

# Say You're Sorry: Court-Ordered Apologies as a Civil Rights Remedy

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# SAY YOU'RE SORRY: COURT-ORDERED APOLOGIES AS A CIVIL RIGHTS REMEDY

Brent T. White †

*This Article proposes that civil rights plaintiffs pursuing cases against governmental defendants should be entitled to receive court-ordered apologies as an equitable remedy. Part I discusses the importance of apology in American society and concludes that apology is culturally embedded as an essential component of everyday dispute resolution. Part II provides a brief overview of current legal scholarship in the area of apology, including the lack of such scholarship related to court-ordered apologies as a civil remedy. Part III argues that traditional forms of compensation fail to provide adequate relief to civil rights victims because they neglect psychological, emotional, and symbolic injuries. It proposes court-ordered apologies as an effective means of healing psychological wounds, reinforcing norms, restoring social equilibrium, promoting social change, and compelling governmental reform. Part IV anticipates and responds to likely objections to court-ordered apologies, including the misguided notion that public apologies must be sincere to be effective. Finally, Part V provides some guidance in the art of compelled apology.*

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## INTRODUCTION

Many civil rights plaintiffs want apologies. Few ever get them. Civil rights defendants are notoriously reluctant to offer apologies,<sup>1</sup> and in contrast to some other countries, the U.S. civil legal system does not provide a mechanism to force recalcitrant defendants to accept responsibility by apologizing.<sup>2</sup> Civil rights plaintiffs are thus, as a rule, left to do without apologies, whether they settle their cases or

<sup>1</sup> See, e.g., NICHOLAS TAVUCHIS, *MEA CULPA: A SOCIOLOGY OF APOLOGY AND RECONCILIATION* 90–98 (1991) (discussing the general reluctance of collectivities to apologize); Jeremiah Marquez, *Apology in L.A. Shooting Rare from Police, SAVE OUR CIVIL LIBERTIES*, May 31, 2005, available at <http://www.saveourcivilliberties.org/en/2005/05/1152.shtml> (describing a police apology as “a rare instance of officers defying a common police taboo against ‘mea culpas’”); WPRI-12 Eyewitness News, *Court Ruling on Narragansett Smokeshop Raid* (Fox television broadcast, May 12, 2005) (discussing Rhode Island’s refusal to apologize after a federal appeals court found that the state violated the sovereignty of the Narragansett tribe).

<sup>2</sup> See Jennifer K. Robbenolt et al., *Symbolism and Incommensurability in Civil Sanctions: Decision Makers as Goal Managers*, 68 BROOK. L. REV. 1121, 1147 n.114 (2003) (noting that court-ordered apologies are not available as a civil remedy in the United States). Countries in which court-ordered apologies are a civil legal remedy include at least China, Japan, Indonesia, Ukraine, Korea, and the Czech Republic. Information on other countries is not readily available. Much has been written on the availability of apology as a legal remedy in Japan, however. See Max Bolstad, *Learning from Japan: The Case for Increased Use of Apology in Mediation*, 48 CLEV. ST. L. REV. 545 (2000); John O. Haley, Comment, *The Implications of Apology*, 20 LAW & SOC’Y REV. 499, 500 (1986); Hiroshi Wagatsuma & Arthur Rosett, *The Implications of Apology: Law and Culture in Japan and the United States*, 20 LAW & SOC’Y REV. 461, 488–92 (1986); see also Dai-Kwon Choi, *Freedom of Conscience and the Court-Ordered Apology for Defamatory Remarks*, 8 CARDOZO J. INT’L & COMP. L. 205 (2000) (discussing apology in Korea); Brent T. Yonehara, *Enter the Dragon: China’s WTO Accession, Film Piracy and Prospects for Enforcement of Copyright Laws*, 12 DEPAUL-LCA J. ART & ENT. L. & POL’Y 63, 83–85 (2002) (noting that apology is a remedy for copyright infringement in China); *Court to Hear Civil Action Against “AWSJ,”* JAKARTA POST, May 18, 2005, at 4 (reporting a civil suit by an American lobbyist who sought \$50 million in damages and a formal apology in an Indonesian court, alleging that an article falsely accused him of bribery); *Yanukovych Ordered to Apologize to Veteran, Pay Fine*, INTERFAX, May 19, 2005, available at [http://www.interfax.ru/e/B/0/28.html?id\\_issue=11293945](http://www.interfax.ru/e/B/0/28.html?id_issue=11293945) (reporting that a Kiev court ordered former Ukrainian prime minister Viktor Yanukovych to apologize publicly to a man whom he had insulted by using an obscenity).

litigate to the end. As a result, many plaintiffs are disillusioned by the process of litigation, irrespective of whether they receive significant monetary or injunctive relief. These plaintiffs aren't disillusioned because they have unreasonable expectations of the legal process; they are disappointed because they haven't been fully compensated.

Consider a typical example: In 2003, the City and County of Honolulu sponsored a Family Day Parade with the Hawaii Christian Coalition.<sup>3</sup> Flyers and advertisements on the City's Web site announced: "Everyone is welcome to join this parade!"<sup>4</sup> Parents and Friends of Lesbians and Gays of Hawaii (PFLAG) requested an application from the City. Almost immediately, the phrase "Everyone is welcome to join this parade!" disappeared from the City Web site, and a week before the parade, PFLAG received a terse letter indicating that its application to join the parade had been denied.<sup>5</sup> Apparently, "everyone" did not include lesbian and gay families.

