

Removing Insult from Injury: Apologies and Violence in Criminal Justice

As a Canadian, I have always felt that I had a pretty good intuitive grasp of apology. After all, Canada's reputation as a sorry nation of polite people continually apologizing to one another is not too far from reality. Yet however familiar we might be with the ubiquitous Canadian “sorry,” a quick glance at the scholarly literature on apologies suggests that, as Nick Smith insists, “Apologies are far more complex than they seem.”¹ According to Nicholas Tavuchis, saying sorry is not merely an element of our daily social repertoire, but is also a “secular rite of expiation” with its own kind of magic that gives it a transcendent potential in human affairs.² Yet we do not have to see the “thamauturgical aura of apology” that Tavuchis describes in order to see apologies as complex.³ Erving Goffman's sociological definition of apologies identified several elements to a full apology: expressed regret, repudiation of wrongdoing and the wrongdoing self, espousal of and commitment to right action, the performance of penance, and offering of restitution.⁴ This approach has been influential on later studies of apology, sparking a fondness amongst scholars of apology for multi-part definitions or long lists of necessary conditions for successful apologies. In Tavuchis's case, apologies are the middle term in a “moral syllogism” of call, apology, and forgiveness.⁵ That middle term in turn has at least two hearts: “the heart of apology consists of a genuine display of regret and sorrow” and “the heart of apology consists of a speech act that responds to a compelling call about something that can neither be forgotten nor forsaken.”⁶ Smith cites Kathleen Gill who follows Goffman and provides five necessary conditions (some of which have multiple parts) for apologizing.⁷ Smith himself eschews simplistic binary approaches to defining apologies, and instead offers the “categorical apology” as a regulative ideal to

1 Smith, *I Was Wrong*, 12.

2 Tavuchis, *Mea Culpa*, 7–8.

3 Tavuchis, 33.

4 quoted in Smith, *I Was Wrong*, 18–19.

5 Tavuchis, *Mea Culpa*, 20.

6 Tavuchis, 20, 34.

7 Smith, *I Was Wrong*, 19.

organize our thoughts about practices of apology.⁸ To do so, he traces the social meanings of practices of apology across no fewer than eleven “elements” or central forms of meaning (sometimes rising to thirteen).

Scholars of apology have no doubt done us all a great favour by illuminating the complicated and often contradictory ways we apologize and make sense of apologies. My concern in this paper is that, in attempting to do justice to the complexity of our various rituals and practices of apology, scholars have come to normatively overburden the *concept* of apology. Real rituals of expiation that involve apology are indeed staggeringly complex – as are most social practices. The practices often have multiple therapeutic and social aims, to which end they invoke a variety of normative concepts, such as apology, forgiveness, reparation, the policing of membership, and (re)affirmation of shared norms. Although related in practice, these other normative concepts should be analytically distinguished from the concept of an apology. Instead, they have found their way into definitions of full, complete, or true apologies. For example, Tavuchis makes a relation (in a moral syllogism) to forgiveness essential to the idea of apology.⁹ Goffman and his followers go further, building a variety of normative elements around admission of guilt, affirmation of norms, and a promise of restitution into the definition of a full or true apology. So specified, the normative expectation of apology is greatly magnified. This is what I have referred to as a normative overburdening. Essentially, apologies come to be asked to do normative work that we cannot reasonably hope for them to complete.

At the same time as scholars of apology ratchet up the complexity of their definitions, others forge ahead with overly simplistic working definitions. Smith accuses a good deal of empirical research of perpetuating deeply problematic definitions – including simply counting the number of utterances of “sorry” regardless of context.¹⁰ Others engage in apology boosterism, advocating a greater use of

8 Smith, 17.

9 Tavuchis, *Mea Culpa*, 20.

10 Smith, *Justice through Apologies*, 15.

apologies in criminal justice through mechanisms such as family group conferences.¹¹ At times, it seems to be a case of scholars who are all nuance on one hand, and practitioners allergic to nuance on the other. How are we to bridge this gap? For his aims, Nick Smith does an admirable job in turning his nuanced, exhaustive study of the meanings of apologies into fairly concrete recommendations: avoid court ordered apologies, but do reduce punishments for the truly penitent (categorically apologetic offenders).¹² This combination is possible in a project spanning two books, but not in a short conference paper. Here, I propose to bridge that gap by working with the simplest definitions of the core concept of apology to make some cautionary statements about the use of apologies in criminal justice.

