); P. Twambley, *Mercy and Forgiveness*, 36 ANALYSIS 84 (1976).

13. For discussions of apologies in civil law in law reviews and by law faculty, see William K. Bartels, *The Stormy Sea of Apologies: California Evidence Code Section 1160 Provides a Safe Harbor for Apologies Made After Accidents*, 28 W. ST. U. L. REV. 141 (2001); Max Bolstad, *Learning from Japan: The Case for Increased Use of Apology in Mediation*, 48 CLEV. ST. L. REV. 545 (2000); Jennifer G. Brown, *The Role of Apology in Mediation*, 87 MARQ. L. REV. 655 (2004); Dai-Kwon Choi, *Freedom of Conscience and the Court-Ordered Apology for Defamatory Remarks*, 8 CARDOZO J. INT'L & COMP. L. 205 (2000); Jonathan R. Cohen, *Advising Clients to Apologize*, 72 S. CAL. L. REV. 1009 (1999); Jonathan R. Cohen, *Legislating Apologies: The Pros and Cons*, 70 U. CIN. L. REV. 819 (2002); Ashley A. Davenport, *Forgive and Forget: Recognition of Error and Use of Apology as Preemptive Steps to ADR or Litigation in Medical Malpractice Cases*, 6 PEPP. DISP. RESOL. L.J. 81 (2006); Robin Ebert, *Attorneys, Tell Your Clients to Say They're Sorry: Apologies in the Health Care Industry*, 5 IND. HEALTH L. REV. 337 (2008); Carole S. Houk & Lauren M. Edelstein, *Beyond Apology to Early Non-Judicial Resolution: The Medicom Program as a Patient Safety-Focused Alternative to Malpractice Litigation*, 29 HAMLINE J. PUB. L. & POL'Y 411 (2008); David Hyman & Charles Silver, *Medical Malpractice Litigation and Tort Reform: It's the Incentive, Stupid*, 59 VAND. L. REV. 1085 (2006); Colin Jones, *Apologies and Corporate Governance in the Japanese Context: Tatsumi Tanaka's Sonna Shazai De Wa Kaisha Ga Abunai (Apologizing that Way Will Endanger Your Company)*, 3 BYU INT'L L. MGMT. REV. 303 (2007); Sidney Kanazawa, *Apologies and Lunch: Strategic Options for Every Litigator*, FOR THE DEFENSE, Jul. 2004, at 29; Steven Keeva, *Does Law Mean Never Having to Say You're Sorry?*, 85 A.B.A. J. 64 (1999); Russell Korobkin & Chris Guthrie, *Psychological Barriers to Litigation Settlement: An Experimental Approach*, 93 MICH. L. REV. 107 (1994); Elizabeth Latif, *Apologetic Justice: Evaluating Apologies Tailored Toward Legal Solutions*, 81 B.U. L. REV. 289 (2001); Aaron Lazare, *The Healing Forces of Apology in Medical Practice and Beyond*, 57 DEPAUL L. REV. 251 (2008); Ilhyung Lee, *The Law and Culture of the Apology in Korean Dispute Settlement (with Japan and the United States in Mind)*, 27 MICH. J. INT'L L. 1 (2005); Deborah L. Levi, *The Role of Apology in Mediation*, 72 N.Y.U. L. REV. 1165 (1997); Virginia L. Morrison, *Heyoka: The Shifting Shape of Dispute Resolution in Health Care*, 21 GA. ST. U. L. REV. 931 (2005); Erin O'Hara & Douglas Yarn, *On Apology and Consilience*, 77 WASH. L. REV. 1121 (2002); Aviva Orenstein, *Apology Excepted: Incorporating a Feminist Analysis into Evidence Policy Where You Would Least Expect It*, 28 SW. U. L. REV. 221 (1999); Donna L. Pavlick, *Apology and Mediation: The Horse and Carriage of the Twenty-First Century*, 18 OHIO ST. J. ON DISP. RESOL. 829 (2003); Peter H. Rehm & Denise R. Beatty, *Legal Consequences of Apologizing*, 1995 J. DISP. RESOL. 115 (1996); Jennifer K. Robbennolt, *Apologies and Legal Settlement: An Empirical Examination*, 102 MICH. L. REV. 460 (2003); Jennifer K. Robbennolt, *Apologies and Medical Error*, 467 CLIN. ORTHOP. RELAT. RES. 376 (2009); Jennifer K. Robbennolt, *Apologies and Reasonableness: Some Implications of Psychology to Torts*, 59 DEPAUL L. REV. 489 (2010); Jennifer K. Robbennolt, *Apologies and Settlement*, CT. REV. (forthcoming); Jennifer K. Robbennolt, *Apologies and Settlement Levers*, 3 J. EMPIRICAL LEGAL STUD. 333 (2006); Jennifer K. Robbennolt, *Attorneys, Apologies, and Settlement Negotiation*, 13 HARV. NEGOT. L. REV. 349 (2008); Jennifer K. Robbennolt, *What We Know and Don't About the Role of Apologies in Resolving Health Care Disputes*, 21 GA. ST. L. REV. 1009 (2005); Michael Runnels, *Apologies All Around: Advocating Federal Protection for the Full Apology in Civil Cases*, 46 SAN DIEGO L. REV. 137 (2009); Daniel W. Shuman, *Role of Apologies in Tort Law*, 83 JUDICATURE 180 (2000); John Soloski, *The Study and the Libel Plaintiff: Who Sues for Libel?*, 71 IOWA L. REV. 217 (1985); Mitchell A. Stephens, *I'm Sorry: Exploring the Reasons Behind the Differing Roles of Apology in American and Japanese Civil Cas-*

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tific studies have appeared in the past twenty years, but consider a few of the more striking recent arguments for increasing the role of apologies in law.<sup>14</sup>

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es, 14 WIDENER L. REV. 185 (2008); Lee Taft, *Apology Subverted: The Commodification of Apology*, 109 YALE L.J. 1135 (2000); Lee Taft, *Apology within a Moral Dialectic: A Reply to Professor Robbennolt*, 103 MICH. L. REV. 1010 (2005); Prue Vines, *Apologising to Avoid Liability: Cynical Civility or Practical Morality?*, 27 SYDNEY L. REV. 483 (2005); Prue Vines, *Apologies in the Civil Liability Context*, 2 AUSTRALIAN CIV. LIABILITY 6 (2005); Prue Vines, *Apologies and Civil Liability in the UK: A View from Elsewhere*, 12 EDINBURGH L. REV. 200 (2008); Prue Vines, *The Power of Apology: Mercy, Forgiveness or Corrective Justice in the Civil Liability Arena*, PUB. SPACE 1 (2007); Brent T. White, *Say You're Sorry: Court-Ordered Apologies as a Civil Rights Remedy*, 91 CORNELL L. REV. 1261 (2006); Jonathan R. Cohen, *Nagging Problem: Advising the Client Who Wants to Apologize*, DISP. RESOL. MAG., Spring 1999, at 19; Marshall Tanick & Teresa Ayling, *Alternative Dispute Resolution by Apology: Settlement by Saying "I'm Sorry,"* HENNEPIN LAWYER, Jul.-Aug. 1996, at 22.

14. For social scientific discussion of apologies in civil law, see Johannes Abeler et al., *The Power of Apology* (2009) available at <http://www.nottingham.ac.uk/economics/cedex/papers/2009-12.pdf>; Brian H. Bornstein et al., *The Effects of Defendant Remorse on Mock Juror Decisions in a Malpractice Case*, 20 BEHAV. SCI. & L. 393 (2002); Jonathan R. Cohen, *Apology and Organizations: Exploring an Example from Medical Practice*, 27 FORDHAM URB. L.J. 1447 (2000); Robert M. Cornell et al., *The Use of Remedial Tactics in Negligence Litigation*, 26 U. UTAH CONTEMP. ACCTG. RES. 767 (2009); Henry S. Farber & Michael J. White, *A Comparison of Formal and Informal Dispute Resolution in Medical Malpractice*, 23 J. LEGAL STUD. 777 (1994); Douglas Frenkel & Carol Liebman, *Words that Heal*, 140 ANNALS OF INTERNAL MED. 482 (2004); Thomas H. Gallagher et al., *Patients' and Physicians' Attitudes Regarding the Disclosure of Medical Errors*, 289 J. AM. MED. ASS'N 1001 (2003); Stephen B. Goldberg et al., *Saying You're Sorry*, 3 NEGOTIATION J. 221 (1987); John O. Haley, *The Implications of Apology*, 20 LAW & SOC'Y REV. 499 (1986); Gerald B. Hickson et al., *Factors that Prompted Families to File Medical Malpractice Claims Following Perinatal Injuries*, 267 J. AM. MED. ASS'N 1359 (1992); Chris Hyman & Clyde Schechter, *Mediating Medical Malpractice Lawsuits Against Hospitals: New York City's Pilot Project*, 25 HEALTH AFF. 1394 (2006); Lauris C. Kaldjian et al., *An Empirically Derived Taxonomy of Factors Affecting Physicians' Willingness to Disclose Medical Errors*, 21 J. GEN. INTERNAL MED. 942 (2006); Ann J. Kellett, *Healing Angry Wounds: The Roles of Apology and Mediation in Disputes Between Physicians and Patients*, 1987 J. DISP. RESOL. 111 (1987); Steve Kraman & Ginny Hamm, *Risk Management: Extreme Honesty May Be the Best Policy*, 131 ANNALS INTERNAL MED. 963 (1999); Rae M. Lamb et al., *Hospital Disclosure Practices: Results of a National Study*, 22 HEALTH AFF. 73 (2003); Elizabeth Latif, *Apologetic Justice: Evaluating Apologies Tailored Toward Legal Solutions*, 81 B. U. L. REV. 289 (2001); Aaron Lazare, *Apology in Medical Practice: An Emerging Clinical Skill*, 296 J. AM. MED. ASS'N 1401 (2006); Carol Liebman & Chris S. Hyman, *A Mediation Skills Model to Manage Disclosure of Errors and Adverse Events to Patients*, 23 HEALTH AFFAIRS 22 (2004); Marilyn L. May & Daniel B. Stengel, *Who Sues Their Doctors? How Patients Handle Medical Grievances*, 24 L. & SOC'Y REV. 105 (1990); Kathleen M. Mazor et al., *Disclosure of Medical Errors: What Factors Influence How Patients Respond?*, 21 J. GEN. INTERNAL MED. 704 (2006); Kathleen M. Mazor et al., *Health Plan Members' Views about Disclosure of Medical Errors*, 140 ANNALS INTERNAL MED. 409 (2004); Dennis Novack et al., *Physicians' Attitudes Toward Using Deception to Resolve Difficult Ethical Problems*, 261 J. AM. MED. ASS'N 2980 (1989); Ameeta Patel & Lamar Reinsch, *Companies Can Apologize: Corporate Apologies and Legal Liability*, 66 BUS. COMM. Q. 9 (2003); Michael B. Rainey et al., *Characterized by Conciliation: Here's How Business Can Use Apology to Diffuse Litigation*, 26 ALTERNATIVES TO HIGH COST LITIG. 131 (2008); Carl D. Schnei-

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Michael Woods, a physician and leading advocate for apologies as a means of reducing medical malpractice litigation, claims that the “likelihood of a lawsuit falls by 50 percent when an apology is offered and the details of a medical error are disclosed immediately.”<sup>15</sup> Evidence from nineteen medical malpractice cases indicated that 91% of cases in which the defendants offered an apology settled, while only 38% settled when the defense did not apologize.<sup>16</sup> Jennifer Robbennolt has reached similar conclusions in her experiments—which distinguish between expressions of sympathy and admissions of wrongdoing—finding that receiving an apology that accepted responsibility increased the likelihood that a respondent would accept a settlement offer by 21%.<sup>17</sup> A team at the Nottingham School of Economics’ Centre for Decision Research and Experimental Economics claimed in a 2009 study that even “cheap talk” apologies—those that should be perceived as obviously insincere calculations performed by professional “apologists whose job is to say sorry to customers who have a grievance”—brought considerable benefit to the apologizer. According to this study, 45% of the aggrieved parties withdrew their complaints after receiving an electronic apology, while only 23% withdrew their complaints upon being offered cash payment to withdraw their grievance.<sup>18</sup> Still another 2009 paper argues that those who apologize for corporate transgressions should pay special attention to the shape of the spokesperson’s face—a “baby face” is best for minor offenses, but a mature face better conveys seriousness in light of grave

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der, *What It Means To Be Sorry: The Power of Apology in Mediation*, 17 *MEDIATION Q.* 265 (2000); Catherine A.G. Sparkman, *Legislating Apology in the Context of Medical Mistakes*, 82 *AORN J.* 263 (2005); Amy B. Witman et al., *How Do Patients Want Physicians to Handle Mistakes? A Survey of Internal Medicine Patients in an Academic Setting*, 156 *ARCHIVES INTERNAL MED.* 2565 (1996); Albert W. Wu et al., *Disclosing Medical Errors to Patients: It’s Not What You Say, It’s What They Hear*, 24 *J. GEN. INTERNAL MED.* 1012 (2009); Albert Wu, *Handling Hospital Errors: Is Disclosure the Best Defense?*, 131 *ANNALS INTERNAL MED.* 970 (1999); Charles Vincent et al., *Why Do People Sue Doctors? A Study of Patients and Relatives Taking Legal Action*, 343 *LANCET* 1609 (1994).

15. WOODS, *supra* note 3, at 3.

16. See Hyman & Schechter, *supra* note 14, at 1395 (methodological concerns regarding this study are noted in Robbennolt, *Attorneys, Apologies, and Settlement Negotiation*, *supra* note 13, at 359 n.36).

17. See Robbennolt, *Apologies and Legal Settlement*, *supra* note 13, at 485–86 (“When no apology was offered 52% of respondents indicated that they would definitely or probably accept the offer, while 43% would definitely or probably reject the offer and 5% were unsure. When a partial apology was offered, only 35% of respondents were inclined to accept the offer, 25% were inclined to reject it, and 40% indicated that they were unsure. In contrast, when a full apology was offered, 73% of respondents were inclined to accept the offer, with only 13–14% each inclined to reject it or remaining unsure.”).

18. See Abeler et al., *supra* note 14, at 233.

wrongdoing.<sup>19</sup> The tension builds: in one respect apologies seem like an admission of defeat antithetical to the practice of adversarial law, but on the other hand they continue to develop as a valuable legal strategy.

Contrary to the arguments I advanced in *I Was Wrong*, and without any serious consideration of the moral features and cultural histories of repentance, various attorneys and legal scholars repeat the assurance that “an apology is *not* synonymous with an admission of guilt or fault” and advise legal parties to exploit the ambiguities of apologetic language to their advantage.<sup>20</sup> Another 2009 study claims in this respect that apologizing may lead to favorable verdicts for accounting auditors accused of wrongdoing, but the authors explicitly claim that apologies express sorrow “without admitting guilt.”<sup>21</sup> Consider how one partner at a 900-attorney firm captures the relationship between apologies and guilt:

Though individuals use apologies to express regret and remorse about a negative outcome, an apology is *not* synonymous with an admission of guilt or fault. When carried out appropriately, an apology can exist without an expression of wrongdoing. In fact, legal research specifically states that defendants may apologize *without* admitting guilt: First, an apology is not necessarily equivalent to the admission of liability. “I’m sorry” is not the same as “I’m at fault.” “I’m sorry” is polite and human. Not to say, “I’m sorry” is rude and arrogant. It has nothing to do with fault. Moreover, “I’m sorry” in everyday speech usually means “I’m sorry we find ourselves in this current situation.” It is not about fault.<sup>22</sup>

Described in this manner, divorcing apologies from admissions of guilt seems like a matter of common decency. This distinction, however, fortifies apologies as a tactical defense that “should be part of the arsenal of resources brought to bear in addressing and resolving legal disputes.”<sup>23</sup> Attorneys can deploy such apologies as an “attitudinal structuring tactic” in order to “lubricate settlement discussions” and “influence an opponent’s bargaining behavior.”<sup>24</sup> What appears like a gesture of empathy can weaponize moral language in legal warfare.

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19. Gerald J. Gorn, Yuwei Jiang & Gita Venkataramani Johar, *Babyfaces, Trait Inferences, and Company Evaluations in a Public Relations Crisis*, 35 J. CONSUMER RES. 36, 37 (2008) (discussing the effect of facial characteristics on trustworthiness).

20. Cornell et al., *supra* note 14, at 770.

21. *Id.* at 767.

22. Kanazawa, *supra* note 13, at 32.

23. Tanick & Ayling, *supra* note 13.

24. *Id.*; Levi, *supra* note 2, at 1173.

Medicine best embodies these two faces of apologies in law. Medical approaches to litigation underwent a dramatic transformation by evolving from an “admit nothing” culture to a profession that routinely advises physicians to apologize for adverse outcomes in order to minimize the costs associated with medical malpractice litigation.<sup>25</sup> Indeed, apologies have become

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25. For further specific discussions of the role of apologies in medicine, see, e.g., *Medical Justice: Making the System Work Better for Patients and Doctors: Hearing Before the S. Comm. on Health, Educ., Labor & Pensions*, 109th Cong. 3 (2006) (testimony of Richard C. Boothman); WOODS, *supra* note 3; Abeler et al., *supra* note 14; Lauren F. Bender, “I’m Sorry” *Laws and Medical Liability*, 9 VIRTUAL MENTOR: AM. MED. ASS’N J. ETHICS 300 (2007); Bornstein et al., *supra* note 14; Davenport, *supra* note 12; Cohen, *Apology and Organizations: Exploring an Example from Medical Practice*, *supra* note 14; Cohen, *Legislating Apologies: The Pros and Cons*, *supra* note 13; Cornell et al., *supra* note 14; Ebert, *supra* note 13; Farber & White, *supra* note 13; Frenkel & Liebman, *supra* note 14; Gallagher et al., *supra* note 14; Hickson et al., *supra* note 13; Hyman & Schechter, *supra* note 14; Hyman & Silver, *supra* note 13; Kaldjian et al., *supra* note 14; Kellett, *supra* note 13; John Kleefeld, *Thinking Like a Human: British Columbia’s Apology Act*, 40 U. B.C. L. REV. 769 (2007); Kraman & Hamm, *supra* note 14; Rae M. Lamb, *Open Disclosure: The Only Approach to Medical Error*, 13 QUALITY & SAFETY IN HEALTH CARE 3 (2004), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1758054/pdf/v013p00003.pdf>; Lamb et al., *supra* note 14; Latif, *supra* note 7; Lazare, *supra* note 13; Lazare, *supra* note 14; Liebman & Hyman, *A Mediation Skills Model to Manage Disclosure of Errors and Adverse Events to Patients*, *supra* note 14; Liebman & Hyman, *Medical Error Disclosure, Mediation Skills, and Malpractice Litigation: A Demonstration Project in Pennsylvania*, *supra* note 13; May & Stengel, *supra* note 13; Mazor et al., *Disclosure of Medical Errors: What Factors Influence How Patients Respond?*, *supra* note 14; Mazor et al., *Health Plan Members’ Views about Disclosure of Medical Errors*, *supra* note 13; Morrison, *supra* note 13; Novack et al., *supra* note 13; Rainey et al., *supra* note 14; Robbenolt, *Apologies and Medical Error*, *supra* note 13; Robbenholt, *What We Know and Don’t About the Role of Apologies in Resolving Health Care Disputes*, *supra* note 13; Runnels, *supra* note 13; Sparkman, *supra* note 14; Lee Taft, *Apology and Medical Mistake: Opportunity or Foil?*, 14 ANN. HEALTH L. 55 (2005); Taft, *Apology Subverted*, *supra* note 6; Vines, *Apologising to Avoid Liability: Cynical Civility or Practical Morality?*, *supra* note 13; Witman et al., *supra* note 14; Wu, *supra* note 14; Wu et al., *supra* note 14; Vincent et al., *supra* note 14; Young, *supra* note 13; Richard C. Boothman, *Apologies and a Strong Defense at the University of Michigan Health System*, PHYSICIAN EXECUTIVE, Mar./Apr. 2006, at 7; Peter Geier, *Emerging Med-Mal Strategy: “I’m Sorry,”* NAT’L L. J., Jul. 24, 2006, available at <http://www.law.com/jsp/article.jsp?id=1153472732197>; Laura Landro, *The Informed Patient: Doctors Learn to Say “I’m Sorry”*; Patients’ Stories of Hospital Errors Serve to Teach Staff, WALL ST. J., Jan. 24, 2007, at D5, available at <http://online.wsj.com/article/SB116960074741385710.html>; Lucian L. Leape, *Full Disclosure and Apology—An Idea Whose Time Has Come*, PHYSICIAN EXECUTIVE, Mar.-Apr. 2006, at 16, available at <https://ps.mdic.com/appdocs/lps/Full%20Disclosure%20and%20Apology%20by%20L%20Leap%20-%20Phys%20Exec%202006.pdf>; Lucian L. Leape, *Understanding the Power of Apology: How Saying “I’m Sorry” Helps Heal Patients and Caregivers*, FOCUS ON PATIENT SAFETY, Winter 2005, at 1, available at <https://ps.mdic.com/appdocs/lps/Full%20Disclosure%20and%20Apology%20by%20L%20Leap%20-%20Phys%20Exec%202006.pdf>; Katherine Mangan, *Acting Sick*, CHRON. HIGHER EDU., Sept. 15, 2006, at 8, available at <http://chronicle.com/article/Acting-Sick/5120>; Kevin Sack, *Doctors Say “I’m Sorry” Before “See You in Court,”* N.Y. TIMES, May 18, 2008, at A1, available at <http://www.nytimes.com/2008/05/18/us/18apology.html?pagewanted=all>; Charlie Schmidt, “We’re

so institutionalized in law that many states now provide evidentiary “safe havens” for certain types of apologies, with some of these laws explicitly encouraging physicians to offer gestures of contrition in the hope that apologetic doctors will be sued less and thereby advance the objectives of tort reform.<sup>26</sup> Prompted by a legislator who sought an apology from the driver who struck and killed his daughter, Massachusetts’s version of this statute provides that statements or writings expressing sympathy or a general sense of benevolence relating to the pain, suffering or death of a person involved in an accident and made to such person or to the family of such person shall be inadmissible as evidence of an admission of liability in a civil action.<sup>27</sup>

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*Sorry*: The Healing Power of Apology—And How Two Little Words Can Make Medicine Safer, HARV. PUB. HEALTH REV., Fall 2007, at 8; Gail Garfinkel Weiss, *Should You Apologize?*, MEDICAL ECONOMICS, Apr. 21, 2006, at 50, available at <http://medicaleconomics.modernmedicine.com/memag/content/printContentPopup.jsp?id=319420>; J. Stratton Shartel, *Toro’s Mediation Program Challenges Wisdom of Traditional Litigation Model*, INSIDE LITIG., June 2005, at 10, available at <http://www.adrprocess.com/images/20071107094925439.pdf>; Lindsey Tanner, *Doctors Eye Apologies for Medical Mistakes*, ASSOCIATED PRESS, Nov. 8, 2004 available at <http://www.highbeam.com/doc/1P1-102175283>; Rachel Zimmerman, *Medical Contrition: Doctors’ New Tool to Fight Lawsuits: Saying “I’m Sorry,”* WALL ST. J., May 18, 2004, at A1, available at <http://online.wsj.com/article/SB108482777884713711.html>;

See also SORRY WORKS!, <http://www.sorryworks.net/> (last visited Oct. 19, 2012).