PFLAG filed suit alleging that the City had excluded it from the parade on the basis of its viewpoint and identity.<sup>6</sup> After first declaring that the "lawsuit ha[d] no merit,"<sup>7</sup> the City ultimately agreed to a series of significant policy and procedural changes designed to prevent it from excluding unpopular individuals or groups from future events.<sup>8</sup> It also agreed to post a diversity statement on its Web site stating that the City "respects all of its residents and welcomes all of its visitors regardless of race, color, sex, marital status, religion, national origin, ancestry, age, disability, gender identification, or sexual orien-

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<sup>3</sup> See, e.g., Debra Barayuga, *City Sued over Family Day Event*, HONOLULU STAR-BULL., July 15, 2003, available at <http://starbulletin.com/2003/07/15/news/story5.html>.

<sup>4</sup> See Plaintiff's Complaint for Injunctive Relief at ¶ 57, PFLAG v. City and County of Honolulu (No. \_\_\_\_ ) (settled) (on file with author).

<sup>5</sup> See *id.* at ¶¶ 73, 79.

<sup>6</sup> PFLAG was represented by the American Civil Liberties Union of Hawaii, of which I was Legal Director at the time. While I have provided sources whenever possible, some representations made in regard to facts surrounding this case are based on personal knowledge and experience. For news accounts of this case, see *Gay Groups Denied Participation in Honolulu Parade*, ADVOCATE, June 28, 2003, available at [http://www.advocate.com/news\\_detail\\_ektid10006.asp](http://www.advocate.com/news_detail_ektid10006.asp); Craig Gima, *ACLU Files Suit over City Parade*, HONOLULU STAR-BULL., June 23, 2003, at A1 [hereinafter Gima, *ACLU Files Suit*]; Craig Gima, *Judge Signals Support for Gays in Kids' Parade*, HONOLULU STAR-BULL., July 2, 2003, at A1; Curtis Lum, *Ruling Expected on Gays in Parade*, HONOLULU ADVERTISER, July 2, 2003, at B1; Mary Kaye Ritz, *ACLU Sues City in Parade Rejection*, HONOLULU ADVERTISER, June 28, 2003, at B1.

<sup>7</sup> See Gima, *ACLU Files Suit*, *supra* note 6 (quoting City of Honolulu spokesperson Carol Costa).

<sup>8</sup> See Mary Adamski, *ACLU Deal Separates Church from July 3 Park Festivities*, HONOLULU STAR-BULL., June 23, 2004, at A3; David Waite, *City to Open Parades to All*, HONOLULU ADVERTISER, June 24, 2004, at B1.

tation.”<sup>9</sup> And it paid almost \$85,000 in plaintiff’s attorney’s fees.<sup>10</sup> From the standpoint of settlement, this was a significant victory.

The settlement was incomplete, however, because what members of PFLAG most wanted was for the City to apologize publicly and to acknowledge that it had wrongly excluded gay and lesbian families from the parade. Members of PFLAG felt strongly that a public apology was the only way to vindicate their rights and send a clear message that discrimination against homosexuals is wrong. Unfortunately, the City steadfastly refused to apologize. And because victory at trial would not have forced the City to apologize at any rate, PFLAG decided to settle.<sup>11</sup> True to form, the City’s attorney broadcast to the media that “the settlement does not include a statement of wrongdoing by the city nor an apology.”<sup>12</sup>

Afterward, PFLAG was left to spin the settlement as a significant victory for gay rights despite the City’s refusal to apologize.<sup>13</sup> PFLAG’s spin may have been somewhat persuasive given that the City agreed to pay substantial attorney’s fees and post a diversity statement. But the public message wasn’t nearly as powerful or unequivocal as it would have been had the City been forced to apologize. Worse, members of

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<sup>9</sup> Waite, *supra* note 8.

<sup>10</sup> See *id.* As background, PFLAG originally moved for a temporary restraining order to prevent the City from excluding it from the parade. See David Waite, *Parade Dispute Could Lead to City Guidelines*, HONOLULU ADVERTISER, July 9, 2005 [hereinafter Waite, *Parade Dispute*]. Despite the fact that City employees had planned the parade, the City responded by stating that it was not actually sponsoring the parade and was merely providing logistical support to the Hawaii Christian Coalition. See *id.* Simultaneously, the Hawaii Christian Coalition threatened in the press to cancel the parade and leave thousands of children disappointed if the judge ordered that it allow PFLAG to join. See Craig Gima, *Ruling Set for Tomorrow in Suit over ‘Family Day’ Parade Access*, HONOLULU STAR-BULL., July 2, 2003, available at <http://starbulletin.com/2003/07/02/news/story8.html>; Lum, *supra* note 6. The judge blinked, denied PFLAG’s motion, and the lesbian and gay families of Honolulu were confined to protest from the sidelines. See Editorial, *City Doubletalk Wins in Court Case on Family Parade*, HONOLULU STAR-BULL., July 5, 2003, at A11; Craig Gima, *Judge Says Parade Can Exclude Gay Groups*, HONOLULU STAR-BULL., July 4, 2003, at A1; David Waite, *Ruling Supports Parade Organizers*, HONOLULU ADVERTISER, July 4, 2003, at B3. When the case did not go away following the parade, the judge encouraged the City to settle amid mounting evidence that the City funded and organized the parade. See Waite, *Parade Dispute*, *supra* note 10.

<sup>11</sup> While PFLAG could have gone to trial and sought nominal damages and a declaratory judgment, it would not have received injunctive relief, as the parade had already passed. Moreover, as will be discussed in greater detail, nominal damages and declaratory judgments lack the expressive value of an apology. See *infra* notes 101–03, 131 and accompanying text.