As a first step in unburdening apologies, I propose to turn to ordinary language. Tavuchis began in a similar place, and approvingly cited Austin's contention that the distinctions made in ordinary speech, tested as they are by long usage, will outdo those of armchair theorists.¹³ This approach is not without its drawbacks – not least of which that, taken too seriously, it would put us all out of business – but still seems well suited for finding a simple definition of apologies that can speak to ordinary experience. The common meaning of apology in English underwent a curious reversal, from a formal defence against a charge (as in the Apology of Socrates) to the “modern” meaning of an acknowledgement of offence and expression of regret.¹⁴ I will focus on the latter meaning, given by the Oxford English Dictionary as, “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.”¹⁵ Even this definition has its complexities, particularly in the ambivalence between unintended (and thus partially excused) offence and the “frank acknowledgement” of intended but nevertheless regretted

11 Petrucci, “Apology in the Criminal Justice Setting.”

12 Smith, *Justice through Apologies*, 14.

13 Tavuchis, *Mea Culpa*, 15.

14 Murray, *The Compact Edition of the Oxford English Dictionary*, 98.

15 Murray.

offence. However, it focuses our attention on two crucial features that seem to form the core of a modern apology (i.e. an apology that is not an attempt to excuse). First, apologies are oriented toward *offence* that has been given, rather than to substantive or material harm that has been done. Second, because of this orientation, to acknowledgement of offence and the expression of regret are themselves offered by way of reparation (for the offence). In other words, an apology is offered in order to efface an insult. This ordinary language understanding is very close to the basic psychiatric definition quoted by Smith: “an acknowledgement of an offence and an expression of remorse.”¹⁶

While I do not claim that this is the “one true essence” of an apology, it does seem like a workable basic definition. In the Austinian sense, its workability is attested by its satisfactory use in language by ordinary people since the reversal of meanings in the 16th century. I would suggest that it has other clear virtues. As a definition, it seems to be both sensitive and specific. It is sensitive, in that most things we commonly take to be apologies fit the definition. This is less true of many of the multi-part typologies used to more fully specify true apologies. The implication of these is that much of what passes for apology in everyday interaction is not worthy of the name. That may be a valuable critical insight, but is more appropriately reached by analysis and normative argument than through a process of definition. Simultaneously, the ordinary language definition seems to retain a high degree of specificity, in that non-apologies are consistently excluded. Smith's examples of non-apologies, such as “I apology for your stupidity” and disingenuous acts of contrition would seem to be safely excluded by the requirement that the existence of offence is acknowledged and regret is expressed.¹⁷ This definition even seems to handle some of the trickiest boundary cases. Take, for example, the ubiquitous sign: “Out of order. We apologize for the inconvenience.” Is this an apology? I would contend that it is – or at least that it can be – a genuine apology. This is captured by the ordinary language definition: there is an implicit acknowledgement that the violation of a legitimate expectation of something functioning

¹⁶ Smith, *I Was Wrong*, 18.

¹⁷ Smith, 21.

constitutes a form of offence to your sensibilities, but that the offended parties can be partially mollified by having their inconvenience acknowledged and regret expressed. Other definitions, on the other hand, would exclude such cases for various reasons. There is no acknowledgement of wrongdoing, for instance, nor a promise that this will not happen again – two frequent specifications for “true” apologies. Similarly, the apology is not delivered personally, which is often a requirement of definitions that emphasize the affective dimensions of apology.¹⁸ While I remain open to arguments that this form of apology is insufficient, and am often myself unsatisfied by such signs (especially when misspelled), it seems intellectually unfair to say that they are tautologically not apologies. It also seems to fail to do justice to a common social practice.

Apologies, then, can be taken to have a robust but narrow normative core. To apologize is to acknowledge that another has been offended, and to express regret for that offence. What is the social purpose of such a practice? I argue that apologies are a form of grease for civil life: they reduce the friction caused by quotidian disagreements, and prevent little matters from causing lasting damage. Apologies are a form of social smoother that allow offences to be addressed in a way that reduces resentment and may repair relationships. In our existence as social creatures, we occasionally find ourselves in situations where offence has been given – or at the very least, offence has been taken. Offences, large and small, degrade relationships of friendship and trust. An apology is one mechanism available for limiting the damage. We can imagine apologies on a spectrum from least to most successful, with the worst apologies only exacerbating the offence, those in the middle managing to limit the damage, and the most successful fully repairing and even strengthening the damaged relationships. We have probably all had the experience of an automated voice apologizing that nobody can take our call right now, then repeating the apology every 35 seconds along with the obviously insincere affirmation that “your call is very important to us”. Such apologies merely add insult to

18 Tavuchis, *Mea Culpa*, 23.

inconvenience, and have certainly never helped my relationship with an organization. At the other end of the spectrum, imagine being stood up by a friend. At first, this might be very damaging to your relationship, as it makes you feel that they do not value your friendship. A sufficiently handsome apology might reverse that damage and draw you closer together by showing that they actually value the friendship *more* than you had previously thought.