For examples of recent media coverage of the increasing role of apologies in medicine, see Sack, *supra* note 25; Landro, *supra* note 25; Mangan, *supra* note 25; Geier, *supra* note 25; Weiss, *supra* note 25.

26. See NATIONAL CONFERENCE OF STATE LEGISLATURES, *2007 State Medical Malpractice Action: Medical Malpractice Tort Reform* (Feb. 8, 2007), <http://www.ncsl.org/default.aspx?tabid=16214>. In addition to the literature discussing apologies in civil law generally, for examples of further specific discussions of “safe apology legislation”, see Bartels, *supra* note 13; Bender, *supra* note 25; Cohen, *Advising Clients to Apologize*, *supra* note 4; Cohen, *Legislating Apologies: The Pros and Cons*, *supra* note 13; Cohen, *Nagging Problem*, *supra* note 13; Edward A. Dauer, *Apology in the Aftermath of Injury: Colorado’s “I’m Sorry” Law*, 34 COLO. L. 47 (2005); Keeva, *supra* note 13; Orenstein, *supra* note 13; Peter Rehm & Denise Beatty, *supra* note 13; Runnels, *supra* note 13; Sparkman, *supra* note 14; Taft, *Apology Subverted: The Commodification of Apology*, *supra* note 6; Vines, *Apologies and Civil Liability in the UK: A View from Elsewhere*, *supra* note 13.

27. For all of the notes identifying relevant legislation, I aggregated findings of various authors working in the area and added them to my own findings. Particular thanks to Jennifer Robbenolt for identifying many of these statutes in her excellent articles.

For examples of various forms of “safe apology” legislation, see ARIZ. REV. STAT. ANN. § 12-2605 (2005) (“Any statement, affirmation, gesture or conduct expressing apology, responsibility, liability, sympathy, commiseration, condolence, compassion or a general sense of benevolence that was made by a health care provider . . . to the patient, a relative of the patient, the patient’s survivors or a health care decision maker for the patient and that relates to the discomfort, pain, suffering, injury or death of the patient as the result of the unanticipated outcome of medical care is inadmissible as evidence

of an admission of liability or as evidence of an admission against interest.”); CAL. EVID. CODE § 1160(a) (West 2009) (expressions of sympathy are inadmissible in proving liability, unless they are accompanied by a statement of fault); COLO. REV. STAT. § 13-25-135 (2003) (expressions of apology or fault are inadmissible as evidence of liability); CONN. GEN. STAT. § 52-184d (2006) (expressions of apology or fault are inadmissible as evidence of liability); DEL. CODE ANN. tit. 10, § 4318 (2006) (expressions of apology, except expressions of liability or fault, are inadmissible as evidence of liability); FLA. STAT. ANN. § 90.4026(2) (West 2010) (expressions of sympathy or benevolence, except a statement of fault, are inadmissible as evidence in a civil action); GA. CODE ANN. § 24-3-37.1 (2006) (all expressions of “benevolence, regret, apology, sympathy, commiseration, condolence, compassion, mistake, error, or a general sense of benevolence . . . shall be inadmissible as evidence and shall not constitute an admission of liability” because sympathy and apology should be encouraged); Rule 409.5, HAW. R. EVID. Ch. 626, HAW. REV. STAT. (2010) (expressions of sympathy are not admissible as evidence to prove liability, but an apology that “acknowledges or implies guilt” is admissible); IDAHO CODE ANN. § 9-207 (2010) (expressions of apology, except statements of fault, are inadmissible for any reason); IOWA CODE § 622.31 (1998) (expressions of sympathy or sorry that relate to “an alleged breach of the applicable standard of care is inadmissible as evidence”); IND. CODE ANN. § 34-43.5-1 (West 2010) (communications of sympathy, except statements of fault, are inadmissible in court); LA. REV. STAT. ANN. § 13:3715.5 (2005) (expressions of apology, except statements of fault, are inadmissible as evidence); MASS. GEN. LAWS. ch. 233, § 23D (1999) (expressions of sympathy are inadmissible as evidence of liability); ME. REV. STAT. ANN. tit. 24, § 2907 (2005) (expressions of apology, except statements of fault, are inadmissible to prove liability); MD. CODE ANN., CTS. & JUD. PROC. § 10-920 (2004) (expressions of apology, except admissions of liability or fault, are inadmissible to prove liability); MONT. CODE ANN. § 26-1-814 (2005) (expressions of apology are not admissible for any reason in malpractice actions); MO. REV. STAT. § 538.229 (2007) (expressions of sympathy, except admissions of fault, are inadmissible as evidence of liability); NEB. REV. STAT. § 27-1201 (2007) (expressions of apology, except statements of fault, are inadmissible to prove liability); N.H. REV. STAT. ANN. § 507-E:4 (2005) (expressions of sympathy, except statements of “culpable conduct,” are inadmissible to prove liability); N.C. GEN. STAT. § 8C-1, Rule 413 (2004) (“Statements by a health care provider apologizing for an adverse outcome in medical treatment, offers to undertake corrective or remedial treatment or actions, and gratuitous acts to assist affected persons shall not be admissible to prove negligence or culpable conduct by the health care provider.”); N.D. CENT. CODE § 31-04-12 (2007) (expressions of apology are not admissible to prove liability); OHIO REV. CODE ANN. § 2317.43 (Lexis Nexis 2010) (expressions of apology are not admissible to prove liability); OKLA. STAT. ANN. tit. 63, § 1-1708.1H (West 2010) (expressions of apology are not admissible to prove liability); OR. REV. STAT. § 677.082 (2003) (“[A]ny expression of regret or apology. . . does not constitute an admission of liability for any purpose.”); S.C. CODE ANN. § 19-1-190 (2009) (“[C]onduct, statements, or activity constituting voluntary offers of assistance or expressions of benevolence, regret, mistake, error, sympathy, or apology between or among parties or potential parties to a civil action should be encouraged and should not be considered an admission of liability.”); S.D. CODIFIED LAWS § 19-12-14 (2005) (“No statement made by a health care provider apologizing for an adverse outcome in medical treatment, no offer to undertake corrective or remedial treatment or action, and no gratuitous act to assist affected persons is admissible to prove negligence by the health care provider.”); TENN. R. EVID. § 409.1 (2010) (expressions of sympathy, except statements of fault, are inadmissible to prove liability); TEX. CIV. PRAC. & REM. CODE ANN. 18.061(a) (1) (West 2010) (expressions of sympathy, except those relating to “culpable conduct,” are inadmissible in court); UTAH CODE ANN. § 78-14-18 (2010) (expressions of apology are inadmissible as evidence); VT. STAT. ANN. tit. 12, § 1912 (2010) (“An oral expression of regret or apology. . . made by or on behalf of a health care provider or health care facility, that is provided within 30 days of when the provider or facility knew or should have known of the consequences of the error, does not constitute a legal admission of liability for any purpose and shall be inadmissible.”); VA. CODE ANN. § 8.01-581.20:1 (2010) (apologies, except statements of fault, are not admissible to prove liability); WASH. REV. CODE § 5.66.010(1) (2010) (expressions of sympathy, except

As argued throughout *I Was Wrong*, however, there is an essential distinction between mere expressions of sympathy and categorical apologies admitting wrongdoing. Whether spoken by a convict or a practicing physician, a sympathetic expression that “I am sorry your daughter died” conveys a distinct moral substance from an admission that “I deserve blame for killing your daughter.” While this distinction may seem rather obvious upon reflection, legislators, attorneys, and academics routinely describe such expressions of sympathy as “apologies.” Even “safe apology” legislation sends mixed messages, with some states protecting only expressions of sympathy,<sup>28</sup> while others protect various sorts of admissions of wrongdoing.<sup>29</sup> Some statutes only apply to cases of medical error.<sup>30</sup> Other states provided general protection for apologies while leaving the term ambiguous.<sup>31</sup> While confused and contested definitions pervade even our most sophisticated public discussions of apologies, apologies become an increasingly common feature of corporate culture. Southwest Airlines, for instance, employs a full time “apology officer” who sends out roughly 20,000 letters—which all include his direct phone number—to dissatisfied customers per year.<sup>32</sup> Recognizing that this will prove a very difficult undertaking, this article seeks to bring some clarity to the moral meanings and social values of apologies within this confounding environment.

### C. A History of the Tension

It is possible to track the tensions in current legal trends regarding contrition to the linguistic and cultural histories of apologies in law. Given the dearth of analyses of apologies in Western philosophical traditions, it is es-

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statements of fault, are inadmissible as evidence); W. VA. CODE § 55-7-11(a) (2005) (expressions of apology are not admissible to prove liability); WYO. STAT. ANN. § 1-1-130 (2010) (expressions of apology are inadmissible to prove liability).

28. See, e.g., CAL. EVID. CODE § 1160(a) (2001); FLA. STAT. § 90.4026(2) (2001); TENN. R. EVID. § 409.1 (2003); TEX. CIV. PRAC. & REM. CODE § 18.061 (1999); WASH. REV. CODE § 5.66.010(1) (2008).

29. See, e.g., COLO. REV. STAT. § 13-25-135 (2003); GA. CODE ANN. § 24-3-37.1 (2006).

30. See, e.g., COLO. REV. STAT. § 13-25-135 (2003); GA. CODE ANN. § 24-3-37.1 (2006); 735 ILL. COMP. STAT. ANN. 5/8-1901 (2005); OHIO REV. CODE ANN. § 2317.43 (2004); OKLA. STAT. ANN. tit. 63, § 1-1708.1H (2004); OR. REV. STAT. § 677.082 (2003); WYO. STAT. ANN. § 1-1-130 (2004).

31. See, e.g., OHIO REV. CODE ANN. § 2317.43 (2004); OKLA. STAT. ANN. tit. 63, § 1-1708.1H (2004); OR. REV. STAT. § 677.082 (2003); WYO. STAT. ANN. § 1-1-130 (2004).

32. Jeff Bailey, *Airlines Learn to Fly on a Wing and an Apology*, N.Y. TIMES, Mar. 18, 2007, available at <http://www.nytimes.com/2007/03/18/business/18sorry.html>.



pecially ironic that so many introductory philosophy courses begin with Plato's *Apology*.<sup>33</sup> Socrates is anything but apologetic as the term has come to be understood. Instead, he provides an apologia (απολογία), as was customary in the classical Greek legal system, in rebuttal to the prosecution's accusations. Rather than accepting blame or even expressing sympathy, Socrates' legal apology argues for his innocence and righteousness. Apologia still finds use in this sense of offering a defense of one's position, and the field of apologetics has come to be associated with the long tradition of defending and reinforcing religious doctrine—particularly Christian beliefs—through argumentation. In modern parlance, we consider an “apologist” to be a sort of spokesperson who promotes and defends causes by using various rhetorical strategies to spin facts and influence an audience, sometimes performing this service for pay. The modern use of apology as an admission of wrongdoing rather than a defense seems to have gained momentum around the sixteenth century, when Shakespeare used it in *Richard III* to imply a kind of regret.<sup>34</sup>

Thus, even the etymology of apology pulls in two directions. On the one hand, we associate apologizing with repentance, confession, remorse, blame, and moral *defenselessness*. On the other hand, a considerable period

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33. For discussions of apologies, repentance, and related matters in the history of philosophy, see KANT, *supra* note 12; JOHN LANGSHAW AUSTIN, *HOW TO DO THINGS WITH WORDS* (1962); MOSES MAIMONIDES, *HILCHOT TESHUVAH: THE LAWS OF REPENTANCE* (1987); MICHEL DE MONTAIGNE, *APOLOGY FOR RAYMOND SEBOND* (M. A. Screech trans., Penguin Books 1988); Michel de Montaigne, *Of Repentance*, in *MONTAIGNE: ESSAYS* 235 (John M. Cohen ed., Penguin Books 1993); JOHN SEARLE, *SPEECH ACTS: AN ESSAY IN THE PHILOSOPHY OF LANGUAGE* (1969); John Searle, *A Classification of Illocutionary Acts*, 5 *LANG. IN SOC'Y* 1 (1976).

For extended conversations about apologies in philosophical literature in addition to *I Was Wrong*, see generally BENNETT, *THE APOLOGY RITUAL*, *supra* note 12; R.A. DUFF, *TRIALS AND PUNISHMENTS* (1986); Jeffrie Murphy, *Repentance, Punishment, and Mercy*, in *REPENTANCE: A COMPARATIVE PERSPECTIVE* (Amitai Etzioni & David Carney eds., 1997); RADZIK, *MAKING AMENDS: ATONEMENT IN MORALITY, LAW, AND POLITICS*, *supra* note 12; MARGARET URBAN WALKER, *MORAL REPAIR* (2006); Luc Bovens, *Apologies*, 108 *PROC. ARISTOTELIAN SOC'Y*. 219 (2008); Paul Davis, *On Apologies*, 19 *J. APPL. PHIL.* 169 (2002); Kathleen Gill, *The Moral Functions of an Apology*, 31 *PHIL. F.* 11 (2000); Trudy Govier & Wilhelm Verwoerd, *Taking Wrongs Seriously: A Qualified Defense of Public Apologies*, 65 *SASKATCHEWAN L. REV.* 157 (2002); Trudy Govier & Wilhelm Verwoerd, *The Promise and Pitfalls of Apology*, 33 *J. SOC. PHIL.* 67 (2002); Jean Harvey, *The Emerging Practice of Institutional Apologies*, 9 *INT'L J. APPL. PHIL.* 57 (1995); Richard Joyce, *Apologizing*, 13 *PUB. AFF. Q.* 159 (1999); Nicolaus Mills, *The New Culture of Apology*, *DISSENT* 113 (Fall 2001); Louis Kort, *What is an Apology?* 1 *PHIL. RES. ARCHIVES* 78 (1975); Glen Pettigrove, *Apology, Reparations, and the Question of Inherited Guilt*, 17 *PUB. AFF. Q.* 319 (2003); Glen Pettigrove, *Unapologetic Forgiveness*, 41 *AM. PHIL. Q.* 187 (2004); Jana Thompson, *The Apology Paradox*, 55 *PHIL. Q.* 470 (2000); Bruce Waller, *Sincere Apology without Moral Responsibility*, 33 *SOC. THEORY & PRAC.* 441 (2007); John Wilson, *Why Forgiveness Requires Repentance*, 63 *PHIL.* 534 (1988).

34. See generally MARION OWEN, *APOLOGIES AND REMEDIAL INTERCHANGES: A STUDY OF LANGUAGE USE IN SOCIAL INTERACTIONS* (1985).

of history understood the practice precisely as a *defense*. A third convention came into usage around 1754 and defined “apology” and “sorry” as a poor substitute, as in a “sorry excuse for a friendship” or “crackers served as but an apology for dinner.” *The Oxford English Dictionary* recognizes each of these forms as acceptable definitions of “apology.”<sup>35</sup> Given this plurality of occasionally competing meanings, consider the complex role of an attorney acting as a paid apologist in the old sense, as she instructs her client to offer something like an apology in the modern sense, because this may be her best rhetorical strategy for the optimal legal outcome. Now imagine the attorney carefully calibrating the apology to avoid admitting wrongdoing, to maximize the strategic benefit of her client appearing to have undergone a moral transformation, while minimizing legal exposure. I suspect that parties to such claims suffer considerable uncertainty about the meaning of such “apologetic” exchanges. The legal landscape becomes still more abstruse when we appreciate that most criminal cases result in pleas and most civil cases result in settlements. A public apology within formal sentencing proceedings presents different issues than, for example, a confidential statement of contrition protected by settlement agreement. Thus, various legal parties may hold very different understandings of the meanings of an apology on the table, and the public may have another reading altogether.

These legal and cultural environments continually co-evolve. Legal institutions and strategies structure our conceptions of the moral components of apologies, and our moral traditions of apologizing for blameworthy behavior shape our legal practices. This dialectical interplay between moral norms and legal institutions requires us to make sense of apologies as they transform from the ancient notion of a legal defense to the modern notion of contrition for wrongdoing, but then occasionally return to their roots as a kind of concealed legal, political, or personal rhetorical stratagem. Given that so many of our conversations about our deepest values occur in the context of apologizing and so many offenses within modern culture become le-

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35. The 2005 edition provides the following definitions of apology:

1. The pleading off from a charge or imputation, whether expressed, implied, or only conceived as possible; defence of a person, or vindication of an institution, etc., from accusation or aspersion; 2. Less formally: Justification, explanation, or excuse, of an incident or course of action; 3. An explanation offered to a person affected by one's action that no offence was intended, coupled with the expression of regret for any that may have been given; or, a frank acknowledgement of the offence with expression of regret for it, by way of reparation; 4. Something which, as it were, merely appears to apologize for the absence of what ought to have been there; a poor substitute.

gal disputes, the feedback between apologies and law resonates throughout modern moral discourse.

I do not wish to overstate the significance of apologies in law, and surely some gestures of contrition have only a very distant relationship to legal proceedings. If one doubts the law's influence over our culture of apologies, however, place any example from *I Was Wrong* within the context of the victim having already brought a legal claim of some sort against the offender. Consider, for instance, the fictional example used in *I Was Wrong* regarding a twelve-member philosophy department attempting to apologize for allegations of sexism in faculty behavior and in the curriculum. The specter of litigation would haunt discussions, even if no one had threatened to bring a claim—sexual harassment or otherwise—and even if the faculty were certain they had not violated any laws. Similarly, notice how the fear that an apology may void insurance coverage influences interactions at the scene of an automobile accident or how extra thought might be given to the wording of an apology for infidelity, if one party might use it against the apologizing party in divorce proceedings. People often act as if they expect the lawyers circling overhead to descend at the first sign of contrition, and this can have a chilling effect on apologetic discourse and everyday moral interactions.