<sup>12</sup> Waite, *supra* note 8.

<sup>13</sup> The spin was as follows: “This global settlement reaffirms basic constitutional principles—the government cannot censor speech or exclude people from public events simply because officials do not agree with the participants’ sexual orientation, gender identity or their message.” See Press Release, ACLU, In Historic Court Victory for ACLU, Honolulu Agrees to Create New Rules Affirming Religious Neutrality and Free Speech (June 23, 2004), available at <http://www.actu.org/religion/frb/16355prs20040623.html>.

PFLAG were left with the bitter taste of never hearing the City acknowledge its wrongdoing.

This Article proposes that civil rights plaintiffs in lawsuits against government defendants should be entitled to pursue court-ordered apologies as an equitable remedy.<sup>14</sup> By way of introduction, Part I discusses the importance of apology in American culture and concludes that apology is culturally embedded as an essential component of everyday dispute resolution. Part II provides an overview of current legal scholarship in the area of apology, including the lack of scholarship related to court-ordered apologies as a civil remedy. Part III, the heart of the Article, argues that traditional forms of compensation fail to provide adequate relief to civil rights victims because they do not address emotional and symbolic injuries. Part III also proposes court-ordered apologies as a means of healing psychological wounds, reinforcing norms, restoring social equilibriums, confirming the justice of plaintiffs' causes, and compelling governmental reform. Part IV anticipates and responds to likely objections to court-ordered apologies as a civil rights remedy, including the misguided notion that public apologies must be completely sincere to be effective. Finally, Part V provides some guidance in the art of compelled apology.

## I

### THE IMPORTANCE OF APOLOGY IN AMERICAN CULTURE

It sometimes seems that every time one picks up a newspaper or turns on the television, some person, group, corporation, or official is offering, demanding, or rejecting an apology. A single Google search on a random day in June 2005 for news articles containing the word "apology" returned over 11,200 articles, with over 220 news stories for that day alone. Stories ranged from the trivial—CBS apologizing to viewers for interrupting its popular crime drama *CSI: New York* for a news announcement of Yasser Arafat's death<sup>15</sup>—to the disturbing—five South Boston high school hockey players receiving probation after they apologized for raping a fifteen-year-old girl.<sup>16</sup> Other stories included Wachovia Bank apologizing for its pre-Civil War links to slav-

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<sup>14</sup> Because of First Amendment concerns with compelling non-governmental actors to apologize, *see infra* Part IV.C, this article does not propose court-ordered apologies as a general civil remedy but rather as a limited remedy against the *government* in civil rights cases. The term "civil rights cases" refers to litigation claiming violations of constitutional rights and brought under any of the panoply of state and federal civil rights statutes.

<sup>15</sup> See Lisa de Moraes, "CSI" Interruption: The Producer Did It!, WASH. POST, Nov. 12, 2004, available at <http://www.washingtonpost.com/wp-dyn/articles/A44123-2004Nov11.hunl>. The apology read: "An overly aggressive CBS News producer jumped the gun with a report that should have been offered to local stations for their late news. We sincerely regret the error." *Id.*

<sup>16</sup> See L.E. Campenella, *Academy Sex Case a Teaching Moment*, PATRIOT LEDGER, June 2, 2005, at 1.

ery,<sup>17</sup> the White House refusing to apologize for U.S. soldiers who allegedly mishandled the Koran at Guantanamo Bay,<sup>18</sup> a Roman Catholic Bishop offering yet another “profound apology” to sexual abuse victims,<sup>19</sup> and two New Jersey disc jockeys apologizing for insulting Asian Americans on air.<sup>20</sup> These and the thousands of other such stories suggest that public apologies are ubiquitous in American culture.<sup>21</sup>

<sup>17</sup> See *Slave Report Prompts Wachovia Contribution*, ABC NEWS, June 3, 2005, available at <http://abcnews.go.com/Business/wireStory?id=817603>.

<sup>18</sup> See *Afghan Clerics Demand U.S. Apology for Alleged Quran Abuse*, USA TODAY, June 14, 2005, available at [http://www.usatoday.com/news/world/2005-06-14-clerics-koran\\_x.htm](http://www.usatoday.com/news/world/2005-06-14-clerics-koran_x.htm).

<sup>19</sup> *Kentucky Catholic Diocese Offers Abuse Settlement*, REUTERS, June 3, 2005, available at [http://www.boston.com/news/nation/articles/2005/06/03/kentucky\\_catholic\\_diocese\\_offers\\_abuse\\_settlement/](http://www.boston.com/news/nation/articles/2005/06/03/kentucky_catholic_diocese_offers_abuse_settlement/).

<sup>20</sup> See Emil Guillermo, *The Politics of Apology*, ASIAN WEEK, June 2, 2005, at 5.