So far, I have used relatively trivial everyday examples to illustrate my claims about apologies. My true subject, however, is substantially more serious: the use of apologies to address violence in criminal justice. Here too I wish to work with simple distinctions drawn from vernacular understandings of criminal justice processes. As Pettit has remarked, democracy do not seem to organize their practices of criminal justice according to any of the competing theories of justice, or even according to any coherent mixture of those theories. Criminal justice is in fact remarkably resistant to deliberative rationalization.¹⁹ Although there are compelling explanations of the political dynamics that make this the case, it nevertheless means that the best theories of criminal justice struggle to explain existing justice practices. If this is the case, we may do better to theorize directly from practices and the everyday understandings that underpin them. This will put us on firmer ground than working within theories that cannot explain what we do.

I suggest two simple distinctions that (I hope) resonate with common understandings of criminal justice. The first, drawn directly from the vernacular, is the distinction between insult and injury – as in the expression, “adding insult to injury.” I contend that injuries and insults are analytically distinct problems that successful criminal justice practices must address. The second distinction concerns the functions criminal justice systems are expected to perform within the broader political order. Here, I draw a little more on the tradition of political theory, but nevertheless work with relatively commonsense concepts. One major function of criminal justice is the enforcement of rules,

19 Pettit, “Is Criminal Justice Politically Feasible,” 427–28.

specifically of the laws of criminal justice. This function is political, not in the sense of politicized, but in as much as criminal justice institutions are embedded within the broader political enterprise of governing our common existence through the making and enforcing of authoritative rules. A second major function is the avoidance of conflict escalation: the justice system is partly in place to prevent feuds from breaking out and threatening order. This too is a political function, in as much as the provision of impartial judges to settle disputes is a function constitutive of political order.²⁰

Why insult and injury? This seems to me a prime example of the sort of robust, time-tested distinction Austin finds in ordinary language. The distinction between insult and injury is both analytically sound and enlightening, with the potential to clarify the appropriate role of apology in criminal justice. Although the phrase, “adding insult to injury” suggests that the insult and the injury are discrete actions, the distinction I wish to make is an analytic one. Injury and insult are two modes of wrong we can do to one another. When we wrong one another, it is possible to do a variety of kinds of material and nonmaterial harm: this constitutes injury. Thus, if we steal, we harm someone by depriving them of their property but we also harm their subjective sense of safety in enjoyment of that which is theirs. If we assault someone, we may cause both physical and psychological harm. Injury is a helpful catchall for this type of wrong, because it is agnostic between these various types of harms; all can be understood as injuries of a sort. Insult, on the other hand, is a different type of wrong. In all these cases, we not only harm the other, but we give a form of offence by treating them improperly. This kind of harm to interpersonal or social status is captured by the term insult. The precise nature of or status with regards to one another and the ways to properly respect that have shifted over time and remain the source of much contention. A broadly acceptable way of describing the problem in contemporary society, however, would be to say that harming others fails to respect them as equals. Part of the shock of being a victim of crime is that the perpetrator fails to consider that your interests

20 Locke, *Second Treatise of Government*, 66–68.

count; by setting you at nought they offend you and insult your status as a moral person.

The admixture of insult and injury in any given crime varies. The two could be relatively distinct: imagine a mugger stealing your wallet and referring to you with a racial slur. In other cases, insult and injury are merely different modalities of the same wrongful act. The insult could massively outweigh the injury, as in the case of hateful graffiti on a place of worship. Sure, cleaning off the graffiti is a pain, but the damage pales into insignificance when compared to the offensiveness of, for example, putting a swastika on a synagogue. Conversely, some crimes are sufficiently impersonal that it really is the damage rather than the offence that matters – take credit card fraud, for instance. In all these cases, however, I contend that it is the insult, rather than the injury, that constitute the offence that is the proper target of apology. Apology is constitutionally incapable of making restitution for the harms that constitute injury, but is a potential mechanism for effacing insults and repairing relations.