For some, what might be described as the commodification of apologies contributes to a skeptical attitude toward the moral legitimacy of law. Take the true case of a woman who was fired from her job days after she informed her employers that she was pregnant. After being advised that she had a strong case for wrongful termination, the prospect of bringing a legal claim repulsed her. As a woman of strong moral convictions, she felt she had been wronged. She had been objectified. She had been mistreated because of her gender, and even her unborn child had been disrespected. Converting such moral injuries into legal claims—and ultimately into a cash award—seemed loathsome to her. Although she could have used the money, it could not provide her with the meaning she sought. From her perspective, only a full apology in which her employers admitted their wrongdoing and promised never to repeat the offense would satisfy her. She doubted that legal recourse could help her because of its overriding concern with money. Instead of helping her redress what she perceived primarily as moral offense, she believed lawyers would prostitute her injury. She did not bring a claim.

With all of this in mind, one can appreciate the complexities of finding these highly nuanced rituals of contrition within the labyrinths of modern legal institutions and the peculiarities of modern culture. *Just Apologies* attempts not only to make explicit the various kinds of hidden meaning in acts of contrition by legal actors, but also to empower those parties by providing them with tools to evaluate the apologies given and received in law and law-like environments. In this regard, *Just Apologies* will have the theoretical

precision expected by philosophers, while offering the type of practical analysis that speaks to judges, legislators, attorneys, advocates, and litigants.

This article will now outline what are regarded as the central questions for the study of apologies in criminal law, setting aside discussions of apologies in law. After briefly summarizing my account of categorical apologies in Section II, I will sketch an overview of problems for apologies in criminal law in Section III and civil law in Section IV. Section V will briefly preview issues related to collective apologies in law.

## II. THE CATEGORICAL APOLOGY REVISITED

Much of *I Was Wrong* is devoted to the inexact science of identifying the distinct spheres of apologetic meaning. The book considers a wide variety of apologetic meanings and warns against thinking of apologies in binary “all or nothing” terms, but the following benchmarks guide the standards for categorical apologies and can serve as touchstones for our thinking about apologies in law. Categorical apologies, understood as a regulative ideal for acts of contrition, address the following concerns:

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 responsibility 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 apologizer’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. 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 she could undo. We can distinguish this from continuing to endorse one’s decisions while 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 forbear 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 feel secure 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 un-

justifiable 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. Questions regarding what constitutes unreasonable or excessive demands will be determined with consideration of cultural practices, even though 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. Questions regarding what constitutes the appropriate qualitative and quantitative emotional components of categorical apologies are to be determined with consideration of cultural practices and individual expectations.

Each of these positions is defended at length in *I Was Wrong*. 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. This is not to say that all apologies must be categorical, or that all noncategorical apologies are meaningless, insincere, inauthentic, or otherwise deficient for their purposes. The author of *I Was Wrong* detailed and classified many kinds of apologies, and the categorical apology offers but one possible arrangement of such meanings.<sup>36</sup> These principles identified in the categorical apology should, however, help us organize our thinking as we consider the role of apologies in law.

Apologies, in the author's view, present genuinely interdisciplinary questions and no single methodology corners the market on insights in this

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36. The classification systems for reconciliation developed by social scientists like Jens Meierhenrich are also valuable in this regard; see Jens Meierhenrich, *Varieties of Reconciliation*, 33 L. & SOC. INQUIRY 195 (2008) (discussing the concept of reconciliation in the new conceptualization framework).

field.<sup>37</sup> His interest in empirical findings leads to his observation of a significant limitation of nearly all current social scientific studies of apologies. The difficulties of conducting social scientific research on highly nuanced and context dependent phenomena, and the methodology used in some of this research could be improved. For example, one finds definitions of apologies utilized by social scientists too oversimplified to capture significant aspects of conciliatory behavior. Some studies simply “count” utterances of the word “sorry” as apologies rather than evaluating the substance of the speech act and its meaning in context.<sup>38</sup> Such findings will not distinguish

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37. I should note here the relationship between the author’s theories and various empirical studies of apologies. Throughout this work the author attempts to flag questions that would benefit from further empirical research, and makes efforts—to the best of admittedly novice ability—to engage and learn from social scientific literature in a range of fields related to apologies.

38. For examples of socio-linguistic discussions of apologies, see APOLOGIES AND REMEDIAL INTERCHANGES: A STUDY OF LANGUAGE USE IN SOCIAL INTERACTIONS (1985); WILLIAM BENOIT, ACCOUNTS, EXCUSES, AND APOLOGIES: A THEORY OF IMAGE RESTORATION STRATEGIES (1995); ANDREW COHEN & ELITE OLSHTAIN, *Comparing Apologies Across Languages*, in SCI. & HUM. DIMENSIONS LANGUAGE 175 (Kurt Jankowsky ed., 1985); JULIANE HOUSE ET AL., CROSS-CULTURAL PRAGMATICS: REQUESTS AND APOLOGIES (Gabriele Kasper & Shoshana Blum-Kulka eds., 1989); INTERLANGUAGE PRAGMATICS (G. Kasper & S. Blum-Kulka, eds., 1993); OWEN, *supra* note 34; DEBORAH TANNEN, YOU JUST DON’T UNDERSTAND: WOMEN AND MEN IN CONVERSATION (1990); Shoshana Blum-Kulka & Elite Olshtain, *Requests and Apologies: A Cross-Cultural Study of Speech Act Realization Patterns (CCSARP)*, 5 APPL. LINGUISTICS 196 (1984); Ann Borkin & Susan Reinhart, “Excuse me” and “I’m sorry,” 12 TESOL Q. 57 (1978); Andrew Cohen & Elite Olshtain, *Developing a Measure of Socio-Cultural Competence: The Case of Apology*, 31 LANG. LEARNING 113 (1981); Janet Holmes, *Apologies in New Zealand English*, 19 LANGUAGE IN SOC. 155 (1990); Janet Holmes, *Sex Differences and Apologies: One Aspect of Communication Competence*, 10 APPL. LINGUISTICS 194 (1989); Maxine Lipson, *Apologizing in Italian and English*, 32 INT’L REV. APPL. LINGUISTICS LANG. TEACHING 19 (1994); Albert Mehrabian, *Substitute for Apology: Manipulation of Cognitions to Reduce Negative Attitude Toward Self*, 20 PSYCHOL. REP. 687 (1976); R. R. Mehrotra, *How to be Polite in Indian English*, 116 INT’L J. SOC. LANG. 99 (1995); Malgorzata Suszczynska, *Apologizing in English, Polish and Hungarian: Different Languages, Different Strategies*, 31 J. PRAGMATICS 1053 (1999); Anna Trosborg, *Apology Strategies in Natives/Non-natives*, 11 J. PRAGMATICS 147 (1987).

For examples of general (distinguished from specific treatments of apologies in law) discussions of apologies in psychology, see W. Austin et al., *Equity and the Law: The Effects of a Harmdoer’s “Suffering in the Act” on Liking and Assigned Punishment*, in ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 217 (L. Berkowitz ed., 1976); AARON LAZARE, ON APOLOGY (2004) (note that Lazare is a psychiatrist); C. Ward Struthers et al., *The Effects of Attributions of Intent and Apology on Forgiveness: When Sorry May Not Help the Story*, 44 J. EXPERIMENTAL SOC. PSYCHOL. 983 (2008); J. T. Tedeschi & C. A. Riordan, *Impression Management and Prosocial Behavior Following Transgression*, in, IMPRESSION MANAGEMENT THEORY AND SOCIAL PSYCHOLOGICAL RESEARCH 223 (J. T. Tedeschi ed., 1981); Robert A. Baron, *Attributions and Organizational Conflict: The Mediating Role of Apparent Sincerity*, 41 ORG. BEHAVIOR & HUMAN DECISION PROCESSES 111 (1988); Mark Bennett & Christopher Dewberry, *I’ve Said I’m Sorry, Haven’t I? A Study of the Identity Implications and Constraints That Apologies Create for Their Recipients*, 13 CURRENT PSYCHOL. 10 (1994); Mark Bennett & Deborah Earwaker, *Victims’ Responses to Apologies: The Effects of Offender Responsibility and Offense Severity*, 134 J. SOC. PSYCHOL. 457 (1994); Bruce W. Darby & Barry R. Schlenker, *Children’s Reactions to Apologies*, 43 J. PERSONALITY & SOC. PSYCHOL. 742 (1982);

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Bruce W. Darby & Barry R. Schlenker, *Children's Reactions to Transgressions: Effects of the Actor's Apology, Reputation, and Remorse*, 28 BRITISH J. SOC. PSYCHOL. 353 (1989); Judy Eaton et al., *When Apologies Fail: The Moderating Effect of Implicit and Explicit Self-Esteem on Apology and Forgiveness*, 6 SELF & IDENTITY 209 (2007); Gregg J. Gold & Bernard Weiner, *Remorse, Confession, Group Identity, and Expectancies About Repeating a Transgression*, 22 BASIC & APPL. SOC. PSYCHOL. 291 (2000); M.H. Gonzales et al., *Explaining our Sins: Factors Influencing Offender Accounts and Anticipated Victim Responses*, 62 J. PERSONALITY & SOC. PSYCHOL. 958 (1992); M. H. Gonzales et al., *Victims as "Narrative Critics": Factors Influencing Rejoinders and Evaluative Responses to Offenders' Accounts*, 20 PERSONALITY & SOC. PSYCHOL. BULL. 691 (1994); Holley S. Hodgins & Elizabeth Liebeskind, *Apology Versus Defense: Antecedents and Consequences*, 39 J. EXPERIMENTAL SOC. PSYCHOL. 297 (2003); Holley S. Hodgins et al., *Getting out of Hot Water: Facework in Social Predicaments*, 71 J. PERSONALITY & SOC. PSYCHOL. 300 (1996); Thomas M. Holtgraves, *The Function and Form of Remedial Moves: Reported Use, Psychological Reality, and Perceived Effectiveness*, 8 J. LANG. AND SOC. PSYCHOL. 1 (1989); Cynthia McPherson Frantz & Courtney Bennigson, *Better Late than Early: The Influence of Timing on Apology Effectiveness*, 41 J. EXPERIMENTAL SOC. PSYCHOL. 201 (2005); Dale T. Miller, *Disrespect and the Experience of Injustice*, 52 ANN. REV. PSYCHOL. 527 (2001); Ken-ichi Ohbuchi et al., *Apology as Aggression Control: Its Role in Mediating Appraisal of and Response to Harm*, 56 J. PERSONALITY AND SOCIAL PSYCHOLOGY 219 (1989); Ken-ichi Ohbuchi & Kobun Sato, *Children's Reactions to Mitigating Accounts*, 134 J. SOC. PSYCHOL. 5 (1994); Jennifer F. Orleans & Michael B. Gurtman, *Effects of Physical Attractiveness and Remorse on Evaluations of Transgressors*, 6 ACAD. PSYCHOL. BULL. 49 (1984); Carrie Petrucci, *Apology in the Criminal Justice Setting*, 20 BEHAVIORAL SCI. & L. 337 (2002); Jane L. Risen & Thomas Gilovich, *Target and Observer Differences in the Acceptance of Questionable Apologies*, 92 J. PERSONALITY & SOC. PSYCHOL. 418 (2007); Daniel P. Scarlicki et al., *When Social Accounts Backfire: The Exacerbating Effects of a Polite Message or an Apology on Reactions to an Unfair Outcome*, 34 J. APPL. SOC. PSYCHOL. 322 (2004); Steven J. Scher & John M. Darley, *How Effective Are the Things People Say to Apologize? Effects of the Realization of the Apology Speech Act*, 26 J. PSYCHOLINGUISTIC RES. 127 (1997); Barry R. Schlenker & Michael F. Weigold, *Interpersonal Processes Involving Impression Regulation and Management*, 43 ANN. REV. PSYCHOL. 133 (1992); Barry Schlenker & Bruce W. Darby, *The Use of Apologies in Social Predicaments*, 44 SOC. PSYCHOL. Q. 271 (1981); G. S. Schwartz et al., *The Effects of Post-Transgression Remorse on Perceived Aggression, Attribution of Intent, and Level of Punishment*, 17 J. SOC. & CLINICAL PSYCHOL. 293 (1987); Seiji Takaku, *The Effects of Apology and Perspective Taking on Interpersonal Forgiveness: A Dissonance-Attribution Model of Interpersonal Forgiveness*, 141 J. SOC. PSYCHOL. 494 (2001); Bernard Weiner et al., *Public Confession and Forgiveness*, 50 J. PERSONALITY 281 (1991).

For examples of general discussions of apologies in sociology, see NICHOLAS TAVUCHIS, *MEA CULPA: A SOCIOLOGY OF APOLOGY AND RECONCILIATION* (1991) (the most frequently cited work by a sociologist on apologies); see also ERVING GOFFMAN, *RELATIONS IN PUBLIC* (1971); CHARLES TILLY, *CREDIT AND BLAME* (2008); Erving Goffman, *On Cooling the Mark Out*, 15 PSYCHIATRY 451 (1952); Marvin B. Scott & Stanford M. Lyman, *Accounts*, 33 AM. SOC. REV. 46 (1968).

For examples of general discussions of apologies in social sciences other than linguistics, psychology, or sociology, see MARTHA MINOW, *BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE* (1998); MELISSA NOBLES, *THE POLITICS OF OFFICIAL APOLOGIES* (2008); D. C. Barnlund & M. Yoshioka, *Apologies: Japanese and American Styles*, 14 INT'L J. INTERCULTURAL REL. 193 (1990); Jerald Greenberg, *Looking Fair vs. Being Fair: Managing Impressions of Organizational Justice*, 12 RES. ORGANIZATIONAL BEHAVIOR 111 (1990); Jens Meierhenrich, *Varieties of Reconciliation*, 31 L. & SOC. INQUIRY 195 (2008); Sim B. Sitkin & Robert J.



between expressions of sympathy and admissions of blameworthiness and therefore do not account for significant variance in meaning between the utterances. Deborah Tannen's widely cited claim that women apologize more frequently than men is a related issue that was considered in *I Was Wrong*. Tannen's claim may be true and there are many intuitive reasons to suspect that she is correct, but we can appreciate how such research would benefit from revising the concepts upon which they build their studies.<sup>39</sup> Jennifer Robbennolt has become the leading figure in the empirical study of apologies in law—indeed, she is a rare contributor of original empirical data in law reviews—and she has made considerable contributions to our understandings of how legal actors understand apologies in both civil and criminal settings. Robbennolt's evenhanded evaluation of existing social scientific literature as well as her own findings pays close attention to distinctions between expressions of sympathy and admissions of guilt, and she explains the limits of her findings with some care.<sup>40</sup> From this author's view, however,

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Bies, *Social Accounts in Conflict Situations: Using Explanations to Manage Conflict*, 46 HUMAN RELATIONS 349 (1993); Edward C. Tomlinson et al., *The Road to Reconciliation: Antecedents of Victim Willingness to Reconcile Following a Broken Promise*, 30 JOURNAL OF MANAGEMENT 165, 171 (2004).

39. I discuss the relation between apologies and gender in *I Was Wrong* at pages 108–113. For further examples of discussions of apologies and gender, see SARA MILLS, GENDER AND POLITENESS 231 (2003); JANET HOLMES, WOMEN, MEN, AND POLITENESS 182 (1995); JEFFREY Z. RUBIN & BERT R. BROWN, THE SOCIAL PSYCHOLOGY OF BARGAINING AND NEGOTIATION 173–74 (1975); DEBORAH TANNEN, TALKING FROM 9 TO 5: WOMEN AND MEN AT WORK 46 (1995); DEBORAH TANNEN, THE ARGUMENT CULTURE 47 (1999); DEBORAH TANNEN, YOU JUST DON'T UNDERSTAND: WOMEN AND MEN IN CONVERSATION 233 (1990); Janet Holmes, *Sex Differences and Apologies: One Aspect of Communication Competence*, 10 APPLIED LINGUISTICS 194 (1989); Levi, *supra* note 2, at 1186; Judith Mattson Bean & Barbara Johnstone, *Workplace Reasons for Saying You're Sorry: Discourse Task Management and Apology in Telephone Interviews*, 17 DISCOURSE PROCESSES 59 (1994); Miriam Meyerhoff, *Sorry in the Pacific: Defining Communities, Defining Practices*, 28 LANGUAGE IN SOCIETY 225 (1999); Erin O'Hara & Douglas Yarn, *On Apology and Consilience*, 77 WASHINGTON LAW REVIEW 1121 (2002); Janet M. Stoppard & Carla D. Gruchy, *Gender, Context, and Expression of Positive Emotion*, 19 PERSONALITY & SOCIAL PSYCHOLOGY BULLETIN 143 (1993); Monique Timmers et al., *Gender Differences in Motives for Regulating Emotions*, 24 PERSONALITY & SOCIAL PSYCHOLOGY BULLETIN 974 (1998); Nessa Wolfson, *Pretty Is as Pretty Does: A Speech Act View of Sex Roles*, 5 APPLIED LINGUISTICS 236 (1984).

40. See, e.g., Etienne & Robbennolt, *Apologies and Plea Bargaining*, *supra* note 7, at 318 n.102 ("In assessing the role of apologies in plea bargaining, we must be mindful of the various alternatives. Most cases do not present a binary choice between 'an apology' and 'no apology.' Cases fall into various categories. In some cases, the defendant makes no admission of guilt or expression of remorse whatsoever. In other instances, the defendant may confess or make a partial admission of guilt without expressing remorse. A third possibility is that a defendant may make an apology that expresses both guilt and remorse. It is certainly possible that a prosecutor would respond to each of these alternatives differently."). See also Robbennolt, *Apologies and Legal Settlement: An Empirical Examination*, *supra* note 13, at 419 ("The effect of an apology on settlement decisions was complex, however, and depended on the type of apology offered. Only the full, responsibility-accepting apology increased the likelihood that the offer would be accepted. The partial, sympathy-expressing apology, in contrast, increased participants' uncertainty about whether or not to accept the offer").

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even Robbennolt's definitions create a blind spot in this literature precisely where one most wants to see.

Following sociologist Nicolas Tavuchis, Robbennolt claims that an "apology is a statement offered by a wrongdoer that expresses acknowledgment of the legitimacy of the violated rule, admission of fault and responsibility for its violation, and the expression of genuine regret and remorse for the harm done."<sup>41</sup> From this definition, Robbennolt asks her subjects to respond to this example of a "full apology": "I want to let you know how sorry I am. The accident was my fault. I was going too fast and not watching where I was going until it was too late. I am so sorry."<sup>42</sup> This example captures the distinction between an expression of sympathy and an acceptance of blame, but notice how various sorts of meaning that *I Was Wrong* identifies as significant for a categorical apology operate beyond the scope of such a study. Most importantly, the example meant to illustrate a full apology tells us almost nothing about reform, redress, or other future behavior.<sup>43</sup> On Robbennolt's account, the offender could provide no redress for the injury and commit the same offense the following day and this would have no bearing on whether the apology is "full" or otherwise. The offender could remain unreformed and untrustworthy, yet receive full credit by Robbennolt's measurements. This would seem to be more than a technicality. If a prosecutor attempts to evaluate a defendant's contrition during plea allocutions or if a judge weighs a convict's statement of remorse at sentencing, the relationship between the specific elements of the apology and the likelihood of recidivism should be one of their primary concerns. In civil matters, we will want to distinguish between an apology from a hospital in response to a medical malpractice claim, which commits to undertaking structural reform to correct the problem, from one that fails to reform the root cause of the injury. Regardless of one's disciplinary perspective, it seems uncontroversial that one of the most meaningful aspects of just about any apology is its relationship to the offender's future behavior. Admittedly, measuring these aspects of apologetic meaning presents some difficulty, as it is surely more

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41. Robbennolt, *Attorneys, Apologies, and Settlement Negotiation*, *supra* note 13, at 352 (citing NICHOLAS TAVUCHIS, *MEA CUOA: A SOCIOLOGY OF APOLOGY AND RECONCILIATION* 3 (1991)).

42. Robbennolt, *Apologies and Settlement Levers*, *supra* note 11, at 357 n.104.

43. Robbennolt, *Apologies and Plea Bargaining*, *supra* note 7, at 302 (noting that "some scholars and practitioners reason that defendants who are remorseful are less likely to repeat their crimes and therefore need little deterrence," but we currently have little evidence for such an important claim).

feasible for researchers to limit definitions of apologies to the words spoken than to study the full range of an offender's future behavior and moral transformation over her lifetime.