<sup>21</sup> This ubiquity extends to popular television shows, where apologies are common fodder for plot lines. For example, an ongoing plot line on the sitcom *Friends* was Ross's refusal to apologize sincerely to Rachel for sleeping with another woman when they were “on a break.” See *Friends: The One with the Morning After* (NBC television broadcast Feb. 20, 1997); *Friends: The One with the Jellyfish* (NBC television broadcast Sept. 25, 1997). *Seinfeld* devoted an episode to George's frustration over not receiving an apology from a friend going through the “making amends” part of a twelve-step program. See *Seinfeld: The Apology* (NBC television broadcast Dec. 11, 1997). The television drama *ER* has dedicated several shows to the issue of apology and medical malpractice. See *ER: Where the Heart Is* (NBC television broadcast May 10, 2001); *ER: Forgive and Forget* (NBC television broadcast Feb. 26, 2004). Apologies are also prevalent in popular music: Elton John's 1976 hit *Sorry Seems to Be the Hardest Word* spent fourteen weeks on the U.S. *Billboard* Top 40 chart, peaking at number six. See Paul MacLauchlan, *Charting the Rocket Man: 30 Years of Elton John on the Pop Charts*, [http://www.vex.net/~paulmac/elton/ej\\_chart.html](http://www.vex.net/~paulmac/elton/ej_chart.html) (last visited Apr. 21, 2006). Other artists have produced popular songs about apology. See, e.g., Howie Day with *Sorry So Sorry*, on MADRIGALS (Sony 2003), Eminem with *Cleanin' Out My Closet*, on EMINEM SHOW (Interscope Records 2002), Connie Francis with *Who's Sorry Now?* (MGM 1958), R. Kelly with *Apologies of a Thug*, on CHOCOLATE FACTORY (Bonus CD) (Jive 2003), S Club 8 with *Don't Tell Me You're Sorry*, on DON'T TELL ME YOU'RE SORRY (Universal 2003), Ruben Studdard of *American Idol* fame with *Sorry 2004*, on SOULFUL (J-records 2003), and UB40 with *Sorry*, on PROMISES AND LIES (Virgin Records 1993). Apologies strike at the heart of human experience. Indeed, if news reports are an indication, the importance of apology transcends culture. See *Bofors: BJP Ridicules Cong Demand for Apology*, OUTLOOKINDIA.COM, June 2, 2005, [http://www.outlookindia.com/pti\\_news.asp?id=301974](http://www.outlookindia.com/pti_news.asp?id=301974) (reporting the Indian Bharatiya Janata Party's ridiculing of a rival party's demand for an apology from persons making allegations about former Indian Prime Minister Rajiv Gandhi); *De Lille Deserves Apology*, *Says ID Whip*, INDEP. ONLINE, June 2, 2005, [http://www.int.iol.co.za/index.php?set\\_id=1&click\\_id=15&art\\_id=qw1117715041427B223](http://www.int.iol.co.za/index.php?set_id=1&click_id=15&art_id=qw1117715041427B223) (reporting a South African politician's demands for an apology after she received death threats for raising concerns about an arms deal); *Gout to Be Forced to Seek Apology for Incidents on DU Campus*, BANGL. OBSERVER, June 4, 2005, available at <http://www.bangladeshobserveronline.com/new/2005/06/04/front.htm> (reporting a Bangladeshi politician's call for a public apology for the government's alleged involvement in killings on the campus of Dhaka University); *Henin-Hardenne Cruises to French Title*, TSN.CA, June 4, 2005, available at [http://www.tsn.ca/tennis/french\\_open/news\\_story.asp?ID=126950&hubName=tennis-french\\_open](http://www.tsn.ca/tennis/french_open/news_story.asp?ID=126950&hubName=tennis-french_open) (reporting Mary Pierce's apology to the French people for losing the 2005 French Open); *Lapid Demands Apology for Philippine Ambassador's Nazi Remarks*, HAARETZ, June 4, 2005, available at <http://www.haaretz.com/hasen/objects/pages/PrintArticleEn.jhtml?itemNo=584243> (reporting former Israeli Justice Minister Joseph Lapid's call for a public apology from the Philippine ambassador to Israel

The permutations of public apologies are many: Nations apologize to nations, groups to groups, individuals to collectives, collectives to individuals, and occasionally governments to their people.<sup>22</sup> Public apologies are played out on an open stage rather than, as in the case of private apologies, behind the curtains of intimate relationships.<sup>23</sup> As will be explored below, the rules of public apologies differ profoundly from those of their private counterparts.<sup>24</sup> But public apologies are no less powerful as a means of healing relationships. They also convey important social messages and teach valuable public lessons that private apologies cannot.

In his recent book *On Apology*, psychiatrist Aaron Lazare suggests that due to a growing understanding of their benefits, the incidence of public apologies has exploded in the last fifteen years.<sup>25</sup> As evidence, he identifies a spate of public apologies, including Congress's apologies to Japanese Americans interned during World War II, President Clinton's apology to African American victims of the Tuskegee experiments, Senator Trent Lott's "serial apologies" for comments supportive of segregation, counterterrorism chief Richard Clarke's apology for his role in failing to prevent 9/11, and growing calls for an official apology for slavery.<sup>26</sup> One could add to this list the Senate's recent historic apology to African Americans for not acting sooner to criminalize lynching.<sup>27</sup> Citing a similar string of public

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after he compared Israel's immigration police to the Nazis); Morgan Lee, *Mexican Official Issues Apology*, BOSTON GLOBE, May 18, 2005, at A13 (reporting Mexican government officials public apology following President Vicente Fox's statement that Mexican immigrants take jobs "not even" African Americans want); *North Korea Demands U.S. Apology*, CNN.COM, June 2, 2005, <http://www.cnn.com/2005/US/06/02/northkorea.cheney> (reporting North Korea's demand for an apology after Vice President Dick Cheney referred to North Korean leader Kim Jong Il as "one of the world's most irresponsible leaders").

<sup>22</sup> See AARON LAZARE, *ON APOLOGY* 4-5, 7-15, 39 (2004) (discussing the growing importance of public and private apologies in American culture).

