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978-1-107-00754-3 - Justice Through Apologies: Remorse, Reform, and Punishment

Nick Smith

Excerpt

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Introduction

In 1984, William Beebe drugged and raped eighteen-year-old Liz Seccuro at a University of Virginia Phi Kappa Psi party. Seccuro awoke the next day wrapped in a bloody sheet on the couch of the deserted fraternity house. She confirmed Beebe's identity by the mail on his dresser. Still bloodied and bruised, Seccuro reported the attack. Campus authorities and Charlottesville police treated her claim dismissively and obstructed her access to a proper investigation. Beebe claimed she had consented. Feeling stonewalled and hoping to move forward with the rest of her education and life, Seccuro stopped pursuing legal recourse.

Twenty-one years later, Seccuro pulled out of her driveway en route to a vacation with her spouse and young child. She stopped at the mailbox and found the following letter:

Dear Elizabeth:

In October 1984 I harmed you. I can scarcely begin to understand the degree to which, in your eyes, my behaviour has affected you in its wake. Still, I stand prepared to hear from you about just how, and in what ways you've been affected; and to begin to set right the wrong I've done, in any way you see fit.

Most sincerely yours,

Will Beebe¹

In a subsequent exchange of e-mails where Beebe explained that he was undergoing a twelve-step addiction recovery program, he confessed to a decades-old crime for which he was not under investigation and that carries a maximum sentence of life imprisonment. "I want to make clear that I'm not intentionally minimizing the fact of having raped you," he wrote, "I did." Seccuro took this opportunity in 2005 to contact Charlottesville police. This time they properly investigated her claim. She pressed charges against Beebe.

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Despite his confession, Beebe hired a Charlottesville criminal defence attorney who rigorously contested Seccuro's account of events and claimed in Beebe's defense: "This was bad behaviour, poor judgment, immature, and all those other things, but it was not a rape."² Further investigation revealed that three men raped Seccuro while she was unconscious that night. This complicated the case, and the state agreed to a plea arrangement whereby Beebe admitted guilt to aggravated sexual battery.

At sentencing Beebe stated:

My only purpose in contacting Ms. Seccuro was to make amends for my conduct twenty-two years ago. I am not trying to excuse my behaviour, but I was a different person then. I was an immature nineteen year old with a drinking problem that I did not yet fully understand. . . . It was not until thirteen years ago when I became willing to address all my mistakes in accountability using these tenants [sic] that I could even stay sober, let alone find the inner freedom that I have today. Since that time, in adopting a new way of life, I have a purpose and that gives life meaning. I didn't have that then.³

Beebe's peers from Alcoholics Anonymous testified to his commitment to sobriety and his exceptional service to others struggling with addiction. Judge Edward L. Hogshire found that Beebe had "been a leader in the recovery community" in ways he had "never seen before."⁴ Hogshire asked himself: "Is he remorseful? I think so."⁵ Beebe received a 10-year sentence, with all but 18 months suspended on the condition that he perform 500 hours of community service in the area of sexual assault and substance abuse on campuses. He served five months.⁶

This extraordinary example captures many of the complexities regarding the role of apologies in law. Contemporary prisons in the United States descend from eighteenth-century penitentiaries, to which society sent its outcasts to study their bibles, experience quiet self-alienation, hear the word of Christ, and repent. Although we wince at the idea of secular states engaging in such soul crafting, this institutional DNA lives on in modern rituals of penance as we expect judges to divine the essence of the offender's nature. Approximately one in every thirty-four adults in the United States is under correctional supervision of the criminal justice system.⁷ In many if not all of these 7 million cases, state agents determined punishments in part according to impressions of whether the offender appeared remorseful or apologetic. These numbers do not include the millions of crimes that never reach the justice system because authorities – for example, parents, teachers, police, or prosecutors – exercise discretion to avoid formal charges because of an offender's apparent contrition.

Although it can seem as if the bureaucracy of justice accounts for every detail in criminal procedures, decisions regarding findings of remorse occur in the star chambers of intuition. State officials consult their gut feelings,

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evaluate a few emotional cues, and render unappealable decisions regarding the offender's character. They usually do not explain why they find an offender's remorse compelling, nor do they offer insight into or defend the standards of contrition that orient their decision. They often rely on instincts, allowing a variety of explicit and implicit biases to color their intuitions. Officials rarely mention that the offender's attitudes impact sentencing, and when they do flag these elements they typically invoke arguably the most overused, opaque, and imprecise term in law: remorse. The Federal Sentencing Guidelines attempted to add some substance to the cultic concept by allowing for reductions in sentences for those who "accept responsibility," but in practice accepting responsibility has come to mean agreeing to a plea *even while denying guilt*. The U.S. Supreme Court has recognized that findings of remorse can determine whether an offender lives or dies, yet we entrust such determinations to "know it when I see it" standards as if judges and juries can look into the eyes of offenders, intuit the depths of their evil, and punish accordingly.