Empirical studies of apologies can lend important insights, and they will provide further illumination as they continue to grow more sophisticated. We should be careful, however, not to let facility in empirical research restrict our understandings of these concepts. Inversely, of course, philosophical theories of apologies disregarding empirical findings suffer from a different set of weaknesses. Although the author aims for an appropriately dialectical balance between the disciplines, this is easier said than done. One hopes that representatives from the various perspectives working in this area can keep each other honest, and integrate the most sensible contributions regardless of their methodological origins.

### III. THE PENITENT AND THE PENITENTIARY: CRIME, PUNISHMENT, AND APOLOGIES

#### A. *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. Numerous religious traditions routinely tortured subjects until they confessed and repented, and authoritarian states have long coerced public statements of "rehabilitation" from dissidents. In this respect, Linda Radzik makes an important and underappreciated claim in *Making Amends*. "The history of atonement," she writes, "is in large part a history of degradation."<sup>44</sup> In retrospect, traditions of repentance often seem like thinly veiled justifications to compound the suffering of the disadvantaged. Whether women were ritually shamed for being sexually assaulted by men or colonial subjects were tortured in the name of Christian repentance, Radzik warns that "society's most vulnerable groups are likely to suffer disproportionately under atonement systems."<sup>45</sup> The powerful can also manipulate conceptions of atonement to their advantage. An example is when institutions like churches hypocritically call for retribution against sinners, but call for forgiveness when finding their own members embroiled in a scandal like the case of the Magdalen asylums of Ireland.<sup>46</sup> Radzik also worries that elevating suffering to a criterion for redemption can encourage submissiveness within vulnerable populations,

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44. RADZIK, MAKING AMENDS, *supra* note 12, at 18.

45. *Id.* at 17.

46. *See id.* at 193.

leading them to accept various harms as legitimate aspects of atonement when they should be questioning and fighting these injustices. When we add everyday *Schadenfreude* to the list, one has good reason to be appropriately wary when theorizing about atonement.<sup>47</sup> Thus, when a contemporary judge requires a convict to publish a letter in the newspaper apologizing for a sexual assault or driving while intoxicated, its meanings are unclear. Should such a requirement be understood as an innovative form of restorative justice, an additional deterrent for future offenders, a retributive or even vengeful attempt to humiliate convicts, or some confused hodgepodge of punishment theory? The intentions are rarely made explicit.

If an offender recognizes her transgressions as a moral failure, a requirement of the categorical apology as I argued in *I Was Wrong*, then 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?

Like so many issues, we can trace much of our thinking about court-ordered apologies to Kant. Kantian ethical theory pulls in two directions. On the one hand, one finds in Kant arguably the most inspiring secular articulation of the meaning and significance of humanity. From the Kantian framework, the human agent deserves respect above all else. Anything that prevents us from orienting our lives by our duties to care for each other should be understood as a lie that must be exposed in the radiance of enlightenment rationality. Despite the arguably racist, sexist, or speciesist undercurrents in his corpus, the central Kantian message rings true for many: clear thinking teaches us that humans deserve respect and people or institutions violating this principle must be reformed. This informs much of the spirit of the restorative justice movement and its efforts to humanize modern legal practices. When first learning Kant, one might expect a kinder, gentler theory of punishment. Kant's retributive theory of punishment, however, feels very different in spirit from his general ethical theory. From his endorsement of capital punishment to his approval of humiliation as a retributive sanction, Kant hardly seems *progressive* to many advocates of restorative justice. Kant's theory of punishment looks to be on the wrong side of

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47. See *id.* at 15.

enlightened history. R.A. Duff attempted to massage this tension nearly twenty-five years ago by describing his theory as “Kantian” while refusing to “call it Kant’s principle,” and two recent books—Radzik’s *Making Amends* and Christopher Bennett’s *Apology Ritual*—use different strategies in their efforts to reconcile Kant and restorative justice.<sup>48</sup> The issue becomes especially prominent regarding involuntary apologies in law.<sup>49</sup>

Kant provides the following scenario in his 1797 *The Metaphysical Elements of Justice*: Now, it might seem that the existence of class distinctions would not allow for the [application of the] retributive principle of returning like for like. Nevertheless, even though these class distinctions may not make it possible to apply this principle to the letter, it can still always remain applicable in its effects if regard is had to the special sensibilities of the higher classes. Thus, for example, the imposition of a fine for a verbal injury has no proportionality to the original injury, for someone who has a good deal of money can easily afford to make insults whenever he wishes. On the other hand, the humiliation of the pride of such an offender comes much closer to equaling an injury done to the honor of the person offended; thus the judgment and Law might require the offender, not only to make a public apology to the offended person, but also at the same time to kiss his hand, even though he be socially inferior. Similarly, if a man of a higher class has violently attacked an innocent citizen who is socially inferior to him, he may be condemned, not only to apologize, but to undergo solitary and painful confinement, because by this means, in addition to the discomfort suffered, the pride of the offender will be painfully affected, and thus his humiliation will compensate for the offense as like for like.<sup>50</sup>

This passage appears to make evident not only the retributive tenor of Kant’s call for apologies in law, but more specifically the inherent value of humiliation as a counterweight on the scales of justice. Kant justifies court-ordered apologies, in other words, because offenders—at least the sorts of offenders in this case—deserve to suffer the negative emotions associated with such rituals. I find Kant’s position here peculiar, even by Kantian logic.

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48. RADZIK, MAKING AMENDS, *supra* note 12. (Although she admits to subscribing to a “broadly Kantian approach to moral theory,” Radzik distances herself from retributivism); *see also* BENNETT, THE APOLOGY RITUAL, *supra* note 12, at 7 (describing his view as a punitive theory of restorative justice, Bennett writes: “unlike many proponents of restorative justice, I believe that the right theory of the importance of apology will lead us to understand properly the importance of *punitive* responses to wrongdoing. On my view, understanding apology will give us an answer to the question of why hard treatment is a necessary part of a response to wrongdoing. Thus I will depart from those who think of restorative justice as being a non-punitive response to crime.”).

49. R.A. DUFF, TRIALS AND PUNISHMENTS 6 (1986).

50. KANT, *supra* note 12

For one, Kant—the great advocate of truth telling—implies 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. In addition, the emphasis on emotions seems out of place in a Kantian framework given that Kant would be expected to minimize the role of emotions in apologetic meaning. Surely within a Kantian framework one's motivation for apologizing should not be to reduce her negative emotions or minimize her sentence. Notice also how the emotional component of apologetic meaning adds to the difficulties facing binary theories of apologies: which emotions, with 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? And how can one account for divergent cultural attitudes toward displays of emotions?

It is important to draw attention to this passage in Kant, in part because it appears so directly at odds with the Kantian versions of restorative justice advanced by leading scholars like Radzik and Bennett. Without citing the humiliation passage above, for instance, Radzik claims that the “suggestion that suffering is an intrinsic good that may be offered by way of compensation is too bloody minded to be acceptable”<sup>51</sup> and that the “wrongdoer's suffering should not be seen as an intrinsic good.”<sup>52</sup> Instead, she believes that the negative emotions associated with retributivism should be viewed not as a form of suffering inherent to just punishment, but rather as the side effects of the appropriate disposition to one's wrongdoing. She describes experiencing guilt after wrongdoing, therefore, as a kind of “moral hangover.”<sup>53</sup> The author shares her sensibilities and, for that reason, resists strictly Kantian justifications for punishment. Radzik prefers to understand negative emotions as not “valuable for their painful nature per se but as indicators that the wrongdoer has the proper attitudes about morality and his relation to it.”<sup>54</sup> Hence Radzik understands her “moral hangover” as a “defense of suffering [that] is not retributivist.”<sup>55</sup> Although Bennett understands himself as

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51. See RADZIK, MAKING AMENDS, *supra* note 12, at 30.

52. *Id.* at 101.

53. *Id.* at 36.

54. *Id.* at 35.

55. *Id.* at 36.

a retributivist, he similarly does not see the negative emotions associated with court-ordered apologies as the source of their value. Instead, on Bennett's account an "apology restores relationships and redeems wrongdoers because it expresses emotions that are appropriate to wrongdoing."<sup>56</sup> Both of these views seem more defensible than Kant's own position, but it should be noted how they resist Kant's full-throated retributivism.

The retributive justification for court-ordered apologies corresponds to the "right to punishment" theory inspired by Kantian and Hegelian principles asserting that legal sanctions must respect an offender's autonomy and her right to be punished like a subject rather than an object of social control.<sup>57</sup> In this tradition Bennett argues for what he calls the "Apology Ritual."<sup>58</sup>

These court-ordered apologies would be "artificial and symbolic"<sup>59</sup> but would fulfill the "need for the expression of symbolically adequate censure."<sup>60</sup> Bennett explains:

by requiring offenders to undertake the sort of reparative action that they would be motivated to undertake were they genuinely sorry for what they have done, the state condemns crimes in a way that is symbolically adequate and hence more meaningful than simple imprisonment or fining.<sup>61</sup>

Because governments have "no business giving out sentences the explicit aim of which is to make offenders genuinely penitent,"<sup>62</sup> Bennett believes that whether the offender is "genuinely remorseful or not is not relevant to his relations with the state."<sup>63</sup> Bennett emphasizes that his court-ordered Apology Ritual "does not require offenders to undertake these amends in a spirit of remorse or even to put on signs of such remorse"<sup>64</sup> For Bennett, forcing an offender to go through the motions of an apology is punishment enough.

I will have much to discuss in *Just Apologies* regarding Bennett's thoughtful but controversial position. Yet in addition to the aforementioned concerns related to Kant's version of court-ordered apologies, we can flag a few questions for further study. Most basically, as argued in *I Was Wrong* and as noted above, categorical apologies convey various forms of emotional meaning for victims and offenders. Appreciating the obvious shortcomings

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56. BENNETT, THE APOLOGY RITUAL, *supra* note 12, at 112.

57. See Herbert Morris, *Persons and Punishment*, 52 THE MONIST 475 (1968).

58. BENNETT, THE APOLOGY RITUAL, *supra* note 12, at 196–97.

59. *Id.* at 149.

60. *Id.* at 196.

61. *Id.* at 9.

62. *Id.* at 154–55.

63. *Id.* at 173.

64. *Id.* at 148.

of emotionless apologies for serious offenses, we can ask if our intuition that the apologizer deserves to suffer some emotional pain is retributive in nature.<sup>65</sup> Do those who wrong others *deserve* to suffer negative emotions, and are court-ordered apologies a legitimate and inexpensive means to “magnify the humiliation inherent in conviction,”<sup>66</sup> as some argue?<sup>67</sup> Rather than reintegrating offenders into the moral community, do such “demeaning rituals” alienate convicts by dehumanizing them instead of recognizing their dignity?<sup>68</sup> If we expect an apology to include an acceptance of blameworthiness, as I do but Bennett does not, how can a court require an offender to internalize moral responsibility? When 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. Courts may lead us to the troughs of virtue in this respect, but they cannot make us drink from them. Likewise, 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 any principled refuser who finds her prosecution an example of a state’s illegitimacy. Requiring such a person to contradict her beliefs under the threat of punishment recalls the most primitive examples of forced conversions. This also raises concerns regarding freedom of speech and conscience discussed later. Yet one can also appreciate the value of a court’s demand for an apology as an expression of appropriate condemnation: you have wronged and we command you—whether you want to or not—to bow your head in respect for our laws and your victims.

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65. See SMITH, *supra* note 1, at 96–107. For additional examples of philosophical discussions of emotions relevant to apologies, see generally JOHN RAWLS, A THEORY OF JUSTICE (1971). See also GUILT AND SHAME (Herbert Morris ed., 1971); SELF-CONSCIOUS EMOTIONS: THE PSYCHOLOGY OF SHAME, GUILT, EMBARRASSMENT, AND PRIDE (J. P. Tangney & K. Fischer eds., 1995); GABRIEL TAYLOR, PRIDE, SHAME, AND GUILT: EMOTIONS OF SELF-ASSESSMENT (1985); R. J. WALLACE, RESPONSIBILITY AND THE MORAL SENTIMENTS (1998); BERNARD WILLIAMS, SHAME AND NECESSITY (1994); Cheshire Calhoun, *An Apology for Moral Shame*, 12 J. POL. PHIL. 127 (2004); John Deigh, *Shame and Self-Esteem: A Critique*, 93 ETHICS 225 (1983).

66. Dan Kahan, *What Do Alternative Sanctions Mean?*, 6 U. CHI. L. REV. 591, 631–32 (1996) (Kahan has since revised views in this paper. See Dan Kahan, *What’s Really Wrong with Shaming Sanctions*, 84 TEX. L. REV. 2075 (2006)).

67. For additional discussions of “shaming sanctions,” see ANDREW VON HIRSCH, CENSURE AND SANCTIONS 82–83 (1996); Stephen Garvey, *Can Shaming Punishments Educate?*, 65 U. CHI. L. REV. 733 (1998); James Q. Whitman, *What Is Wrong with Inflicting Shame Sanctions?*, 107 YALE L.J. 1055 (1998).

68. See VON HIRSCH, *supra* note 7, at 82–83.



Perhaps more importantly, we should notice that a Kantian disposition like that advocated by Radzik and Bennett prevents one from seriously considering the consequentialist value of restorative justice and apologies in law.<sup>69</sup> I, for one, will not be satisfied with a theory of contrition and punishment that does not address the concrete issues of deterrence, rehabilitation, recidivism, and the like. In this respect one 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.

Having said that, it seems that Bennett's assertion in the conclusion to *The Apology Ritual* is an important point of clarification and contention for punishment theory:

even if one sees deterrence or preventative punishment as necessary, why see it as part of punishment rather than as a quite different type of social agency, something more akin to welfare or housing, that aims at the eradication of serious and avoidable harms? This insistence on the distinctiveness of punishment "proper" might look like a valid but uninteresting point, until realizing that it is only by insisting on that distinction that one gets a clear picture of the moral costs of some aspects of crime prevention—the way in which sometimes actions necessary to prevent crime involves wronging individuals who are owed better treatment.<sup>70</sup>

I agree that we should be precise regarding the distinctive retributive and consequentialist aspects of both punishments and apologies. My holistic view of apologies in law, therefore, attempts to account for the range of meanings and functions of acts of contrition so that we can conceptualize and evaluate their full range of moral and practical significance. Indeed, unlike other forms of utilitarian punishment that treat "a man like a dog instead of with the freedom and respect due to him as a man," we have some reason to believe that what I describe as categorical apologies can go some way toward satisfying both retributive and consequentialist justifications for pun-

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69. See BENNETT, *THE APOLOGY RITUAL*, *supra* note 12, at 148 ("the fundamental job of the criminal sanction is not to induce repentance or to achieve moral reconciliation between offender and community: its job is simply to express proportionate condemnation, and that is done perfectly well regardless of how the offender receives that condemnation.").

70. *Id.* at 196.

ishment.<sup>71</sup> In my view, however, we are most likely to realize the benefits of apologies in criminal law from the sorts of voluntary gestures of contrition to which I now turn.

### *B. 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 described in *I Was Wrong* achieves all of the meanings and functions of effective punishment. According to that account, a categorically apologetic criminal has undergone, a verifiable moral transformation that reorients her behavior. How should we punish such a person? Our moral compasses and policies may point toward reducing sentences for the sincerely apologetic, but these intuitions would benefit from some analysis. Is leniency toward the contrite a vestige of a 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? What are the benefits of such a practice, and how do they compare with the costs?

The very idea of voluntary apologies in criminal law has been met with some resistance in recent philosophical literature. Both Radzik and Bennett, for instance, object to the state's overt involvement in the sort of moral development characterized by voluntary apologies. Although Bennett claims in passing that "of course the world would be a better place if offenders did respond to expressions of condemnation with genuine repentance and reform," he doubts that "aiming to make this happen is the business of the state, let alone the justification for the criminal sanction."<sup>72</sup> Arguing that it is "not part of the remit of the state to pursue the full-blown moral reconciliation that comes with repentance" and that "the state has no duty forcibly to rehabilitate the offender, or even to aim to induce repentance in any way other than through the symbolically adequate expression of condemnation,"

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71. GEORG WILHELM FRIEDRICH HEGEL, *THE PHILOSOPHY OF RIGHT* 246 (T. Knox trans., 1942) (1820).

72. BENNETT, *THE APOLOGY RITUAL*, *supra* note 12, at 197.

Bennett prefers the sorts of court-ordered apologies noted previously.<sup>73</sup> Radzik questions the relevance of voluntary apologies on similar grounds, adding skepticism regarding the authenticity of such gestures. “How could the state possibly contribute to the distinctively moral project of atonement,” Radzik asks, “since atonement requires the wrongdoer’s sincere repentance and voluntary efforts?” Because “sincere and voluntary responses cannot be compelled by the state,” she continues, “attempts by the state to use the criminal justice system to persuade offenders to make amends threaten to undermine any credibility that a sincerely repentant offender might otherwise have.”<sup>74</sup> Radzik correctly notes that offenders have “good reason to fake a sincerity they do not feel,” but from this general suspicion it seems premature to suggest “the use of the criminal justice system to pursue amends might be self-defeating.”<sup>75</sup>

These concerns do not apply to offenders who voluntarily offer something like what I call a promissory categorical apology. If an offender voluntarily confesses her crime early in the proceedings (or even before she is suspected or apprehended), accepts blame, and undertakes proportionate remedial efforts, surely this should have some relevance to how a criminal justice system treats her. Undoubtedly, lenience for apologetic offenders creates incentives for various sorts of “inauthentic” apologies. 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. One U.S. federal appellate court warned that reducing sentences for the contrite will result in “lenience toward those who cry more easily, or who have sufficient criminal experience to display sentiment at sentencing.”<sup>76</sup> However, this does not conclude the matter; rather it requires us to consider difficult questions regarding whether we have good reasons for reducing punishment for “genuinely” apologetic offenders, how we might differentiate between the sorts of apologies that should be rewarded and those that amount to little more than gaming the system, and what sort of procedures would promote a morally sensible and criminologically sound administration of such principles. Consider, for example, the case of William Beebe. As part of a twelve-step addiction recovery program, Beebe wrote a letter apologizing to a woman he had sexually assaulted twenty years earlier, thereby admitting his guilt for a crime for which he was not even suspected.<sup>77</sup> Beebe received a ten year sen-

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73. *Id.* at 196–97.

74. RADZIK, MAKING AMENDS, *supra* note 12, at 154.

75. *Id.* at 160.

76. *United States v. Vance*, 62 F.3d 1152, 1158 (9th Cir. 1995).

77. Kristen Gelineau, *Man Gets 18 Months for '84 Attack*, ASSOCIATED PRESS, Mar. 16, 2007.

tence for a crime that was not under investigation before his apology, with all but eighteen months suspended on the condition that Beebe performed 500 hours of community service in the area of sexual assault and substance abuse on campuses. Offenders like Beebe who offer morally rich apologies admitting guilt, and thereby act contrary to their legal self-interests, present materially distinct moral issues from defendants who go through the motions of contrition for the primary purpose of reducing their sentences. Such apologies may admittedly be rare, and Margaret Urban-Walker correctly notes that the “very contempt and indifference of those with the power to . . . terrorize a population . . . is both a source of the crime and what ensures that those responsible are likely to disdain judgments of wrong or shrug off responsibility.”<sup>78</sup> Whatever compels us to misdeeds, in other words, probably also drives us away from conscientiously apologizing for those offenses. It seems especially unlikely that someone guilty of a grave criminal offense can transform from a wrongdoer to an exemplary penitent. Rarity, however, does not diminish significance.

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 answer in the affirmative, allowing judges to reduce punishments by considerable amounts for defendants who “accept responsibility” for their crimes and “express remorse.”<sup>79</sup> But why, exactly? What do these terms signify, how does case law interpret this language, and do the provisions capture the sorts of meaning that they should?<sup>80</sup> Is it that an apology signifies a kind of successful rehabilitation given the fulfilled promise to refrain from reoffending? How, in this regard, do various aspects of apologetic meaning predict recidivism rates? Is recognizing the victim as a moral interlocutor, for example, a better indicator of the offender’s future

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78. MARGARET URBAN WALKER, *MORAL REPAIR: RECONSTRUCTING MORAL RELATIONS AFTER WRONGDOING* 202 (2006).

79. See U.S. SENTENCING GUIDELINES MANUAL § 3E1.1 (2009); see also, 2007 U.S. SENTENCING GUIDELINES MANUAL, available at [http://www.ussc.gov/2007guid/3e1\\_1.html](http://www.ussc.gov/2007guid/3e1_1.html).