<sup>23</sup> See TAVUCHIS, *supra* note 1, at 70-71. Private apologies are interpersonal apologies between individuals; the kind of apologies with which most of us are most familiar. These apologies include run-of-the-mill apologies for things like being late and more consequential apologies such as being sorry for barsh words that damaged a personal relationship. We know of the power, difficulty, and healing potential of such apologies from our own lived experience. Most of us have fought with a loved one over who owes whom an apology. We have felt the reparative effects of a sincere apology either given or received, and the sting of another's refusal to offer an apology that we felt we deserved. And we have refused to give apologies demanded, either because we felt we had done nothing wrong or because we were reluctant to admit our fault. While we may intuitively understand that apologies are called for when we hurt or inconvenience another, we also know firsthand that apologies can be painful to deliver, regardless of how wonderful they are to receive.

<sup>24</sup> See *infra* Part IV.A.

<sup>25</sup> LAZARE, *supra* note 22, at 1-21, 251.

<sup>26</sup> *Id.* at 4-5, 51, 254.

<sup>27</sup> See Avis Thomas-Lester, *A Senate Apology for History on Lynching*, WASH. POST, June 14, 2005, at A12 (reporting that by apologizing "the senators in essence admitted that their predecessors' failure to act [to pass an anti-lynching law] had helped perpetuate a horror that took the lives of more than 4,700 people from 1882 to 1968, most of them black men,"



apologies, Roy Brooks, editor of *When Sorry Isn't Enough: The Controversy over Apologies and Reparations for Human Injustice*, has argued that we have entered an "Age of Apology."<sup>28</sup> Whether or not Lazare and Brooks are correct that public apologies are on the rise in the United States, or whether they have always been as prevalent, public apologies undoubtedly occupy a central role in resolving disputes in modern American culture.

## II

### RECOGNITION OF THE IMPORTANCE OF APOLOGY IN THE LAW

The importance of apology has not been lost on legal scholars. In the last ten years, an increasing number of scholars have discussed the merits of incorporating apology into the criminal legal system.<sup>29</sup> A number of "shaming" advocates have advanced forced apologies as a cost-effective means of deterring crime, exacting retribution, and reinforcing social norms.<sup>30</sup> Other scholars have lauded the restorative benefits of apology in healing psychic wounds.<sup>31</sup> These proponents of restorative justice have argued that the criminal process should be restructured to foster more opportunities for victims and offenders to meet face-to-face, with the ultimate goal of encouraging genuine remorse and forgiveness.<sup>32</sup>

Meanwhile, some judges have taken to the idea of coerced apology in criminal proceedings with gusto, using apology mostly as a shaming mechanism.<sup>33</sup> Reports abound in the media of judges re-

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but noting that the apology resolution was signed by only eighty of the one hundred Senators, and that "[m]issing from that list were senators from the state that reported the most lynching incidents: Mississippi Republicans Trent Lott and Thad Cochran").

<sup>28</sup> Roy L. Brooks, *The Age of Apology*, in *WHEN SORRY ISN'T ENOUGH: THE CONTROVERSY OVER APOLOGIES AND REPARATIONS FOR HUMAN INJUSTICE* 3 (Roy L. Brooks ed., 1999).

<sup>29</sup> See Jayne W. Barnard, *Reintegrative Shaming in Corporate Sentencing*, 72 S. CAL. L. REV. 959 (1999); Stephanos Bibas & Richard A. Bierschbach, *Integrating Remorse and Apology into Criminal Procedure*, 114 YALE L.J. 85 (2004); Stephen P. Garvey, *Can Shaming Punishments Educate?*, 65 U. CHI. L. REV. 733 (1998); Dan M. Kahan & Eric A. Posner, *Shaming White-Collar Criminals: A Proposal for Reform of the Federal Sentencing Guidelines*, 42 J.L. & ECON. 365 (1999); Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591 (1996); Toni M. Massaro, *Shame, Culture, and American Criminal Law*, 89 MICH. L. REV. 1880 (1991); David A. Skeel, Jr., *Shaming in Corporate Law*, 149 U. PA. L. REV. 1811 (2001); James Q. Whitman, *What Is Wrong with Inflicting Shame Sanctions?*, 107 YALE L.J. 1055 (1997).

<sup>30</sup> See Kahan & Posner, *supra* note 29, at 367-68; Kahan, *supra* note 29, at 593; Skeel, *supra* note 29, at 1814-17.

<sup>31</sup> See, e.g., Bibas & Bierschbach, *supra* note 29.

<sup>32</sup> See *id.* at 130-34 (noting that victim-offender mediation programs "seem to leave both victims and offenders more satisfied and better off").

<sup>33</sup> See generally Elizabeth Latif, Note, *Apologetic Justice: Evaluating Apologies Tailored Toward Legal Solutions*, 81 B.U. L. REV. 289, 296-98 (2001) (describing several such reports including one about an Ohio judge who ordered three men to publicly apologize for disorderly conduct during Oktoberfest celebrations and a Texas judge who ordered a teenager to apologize to students for vandalizing their schools).

quiring defendants to apologize as a condition of receiving probation rather than incarceration.<sup>34</sup> Examples range from judges ordering drunk drivers to take out newspaper ads with an apology to the community,<sup>35</sup> to requiring batterers to apologize to their spouses before women's groups,<sup>36</sup> to ordering corporate polluters to write letters of apology for their environmental crimes and pay for newspaper advertisements detailing their conduct.<sup>37</sup> When defendants refuse to cooperate in such coerced expressions of remorse they risk the wrath of the court. For example, a federal judge in Hawaii recently sent a former city council-member back to prison, rather than to a halfway house, after the former city council-member refused to apologize to the community for misusing taxpayer funds.<sup>38</sup> And a court in New Hampshire recently ordered a man to undergo "empathy training" after he failed to apologize as a condition of probation.<sup>39</sup> Similarly, under the Federal Sentencing Guidelines, defendants who refuse to apologize routinely serve sentences that are up to 35% longer than those who do.<sup>40</sup>