Return to Beebe in the context of these traditions. On the one hand, Beebe's confession and expressions of remorse speak to core issues of justice. An act of voluntary confession inviting life in prison in order to make amends bespeaks such reform that ordinary punitive measures seem inappropriate. His story seems more at home in religious parables than in a prosecutor's statement of facts. Denigrating this as "*just* an apology" – a vacuous "legalogy" uttered in service of the offender's strategic interests – avoids difficult issues regarding how acts of contrition can advance objectives of justice and require us to reconsider how to respond justly to apologetic offenders.⁸ The criminal justice system seems like such an unnatural habitat for such acts that we do not know what to make of Beebe. If he confesses, what is the role of his attorney? Why does she deny the rape and minimize its significance? If Beebe appreciates the seriousness of his offense, should he serve the maximum sentence rather than accept a plea? Should he tell the full story regarding the identity of the multiple attackers rather than leverage this knowledge to reduce his sentence? How should we view the apparent self-serving nature of Beebe's act of contacting the woman he raped? Completing his recovery program seems like his primary motivation for contacting Seccuro, even though this caused her considerable pain in forcing her to again confront her rapist on his terms. Is he so clueless about the seriousness of rape that he only realized the potential penalties after he confessed? Did he mistakenly believe a statute of limitations would protect him?

Somehow Hogshire resolved these rather complex moral and factual questions into an eighteen-month sentence. How did he come to this conclusion? What does remorse mean for this judge? Why exactly does Hogshire find Beebe genuinely remorseful? Precisely how does remorse warrant such a

considerable reduction in punishment? Does such a light sentence belittle violence against women? If Beebe confessed to a rape, should courts treat him like all other rapists – repentant or not – lest they violate basic principles of equality under law? As in the vast majority of cases, we do not get to see the judge’s evaluation here beyond a few words finding him remorseful. With no analysis to evaluate, appellate courts and courts of public opinion have little to scrutinize.

We also do not know whether Hogshire considered the broader context and the various other individuals and institutions involved in this case. Beebe knows the identity of the other rapists but refuses to implicate them. How did Hogshire reconcile this refusal to cooperate with his finding of Beebe’s remorse? Did the justice system pursue the associate dean who gave Seccuro false legal information, seemingly to discourage her from pursuing a legal claim and tarnishing the school’s reputation? In 2010, University of Virginia lacrosse player George Huguely beat his ex-girlfriend Yeardley Love to death after school officials missed multiple warning signs that Huguely presented dangers.⁹ Huguely also appeared before Hogshire, and he hired the same defense attorney that negotiated such a light punishment for Beebe. Seccuro spoke at the university’s Take Back the Night events three weeks *before* Love’s murder, calling on administrators to do more to prevent violence against women on campus. At the time of Love’s death the university did not require students to undergo any education in sexual assault, dating violence, or substance abuse.¹⁰ Should the justice system hold the university and Charlottesville police accountable for their roles in these offenses? What sorts of meanings could apologies from such institutions hold? Should views change if instead of a privileged college student the apology comes from someone like Dumisani Rebombo, a black South African who now works as a national manager for the Sonke Gender Justice Network and who received no punishment when he apologized for gang-raping a woman twenty years after the crime?¹¹ Did Hogshire think through any of these issues of race and class? To what extent did he see Beebe as a brethren University of Virginia alumnus – Hogshire attended the school as both an undergraduate and a law student – to whom he afforded benefits of the doubt? Would he have been more skeptical of apologetic gestures from a defendant who did not share his race, gender, and educational pedigree?

The case of Conor McBride raises different sorts of questions regarding the extent to which apologies should reduce punishments.¹² Nineteen-year-old McBride had been arguing with his girlfriend Ann Grosmaire over the course of two days. As McBride tells the story, the exchanges escalated. In the drama of an overwrought teen romance, Ann said “I just want you to die.” McBride took his father’s gun, loaded it, and pointed it under his own chin. Ann came into the room and McBride put the gun down but entered into what he described as a “wrathful anger.” Emotionally exhausted, Ann

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said in weeping convulsions that she wanted to die. McBride retrieved the gun claiming that this would “scare her” so that “maybe she would snap out of it.” Finding her on her knees and “not thinking straight,” he pointed the gun at her: “Is this what you want? Do you want to die?” He fired, tearing through the hand Ann raised to protect herself. An hour later he drove to the Tallahassee police department. “You need to arrest me,” he told the officer. “I just shot my fiancée in the head.”