80. See *United States v. Fagan*, 162 F.3d 1280, 1284 (10th Cir. 1998) (holding that a sentencing court may depart downward from the sentencing guidelines if it finds the defendant exhibits exceptional degree of remorse); *United States v. Hammick*, 36 F.3d 594, 600 (7th Cir. 1994) (holding that a guilty plea does not entitle defendant to sentence reduction for acceptance of responsibility, judge is to determine whether defendant has manifested acceptance of responsibility in moral sense); *United States v. Camargo*, 908 F.2d 179 (7th Circuit 1990) (holding the two level reduction for recognition and personal responsibility where the sentencing court believed defendant’s apology was calculated simulation of remorse).

behavior than the emotional content of her apology? Alternatively, might exercising lenience 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?<sup>81</sup> Do voluntary apologies serve specific or general deterrence? Bennett argues for the retributive value of court-ordered apologies, but what deontological significance can we attribute to voluntary acts of contrition? When we consider Beebe's apology for his crime twenty years earlier, how can we reconcile the intuition that he deserves moral credit for his act with the sense that he also deserves serious punishment. Does lenience in this respect minimize the wrongness of his deed or diminish the justice due to the victim? Or might voluntary categorical apologies present a regulative ideal for a form of punishment that maximally honors the Kantian and Hegelian traditions of honoring the dignity of both offenders and victims?

If we conclude that apologetic offenders deserve lenience of some kind, numerous morally-laden practical issues arise. *How* might we distinguish between genuine categorical apologies and staged acts of contrition? 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? What criteria should we use to evaluate an offender's interior life and determine the nature of her beliefs, values, emotions, or intentions, thereby differentiating genuine contrition from purely instrumental attempts to manipulate the system?<sup>82</sup> What attributes of modern legal culture might unfairly influence our judgments? In both civil and criminal matters, 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?<sup>83</sup> How might such concerns change the practices of criminal prosecution and defense? Would the opportunity for confession further compound the advantages of the wealthy who could afford the best attorneys and “contrition consultants” to coach them in the subtleties of apologizing?

When should we judge apologies from an offender? Must certain elements, like an admission of guilt, come during plea allocutions or otherwise early in the proceedings? Otherwise, defense attorneys would coach their clients to apologize after convictions but before sentencing, in order to maximize the benefit but reduce the risks of accepting blame.<sup>84</sup> Considering that

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81. See Bibas & Bierschbach, *supra* note 7.

82. See generally Etienne, *supra* note 7, at 2162; O'Hear, *supra* note 7, at 1511.

83. See Etienne, *supra* note 7.

84. See *id.*

“approximately ninety-five percent of state criminal convictions are obtained through guilty pleas,” the relationship between apologies and pleas generally deserves special attention.<sup>85</sup> We should treat accordingly apologies that become less cautious and more histrionic between conviction and sentencing. If we reserve restorative justice practices for the sentencing phase rather than for the prosecution, we can appreciate that apologies at that stage may lose much of their significance because it can seem too easy to confess after you’ve been found guilty. In addition, arguably 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. It would seem that the words “I’m sorry” should be viewed with the same scrutiny as if someone said “I love you” on the first date: much more information would be needed before a well-informed judgment could be made. 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 process creates considerable logistical problems for a justice system. Perhaps we should judge a convict’s apology several years into her sentence so that we can better evaluate the sincerity of her commitment to reform? If we seek assurance that the convict does not treat the apology as mere means to earthly ends, perhaps the most appropriate moment for repentance is immediately before her execution, as Foucault found in eighteenth century practices?<sup>86</sup> Research suggesting that people generally desire apologies quickly after the offense—and seemingly before the offender could have undergone a moral transfor-

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85. Etienne and Robbennolt, *supra* note 7, at 300 (citing Matthew R. Durose & Patrick A. Langan, Bureau of Justice Statistics, U.S. Dep’t of Justice, *Felony Sentences in State Courts, 2002* 1 (2004), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/fs02.pdf>). For additional discussions of the prominence of plea bargaining and its relation to apologies, see GEORGE FISHER, *PLEA BARGAINING’S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA* (2003); Bibas & Bierschbach, *supra* note 7; Candace McCoy, *Plea Bargaining as Coercion: The Trial Penalty and Plea Bargaining Reform*, 50 CRIM. L. Q. 67 (2005); Jacqueline E. Ross, *The Entrenched Position of Plea Bargaining in United States Legal Practice*, 54 AM. J. COMP. L. 717 (2006); Stephen J. Schulhofer, *Is Plea Bargaining Inevitable?* 97 HARV. L. REV. 1037 (1984).

86. MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* (Alan Sheridan trans., 1995); see also STUART BANNER, *THE DEATH PENALTY* 16–23 (2003); LAWRENCE FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 26 (1993).

mation—complicates issues regarding the optimal timing for apologies in criminal contexts.<sup>87</sup>

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? What sorts of appellate processes should oversee such determinations?

*Where* and *how* should these apologies occur? I argue in *I Was Wrong* that meaningful apologies consist of far more than the 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>88</sup> If Markus Dubber is correct in his assessment that within modern penal institutions “offenders and victims alike are irrelevant nuisances, grains of sand in the great machine of state risk management,” can the assembly line of justice build in the intricacies of apologetic meaning?<sup>89</sup> Stephanos Bibas and Richard Bierschbach describe how even the most “genuinely remorseful offender who wishes to apologize to his victim and make amends usually has no readily available way to do so.”<sup>90</sup> Offenders “almost never” encounter victims until sentencing, instead interacting primarily with their attorneys who are likely to obviate attempts to apologize. Even during sentencing, an offender typically directs her statements to the court and must literally turn her back on the judge if she wishes to face her victim while apologizing.<sup>91</sup> Considering this, 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?

The significance of plea bargaining for apologies in criminal law should be emphasized. As noted earlier, pleas are the most determinative phase of criminal prosecution and their procedures and tendencies will shape the majority of expressions of contrition in this context. Questions regarding the role of apologies in jury trials and sentencing hearings may hold the most immediate interest for philosophers, but they have considerably less practi-

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87. For considerations regarding how the timing of apologies impacts their effectiveness, see Frantz and Bennigson, *supra* note 37; Scarlicki et al., *supra* note 37; and Tomlinson et al., *supra* note 37, at 179–80.

88. See generally Bibas & Bierschbach, *supra* note 7.

89. Markus Dubber, *Policing Possession: The War on Crime and the End of Criminal Law*, 91 J. CRIM. L. & CRIMINOLOGY 829, 849 (2001).

90. Bibas & Bierschbach, *supra* note 7, at 97.

91. *Id.* at 136; see also Szmania and Mangis, *supra* note 7, at 356 (“It is important to acknowledge that offenders are highly restricted, both procedurally and interpersonally, while attempting to express remorse in the traditional criminal justice system”).

cal import for most criminal defendants in the contemporary United States than do issues related plea bargaining.

Within a culture of plea bargaining, prosecutors exercise increasing discretion in state and federal courts regarding who to charge, what to charge, and how to punish.<sup>92</sup> As a practical matter, prosecutors serve as the primary judge of the meaning and value of acts of contrition within the criminal justice system. Criminal prosecutors stand in a different relationship to offenses than civil plaintiff's attorneys because they represent the state rather than the individual victim. Whereas a civil attorney is beholden to the wishes of her client because the client pays the bill for her legal services, prosecutors are employees of the state and operate with much greater independence from the will of the victim. If an apology moves a civil plaintiff to settle, her attorney will serve her client's wishes accordingly. A criminal prosecutor, however, need not consult the victim regarding her perception of an offender's contrition. Victims rarely interact with offenders in the contemporary criminal justice system, but even if the offender provides a promissory categorical apology directly to the victim and this moves the injured party to believe that the state should drop all charges, the prosecutor can usually disregard the victim's desires.<sup>93</sup>

Prosecutors can not only exercise discretion to ignore or discount apologies, but various reasons suggest that they are likely to do so. Unlike individual victims with emotional investments in the particularities of their injuries, prosecutors stand at a greater critical distance from the offense. This "detachment" renders prosecutors less concerned with the reconciliation—emotional reconciliation or otherwise—of the specific parties and more focused on the state's interests.<sup>94</sup> Having accumulated experience with these matters, prosecutors can also develop a healthy skepticism for "handcuff apologies" that inexperienced victims may lack. Rather than reducing penalties for contrite offenders, prosecutors may view apologies offered in early proceedings as evidence that they have a particularly strong case worthy of a full trial or at least a defendant likely to accept a harsh plea offer.<sup>95</sup> Inverse-

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92. See Etienne & Robbennolt, *supra* note 7, at 300 ("Over the last several decades, prosecutorial power has been on the rise in state and federal courts").

93. *Id.* at 307–08 ("The degree to which a crime victim has control over the prosecutor varies from limited to non-existent").

94. *Id.* at 316–17.

95. *Id.* at 320 ("A defendant who desperately wants to plead is more likely to accept the plea offer presented. Following an admission of guilt, her attorney will have little leverage to obtain a



ly, defense attorneys—especially overburdened public defenders—might consider apologetic clients bad investments of their efforts. As Robbennolt worries, a “defense attorney who is engaging in triage is likely to spend fewer resources investigating and researching a case with a statement by the defendant expressing responsibility or remorse.”<sup>96</sup> An apologetic defendant may find herself doubly disadvantaged: prosecutors will pursue her more aggressively because they smell blood in the water, while defense attorneys devote their attention to more winnable cases. For several of these reasons, Robbennolt has concluded that “contrary to the assertion that apologies might lead to more favorable plea bargained outcomes for defendants, the nature of plea negotiation renders this result unlikely.”<sup>97</sup> Here important normative questions arise: should apologies play a more significant role early in criminal proceedings, and if so how should we transform those institutions to accommodate and encourage desired social meanings without disadvantaging appropriately contrite offenders?

Additional issues, from the general to the specific, deserve attention. Most generally, if an offender does provide a promissory categorical apology, should she accept full punishment rather than seek to reduce her sentence? Does accepting responsibility for criminal offenses, in other words, entail accepting the full legal penalties? How should we treat demonstrably insincere apologies designed to manipulate the criminal justice system? If we deem such acts lies designed to deceive, should they be treated as a form of perjury and thus as a separate punishable offense? As with civil law, the venue for an apology in a criminal context will inflect much of its meaning. Whether in an open court, a local newspaper, or a private post-conviction restorative justice proceeding, the context has considerable bearing on the meaning and utility of apologetic gestures.<sup>98</sup> How do such venues track desired meaning and social functions? Further questions arise regarding the relationship between such lenience and forgiveness. *I Was Wrong* argued for a dialectical relationship between apologies and forgiveness, and several very recent books and volumes have taken up this topic. Does a categorical

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more favorable plea offer. The primary leverage that defendants have is the threat of trial, and this threat may become far less credible after an apology”).

96. *See id.* (“A defense attorney who is engaging in triage is likely to spend fewer resources investigating and researching a case with a statement by the defendant expressing responsibility or remorse. Thus, even absent the impact of an apology on the prosecution of the case, an apology may affect the defense of the case, likely resulting in a less favorable plea agreement for the defendant”).

97. *Id.* at 301.

98. *See Szmania & Mangis, supra* note 7 (discussing the relevance of the venue for an apology).

apology from the offender require the victim to forgive her?<sup>99</sup> What is the nature of such forgiveness? What is the relationship between forgiveness and punishment, mercy, and clemency? Can one be forgiven upon providing a categorical apology yet still deserve punishment? The author aims for an appropriately dialectical balance between the disciplines, for instance with philosophers refining the concepts and social scientists providing data that both corroborates the concepts and calls for their further development.

### *C. Apologies and Restorative Justice*

It is also useful to consider the developing literature on apologies and restorative justice. Considering its emphasis on various aspects of the relationship between offenders, victims, and communities, many attributes of

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99. See SMITH, *supra* note 1, at 132–39 (discussing the relationship between apologies and forgiveness); for examples of discussions of forgiveness in the history of philosophy, see HANNAH ARENDT, *THE HUMAN CONDITION* (1968); JOSEPH BUTLER, *FIFTEEN SERMONS PREACHED AT THE ROLLS CHAPEL* (Robert Carmichael ed., 1856); JACQUES DERRIDA, *COSMOPOLITANISM AND FORGIVENESS* (M. Dooley & R. Kearney trans., 2001); Jacques Derrida, *On Forgiving, in QUESTIONING GOD* (John Caputo et al. eds., 2001); GEORG WILHELM FRIEDRICH HEGEL, *PHENOMENOLOGY OF SPIRIT §670* (A. V. Miller trans., 1977); Seneca, *De Ira, in SENECA: MORAL AND POLITICAL ESSAYS* (John M. Cooper & J. F. Procopé eds., 1995).

For examples of philosophers discussing forgiveness in recent literature, see BEFORE FORGIVING: CAUTIONARY TALES OF FORGIVENESS IN PSYCHOTHERAPY (Sharon Lamb & Jeffrie Murphy eds., 2004); PETER DIGESER, *POLITICAL FORGIVENESS* (2001); TRUDY GOVIER, *FORGIVENESS AND REVENGE* (2002); CHARLES GRISWOLD, *FORGIVENESS: A PHILOSOPHICAL EXPLORATION* (2007); JORAM HABER, *FORGIVENESS: A PHILOSOPHICAL STUDY* (1991); MINOW, *supra* note 36; JEFFRIE MURPHY & JEAN HAMPTON, *FORGIVENESS AND MERCY* (1988); Uma Narayan, *Forgiveness, Moral Reassessment and Reconciliation, in EXPLORATIONS OF VALUE*, (Thomas Magnell ed., Rodopi 1997); MARGARET URBAN WALKER, *MORAL REPAIR: RECONSTRUCTING MORAL RELATIONS AFTER WRONGDOING* (2006); Jay M. Bernstein, *Conscience and Transgression: The Persistence of Misrecognition*, 29 *BULL. OF THE HEGEL SOC'Y OF GR. BRIT.* 55 (1994); Patrick Boleyn-Fitzgerald, *What Should "Forgiveness" Mean?*, 36 *J. VALUE INQUIRY* 486 (2002); Cheshire Calhoun, *Changing One's Heart*, 103 *ETHICS* 76 (1992); Claudia Card, *Mercy*, 81 *PHIL. REV.* 182 (1972); Robin Dillon, *Self-Forgiveness and Self-Respect*, 112 *ETHICS* 53 (2001); Eve Garrard & David McNaughton, *In Defense of Unconditional Forgiveness*, 103 *PROCEEDINGS OF THE ARISTOTELIAN SOC'Y* 39 (2003); Martin Golding, *Forgiveness and Regret*, 16 *PHIL. F.* 121 (1984–85); Jean Harvey, *Forgiveness as an Obligation of the Moral Life*, 8 *INT'L J. MORAL & SOC. SCI.* 211(1993); Margaret Holmgren, *Forgiveness and the Intrinsic Value of Persons*, 30 *AM. PHIL. Q.* 341 (1993); Martin Hughes, *Forgiveness*, 35 *ANALYSIS* 113 (March 1975); Aurel Kolnai, *Forgiveness*, 74 *PROC. ARISTOTELIAN SOC.* 91 (1973–74); Mary Beth Mader, *Fore-given Forgiveness*, 42 *S. J. PHIL.* 16 (2004); David Novitz, *Forgiveness and Self-Respect*, 58 *PHIL. AND PHENOMENOLOGICAL RES.* 299 (1998); Martha Nussbaum, *Equity and Mercy*, 22 *PHIL. & PUB. AFF.* 83 (1993); Pettigrove, *supra* note 33; Norvin Richards, *Forgiveness*, 99 *ETHICS* 77 (1988); Robert C. Roberts, *Forgivingness*, 32 *AM. PHIL. Q.* 293 (1995); Wilson, *supra* note 33; Joanna North, *Wrongdoing and Forgiveness*, 62 *PHIL.* 499 (1987);

the restorative justice movement seem to make it a better fit for voluntary apologies than punitive adversarial systems. In particular, restorative justice aims to give voice to victims, place them in dialogue with their offenders and communities, and maximize the support available to all parties. Unlike routinized criminal justice bureaucracies, proponents of restorative justice believe communities can determine more meaningful and compelling sentences for offenders. As many commentators have explained, restorative justice also marks a shift away from an adversarial approach and toward reconciliation as its primary objective. The collaborative tone of restorative justice creates an environment conducive to voluntary apologies fundamentally different from the “admit nothing” attitude of adversarial punitive justice. While there may be little time or place for reconciliation in punitive criminal justice systems, restorative justice was built precisely for these sorts of concerns and could provide procedural mechanisms 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.

However, several issues should be noted, regarding apologies and restorative justice. Following Radzik, one can classify one set of criticisms as the “objections from liberal neutrality.” Bennett has described the “laissez-faire conception of restorative justice” as advocating for procedures that largely exclude the state from the restorative process and trust the relevant parties to determine—usually face-to-face—how to best respond to particular cases.<sup>100</sup> This raises several concerns. First, one might worry with Radzik that restorative justice’s reliance on “deep and wide-ranging communications about the causes and effects of crime suggests that the goal is the offender’s internal improvement—a change in her point of view, values, or motivations, where those are judged to be lacking according to some moral standard.”<sup>101</sup> Here, one might argue, the state coercively enforces certain moral positions and thus infringes on its citizens’ freedom of conscience. Radzik correctly responds that although “the liberal state is committed to freedom of conscience and the pluralism of reasonable conceptions of the good . . . liberalism is committed, at its core, to certain moral values—specifically the freedom and equality of persons.”<sup>102</sup> In cases of voluntary apologies, this objection seems less relevant because the offender presumably undergoes the moral transformation with a greater degree of independence from state intervention.

The second concern claims that restorative justice imposes a certain brand of moral transformation not only on offenders, but also on victims, by

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100. BENNETT, *THE APOLOGY RITUAL*, *supra* note 12, at 121.

101. RADZIK, *MAKING AMENDS*, *supra* note 12, at 161.

102. *Id.* at 163.

requiring them to adopt and practice a generally forgiving attitude toward injustice and apply it to particular offenders. For those whose gods advocate a more vengeful brand of punishment, the principles of restorative justice may seem against their faith. It is not the state's business, the argument goes, to require citizens to adopt a view of punishment contrary to their moral beliefs. Radzik offers a noncommittal response to this objection: "one might rather argue that restorative justice systems better enable victims to live in accordance with their own conceptions of the good than do standard, punitive criminal justice systems."<sup>103</sup> Radzik's response seems fair enough, but one wonders how to evaluate the relative benefits at stake. Radzik suggests an empirical claim that a greater percentage of the population would endorse the restorative justice model, but is this assumption correct and is it the best criterion for evaluation?<sup>104</sup>

Restorative justice can also create difficulties with respect to the balance between achieving context sensitive sentences that respond to the needs of individual cases and the need for equality, fairness, and consistency. Offenders have considerable incentive to coalesce to the views of their victims in order avoid even harsher punishments, and Radzik rightly worries that "these parties might agree to the negotiation even if they believe their rights are not being properly respected."<sup>105</sup> Radzik further notes that such inequalities in bargaining power can be compounded by "race, gender, class, education, physical strength, or linguistic abilities."<sup>106</sup> Here she reminds us of Martha Nussbaum's notion of "adaptive preference formation" in which the disadvantaged come to expect less and the privileged expect more. Thus a resident of a wealthy community may arrive at a sentencing conference believing that she has suffered a grave injustice if the offender picked her pocket, but a victim who lives in an impoverished area might see such an offense as a rather typical event. Such differential views of similar crimes can lead to a further inequality, where the disadvantaged expect and demand less justice than the privileged and thus crimes against the poor will result in lighter sentences than crimes against the rich.<sup>107</sup> There are good reasons to worry, therefore, that the emphasis in restorative justice on specificity and

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103. *Id.* at 165.

104. The author will discuss at length Radzik's account at length in his forthcoming book, *Just Apologies: Remorse, Reform, and Punishment*.

105. *Id.* at 166.

106. *Id.* at 171.