Feeding on the growing prevalence of apology in criminal legal scholarship and practice, scholars also have begun in the last several years to advocate changes in the civil system to encourage apologies.<sup>41</sup> Several scholars point out that plaintiffs often want an apology above all else, and only file a civil lawsuit when this desire is thwarted.<sup>42</sup> These scholars argue that because the law treats apologies as admissions of guilt, it inadvertently discourages apologies and encourages

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<sup>34</sup> See, e.g., *id.*

<sup>35</sup> See Daniel W. Shuman, *The Role of Apology in Tort Law*, 83 JUDICATURE 180, 187 (2000).

<sup>36</sup> See, e.g., Haya El Nasser, *Paying for Crime with Shame: Judges Say "Scarlet Letter" Angle Works*, USA TODAY, June 25, 1996, at A1; see also Thomas M. Antkowiak, Note, *Truth as Right and Remedy in International Human Rights Experience*, 23 MICH. J. INT'L L. 977, 1009-12 (2002) (noting several instances of judge-ordered apology in the context of a discussion of the benefits of systematically incorporating restorative principles in the U.S. criminal justice system).

<sup>37</sup> See Kahan & Posner, *supra* note 29, at 367 (citing Richard Phillips, *Shame as a Deterrent*, CHI. TRIB., July 27, 1988, at C20).

<sup>38</sup> See KITV News, *The Hawaii Channel* (ABC television broadcast May 16, 2005).

<sup>39</sup> Alan J. Keays, *Court: Man Must Work on Empathy Issues*, RUTLAND HERALD, May 17, 2005, at B1.

<sup>40</sup> See Bibas & Bierschbach, *supra* note 29, at 93 n.19 (citing U.S. SENTENCING GUIDELINES MANUAL § 3E1.1, cmt. n.3 (2003) (authorizing judges to consider defendants' acceptance of responsibility when determining sentences); see also *United States v. Fagan*, 162 F.3d 1280, 1284 (10th Cir. 1998) ("The commentary to Section 3E1.1 of the Sentencing Guidelines also indicates the Commission intended remorse to be a component of acceptance of responsibility."); *United States v. Hammick*, 36 F.3d 594, 600 (7th Cir. 1994).

<sup>41</sup> See Lee Taft, *Apology Subverted: The Commodification of Apology*, 109 YALE L.J. 1135 (2000) (discussing the benefits of apology in the context of civil mediation); Deborah L. Levi, Note, *The Role of Apology in Mediation*, 72 N.Y.U. L. REV. 1165 (1997) (arguing for an increased role for apology in dispute resolution).

<sup>42</sup> See, e.g., Shuman, *supra* note 35, at 180.

litigation.<sup>43</sup> They therefore propose rewriting the rules of evidence to exclude certain apologetic statements.<sup>44</sup> While some scholars criticize such proposals as subverting apology,<sup>45</sup> a number of states nevertheless have passed laws that exclude expressions of sympathy from evidence.<sup>46</sup> Other scholars argue that because plaintiffs often value expressions of remorse more than monetary compensation, defendants should apologize as a cost-effective means of avoiding litigation, promoting settlement, and mitigating damages.<sup>47</sup> Still other scholars encourage mediation to facilitate apologetic discourse and forgiveness in civil cases in much the same way those in the restorative justice movement promote face-to-face meetings in the criminal context.<sup>48</sup> These scholars explain that plaintiffs often file lawsuits expecting to receive apologies as part of the “therapeutic” process of litigation.<sup>49</sup> But, like PFLAG, most plaintiffs never receive apologies and are “seriously disappointed.”<sup>50</sup>

Nevertheless, only a few scholars have touched on the appropriateness of court-ordered apologies in civil cases.<sup>51</sup> The paucity of discussion on this issue is striking given that most of the arguments in favor of forced apologies in the criminal system apply equally in the civil context. For example, as in criminal cases, compelled apologies in civil cases could play a critical role in healing psychological wounds, reinforcing accepted norms, restoring social equilibrium, and deterring future wrongdoing.<sup>52</sup> Moreover, whereas compelled apologies in the criminal arena serve primarily to reinforce the existing social and

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<sup>43</sup> See Levi, *supra* note 41, at 1167.

<sup>44</sup> See Shuman, *supra* note 35, at 188.

<sup>45</sup> See Taft, *supra* note 41, at 1138 (arguing that the “strategic” use of apology to facilitate dispute resolution may undermine the moral quality of apology).

<sup>46</sup> See Jonathan R. Cohen, *Legislating Apology: The Pros and Cons*, 70 U. CIN. L. REV. 819, 820 (2002) (noting that as of 2002 eight states were considering bills that would exclude from admissibility apologetic expressions of sympathy); Shuman, *supra* note 35, at 188 (discussing Massachusetts evidence rules rendering inadmissible evidence related to “benevolent gestures” to show liability in a civil action).

<sup>47</sup> See Jennifer K. Robbennolt, *Apologies and Legal Settlement: An Empirical Examination*, 102 MICH. L. REV. 460, 463 (2003); Aviva Orenstein, *Apology Excepted: Incorporating a Feminist Analysis into Evidence Policy Where You Would Least Expect It*, 28 SW. U. L. REV. 221 (1999).