Recall the two features of apology highlighted by our working definition. First, apology addresses itself to an acknowledged offence. In the language of insult and injury, insult is the offence that is taken at the harm done. Second, apology offers *itself* – that is, the recognition of the offence and the expression of regret – as restitution. An apology alone cannot be restitution for the injury that was done: it will not replace lost property or heal your wounds. All an apology can be expected to do is heal wounded pride. That is, a properly offered apology *may* constitute an appropriate recompense for an insult. The offended party may feel that an apology is sufficient to mollify their offence and scrub out the resentment that they feel as a result of the injury they suffered. To some extent, this is conceptually independent of whether reparation is made for the injury itself. In practice, the effectiveness of an apology may be linked to reparation: some victims may only accept an apology if the injury is also repaired (or at least compensated for). But in other cases, apologies may be offered – and accepted – precisely in situations where reparation is impossible. The link, however, is a contingent, empirical one – not a necessarily, conceptual connection. Scholars of apology who try to make repair of harm a

component of the concept of apology contribute to unreasonable expectations of the role apology can play. If we are asking apology to fix injuries, we are setting ourselves up for disappointment.

Within a criminal justice system, then, apologies cannot realistically be expected to address injuries or directly repair their constituent harms. For now, I would like to set aside the question of what makes an apology successful (a question that is best dealt with by the more complicated typologies and sociological analyses). Instead, I would like to ask, what can we hope for a successful apology to accomplish? A reasonable expectation of apology would be that they may, as an additional element, efface the insult that accompanies those injuries and so prevent the harbouring of destructive resentments. Even this more modest goal, however, would constitute a powerful contribution to the purposes of criminal justice. From the perspective of the wider political order, a criminal justice system is expected to prevent individual harms and localized conflicts from escalating into feuds that threaten public order. The mechanism by which a feud can develop is through a cycle of insult and resentment: if an offence is not addressed, the injured party may have recourse to revenge. This creates a new injury, a new offence, and so an escalating or at least self-perpetuating cycle of tit-for-tat exchanges can emerge. Criminal justice systems prevent this by – at great expense – interposing the force of the state between the offending and offended parties. State punishment of the original offender is substituted for vengeance by the aggrieved party, backed by the threat of further punishment if vengeance is taken. Successful apologies offer another mechanism for foreclosing cycles of vengeance. If the offended party accepts an apology (either accompanying recompense for the injury or despite its absence), they give up their resentment. Even if the original harm cannot be fully repaired or forgotten, a successful apology ensures that it does not spawn further disruption of the social order. As Tavuchis formulates it, apologies are “the institutionalization of symbolic exchange as one means of precluding or containing socially disruptive conflicts.”²¹ Because apology is much less costly than state punishment, the

21 Tavuchis, *Mea Culpa*, 35.

substitution of apologies for punishment where possible should be appealing from the perspective of the state. It also seems to hold considerable appeal for advocates of criminal justice reform who are skeptical of the normative appropriateness of state punishment in the first place.

Apologies – even successful apologies – stand in a much more ambivalent relationship to the other political function of criminal justice systems. A core purpose of criminal justice is to give effect to the authoritative rules created by the political system to govern society. Although some of this is done by direct law enforcement, such as the presence of police officers to provide security at vulnerable locations or events, much is accomplished by the imposition of penalties for the violation of laws. At a basic level, rules are made effective by making the breaking of those rules sufficiently costly to induce compliance (at least from most people, most of the time). It is possible that apologies could support the enforcement of rules. Offering an apology, especially for a serious harm, can be painful and difficult for an offender. Thus, an institutionalized expectation of apology could constitute a deterrent to lawbreaking. If apologies are sufficiently difficult, that is to say, psychologically costly, they may substitute for a degree of punishment in making lawbreaking sufficiently costly to induce compliance. However, there is a real risk that making apologies available as a response to criminal violations will in fact reduce the cost of lawbreaking and undermine the enforcement of law by opening up an avenue for relative impunity. If an offender does not find it particularly difficult or painful to apologize, then the option makes crime sufficiently less costly (and therefore, more attractive). While it may be true that few criminals actually make any kind of cost-benefit analysis before committing crimes, it is precisely those who do so who would be mostly likely to abuse the availability of apologies.