107. *Id.* at 171–72; see also Martha C. Nussbaum, *Adaptive Preferences and Women's Options*, 17 *ECON. & PHIL.* 67 (2001).

particularity in sentencing risks undermining the values of equality and consistency.<sup>108</sup>

Most thoughtful uses of apologies in criminal law require a considerable degree of indeterminate sentencing—for instance, as we wait to see if the offender honors her promise to reform. As with all rehabilitative forms of punishment that grant discretion to various officials to determine if the offender has met certain expectations, an increased role for apologies in criminal law creates legitimate concerns regarding fairness in sentencing. Andrew Von Hirsch has expressed a retributivist version of this objection, claiming that considerations of the penitence of offenders fails to honor the “principle of proportionality” whereby crimes of equal seriousness should receive equally harsh punishments regardless of the convicts’ subsequent attitude toward the deed.<sup>109</sup> Rather than minimizing the significance of questions of desert, a broadly compelling theory of apologies in criminal law will explain why an apologetic offender *deserves* particularized treatment and why her sentence is fair. In this regard some standardization seems prudent: just as like crimes should be treated the same, like apologies should be treated the same.

Just as we can ask whether judges, juries, victims, or some sort of specialists in contrition should judge the qualities of an offender’s apology with procedures administered by the state, it is similarly unclear who should evaluate an offender’s voluntary apology within restorative justice proceedings and what sort of deference the state should grant these determinations. It is my view that apologies can be complicated and deceptive. Restorative justice practices might prove even more vulnerable to rewarding good actors rather than the truly reformed, because of the relative naiveté of its participants when compared with the experience of professional administrators of the punitive system. Newcomers to the criminal justice system might also unwittingly further compound the advantages of the wealthy who can afford the best attorneys and “contrition consultants” to coach them in the subtleties of apologizing.

The third objection from liberal neutrality against restorative justice is especially troubling, as Radzik also points out. If individuals are allowed to

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108. Christopher Bennett also appreciates this difficulty. See BENNETT, *THE APOLOGY RITUAL*, *supra* note 12, at 179 (“However, we will not be able to be more specific until we know the details of the particular offence and the details of the situation of victim and offender. This suggests that judgments about sentencing will rely heavily on the discretion of sentencers and will only be able to be lightly constrained by guidelines that are laid down in advance. The problem with this, however, is that it makes it hard to see how we could achieve consistency across cases. This is a real problem if the point of having consistency across cases is to communicate proportionate condemnation of crime.”).

109. See von Hirsch & Ashworth, *supra* note 12, at 101–03.

fashion justice according to their beliefs about punishment, this will in all likelihood leave the state to enforce inappropriate religious, objectionable, or patently unreasonable agreements arrived at in sentencing agreements. If the parties determine that the offender must attend particular religious services to achieve repentance or to undergo various forms of humiliation or abuse as penance, state agents will be expected to monitor—and thereby implicitly endorse—these practices. As an example of how these face-to-face conferences might arrive at indefensible conclusions, Radzik imagines a sex offender receiving a mild sentence because those around the table at the sentencing meetings believe that the victim deserves some of blame for the assault because she wore revealing clothing. Here again, we should be mindful of the dangers of replacing excessively standardized justice with more particularized but inconsistent legal practices.

Radzik responds to these concerns with a rather general proposal. The liberal state, she argues, “has a broader constituency and a distinctive agenda that gives it an independent stake in the resolution of crime.” Thus, while she “approve[s] of restorative justice’s interest in empowering both victims and offenders in the criminal justice system, the liberal state should not simply endorse whatever outcome the other parties to the conflict decide upon.”<sup>110</sup> She elaborates:

[T]he state has a stake in the resolution of crime that is broader than its duty simply to aid particular victims, offenders, and even local communities in coming to a negotiated resolution. It has both a right and a duty to express its own views about what counts as an acceptable and satisfactory resolution. The state should not replace the victim,<sup>111</sup> but neither should it be a neutral bystander or a mere servant.<sup>112</sup>

Radzik proposes that “the tensions between restorative justice and liberalism can be resolved only by granting a greater role to the state than many advocates of restorative justice would find acceptable,” but she does not explain with much specificity what this might entail.<sup>112</sup> She suggests that the state might adopt procedural safeguards or veto powers, but she leaves the central practical issues unresolved. What sorts of issues will trigger state intervention, and when do restorative justice practices cross the line that requires state intervention? How will the state police these standards? What

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110. RADZIK, MAKING AMENDS, *supra* note 12, at 173.

111. *Id.* at 172.

112. *Id.* at 174.

role might judges, lawyers, mediators, juries, or other state agents play? How should the state exercise its authority, and what are the penalties for rejecting the state's attempt to veto or otherwise control the outcomes of restorative justice?<sup>113</sup> Even the most "laissez faire" conceptions of restorative justice typically expect the state to participate in the process in some capacity, but precisely what "greater role" should it play? Bennett, for instance, argues that the state should "retain the role of setting the level of the sentence" but set the sentence in "fairly abstract terms" that would then be filled in and made more determinate via restorative justice practices.<sup>114</sup> Thus if the state determines a sentence of X amount of public service, the community could determine what sorts of activities would fill that time.<sup>115</sup> Many rich issues lie in these details.

The arguments for reducing sentences for the contrite seem quite compelling, but I hope to unpack these claims so that they can be subjected to the scrutiny of social scientists as well moral philosophers. It is also expected that answers to the general question, about whether apologetic offenders deserve less punishment than unapologetic offenders, will need to be nuanced in various ways. For example, should apologies from juvenile offenders be treated differently from those from adults? Should different standards be applied to apologies from children? What comparisons should be drawn between court-ordered apologies and the common parenting tactic of requiring children to apologize under threat of punishment or deprivation, as in "Say you're sorry or I'm taking that toy away"? Do some uses of apologies in the moral education of juvenile or adult offenders infringe on their freedom of conscience?

These questions blur the line that I draw between voluntary and involuntary apologies, and I anticipate that the middle category will be well-populated with examples. Here, I expect to find cases of acts of contrition that appear voluntary in the sense that they are not ordered by the court, but that are arguably coerced by various social and legal pressures. We would hardly describe an apology from someone with a gun to her head or the threat of a death sentence as voluntary, but the issue becomes less clear if the incentive structure is less obvious or drastic. Some apologies might evolve, starting as reluctant court-ordered statements designed as occasions for moral reflection and growing into a robust appreciation for the wrongness of the offender's actions. Duff, in fact, argues that a primary objective of punishment and condemnation should be to bring the offender to understand that she should freely repent and accept her punishment as a deserved aspect of

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113. *See id.* at 173.

114. BENNETT, THE APOLOGY RITUAL, *supra* note 12, at 180.

115. *Id.*

her penance.<sup>116</sup> Such a moral transformation could result in a hybrid apology that begins as coerced, but ends as a categorical state of contrition. An offender might also have an authentic desire to apologize or generally “become a better person,” but she may be uncertain of how to proceed. Like an addict wanting to come clean, the contrite but confused offender may need considerable help from the state before she understands how to provide and maintain a categorical apology. Here again the lines between voluntary and involuntary—or between education and punishment—seem too simplistic to capture the subtleties of apologies unfolding in fluid contexts. The relative significance of such various states of apologies also requires some analysis. Even a voluntary instrumental apology—for instance an obviously disingenuous statement offered freely in order to curry favor with authorities—has value as an expression of the state’s commitment to the breached principle and its ability to bend the will of its subjects to honor such laws. Acts of contrition in criminal law fail and succeed in ways that defy binary conceptions of apologies, and these questions provide a sense of the work before a comprehensive treatment of the subject.

#### IV. APOLOGIES IN CIVIL LAW

##### A. *An Example*

Antony Duff finds it “notoriously difficult to give a clear and plausible account of the distinction between civil and criminal law” with respect to both the definitional issues—what precisely is the distinction?—as well as the normative questions regarding which sorts of offenses should fall into which category.<sup>117</sup> Many of the issues salient to apologies in criminal law

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116. *See id.* at 189 (discussing Bennett’s understanding of Duff’s theory).

117. Antony Duff, *Legal Punishment*, in STAN. ENCYCLOPEDIA OF PHIL. (Fall 2008 ed.), available at <http://plato.stanford.edu/entries/legal-punishment> (“It might be tempting to say that crimes are ‘public’ wrongs in the sense that they injure the whole community: they threaten social order, for instance, or cause ‘social volatility’; or they involve taking unfair advantage over those who obey the law; or they undermine the trust on which social life depends. But such accounts distract our attention from the wrongs done to the individual victims that most crimes have, when it is those wrongs that should be our central concern: we should condemn the rapist or murderer, we should see the wrong he has done as our concern, because of what he has done to his victim. Another suggestion is that ‘public’ wrongs are those which flout the community’s essential or most basic values, in which all members of the community should see themselves as sharing: the wrong is done to ‘us’, not merely to its individual victim, in the sense that we identify ourselves with the victim as a fellow citizen.” (internal citations omitted)).



will apply with equal force to civil matters, but certain features of modern civil law deserve special attention. Identified here are what I consider the most significant—and often the most worrisome—questions regarding the role of apologies in civil proceedings.

An example provides a sense of the kinds of questions that evoke concern. Donna Bailey, a mother of two teenage children, had been studying to become physical education teacher when she was paralyzed below the neck in a rollover crash while riding in a Ford Explorer equipped with Bridgestone/Firestone tires.<sup>118</sup> This combination of vehicle and tire resulted in at least two hundred fatal rollover crashes, and Bailey sued the companies for \$100 million. Three of Ford's lead attorney's came to her hospital bed and apologized to Bailey. Ford negotiated to videotape the apology, but only if the audio would be turned off. According to Bailey's attorney, Ford insisted on this condition because "they didn't want anyone hearing what they say."<sup>119</sup> Despite what looks like a transparent attempt to limit the public value of the apology, it satisfied Bailey. "The gist of the whole thing was that they were truly sorry for what . . . happened to me," Bailey explained, "[a]nd I felt like it was very sincere."<sup>120</sup> Bailey settled for an undisclosed amount that day. Ford's spokesperson issued a statement: "We are pleased to have resolved this case with Donna Bailey . . . . We extend our sympathies to her and her family."<sup>121</sup>

Such a situation raises many questions, and without a transcript of the interactions, we can only speculate about many of the meanings of Ford's apologies. We do know that Ford did not publicly accept blame for any of the crashes. Ford blamed Bridgestone. Bridgestone blamed Ford. It seems unlikely that Ford's attorneys accepted blame in their apology to Bailey, instead providing an expression of sympathy. The spokesperson's public extension of "sympathies to her and her family" provides an additional reason to doubt that the semi-private apology explained how and why Ford had done something wrong that they would not repeat. Bailey's attorneys explained that she did "not want her case to stand merely for someone who wanted a monetary award" but rather "wanted to advance public safety and protect lives," yet we can appreciate how Ford's refusal to admit guilt undermines this objective. In fact, at the time of the apology, Bridgestone had refused to recall the model of tires that allegedly caused Bailey's accident. It is difficult to see, therefore, how the offenders had reformed their behav-

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118. CBS, *Tire Victim: Apology Seemed Sincere*, Jan. 9, 2001, <http://www.cbsnews.com/stories/2000/12/20/national/main258587.shtml>.

119. *Id.*

120. *Id.*

121. *Id.*

ior. The settlement did include, however, the public release of internal documents and promises to undergo further reviews of the tires that might lead to additional recalls. Thus we have a rather conflicted series of events: a semi-public apology that refuses to admit wrongdoing and seems unlikely to initiate reform, yet is accompanied by a negotiated release of the information that could indeed lead to reform and increased public safety.

Many of the concerns addressed in *I Was Wrong* regarding collective apologies surface here. In addition to avoiding the acceptance of blame, it also seems unlikely that Ford named any specific individuals who had wronged her. Instead, the attorneys deflected misdeeds into the abstract collective of the corporation. On this account, no one in particular deserves blame for paralyzing her and killing hundreds of others. Court documents established that Ford engineers and executives knew about rollover problems for some time and even redesigned the vehicle without addressing the problem. Bridgestone was also aware of the failings on its tires on these vehicles. None of these individuals appear to have accepted blame in an apology to Bailey or other victims. Those most directly responsible for Bailey's injury could have come before her to categorically apologize and admit their wrongdoing, experience appropriate emotions, undergo a moral transformation, promise not to reoffend, and provide redress. Instead, it seems that Ford paid attorneys to express sympathy in a manner that minimized legal exposure while maximizing strategic benefit. In this case, that meant having attorneys say what Bailey wanted to hear in order to settle, while concealing the content of the apology from the public by turning off the sound on the video. Thus Ford can say that it "apologized" and gain credit for doing so—both in the settlement negotiations and in the public opinion—without admitting wrongdoing or otherwise undertaking legal risk. Ford and Bridgestone's intent—which I have argued is quite significant for an apology's meaning—was clear: to settle as many cases as quickly as possible because "protracted litigation would serve no useful purpose" and risked further damaging their reputations.<sup>122</sup> Ford settled six cases like Bailey's in a single day. We can hardly fault Ford for its legal strategy, but such examples should lead us to ask if our legal practices and institutions sometimes convey undeserved moral credit and strategic advantage to even the wrongs sorts of apologies.

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122. *Id.*

*B. Conciliatory Behavior in an Adversarial Environment*

One need not be an orthodox Marxist to appreciate how economic conditions structure the existence of apologies in civil law. I have written at some length about such issues, identifying from a perspective mindful of both analytic and Continental traditions the central normative issues at stake in the various debates concerning commodification in law.<sup>123</sup> The commodification debate too often swings between rhetorical flourishes, with “root of all evil” claims countering dogmatic faith in free markets. By classifying the different types of arguments against commodification, distinguishing these issues to the extent possible, and identifying how the normative criteria typically deployed may in fact bootleg pro-market bias into the discourse, I attempted to lend some conceptual clarity and meta-conceptual analysis to a set of problems that will be with us for some time. Critiques of commodification in law face what I call problems of ideology, intractability, and hyperbole, and identifying these issues helps to explain the momentum of the law and economics movement. Providing an evenhanded evaluation of the relative costs of commodification against its benefits with respect to each of the many issues identified would require multiple volumes of analysis, and compelling conclusions would benefit from empirical research that has yet to begin. I do not wish to return to those complex and contentious problems in much detail here, other than to note how such features give shape to apologies in civil law.

Most generally, and as noted in the introduction, apologies can seem out of place within an adversarial legal system charged with adjudicating claims within highly competitive markets. We can avoid the chicken or egg problem regarding whether competitive markets give rise to adversarial law or whether adversarial law drives competitive markets by simply recognizing that they have coevolved to fit hand in glove. Within this competitive legal environment an apology will look, *prima facie*, like a concession or a sign of weakness. Conciliatory behavior like apologizing simply seems out of place in an adversarial environment. Something like the categorical apology—even if only the elements of accepting blame and providing redress—seems outside the bounds of the practice. If one wished to apologize in this rich sense in order to informally resolve their dispute, litigation would seem largely unnecessary. Considering this, one would not expect to find many apologies within such a competitive environment unless they—rather counter-intuitively—conferred a strategic advantage. This tactical use of apolo-

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123. Nick Smith, *Commodification in Law: Ideologies, Intractabilities, and Hyperboles*, CONTINENTAL PHIL. REV., Feb. 2009, at 101 (discussing the process of converting various legao harms into monetary value).

gies, I argue, results in part from its ability to appear as something more than tactical. One of the primary sources of an apology's economic value, in other words, is its tenuous identity as something not commodifiable.

*C. Crosscurrents: Economic Outcomes and Non-Economic Values*

Consider Donna Bailey's demand for an apology from Ford and the significance this held for her. Bailey did "not want her case to stand merely for someone who wanted a monetary award" and the apology—in addition to the information released as a condition of the settlement—satisfied her desire for something more than a financial transaction. The apology, in some respect, spoke to the moral nature of her claim. We can say that it provided inherent value rather than serving a merely instrumental or strategic purpose. Bailey's sentiments here resonate with what are probably common intuitions: an apology provides value along a different register than a cash payment might. If a cheating lover refuses to apologize, but instead offers to pay money to compensate for the harm suffered because of her infidelity, one will likely take offense. At a minimum, one will notice that he is crossing two distinct and often incommensurable realms of value. Despite living in a world where one seems comfortable with an increasingly broad range of goods entering the stream of commerce, one still maintains some sense of the separation—even if only as a form of nostalgia—between commodities and goods that should not be bought and sold. In part because of their historical associations with traditions of repentance, apologies strike us as one of those ceremonies that strike deeper than money.<sup>124</sup>

This sense of apologies transcending money goes some way toward making sense of the 2009 study conducted by a team at the Nottingham School of Economics's Centre for Decision Research and Experimental Economics, claiming that even the most transparently tactical apologies conferred rather astonishing benefits to wrongdoers. In this controlled experiment, eBay sellers responded to dissatisfied customers with either a standardized email apology that did not accept blame or a cash payment. According to their findings, 45% of the aggrieved parties withdrew their complaints after receiving electronic apology. Only 23% withdrew their complaints upon being offered cash payment to withdraw their grievance.<sup>125</sup>

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124. See SMITH, I WAS WRONG, *supra* note 1, at 114–125 (discussing how even within some religious traditions, repentance could be bought through indulgences and similar practices).

125. See Abeler et al., *supra* note 14.

Attempting to explain why customers would be moved by a “cheap talk” email denying responsibility, and obviously sent for the purpose of convincing them to retract their negative comments, the researchers speculated that “apologizing triggers a heuristic to forgive that is hard to overcome rationally.”<sup>126</sup> They concluded: “apologies are a powerful and at the same time cheap tool to influence customers’ behavior.”<sup>127</sup> Without making too much of this study, it is worth pausing here to emphasize the dramatic nature of this assertion: even when recognizing that an apology is provided in order to manipulate us, we may still feel a strong urge to give the apologizer what she wants. This brings to mind situations where someone offers an obviously poor excuse for their behavior, yet we reflexively respond with conciliatory clichés like “don’t worry about it.” Whether from a desire to minimize social conflict or from a sense that it would be somehow impolite to not to release the transgressor from our negative evaluations, psychological studies suggest that in some respects our impulse to reconcile is deeper than our ability to rationally evaluate whether reconciliation is deserved.<sup>128</sup> Other studies have found, rather incredibly, that we disapprove of victims who do not accept even “unconvincing” apologies.<sup>129</sup> Within some contexts, in other words, apologetic language confers credit and triggers responses that would not withstand rational evaluation.

Civil litigators have begun to internalize this point. What was once considered a radical strategy of the Toro Company—the subject of many personal injury claims given the dangerousness of lawn equipment—has become the favored *modus operadi* of many industries seeking to reduce legal damages. In the words of the title of one of the most influential movements advocating for the use of apologies in medicine: “Sorry Works!”<sup>130</sup> Empirical research continues to verify the effectiveness of apologies for potential litigants, including a 2009 study led by a Cornell economist finding that

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126. *Id.* at 235.

127. *Id.*

128. See WILLIAM IAN MILLER, *FAKING IT* 92 (2003) (“The victim is as often forced by social pressure to forgive no less than the wrongdoer is forced to apologize. Or he forgives because it is embarrassing not to once the wrongdoer has given a colorable apology.”); Bennett & Dewberry, *supra* note 37 (discussing how people tend to accept unconvincing apologies); Risen & Gilovich, *supra* note 37 (discussing how observers can better differentiate a coerced apology from a spontaneous apology than the target of that apology can).

129. See Bennett & Dewberry, *supra* note 37, at 14–16; Risen and Gilovich, *supra* note 36, at 426.

130. See *SORRY WORKS!*, *supra* note 25.

“safe apology” legislation for medical malpractice cases could “increase the number of settlements by 15% within 3 to 5 years of adopting the laws.”<sup>131</sup>

Understanding apologies in the crosscurrents of law helps make sense of these trends. In one direction, these currents flow toward extensive commodification in civil law. Litigants’ desires for non-economic value flow in the other direction. To the extent possible, I would like to set aside for the moment the general normative questions regarding the increasing prominence of commodification in civil law. These include debates regarding the presuppositions of liberalism, the background conditions of global inequality, commodification as a cause of poverty, objectification and offenses against dignity, exploitation, consent and coercion, instrumentalizing tendencies, reductionism and identity thinking, concrete particularities and cognitive errors of economic logic, contested notions of violence and domination, intertwined matters regarding commensurability, fungibility, homogenization, the expressive force of commodification in law, the “gateway” theory of commodification in law, the role of legal institutions as locations for substantive justice, the state of inherent value and sacredness, the metaphysical status of money, and the features of market cultures and market personalities. I discuss these problems elsewhere, and they are complex issues that polarize readers and present no simple answers.<sup>132</sup> Instead, we can note a few features of modern civil law that channel litigants toward economic remedies.