Prosecutor Jack Campbell charged McBride with first-degree murder, which usually carries a mandatory life sentence in Florida. Campbell explained to Grosmaire’s parents that he had considerable discretion in determining McBride’s punishment. Before the murder, the Grosmaires treated McBride as a member of the family and expected him to become their son-in-law. In the throes of grief, Ann’s father Andy believed he heard his comatose daughter tell him to forgive McBride. Andy Grosmaire recounts when he “realized it was not just Ann asking me to forgive Conor, it was Jesus Christ,” explaining that “I hadn’t said no to [Christ] before, and I wasn’t going to start then.” “It was just a wave of joy, and I told Ann: ‘I will. I will.’”

Commanded to forgive by their god and murdered daughter, the Grosmaires embarked on a mission of restorative justice. With Prosecutor Campbell’s reluctant permission, they enlisted a facilitator to conduct a pre-plea conference that would bring them together with McBride, his parents, a reverend, attorneys, and a photo of Ann along with a few of her belongings. The meeting began with McBride hugging his parents and the Grosmaires. They went around the circle to give participants the opportunity to speak without interruption. Campbell summarized the police reports. The Grosmaires spoke of Ann’s birth, her childhood, her passions, her life plans, and their devotion to her. “You worked so hard to send her off into the world,” said Ann’s father capturing some of every parent’s existential horror, “what was the purpose of that now?” Campbell found Grosmaires’ testimony excruciating: “as traumatic as anything I’ve ever listened to in my life.”

McBride had expressed his sorrow to the Grosmaires previously, but on this occasion he confessed to the details of the events leading to Ann’s death. Despite not remembering a decision to pull the trigger, he accepted blame. In a later interview McBride explained his crime as “inexcusable.” “There is no why, there are no excuses, there is no reason.” He did not plan to shoot Ann, but he did not see her death as an accident: “[O]n some subconscious level, I guess, I wanted it all to end. I don’t know what happened. I just – emotions were overwhelming.”

After McBride finished speaking, the facilitator asked the participants for their views regarding restitution and punishment. In addition to a sentence of between five and fifteen years, Ann’s mother wanted McBride “to do the

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good works of two people because Ann is not here to do hers.” McBride’s parent’s agreed with Ann’s father that ten to fifteen years was an appropriate sentence. McBride recognized that he should not weigh in regarding his punishment. Against the usual restorative justice protocol where such conferences end with a resolution, Campbell wanted time to think through the emotional process and to discuss the issues with community leaders and experts in violence against women. Campbell thought his supervisor would require a minimum sentence of forty years, but their office offered McBride twenty years plus ten years of probation. He now works in the prison library and enrolled in an anger management class. The Grosmaires say they have forgiven McBride, primarily as a means of what Ann’s mother describes as “self-preservation.” They visit him about once per month. Upon release, McBride plans to volunteer in animal shelters and to speak publicly about dating violence.

At first glance, McBride’s case seems to tell of a remorseful offender who turns himself in and thereby earns deserved mercy from both the state and the victim’s family – although readers unaccustomed to sentencing in the United States may still find a twenty-year sentence rather long and difficult to characterize as merciful. But notice troubling issues beneath the surface of this *New York Times* story of apology and forgiveness. Like Beebe, McBride turned himself in and confessed to the crime. But unlike Beebe, McBride surely would have been caught and convicted. Investigators discovered a history of McBride abusing Ann. Ann had written “The List” for McBride, seemingly to correct a history of mistreatment: “No aggressive cursing, no negative comments on physical appearance, no negative comments on relationship, no falling asleep on the phone while talking to me, no running away from our problems.” Under the heading “Never Again” she listed “physical (sic) harm me, look at porn, cheat, try ending us due to anger, yell at me, keep me in the dark.” McBride had hit Ann several times during their relationship. Investigators found an apology card stating “I’m sorry doesn’t begin to cover how horrible I feel or how much I am going to make it up to you. I love you, Conor.” A few days before her death, Ann texted Conor: “I’m starting to think it’s a bad idea if we live together.”¹³ With this information the situation begins to look like a typical cycle of domestic violence characterized by a treadmill of contrition and abuse: abuse, apology, escalating abuse, intensified histrionics of remorse that convinces the victim to stay, and further escalation of abuse. A victim’s attempt to break off the relationship can bring about the gravest threats, and this abusive relationship ends with nineteen-year-old Ann on her knees near the door pleading for her life. Her first serious boyfriend shoots her in the head. McBride recounts his side of the story in a manner that accepts responsibility while describing the shooting as almost-but-not-quite-accidental, says he is sorry, and sees his punishment effectively halved. Difficult questions abound.