<sup>48</sup> See, e.g., Levi, *supra* note 41, at 1171.

<sup>49</sup> See Shuman, *supra* note 35, at 185 (citing Nathalie Des Rosiers et al., *Legal Compensation for Sexual Violence: Therapeutic Consequences and Consequences for the Judicial System*, 4 PSYCHOL. PUB. POL’Y & L. 433 (1998)).

<sup>50</sup> See *id.*

<sup>51</sup> See Robbennolt et al., *supra* note 2, at 1147 (noting that juries, if allowed, might prefer to order apologies in addition to or in lieu of damages in some civil cases); Sharon Elizabeth Rush, *The Heart of Equal Protection: Education and Race*, 23 N.Y.U. REV. L. & SOC. CHANGE 1, 50–57 (1997) (stating that court-ordered apologies should be but are not available as an equitable remedy in civil cases); Wagatsuma & Rosett, *supra* note 2, at 487 (suggesting that the civil legal system would be improved if apology were better incorporated).

<sup>52</sup> See, e.g., LAZARE, *supra* note 22, at 44 (listing psychological needs that successful apologies satisfy); see also TAVUCHIS, *supra* note 1, at 13; Robbennolt et al., *supra* note 2, at

political order, court-ordered apologies in the civil rights context could serve a much more transformative function by helping to redefine social norms and confirming the justice of important causes.<sup>53</sup>

### III

#### THE CASE FOR COURT-ORDERED APOLOGIES AS A CIVIL RIGHTS REMEDY

In non-civil rights contexts, scholars have noted that many civil claimants want apologies from defendants.<sup>54</sup> For example, up to 98% of civil medical malpractice claimants desire apologies.<sup>55</sup> And 37% wouldn't have filed suit had the doctor fully explained and offered an apology to begin with.<sup>56</sup> Similarly, sexual assault victims often pursue civil claims for therapeutic rather than financial reasons.<sup>57</sup> The "desire to be heard, have their experience validated, and receive an apology" are "important aspects of their therapeutic expectations for the legal process."<sup>58</sup> Likewise, in another study, 75% of plaintiffs who agreed to mediate civil claims identified apology as an important issue for them in deciding to mediate.<sup>59</sup>

While these studies have not focused on civil rights plaintiffs, there's no reason to suspect that civil rights plaintiffs are any different than other civil litigants in desiring apologies. Indeed, if my former clients are any indication, civil rights plaintiffs may match medical malpractice claimants in their desire for apologies. Excluding those who suffered no personal injury but were challenging statutes, ordinances, or general governmental policies, nearly every one of my clients wanted an apology, and many listed a public apology as the major goal of settlement discussions. These clients included the gay families

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1140-41 (noting that civil punishment is a means of restoring the value of equality); Wagatsuma & Rosett, *supra* note 2, at 473, 492.

<sup>53</sup> Haley, *supra* note 2, at 503 (discussing the socially transformative effect of apologies related to pollution and drug-related injury cases in Japan in the 1970s).

<sup>54</sup> See TAVUCHIS, *supra* note 1, at 3; Robbennolt, *supra* note 47, at 463 & n.12; see also Des Rosiers et al., *supra* note 49; 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 OF INTERNAL MED. 2565 (1996).

<sup>55</sup> See Witman et al., *supra* note 54, at 2566.

<sup>56</sup> See Charles Vincent et al., *Why Do People Sue Doctors? A Study of Patients and Relatives Taking Legal Action*, 343 LANCET 1609, 1612 (1994), cited in Robbennolt, *supra* note 47, at 463 n.12.

<sup>57</sup> See Des Rosiers et al., *supra* note 49, at 443-44.

<sup>58</sup> Shuman, *supra* note 35, at 185; see also Katharine K. Baker, *Sex, Rape, and Shame*, 79 B.U. L. REV. 663, 695 (1999) (citing Andrea Parrot, *Recommendations for College Policies and Procedures to Deal with Acquaintance Rape*, in ACQUAINTANCE RAPE: THE HIDDEN CRIME 368 (Andrea Parrot & Laurie Bechhofer eds., 1991)) (explaining that most victims of acquaintance rape would prefer that their assailants know that what they did was wrong rather than be arrested).

<sup>59</sup> See Mark S. Umbreit, *VICTIM MEETS OFFENDER: THE IMPACT OF RESTORATIVE JUSTICE AND MEDIATION* 22 (1994), cited in Bolstad, *supra* note 2, at 548-49.

mentioned previously, the family of a man who died in prison due to inadequate health care, and a thirteen-year-old girl strip-searched at school. For each of these plaintiffs, receiving an apology was *the* motivating factor in choosing to litigate.<sup>60</sup>

Other civil rights attorneys and plaintiffs with whom I have spoken echo this desire. For instance, when a Continental Airlines pilot forced Michael Dasrath, a soft-spoken Indian American employee of J.P. Morgan, and two other men of color off a plane on New Year's Eve in 2001, Mr. Dasrath sought an apology from the pilot.<sup>61</sup> Only after the pilot and the airline repeatedly refused to apologize did Mr. Dasrath file a civil rights claim in federal court "to make them acknowledge that what they did was wrong."<sup>62</sup> Over four-and-a-half years later, Mr. Dasrath is still waiting for an apology, and he refuses to settle without one. Mr. Dasrath explains, "I know for a fact it won't be sincere at this point. I just want them to acknowledge what they did was wrong. They may not believe it, but at least I could say I have it in writing that [they] admitted that what [they] did was wrong."<sup>63</sup>

Despite the importance of apologies to civil rights plaintiffs, public collectives rarely apologize when they violate moral or legal norms.<sup>64</sup> As Nicholas Tavuchis explains in his sociological study of apology, "Typically, individuals who have been ill used by collective agencies must, when so disposed, exert considerable and sustained effort to receive an apology, no less material compensation when it is in order, with little or no hope of success."<sup>65</sup> While Tavuchis is correct that both compensation and an apology can be hard to come by, he

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<sup>60</sup> See Shuman, *supra* note 35, at 183 (noting that a civil rights action over the Ohio National Guard's killing of students at Kent State University during a protest of the Vietnam War did not settle until an apology was negotiated).