I discussed, in *I Was Wrong*, the importance of shared values for categorical apologies and the difficulty of reaching such agreements within and between pluralistic cultures. I also noted the uncontroversial fact that, for better or for worse, money serves as the prevailing common denominator of value between our diverse worldviews. This is the case in both culture generally and law specifically, and the law and economics movement has refined the ability of legal institutions to convert nearly all injuries into financial metrics. Although the thought may seem disconcerting, attorneys have become accustomed to legal handbooks such as *Valuing Children in Litigation: Family and Individual Loss Assessment*. Here they find tables with titles such as “Benefits from a Child to Parents from Ages 19–58 Based on a Child Born in 1977,” “Lost Earnings Capacity and Contribution,” and “In-

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131. See Benjamin Ho & Elaine Liu, *Does Sorry Work?: The Impact of Apology Laws and Medical Malpractice*, Feb. 2010, available at <http://www.class.uh.edu/econ/faculty/emliu/medmal.pdf>.

132. See Smith, *Commodification in Law*, *supra* note 123.

vestment Value of Indirect Costs of Generic and Marginal Children for Working and Non-Working Mothers by Level of Mother's Education."<sup>133</sup> These studies determine the legal value of dead children, and they are conducted exclusively in the language of U.S. dollars. As courts routinely reduce the particularities of one's flesh, bone, thoughts, and emotions to a monetary value, it seems that everything now has a price in civil law. Again setting aside the significant questions regarding the relative benefits and harms of such practices against alternatives, we can appreciate the economic tenor of contemporary civil law in the United States.

These tendencies in law do not develop in isolation. Culture influences law, law influences culture, and Pierre Schlag has rendered any clear separation between law and culture deeply problematic.<sup>134</sup> Law is so "inextricably intertwined" with culture, society, politics, and markets that attempts to disentangle the causal chains rarely withstand scrutiny.<sup>135</sup> Regardless of whether law and economic theories cause us generally to think of injuries in financial terms or it merely reflects the economic mindset prevalent outside of legal institutions, money pervades both spheres as something of an "ultimate value." This results, in part, because traditionally dominant moral codes founded on conceptions of religious or secular universality fall out of favor in the liberal state. Though critics often contest its neutrality and its very presence in certain spheres, money has become widely recognized as the most broadly accepted indicator of value. Financial sensibilities inflect our traditionally non-economic evaluative concepts, for instance as "responsibility" takes on increasingly monetary connotations and moral trespasses come to be seen as economic injuries. If one wishes to admit blame and accept responsibility, she should be mindful that within this culture she may be exposing herself to litigation and economic damages in addition to any moral debt she intends to pay. Even if a litigant seeks primarily moral rather than economic redress, she may seek a cash award because she appreciates that her culture measures significance in dollars. A large award conveys that the courts have taken a claim seriously and speaks most directly to the sorts of cost-benefits analyses that drive policy. In civil law in the contemporary United States—as in the culture at large—success has become largely synonymous with winning money. Within this climate, some plaintiffs and their attorneys understandably view winning in court like hitting the jackpot and they roll their dice accordingly.

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133. THOMAS R. IRELAND & JOHN O. WARD, VALUING CHILDREN IN LITIGATION: FAMILY AND INDIVIDUAL LOSS ASSESSMENT 9, 27, 103 (1995).

134. Pierre Schlag, *The De-Differentiation Problem*, CONTINENTAL PHIL. REV., Feb. 2009, 35.

135. *Id.* at 35.

A plaintiff primarily seeking an apology rather than an economic award may find himself swimming against this tide. Consider, for instance, the role of contingency fee arrangements in which attorneys take on matters under the condition that they will receive a percentage of their clients' winnings rather than a flat fee or an hourly rate. Within modern incentive structures, most plaintiffs' attorneys would prefer not to make a living on the prospect of receiving one-third of an apology.<sup>136</sup> Contingency fee arrangements enfranchise litigants who otherwise could not afford access to the courts, but they also encourage attorneys to steer clients toward economic remedies. If the accumulating research is correct and providing an apology of some sort tends to lessen the economic damages that an offender must pay, this also threatens to decrease the earnings of attorneys compensated with contingency fees. Such a conflict of interest may seem inconsequential, but the stakes can be high. This is especially evident in the context of a class-action litigation like *Wal-Mart v. Dukes*, where attorneys seek to represent the sexual discrimination claims of 1.6 million women.<sup>137</sup> If the attorneys negotiate to maximize payment for their clients and thus themselves, this would produce rather different social consequences than if they sought something like a collective categorical apology from Wal-Mart executives that promised to reform their policies and otherwise promote gender equality. Notice also how an apology from Wal-Mart concealed within a confidential settlement agreement would have very different meanings and value than a public admission of wrongdoing and promise to redress the injuries. Ford's videotaped apology discussed earlier blurs the distinction between public and private, with the media widely giving the corporation credit for apologizing to Bailey while Ford conceals the content of the gesture by turning off the sound. If a plaintiff insists on an apology as the primary or sole form of remedy, she will likely need to pay attorney's fees out of pocket or rely on pro bono advocacy. Plaintiffs who insist that their injury is "not about money" may find that this moral high ground comes at a price, and shifting the burden of attorneys' fees in this manner increases the likelihood

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136. See Jean R. Sternlight, *Lawyers' Representation of Clients in Mediation: Using Economics and Psychology to Structure Advocacy in a Nonadversarial Setting*, 14 OHIO ST. J. ON DISP. RESOL. 269, 271-72 (1999) ("These disparities between the perceptions and incentives of lawyer and client may at times impede settlements that would serve the best interests of the client or principal. Psychological or economic divergences between lawyers and their clients will also sometimes cause a settlement to be reached that is inappropriate in that it does not serve the client's best interests.").

137. *Wal-Mart v. Dukes*, 131 S. Ct. 2541 (2011).



that apologies as remedies in civil litigation will become luxuries for the privileged.

Considerable disincentives therefore deter both plaintiffs and their attorneys from pursuing apologies as a primary remedy, yet this very rarity of acts of contrition in law appears to increase their value. In what can seem like a sea of cold economic self-interest, an apology can appear like a beacon of compassion. For those who seek specifically moral redress for their injuries or experience discomfort with the idea of converting their suffering into financial damages, an apology may resonate loudly in a different register of meaning. We adjudicate a variety of claims in civil proceedings, and something is lost in the translation when the law struggles to reduce such a range of injuries to a monetary common denominator. The transactional model of justice provides considerable benefits and suffers from many limitations, and the truth lies somewhere between the dueling hyperboles demonizing the commodification of human life and evangelizing blind faith in liberal market forces. Within this context, an apology can offer a distinct and significant kind of meaning for those who seek more than money from their civil actions. One attorney describes how he believed “something was missing” in the cash awards he won for his clients:

I made this observation firsthand in the early 1980s when I represented a young widow in a medical negligence case. Her husband had been seriously injured, and the medical team in charge of his care failed to discern the extent of the injuries he had sustained. He died a slow and agonizing death. She was left with small children, few financial resources, and deep feelings of resentment against the doctors in charge of her husband’s care. The case was eventually settled, and because there were minor children involved, a hearing was held to apportion the settlement proceeds between the widow and the children. As we left the courthouse after the hearing, she began to rage. I thought she was disappointed in the apportionment ordered by the court or that she regretted settling rather than trying the case. But she denied that either of these feelings was the source of her hostility. She was angry that none of the doctors had ever said he was sorry that his conduct had contributed to her husband’s death. She experienced this omission as another injury, moral harm added to professional malpractice. She said that if the doctors had apologized, she would have felt more able “to heal.”<sup>138</sup>

For this litigant, an apology admitting fault would have conveyed vast meaning, perhaps more than any amount of money.

Herein lies the irony. As we find with many goods described as priceless—consider a master work of art—the very notion that something has value beyond price renders it very expensive. The sense that an apology

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138. Taft, *Apology Subverted*, *supra* note 6, at 1136–37.

within law conveys exceptional non-economic meaning, in other words, creates an especially valuable commodity. Recall Bailey's settlement agreement with Ford. Once three corporate defense attorneys—who might each bill upwards of \$1250 per hour—traveled to Bailey's bedside to deliver undisclosed apologetic language, this was enough to convince the paralyzed claimant that the settlement was no longer just “about the money.”<sup>139</sup> Ford settled her case—like numerous others—on the day of the apology. Again, what appears from a plaintiff's perspective to transcend money looks like an effective cost-cutting strategy to the defense.

#### *D. Specific Strategies and Practices*

Various strategies and practices have come to shape the rather conflicted life of apologies within this environment. Where apologies would have once been viewed as conveying weakness in adversarial civil proceedings, their economic value as a bargaining tactic that can “lubricate settlement discussions” is now widely accepted by academics and practitioners.<sup>140</sup> In the widely cited *Alternative Dispute Resolution by Apology: Settlement by Saying “I’m Sorry,”* for instance, Marshall Tanick and Teresa Ayling describe apologizing as “one of the most effective means of averting or solving legal disputes.” They advise that “[l]awyers, litigants, and prospective litigants all should be aware . . . of the utility of contrition” and that “apologies should be part of the arsenal of resources brought to bear in addressing and resolving legal disputes.”<sup>141</sup>

Dozens of papers have corroborated or repeated this position. According to various social scientific studies, even apologies that were rather obviously constructed for the financial benefit of the apologizer and that admitted no fault generated as much as a 45% likelihood that offended parties would withdraw their complaints.<sup>142</sup> Examples in medicine further supported the financial value of apologies as legislation encouraged or even required physicians to apologize for adverse outcomes rather than continuing the “admit nothing” culture.<sup>143</sup> Some civil attorneys now coach clients to

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139. Leigh Jones, *Billing: Law Firm Fees Defy Gravity*, NAT'L L. J., Dec. 8, 2008, at S1 (reporting that attorney billing rates are on the rise, with the most expensive billing rate reported at \$1260 an hour).

140. Tanick & Ayling, *supra* note 13.

141. *Id.*

142. Abeler et al., *supra* note 14, at 234; WOODS, *supra* note 3, at 3.

143. See *supra* note 13 for sources discussing apologies in medicine.

navigate the dangers and benefits of apologizing in legal contexts, typically advising them to say just enough to maximize the appearance of contrition without undermining their claims of innocence.<sup>144</sup> Tanick and Ayling, for instance, recommend that the apology be “carefully crafted to avoid admission of wrongdoing.”<sup>145</sup> Deborah Levi advised in the *New York University Law Review* that “lawyers protective of their clients’ interests might serve those interests by encouraging clients to apologize short of admitting liability.”<sup>146</sup> Levi suggests that “lawyers might allow their clients to express empathy and regret while avoiding formulations that would make liability undeniable, such as ‘I neglected my duty,’ ‘my actions caused your injury,’ or ‘if only I hadn’t done X, you would never have been injured.’”<sup>147</sup> In order to give the appearance of offering a “sincere” apology and thereby receive the strategic benefits of appearing to be remorseful, a defendant can express sympathy without admitting responsibility, corroborating the factual record, or even acknowledging the legitimacy of the victim’s injury. Apologies in this context also probably do not identify the nature of the moral harm suffered by the plaintiff and therefore also fail to express a shared commitment to honoring those values. The apologizing party may even continue to commit the same harm against the plaintiff or others as she apologizes.

More nuanced strategists propose offering expressions of sympathy first as a test to determine if that alone would be “sufficient to quell a purported ‘victim.’”<sup>148</sup> If claimants expect more than sympathy, one can dole out a little apologetic meaning at a time to determine how much is needed. This allows mediators to reserve admissions of guilt as the trump card if negotiations stall.<sup>149</sup> Some further advise that if “a full apology is to be made, a mediation session preceded by a confidentiality agreement may often be the best place for it since apologies made in that forum are protected by federal law.”<sup>150</sup> Still others warn that, even if you reserve the apology for a confidential mediation session, “clients should be counseled not to make an admission of fault, especially since such an admission is not a requirement of an authentic apology.”<sup>151</sup> Some claim that offenders should leave the act of

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144. See Robin Topping, *Attorneys Balance ‘Safe’ with ‘Sorry’*, NEWSDAY, Feb. 4, 2004, at A22, available at <http://www.newsday.com/columnists/robin-topping/attorneys-balance-safe-with-sorry-1.715090>.

145. Tanick & Ayling, *supra* note 13.

146. Levi, *The Role of Apology in Mediation*, *supra* note 2, at 1188.

147. *Id.*

148. Patel & Reinsch, *supra* note 13, at 22.

149. *Id.* at 23.

150. *Id.*

151. Pavlick, *supra* note 13, at 863. See also Cohen, *Advising Clients to Apologize*, *supra* note 4, at 1058 (“A more cautious approach would have been to write a note expressing sympathy for the

apologizing to their attorneys “in order to prevent unwitting exposure to liability or inadvertent admitting of guilt.”<sup>152</sup>

Many of these strategies go further than claiming that defendants should pitch an expression of sympathy in apologetic language in order to receive the moral—and thus strategic—benefit of admitting wrongdoing when they have not. Instead, this discourse repeatedly and explicitly *asserts that apologies are not confessions of wrongdoing*. I defend at some length in *I Was Wrong* that traditions of apologies and repentance have a core meaning grounded in thousands of years of history across a wide range of cultures: the most significant kinds of apologies admit wrongdoing and signify moral transformation, and this is why they can convey such profound meaning for us. Yet without any serious explanation of how they arrive at this position, those who write on apologies in law gravitate toward the claim that apologies have only accidental relationships to confessions of guilt. Robert Cornell, Rick Warne, and Martha Eining assure readers that “an apology is *not* synonymous with an admission of guilt or fault.”<sup>153</sup> Donna Pavlick believes “clients should be counseled not to make an admission of fault, especially since such an admission is not a requirement of an authentic apology.”<sup>154</sup> Still another 2009 study claims that apologizing may lead to favorable verdicts, while explicitly claiming that apologies express sorrow “without admitting guilt.”<sup>155</sup> Others frame the divorce of apologies and accepting blame as a matter of courtesy: “Not to say, ‘I’m sorry’ is rude and arrogant. It has nothing to do with fault.”<sup>156</sup>

In one sense, the rather incredible assertion that apologies have “nothing to do with fault” could result from the logic of the discourse in context: apologies only make sense in law and only have a place in law if we understand them as something other than admissions of fault. Otherwise there is no place for them within adversarial legal institutions, like there is no place for giving away goals in a soccer match. The dissonance we experience from this perspective is like forcing a square peg into a round hole—when we round apologies by removing the aspect of confession we distort them

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injury without admitting fault (‘Dear Ms. Reardon, I write to express my wishes that you are feeling well following our accident several days ago. Sincerely yours, Mr. Trendle.’) and to wait until later to admit fault (but not assume liability), ideally in a ‘safe’ channel such as mediation.”)

152. Patel & Reinsch, *supra* note 14, at 23.

153. Cornell et al., *supra* note 14, at 770 (emphasis in original).

154. Pavlick, *supra* note 13, at 863.

155. Cornell et al., *supra* note 14, at 767.

156. Kanazawa, *supra* note 13, at 32.

beyond recognition. The other possibility seems less benign: legislators and defense attorneys repeat the counter-intuitive notion that apologies do not admit fault because cultivating this revised usage conveys strategic advantage. Powerful interests stand to gain from this linguistic development and these interests also exert disproportionate control over language usage—winners write not only the histories, but also the clause in legislation defining the terms that govern us. I do not mean to suggest that legal scholars or civil attorneys intentionally conspire to distort language to their advantage, but surely the aggregation of power behind one definition can sway accepted definitions of legal terminology. For those with the most power over legal discourse, most of the incentives point toward redefining apologies as something other than moral transformations that admit guilt and promise reform.

While one might fairly question the significance of a few bare assurances from attorneys and legal scholars claiming that apologies have do not admit wrongdoing, legislative records codify this position. Like civil defense attorneys, legislators have an interest in how legal actors understand apologies because of the political pressure surrounding “tort reform.” If apologies without admissions of fault can reduce litigation and if powerful constituencies favor tort reform, legislators stand to benefit from promulgating a definition of apology that best serves their interests. The origins of “safe apology” statutes which provide evidentiary “safe havens” for certain types of apologies may not seem, *prima facie*, as politically calculated as I suggest. Commentators emphasize the emotional motivations of Massachusetts’s pioneering laws on this matter, which carved out a protected legal space for conversations like the one desired by the legislator who sought an apology from a driver who killed his daughter.<sup>157</sup> As other states followed Massachusetts’s example, the political and economic justifications for describing expressions of sympathy as apologies became more apparent. Tort reform comes to serve as the primary justification driving safe apology legislation.<sup>158</sup> Some states protect expressions of sympathy but do not cover state-

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157. See *supra* note 25 for sources discussing safe apology legislation.

158. Robbennolt gathered several sources attesting to the claims that safe apology legislation would advance the objective of tort reform. See Robbennolt, *Apologies and Legal Settlement*, *supra* note 12, at 505 n.214 (citing Cal. Assembly Comm. on Judiciary, Comment to CAL. EVID. CODE 1160 (“The author introduced this bill in an attempt to reduce lawsuits and encourage settlements by fostering the use of apologies in connection with accident-related injuries or death.”)). See also TENN. R. EVID. § 409.1 advisory commission comment (stating that legislation was “designed to encourage the settlement of lawsuits”); Arthur Kane, *GOP Pushes Tort Reform*, DENVER POST, Apr. 6, 2003, at B4; Al Lewis, *Malpractice Measure is “Sorry” Protection*, DENVER POST, Apr. 13, 2003, at K1 (describing the bill as “among a dozen tort reform proposals”); Peggy Lowe, *“Sorry” Bill Advances*, ROCKY MOUNTAIN NEWS, Apr. 2, 2003, at 22A (noting that opponents described legislation as “anti-patient rights”). Also, the materials at Wojcieszak, *supra* note 24, claim many benefits of apologies for medicine.

ments of fault.<sup>159</sup> Some statutes only apply to cases of medical error.<sup>160</sup> As the result of contested tort reform initiatives, Colorado now protects even admissions of wrongdoing.<sup>161</sup> Some statutes provide general protection for apologies while leaving the term ambiguous.<sup>162</sup> Within a larger tort reform package, members of the Texas legislature unsuccessfully attempted to make definitions of safe apologies *more ambiguous* by repealing provisions clarifying that acknowledgements of fault remained admissible.<sup>163</sup> Some states specifically emphasize the significance of these measures for tort reform in health care and make specific demands of health care providers. Pennsylvania, Nevada, and New Jersey, for instance, require providers to notify patients of preventable adverse events.<sup>164</sup> Thus, many powerful forces seek control of the pen when we define apologies, and their interests color their understanding of this contested term that references our deepest values and oldest moral traditions. From the perspective of conceptual analysis, it seems rather obvious that “I am sorry for your loss” conveys distinct moral meaning from “I confess that I killed your daughter.” When viewed in the

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159. See FLA. STAT. § 90.4026(2) (2010) (“The portion of statements, writings, or benevolent gestures expressing sympathy or a general sense of benevolence relating to the pain, suffering, or death of a person involved in an accident and made to that person or to the family of that person shall be inadmissible as evidence in a civil action. A statement of fault, however, which is part of, or in addition to, any of the above shall be admissible pursuant to this section.”). See also CAL. EVID. CODE § 1160(a) (2009) (expressions of sympathy are inadmissible in proving liability, unless they are accompanied by a statement of fault); TENN. R. EVID. § 409.1 (2010) (expressions of sympathy, except statements of fault, are inadmissible to prove liability); TEX. CIV. PRAC. & REM. CODE ANN. 18.061(a) (1) (West 2010) (expressions of sympathy, except those relating to “culpable conduct,” are inadmissible in court); WASH. REV. CODE § 5.66.010(1) (2010) (expressions of sympathy, except statements of fault, are inadmissible as evidence).

160. See, e.g., COLO. REV. STAT. § 13-25-135 (2003) (extends to actions “brought by an alleged victim of an unanticipated outcome of medical care”); GA. CODE ANN. § 24-3-37.1 (2006); OHIO REV. CODE ANN. § 2317.43 (Lexis Nexis 2010); OKLA. STAT. ANN. tit. 63, § 1-1708.1H (West 2010); OR. REV. STAT. § 677.082 (2003); Wyo. Stat. Ann. § 1-1-130 (2010).

161. COLO. REV. STAT. § 13-25-135 (“In any civil action brought by an alleged victim of an unanticipated outcome of medical care, or in any arbitration proceeding related to such civil action, any and all statements, affirmations, gestures, or conduct expressing apology, fault, sympathy, commiseration, condolence, compassion, or a general sense of benevolence . . . which relate[s] to the discomfort, pain, suffering, injury, or death of the alleged victim as the result of the unanticipated outcome of medical care shall be inadmissible as evidence of an admission of liability.”). See also GA. CODE ANN. § 24-3-37.1 (2006).