Although there is already widespread concern that manipulative offenders might abuse the apology option, I am concerned that even with the genuinely repentant an overemphasis on apology could undermine the rule-enforcing purpose of criminal justice.²² Two broad classes of violent

22 Smith, *Justice through Apologies*, 15; Tavuchis, *Mea Culpa*, 20.

offenders raise particular issues: those who abuse intimate partners, and those who are violent while intoxicated. Julie Stubbs raises significant concerns about the appropriateness of apologies in dealing with domestic violence.²³ Outside of criminal justice, apologies often play a role in perpetuating vicious cycles of violence. After an episode of abuse, the abusive partner often expresses remorse and apologizes in order to convince the victim to remain in a relationship. A willingness to accept such apologies makes women more vulnerable to future abuse.²⁴ Cynical abusers may strategically manipulate apologies to these ends, or deploy apologies to minimize the abuse and close down discussion.²⁵ Yet even if abusers are, in their calmer moments, genuinely remorseful and horrified by what they have done, the giving and receiving of apologies minimizes the abuse and prolongs circumstances that increase the likelihood of repetition. To interrupt the cycle of abuse, separation is necessary – and separation often requires outside intervention to protect the abused. If instead of providing that protection and enforcing rules preventing violence, the criminal justice system presents apologies as a remedy, it can become complicit in abuse. Restorative justice proceedings involving apologies do sometimes put pressure on victims both to participate and forgive. Some advocates even argue that victims have a responsibility to accept apologies and even to express a willingness to forgive.²⁶ This is a case of overconfidence in the power a normatively overburdened concept of apology pushing the justice system into complicity with the violent abuse of vulnerable people.

A great deal of violent crime is associated with substance abuse. Many offenders only offend while intoxicated by alcohol or other drugs. Such cases pose a particular difficulty for apologies: how do you treat the sober regret of someone who is only violent while drunk? In many – perhaps most – cases, sober individuals are horrified by their behaviour while under the influence of substances. Their regret may be fully sincere, and their apologies may go beyond the minimal working definition of this paper

23 Stubbs, “Beyond Apology?”

24 Stubbs, 177.

25 Stubbs, 174, 177.

26 Hudson and Galaway, cited in Stubbs, 175.

to satisfy more extensive Goffmanesque criteria. Yet for all the sincerity of the apologies and the best intentions of the offender, they may to be able to beat their addiction. Thus, they can be trapped in a cycle in which they continue to abuse substances and continue to be violent. In some ways, such cases pose deep questions of the continuity of identity: what responsibility does Dr. Jekyll bear for the actions of Mr. Hyde? What is the normative appropriateness of apology for actions we do not fully control? On a pragmatic level, however, it simply suggests again that apologies are unlikely to effectively interrupt such cycles of violence. Some kind of outside intervention – in this case, likely a therapeutic one – is called for.

In many ways, violence is a special case when considering the appropriateness of apology. Some authors' analyses would suggest that violence is in fact a prime candidate for apology. Although he argues that some violations are so severe that no apology is possible, the general core of apology for Tavuchis is seeking “forgiveness and redemption for what is unreasonable, unjustified, undeserving, and inequitable.”²⁷ This is violence: the paradigmatic violation of another for which there is no excuse or justification. Unjustified, inexcusable violence regrettably remains a part of human interaction, after which we must find a way to live with one another. This seems to underline more than anything else the need for what he calls “perhaps, the ultimate humane gesture: redemption without reason.”²⁸ Such a response, however, is far too ethically demanding to be practicable with the crooked timber of humanity. Instead, we have designed political institutions, including the institutions of criminal justice, to manage such conflicts. In large-scale modern societies, it is often the case that we do not have to live with one another after violence, but can instead be effectively separated. Rather than invoking the “thaumaturgical aura” of apology, we use the strange alchemy of criminal law to turn the most personal of offences – violence by one person against another – into an offence not primarily against the victim, but instead against the state as a whole. This has the effect of taking shifting the focus from the

²⁷ Tavuchis, *Mea Culpa*, 17.

²⁸ Tavuchis, 20.

individual conflict – the individual insult and injury caused by the violence – to the damage to shared norms of nonviolence that underpin public safety. This approach to violence renders an apology of significantly reduced relevance. If an apology appropriately addresses only the insult to the status of the victim, it fails to reach even their injury, let alone the violation of shared norms and the threat to public order. To that extent, the construction of violence as a crime against the state puts it into the general category of things for which no apology is possible. Just as the interposition of the state precludes a cycle of vengeance regardless of the resentment felt by the victim, an offering and acceptance of apology between the offender and the offended does not obviate the necessity of the state reimposing public order through the enforcement of law.

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