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Despite knowing that their relationship was toxic and subject to “wild swings,” Ann’s parents seemed to encourage it and embraced McBride. Should we wonder that the man who emotionally devastated Ann also manipulated her parents, both before the murder and after? Their remarkable mission to forgive McBride begins with Ann’s very religious father literally hearing voices – both of his comatose daughter and of Jesus Christ – as he stands at her deathbed in incomprehensible grief. Should the state allow such impassioned and explicitly Christian motivations to guide its hand in punishment for murder? When a murderer silences a victim of domestic violence, should standard retributive and consequentialist penological objectives be overridden by the wishes of family members who put words of forgiveness into her mouth in order to advance their own interests? While we can feel great empathy for their desire to mitigate their pain and guilt for not intervening in what retrospectively appears to have been an abusive relationship, did these proceedings overvalue their interests at the expense of public objectives such as reducing violence against women?

Ann mistakenly believed Conor’s apologetic promises to reform his behavior. Why should the state now believe in his transformation? The restorative justice facilitator asserts with remarkable ease that she is “not worried about him getting out in 20 years at all.”¹⁴ She explains that the process examined “more deeply at the root of where this behavior came from than we would have had it gone a trial route – the anger issues in the family, exploring the drama in their relationship, the whole conglomeration of factors that led to that moment.” These important points emphasize the strengths of restorative justice over assembly line incarceration. But if she believes “there’s no explaining what happened,” how do we know that McBride deserves the sentence reduction? Do we have sufficient confidence in prison anger management programs to allow him to resume dating before he turns forty? What evidence do we have that he can control his impulses toward violence? How does the prosecutor weigh these factors? Campbell knows that “if Conor gets out in 20 years and goes and kills his next girlfriend, I’ve screwed up terrible.” As an elected official, he also worries about political “backlash” against a light sentence. What convinces him that McBride has not put on a show of contrition because he realized that was the best way to play his legal hand? With Beebe, the court could review a twenty-year record of reformed behavior within civil society. Although far from providing certainty that Beebe would never reoffend, he presented a long and compelling record of staying clean.

How convincingly can we extrapolate McBride’s future behavior based on what we know at the time of sentencing? He has been incarcerated since the day of the murder, so we have no evidence that he has learned to control his anger in the context of intimate relationships. Removed from the temptations to abuse other women, McBride offers little more than promises that

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decades from now he will publicly address dating violence and volunteer in animal shelters. Apologetic actions speak louder than apologetic words, and beyond turning himself in and confessing – powerful but ambiguous acts because of the likelihood that he would have been convicted even if he tried to flee – we have very few data points on the extent of his contrition. Expecting a prosecutor, judge, or jury – however thoughtful and fair – to peer into McBride’s soul and decide his fate seems unreasonable if not delusional. Even if we could prove that McBride has undergone a genuine moral transformation and that he provides a categorical apology for murdering Ann, does that entail that the state should reduce his punishment? Where did prosecutor Campbell look for the answer to that question?

Like Beebe’s story, McBride’s case makes for a gripping magazine article on the alchemical abilities of remorse and forgiveness to transform a brutal attack against a defenseless woman into a narrative of grace. These stories attract us, in part, because they remind us that humans can be simultaneously the ugliest and the most beautiful of creatures. But these situations raise far more questions than they answer about the relationship between apologies and justice, and I fear that our desire to find a silver lining of redemption in the most inhumane actions – as if all of the horror happens for some cosmic reason – clouds our ability to think clearly about how we should treat apologetic offenders. It has taken me two books to identify and address these questions. In 2008, I published *I Was Wrong: The Meanings of Apologies*.¹⁵ I originally intended to establish a conceptual framework for apologetic meaning and apply that framework to criminal and civil law in *I Was Wrong*. That proved naively ambitious. One book became two as I realized the richness of the subject. The first book developed a framework for apologetic meanings. This book applies that framework to law.

