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Invasions of Conscience and Faked Apologies

Stephanos Bibas¹

Jeffrie Murphy does an admirable job cautioning us against viewing remorse and apology as panaceas, cheap cures for crime victims' deep wounds. At the end of the day, though, he views the glass as half empty and I see it as half full. Though often remorse and apology will not work, they are worth the risks that Murphy notes.

Murphy suggests that the liberal state may not properly probe offenders' character or perhaps even motives. Of course political theorists have fought this battle for years, but I question whether government should be completely neutral among competing conceptions of the good, especially when it comes to crime. Hate, anger, and bigotry privately held may be matters of inviolable conscience. But when hateful men murder, angry mobs assault, or bigots burn and desecrate, they have already violated the Millian harm principle. They no longer deserve immunity from scrutiny. The state must teach them a lesson; the only question is what and how. Fostering remorse in apology for acts that have already violated others' rights depends on a suitably thin theory of the good that even a libertarian state could subscribe to it.

Another objection is that remorse and apology are irrelevant to certain justifications for punishment. Murphy's discussion of rehabilitation, or moral reform as I prefer to call it, assumes that reform takes place once the offender has already landed in prison. As the therapeutic-jurisprudence movement argues, however, even the way in which we try and convict criminals can itself have therapeutic or anti-therapeutic effects. A criminal justice system that rewards or fails to penalize false denials, for example, may harden offenders, while one that vigorously challenges denials may produce confessions. Admitting that one has a problem is one of the first steps toward overcoming it, as Alcoholics Anonymous and other twelve-step programs recognize.

Murphy's analysis of retributivism is particularly important, as he is a leading retributivist theorist. But here too, I think he undervalues remorse and apology. Victims care greatly about remorse and apology, which seem to lessen their grievance. Some victims may see apologies as vindicating them and humiliating wrongdoers; others take remorse and apologies as opportunities to release the weight of their anger and forgive. A classical Kantian would ignore the victim's desires and wishes, viewing punishment as entirely the state's prerogative, but this approach seems too bloodless and theoretical. After all, the victim is the real party in interest, the one most directly harmed whom the state seeks to vindicate and heal. The victim, then, ought to have at least a share and a say in the matter. (Granted, giving victims a say risks introducing

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inequality depending on whether particular victims are forgiving or hard-hearted, but that cost may be acceptable.) If the victim is satisfied, that is a strong argument for at least mitigating the offender's punishment. By expressing remorse and perhaps apologizing, the wrongdoer has at least begun to make amends and suture the wound caused by his crime.

Turning from theory to practice, Murphy is quite right to question the sincerity of many expressions of remorse and apology in the criminal justice system. Defendants know that faking remorse may reduce their sentences, and many are not above lying if it might serve their interests. Others genuinely mean to turn over a new leaf, but can easily backslide the next time temptation presents itself.

Nevertheless, at least some sentencing discounts are worth the risk. First, prosecutors, judges, and juries are no dummies. They know that defendants are tempted to lie and have keen noses for fakery. Second, though it is in their interests to lie, surprisingly many defendants are emotionally invested in denying guilt or minimizing blame. As a prosecutor, I saw countless defendants deny or admit guilt grudgingly, even though their lawyers had tried repeatedly to coach them into remorse and apology. These defendants will not express remorse and apologize until they are at least open to the possibility that they were wrong. Third, even an insincere apology has great value. It vindicates the victim, prevents the defendant from persisting in his denial, brings the episode to some form of closure, and may teach others and even the defendant a lesson. As the psychology of cognitive dissonance indicates, a defendant who at first professes something insincerely or half-heartedly may well come to internalize his admission of guilt.

In the end, Murphy's arguments are forceful, but so too are the arguments above. A risk-averse society will side with Murphy and not take chances on potentially dangerous criminals. But one that holds open hope of redemption will take chances, even though many convicts will take advantage of them and disappoint us. Our more humane impulses tug at our hearts to condemn crimes and punish criminals, but then stretch out our hands to forgive.