162. See, e.g., OHIO REV. CODE ANN. § 2317.43 (Lexis Nexis 2010); OKLA. STAT. ANN. tit. 63, § 1-1708.1H (West 2010); OR. REV. STAT. § 677.082 (2003); WYO. STAT. ANN. § 1-1-130 (2010).

163. H.R. 4, 78th LEG., REG. SESS. (Tex. 2003) (March 28, 2003 version).

164. See Robbenolt, *What We Know and Don't About the Role of Apologies in Resolving Health Care Disputes*, *supra* note 12, at 1010–11 (discussing the specific legislation in these states).

context of contemporary legal, political, and economic culture, however, matters are considerably more complicated.

I intend to consider additional features of contemporary law that explain its confounding and often contradictory relationship to apologies. Given that apologies—even if understood as expressions of sympathy rather than admissions of guilt—become economically valuable in part because they signify something more than economic value, some argue that they should be exchanged or bargained for like other legal goods. When arguing for Hong Kong courts to utilize apologies as a remedy in disability discrimination cases, for instance, Carol Peterson suggests that courts “should ask the defendant whether he is willing to give the apology, making it clear that if he is unwilling to do so the court will increase the award of monetary damages by a specified amount.”<sup>165</sup> If the defendant declines to apologize, the court would order damages at the higher level in order “to compensate for the fact that the defendant was unwilling to give an apology.”<sup>166</sup> Although this particular example invokes the diverse cultural conceptions of apologies that I addressed in *I Was Wrong*, such reduction of an apology to a cash value makes explicit many of the tensions, and peculiarities, and concerns raised throughout this work.

Also notice that if the law construes an apology as something other than an admission of guilt, the apologizing party need not admit to having done anything wrong. If they have not transgressed, they need not reform their behavior. Thus a party can simultaneously offer a “safe apology” while continuing to commit the same offense against the plaintiff or others. In a product liability action—consider the Ford rollover example—Ford could offer a safe apology without taking any actions to fix the problem. Indeed, Ford could offer a safe apology while simultaneously launching a public relations campaign denying wrongdoing and assuring the public regarding the safety of vehicles they know to be faulty. Cost-benefit analyses may often find providing a safe apology and settling a claim in this manner a cost-effective alternative to recalling and expending resources to improve a dangerous product.

The Ford example raises further questions regarding the role of apologies in settlements.<sup>167</sup> Considering that the majority of civil cases in the United States end in settlement agreements, these issues have considerable practical significance. The substance of many of these agreements is pro-

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165. Carole J. Peterson, *The Failure of the Hong Kong Court of Appeal to Recognise and Remedy Disability Discrimination*, 30 HONG KONG L. J. 6, 20 (2000).

166. *Id.*

167. Shuman, *supra* note 12, at 186–87 (discussing how negotiated apologies in settlements serve a different purpose than spontaneous apologies).

ected by strict confidentiality provisions which allow parties to resolve conflicts outside the realm of public scrutiny. Apologies offered in such contexts often have distinct meanings from public apologies. In the Ford example, a public declaration admitting wrongdoing and committing to reform would have been an occasion for public discussion where Ford would be on the record describing what it did, why it was wrong, and how it would correct the problem. The public could then evaluate Ford's future behavior in light of these declarations. Instead, the primary value of Ford's apology is limited to its perceived value by an individual victim.

We can also worry that Ford shields the apology from public scrutiny because it would not withstand analysis. This can compound the often considerable imbalance of power between parties. Many claims between sophisticated corporate defendants and individual plaintiffs take place through arbitration or settlement proceedings. Removing disputes from public proceedings can exacerbate power differentials between disputants as legally savvy wrongdoers can convince inexperienced and vulnerable victims of the value and sincerity of their apology. In light of the economic incentives in class action litigation, for example, civil defense attorneys have strategic reasons to offer confidential apologies in settlement agreements if doing so carries little risk (both within that particular negotiation and with respect to exposure to future litigation) and might soften plaintiffs' demands for financial damages. Defense attorneys can "divide and conquer in this respect," reaching favorable terms with individual claimants that would not satisfy a unified class of victims who publicly stated their demands and collectively scrutinized offers.

Also notice here peculiarities related to issues of standing. In *I Was Wrong*, I discussed the significance of an offender's standing to accept blame for the wrongdoing. A categorical apology requires an offender to accept proximate responsibility and thereby blame for the harm. The offender—rather than a proxy or other third party—will undertake the work of apologizing. Notice in this respect the difference between a corporate executive admitting her personal failures and blameworthiness for the harm and statements from a team of attorneys who are paid to express sympathy on behalf of a corporate client. While such statements from paid representative may convey important meanings in some respects, much of the richest moral content can only be provided by those who committed the wrongdoing. Some apologetic meanings, in other words, cannot be delegated just as I cannot have someone exercise for me. In this light we can anticipate the sorts of questions that will arise when litigants employ attorneys trained in both the law and psychology of contrition. Given the financial stakes of



conveying the proper emotions, leveraging those sentiments into favorable outcomes, and avoiding further exposure, paying someone to apologize for you might seem like money well spent.

I consider the role of contrite emotions in the criminal context, and civil litigation presents related questions. Attorneys are taught to advocate for the legal advantage of their clients, and they may view the emotional stakes of litigation as irrelevant to or even competing with legal strategy.<sup>168</sup> If an injured party seeks an apology to satisfy an emotional need—discussed in *I Was Wrong* as notoriously complex desires—how might this influence her legal tactics and her perception of the quality of her representation?<sup>169</sup> Might she be more susceptible to being “duped” or otherwise settling for less than she deserves?<sup>170</sup> Robbennolt’s research in the context of settlement negotiations suggests that “participants who received an apology from a clear offender had lower reservation prices, aspirations, and conceptions of fair settlements,” which rightly “raises the concern that plaintiffs may be persuaded by an apology to agree to a settlement that does not provide them with the monetary settlement to which they may be legally entitled.”<sup>171</sup> Here

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168. See Robbennolt, *Attorneys, Apologies, and Settlement Negotiation*, *supra* note 13, at 351 (exploring “how attorneys respond to apologies offered in litigation as they advise claimants about settlement, and compares the reactions of attorneys to those of lay litigants”); Sternlight, *supra* note 136, at 321–22 (“Clients’ nonmonetary incentives or goals are not always shared by their attorneys. Because the attorney does not share her client’s nonmonetary interests, she may regard these interests as having little or no value. She therefore may not present them or certainly not emphasize them as part of the settlement package. Yet, if these nonmonetary interests are important to the client, their absence may well prevent a settlement from being reached. Some examples should help to clarify the point. A client in an employment discrimination case might seek not only monetary compensation but also nonmonetary relief including an apology, establishment of a training program intended to discourage future discrimination, or reinstatement. More generally, the client may seek dignity and respect. Yet, these nonmonetary goals likely have little appeal for the attorney who, after all, cannot take a one-third contingency of an apology. Other nonmonetary client goals might include desires for revenge, security, love, an opportunity to ‘vent,’ or the possibility of securing future business from the opposing party. Again, because the attorney likely does not share these goals, the attorney will not always take adequate steps to secure them in a settlement.”).

169. See Melissa L. Nelkin, *Negotiation and Psychoanalysis: If I’d Wanted to Learn About Feelings, I Wouldn’t Have Gone to Law School*, 46 J. LEGAL EDUC. 420, 423 (1996) (“[C]lients inevitably suffer when their lawyers insist on divorcing the professional encounter from the emotional underpinnings of the dispute involved. Client dissatisfaction with legal representation often results from the lawyer’s inability to see the client’s emotional self as anything but an impediment to sensible, rational management of the legal problem the client brings.”).

170. See Levi, *The Role of Apology in Mediation*, *supra* note 2, at 1171 (“[I]f a plaintiff settles because she’s emotionally fulfilled by an apology, isn’t she being duped out of her legal entitlement—an entitlement that the apology itself makes concrete?”); O’Hara & Yarn, *On Apology and Consilience*, *supra* note 12, at 1186 (“[A]pology can be used as a tool for organizations to strategically take advantage of individual victims’ instincts to forgive in the face of apology.”); O’Hara, *supra* note 7, at 1079 (discussing how in the context of medical malpractice, meritorious claims are often dropped when the doctor apologizes).

171. Robbennolt, *Apologies and Settlement Levers*, *supra* note 11, at 369.

we confront further questions regarding the perception of value. Robbennolt finds that attorneys view the value of apologies in litigation more suspiciously than their clients, but we can ask whether assertions that plaintiffs were duped by an apology rely on excessively economic conceptions of worth that discount the emotional value of the interaction.<sup>172</sup> Or can we say that some plaintiffs are in fact misled because they did not actually receive the sort of apologetic meaning they sought, for instance when inexperienced plaintiffs mistake an expression of sympathy for an acceptance of blame and commitment to reform? Should attorneys and legislatures take efforts to prevent this sort of deception, even if doing so reduces the benefits of such apologies to tort reform?

Although I have emphasized and probably overstated the financial considerations that shape apologies in civil law, money plays a less prominent role with respect to numerous other issues that deserve attention. Consider court-ordered apologies in civil law. If a court requires a defendant to a discrimination claim to apologize in the local newspaper, for instance, this will present issues parallel to those discussed earlier regarding court-ordered apologies in criminal law. How, precisely, do civil and criminal court-ordered apologies differ and how are these differences salient for their moral significance and social value? For an orthodox Marxist, the issues discussed regarding the role of economics shaping apologies in civil law will apply with equal force to criminal law. Can we cleanly distinguish economic from non-economic issues, especially if we pay proper attention to the roles of class, differential quality of legal and political representation, relative power, the background conditions of global poverty, and ideology formation? Such questions seem increasingly relevant considering the rise of incarceration as a for-profit service industry and the prevalence of arguments like Randy Barnett's for commodifying criminal penalties.<sup>173</sup>

As noted in the introduction, apologies in civil law exist within an intricate context in which law influences culture and culture influences law. Legal concepts both reflect and shape a community's often conflicted worldview, and it can be difficult to hear meaningful apologies through the noise of this feedback loop.

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172. *Id.* ("A concern for plaintiffs' outcomes is based in part on the assumption that a legally defined monetary entitlement is the appropriate benchmark.")

173. See Randy E. Barnett, *Restitution: A New Paradigm of Criminal Justice*, 87 *ETHICS* 279 (1977) (discussing Barnett's belief that punishment should be abandoned in favor of restitution).

V. COLLECTIVE APOLOGIES IN LAW: CORPORATE, NATIONAL, AND  
INSTITUTIONAL WRONGDOING

Nearly half of *I Was Wrong* is devoted to collective apologies and collective forgiveness, arguing that collective apologies add layers of complexity to nearly every facet of apologetic meaning.<sup>174</sup> They also tend to traffic in

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174. I consider collective apologies at length in SMITH, I WAS WRONG, *supra* note 1. For additional examples of philosophical discussions of collective responsibility, collective punishment, and collective apologies, see Hannah Arendt, *Collective Responsibility*, in RESPONSIBILITY AND JUDGMENT 147 (Jerome Kohn ed., 2003); Hannah Arendt, *Organized Guilt and Universal Responsibility*, in COLLECTIVE RESPONSIBILITY: FIVE DECADES OF DEBATE IN THEORETICAL AND APPLIED ETHICS 273 (Larry May & Stacey Hoffman eds., 1991); MICHAEL E. BRATMAN, FACES OF INTENTION: SELECTED ESSAYS ON INTENTION AND AGENCY 109–29 (1999); COLLECTIVE RESPONSIBILITY, *supra*; MEIR DAN-COHEN, RIGHTS, PERSONS, AND ORGANIZATIONS (1986); PETER A. FRENCH, COLLECTIVE AND CORPORATE RESPONSIBILITY (1984); Peter A. French, *The Corporation as a Moral Person*, in COLLECTIVE RESPONSIBILITY, *supra*, at 133; MARGARET GILBERT, LIVING TOGETHER: RATIONALITY, SOCIALITY, AND OBLIGATION (1996); MARGARET GILBERT, ON SOCIAL FACTS (1992); INDIVIDUAL AND COLLECTIVE RESPONSIBILITY (Peter A. French ed., 2d ed. 1998); KARL JASPERS, THE QUESTION OF GERMAN GUILT (E.B. Ashton trans., 2000); ALASDAIR MACINTYRE, AFTER VIRTUE: A STUDY IN MORAL THEORY (2d ed. 1984); LARRY MAY, THE MORALITY OF GROUPS: COLLECTIVE RESPONSIBILITY, GROUP-BASED HARM AND CORPORATE RIGHTS (1987); Camille Paglia, *Ask Camille: Camille Paglia's Advice for the Culturally Disgruntled*, SALON MAG., <http://www.salon.com>, Jul. 8, 1997, reprinted in WHEN SORRY ISN'T ENOUGH: THE CONTROVERSY OVER APOLOGIES AND REPARATIONS FOR HUMAN INJUSTICE (Roy L. Brooks ed., 1999); JOHN R. SEARLE, THE CONSTRUCTION OF SOCIAL REALITY (1995); CHRISTOPHER D. STONE, WHERE THE LAW ENDS: THE SOCIAL CONTROL OF CORPORATE BEHAVIOR (1991); RAIMO TUOMELA, COOPERATION: A PHILOSOPHICAL STUDY (2000); RAIMO TUOMELA, THE IMPORTANCE OF US: A PHILOSOPHICAL STUDY OF BASIC SOCIAL NOTIONS (1995); RAIMO TUOMELA, THE PHILOSOPHY OF SOCIAL PRACTICES: A COLLECTIVE ACCEPTANCE VIEW (2002); MAX WEBER, ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY (Guenther Roth & Claus Wittich eds., 1978); David E. Cooper, *Collective Responsibility*, 43 PHILOSOPHY 258 (1968); J. Angelo Corlett, *Collective Moral Responsibility*, 32 J. SOC. PHIL. 573 (2001); Michael Cunningham, *Saying Sorry: The Politics of Apology*, 70 POL. Q. 285 (1999); Joel Feinberg, *Collective Responsibility*, in COLLECTIVE RESPONSIBILITY, *supra*, at 53; Mark Gibney & Erik Roxstrum, *The Status of State Apologies*, 23 HUM. RTS. Q. 911 (2001); Elizabeth Kiss, *Saying We're Sorry: Liberal Democracy and the Rhetoric of Collective Identity*, 4 CONSTELLATIONS 377 (1998); Jan Narveson, *Collective Responsibility*, 6 J. ETHICS 179 (2002); John Ladd, *Morality and the Ideal of Rationality in Formal Organizations*, 54 MONIST 488 (1970); H. D. Lewis, *Collective Responsibility*, in COLLECTIVE RESPONSIBILITY, *supra*, at 17; Deborah Perron Tollefsen, *Participant Reactive Attitudes and Collective Responsibility*, 6 PHIL. EXPLORATIONS 218 (2003); Glen Pettigrove, *Hannah Arendt and Collective Forgiving*, 37 J. SOC. PHIL. 483 (2007); Linda Radzik, *Collective Responsibility and Duties to Respond*, 27 SOC. THEORY & PRAC. 455 (2001); Juha Räikkä, *On Dissociating Oneself from Collective Responsibility*, 23 SOC. THEORY & PRAC. 93 (1997); Manuel Velasquez, *Why Corporations Are Not Morally Responsible for Anything They Do*, in COLLECTIVE RESPONSIBILITY, *supra*, at 111; Jeff McMahan, *Collective Crime and Collective Punishment*, CRIM. JUST. ETHICS, Winter/Spring 2008, at 4; David T. Risser, *Punishing Corporations: A Proposal*, BUS. & PROF. ETHICS J., Fall 1989, at 83.

For examples of significant discussions of collective responsibility, collective punishment, and collective apologies outside of philosophy, see THE AGE OF APOLOGY: FACING UP TO THE PAST (Mark

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 corporate and political bureaucracies obscured by complex fiduciary duties and chains of command.

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 what I consider 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 executive or a political leader on behalf of the collective influence how we punish that leader or those who followed

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Gibney et al., eds., 2008); DANIELLE CELERMAJER, *THE SINS OF THE NATION AND THE RITUAL OF APOLOGIES* (2009); DIGESER, *supra* note 99; ALEXIS DUDDEN, *TROUBLED APOLOGIES AMONG JAPAN, KOREA, AND THE UNITED STATES* (2008); GENOCIDE'S AFTERMATH: RESPONSIBILITY AND REPAIR (Claudia Card & Armen T. Marsoobian eds., 2007); CHRISTOPHER KUTZ, *COMPLICITY: ETHICS AND LAW FOR A COLLECTIVE AGE* (2000); ENNIFER LIND, *SORRY STATES: APOLOGIES IN INTERNATIONAL POLITICS* (2008); Girma Negash, *A Political Calculus of Apology: Japan and Its Neighbors*, in *JUSTICE AND VIOLENCE: POLITICAL VIOLENCE, PACIFISM AND CULTURAL TRANSFORMATION* 57 (Allan Eickelmann et al. eds., 2005); GIRMA NEGASH, *APOLOGIA POLITICA: STATES AND THEIR APOLOGIES BY PROXIES* (2006); MELISSA NOBLES, *THE POLITICS OF OFFICIAL APOLOGIES* (2008); SAMUEL P. OLINER, *ALTRUISM, INTERGROUP APOLOGY, FORGIVENESS, AND RECONCILIATION* (2008); SAMANTHA POWER, "A PROBLEM FROM HELL": AMERICA AND THE AGE OF GENOCIDE (2002); TAKING WRONGS SERIOUSLY: APOLOGIES AND RECONCILIATION (Elazar Barkan & Alexander Karn eds., 2006); *Truth and Reconciliation Hearing Testimony of Former President F. W. de Klerk*, in *WHEN SORRY ISN'T ENOUGH*, *supra* at 505; BRIAN A. WEINER, *SINS OF THE PARENTS: THE POLITICS OF NATIONAL APOLOGIES IN THE UNITED STATES* (2005); *WHEN SORRY ISN'T ENOUGH*, *supra*; Richard E. Bilder, *The Role of Apology in International Law and Diplomacy*, 46 VA. J. INT'L L. 433 (2006); Cohen, *Apology and Organizations*, *supra* note 14; Neil Funk-Unrau, *The Re-Negotiation of Social Relations Through Public Apologies to Canadian Aboriginal Peoples*, 29 RES. SOC. MOVEMENTS, CONFLICT, & CHANGE 1 (2008); Colin Jones, *supra* note 13; Hilary K. Josephs, *The Remedy of Apology in Comparative and International Law: Self-Healing and Reconciliation*, 18 EMORY INT'L L. REV. 53 (2004); Meierhenrich, *supra* note 36; Patel & Reinsch, *supra* note 14; Weyeneth, *supra* note 11; Eric K. Yamamoto, *Race Apologies*, 1 J. GENDER RACE & JUST. 47 (1997); Taryn Fuchs-Burnett, *Mass Public Corporate Apology*, DISP. RESOL. J., May-Jul. 2002, at 26; Bernard H. Siegan, *The United States Has Already Apologized for Racial Discrimination*, in *WHEN SORRY ISN'T ENOUGH*, *supra*, at 413.

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 or civil 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 forgiveness. 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.

The highest courts continue to contest the meanings of collective apologies in law. In the context of interpreting the 1993 resolution apologizing for the overthrow of the native Hawaiian government, for instance, in 2009 the United States Supreme Court reversed the Supreme Court of Hawaii’s judgment by holding that the congressional apology did not alter the status of 1.2 million acres of lands once held by the native Hawaiians.<sup>175</sup> Siding with the view that found such apologies “strictly symbolic,” such determinations raise serious questions regarding whether collective apologies can provide substantive meaning in legal contexts.

## VI. CONCLUSION

This paper poses far more questions than it answers, and most of my assertions create more problems than they solve. I hope to provide even-handed discussions of these issues in *Just Apologies: Remorse, Reform, and*

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175. *Hawaii v. Office of Hawaiian Affairs*, 129 S. Ct. 1436 (2009) (finding that Hawaii’s apology did not take away its ability to sell or transfer ceded lands).

*Punishment.* This represents a daunting task, and I very much appreciate the collegiality of the fellow contributors to this volume as we collaborate to address intertwined interdisciplinary issues regarding reconciliation and law.