I Was Wrong argued that our beliefs about the moral substance and social functions of apologies are honeycombed with deep confusions. Rather than asking the binary question of whether a speech act “is or is not” an apology, I attempted to account for the many ways that acts of contrition succeed or fail to achieve various objectives. I argued that apologies have evolved from a confluence of diverse cultural and religious practices that do not translate easily into pluralistic secular discourse, but I made the case for a robust core of meanings conveyed by what I named a “categorical apology.” I summarize that argument in Chapter 1 of this book, but in general a few questions guide my thinking: Did the offender explain what she did with an appropriate degree of specificity? Does she accept blame rather than merely express sympathy? Does she resist casting the offense as an accident or otherwise deny 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? Does she understand apology as an

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ongoing process, a kind of treatment for wrongdoing rather than a cure? Veblen's quip that researchers should seek "to make two questions grow where one question grew before" describes my experience with the subject, as a complex second set of questions sprouted regarding apologies from collectives. Although apologies from corporations, governments, and other groups can be profoundly significant, *I Was Wrong* flagged the kinds of meaning that collective apologies often do not convey and warned of the dangers of collective acts of contrition that allow individual wrongdoers to obscure their personal blame. This comparatively high-resolution conceptual framework allows me to look a bit deeper into the dark corners of apologies in legal contexts.

The Two Faces of Apologies in Law

I Was Wrong argued that much of our private and public moral discourse occurs in the giving, receiving, or demanding of apologies. Daily headlines feature someone apologizing or calling for someone to apologize. We understand that certain kinds of apologies can amount to life-transforming events for both victims and offenders in crisis situations, and we also appreciate that apologies serve as the daily bread of our moral discourse as we develop social habits. 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, apologetic rituals provide one of the most familiar and significant occasions when we think explicitly about our shared values. Yet we rarely consider precisely what we expect from a gesture of contrition. As a result, apologizing has become a vague, clumsy, and sometimes spiteful ritual. We all know that 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 returning a relationship to the desired state. Sometimes apologies become weaponized in various social conflicts, for instance when an offender intentionally wishes to deceive and 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 partner with no intention to reform claims to be "sorry that" a lover is upset, victims stand to suffer further injuries if they attribute more substance to an apology than warranted.

Whereas religion and its practices of repentance and perdition once provided the backdrop for apologies, a legal environment driven by adversarial procedures and oriented toward economic outcomes increasingly frames our apologies. This creates a tension. Apologies bring people together. Adversarial law typically pushes legal combatants apart in high-stakes competitions. It might therefore seem like apologies would play a minor role in modern

legal proceedings, but the situation is decidedly more convoluted. 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 in an adversarial justice system can amount to legal suicide.¹⁶ As the American Medical Association once warned physicians: “Anything you say can and will be held against you.”¹⁷ Some medical malpractice insurers will void their policies if doctors provide too many details to injured patients.¹⁸ 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. Criminal defense attorneys typically advise clients to resist apologizing to victims, even if the defendant feels a moral compunction to “come clean” early in the proceedings. Skepticism for the efficacy of rehabilitative techniques, increased support for standardized sentencing, a desire to avoid state involvement in an offender’s religious awakening through repentance, and a refusal to fund the sorts of therapeutic programs that might promote moral development all point away from early views of penance as the primary objective of the penitentiary.

For some, the problem is metaphysical rather than strategic. Blackstone wrote in his eighteenth-century *Commentaries on the Laws of England* that law concerns fallible humans but repentance is a matter “left to the just determination of the Supreme Being.”¹⁹ As Leszek Kolakowski phrases it, “legal punishment is for transgressions of law, but sin is part of the moral order of the universe.” As such, “ideas of sin, of evil, of guilt, of repentance, are beyond the scope of the legal system; the law can function well without them.”²⁰ Given that contemporary secular apologies inherit much of their meanings from religious rituals and these practices do not always translate into the legal vernacular of the liberal state, we might interpret the many complexities regarding apologies in law as a sign that their logics stand beyond our mortal capacities. In all of these respects, the sorts of morally rich apologies that I describe in *I Was Wrong* seem antithetical to the very spirit of modern adversarial law. Legal battlegrounds hardly provide a natural habitat conducive to reconciliation through moral transformation.²¹

On the other hand, current legal trends point toward a rise in the prevalence of certain kinds of apologies in law. Building on findings in the social sciences,²² legal scholarship and legislation now reinforce the belief 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.²³ The U.S. Federal Sentencing Guidelines permit judges to reduce punishments by considerable amounts for defendants who “accept responsibility” for their crimes.²⁴ Expressions of remorse can be the difference between life and death in capital sentencing procedures.²⁵