<sup>61</sup> Interview with Michael Dasrath, in New York, N.Y. (June 23, 2005) (on file with author). The airline pilot took this action after a white female passenger told the pilot that the "brown men are behaving suspiciously." Press Release, ACLU, ACLU Sues Four Major Airlines Over Discrimination Against Passengers (June 4, 2002), available at <http://www.aclu.org/racialjustice/racialprofiling/15867prs20020604.html>. Though Mr. Dasrath had been repeatedly searched and cleared to fly, and though his wife actually worked for Continental Airlines, the pilot had him removed from the plane and asked that he be arrested. Instead, Mr. Dasrath was placed on the next flight, without being required to undergo any additional security checks whatsoever, and his luggage was allowed to remain on the original airplane. Since Mr. Dasrath's lawsuit is against Continental Airlines and not the government, this Article does not propose that he should be able to pursue a court-ordered apology. Rather, Mr. Dasrath's story is used to illustrate the motivations and desires of a typical civil rights plaintiff.

<sup>62</sup> Interview with Michael Dasrath, *supra* note 61.

<sup>63</sup> *Id.* While anecdotal, Mr. Dasrath's story illustrates in concrete terms what psychological literature already tells us about the importance of apology to many individuals who have been injured.

<sup>64</sup> See, e.g., TAVUCHIS, *supra* note 1, at 92; see also Marquez, *supra* note 1 (reporting a rare apology from the Los Angeles County Sheriff's Department for damage caused to several Compton homes when sheriffs fired 120 rounds at an unarmed driver).

<sup>65</sup> TAVUCHIS, *supra* note 1, at 93.

incorrectly suggests that the two are equally elusive. Federal and state civil rights statutes at least provide some mechanism for victims of governmental abuse to secure monetary relief.<sup>66</sup> But civil courts generally do not order apologies,<sup>67</sup> leaving victims of governmental abuse who desire an apology without recourse.

As Professors Hiroshi Wagatsuma and Arthur Rosett explain in their influential comparative study of apology in the Japanese and American legal systems,<sup>68</sup> the failure of the American legal system to do more to encourage apology deprives victims of an important mechanism to relieve psychic and status injuries that cannot be healed by money alone:

The important point here is that while there are some injuries that cannot be repaired just by saying you are sorry, there are others that can *only* be repaired by an apology. Such injuries are the very ones that most trouble American law. They include defamation, insult, degradation, loss of status, and the emotional distress and dislocation that accompany conflict. To the extent that a place may be found for apology in the resolution of such conflicts, American law would be enriched and better able to deal with the heart of what brought the controversy to public attention.<sup>69</sup>

A similar point has been made by other scholars, who have noted that while material reparation is often "much less important than emotional or symbolic reparation,"<sup>70</sup> the American legal system is inadequately structured to provide the latter.<sup>71</sup>

#### A. Court-Ordered Apology and Psychological Healing

Commodified concepts of compensation may provide some measure of recompense for physical injuries, but they do little to redress emotional and psychological wounds.<sup>72</sup> Apologies, on the other

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<sup>66</sup> See, e.g., 42 U.S.C. § 1983 (2000) (providing for the liability of a party depriving constitutional rights of another in an "action at law, suit in equity, or other proper proceeding for redress").

<sup>67</sup> See Robbennolt et al., *supra* note 2, at 1147 n.114 ("Civil jurors . . . do not typically have the ability to compel an apology from the defendant to the plaintiff."); Robert A. Creo, *Mediation 2004: The Art and the Artist*, 108 PENN ST. L. REV. 1017, 1037 (2004) ("Civil courts do not order apolog[ies] . . .").

<sup>68</sup> Wagatsuma & Rosett, *supra* note 2, at 487.

<sup>69</sup> *Id.*

<sup>70</sup> John Braithwaite, *A Future Where Punishment Is Marginalized: Realistic or Utopian?*, 46 UCLA L. REV. 1727, 1744 (1999).

<sup>71</sup> See Bolstad, *supra* note 2, at 545 ("The conspicuous absence of apology . . . in American legal mechanisms[ ] constitutes a surprising failure given the importance of both apology and forgiveness in Judeo-Christian culture.").

<sup>72</sup> See, e.g., Antkowiak, *supra* note 36, at 1011 ("The enduring American emphasis on monetary damages is a completely inadequate method of providing a true satisfaction to victims."). As Mr. Dasrath put it, "Money doesn't matter to me. It's not about money. I'd rather have an apology than money. I want them to know it was wrong." Interview with Michael Dasrath, *supra* note 61; see also Jeffrey Berryman, *Reconceptualizing Aggravated Dam-*

hand, can be quite effective in helping plaintiffs heal. “[S]uccessful apologies heal because they satisfy at least one—and sometimes several—distinct psychological needs” of victims.<sup>73</sup> These needs include restoring self-respect and dignity, assuring victims that the offense wasn’t their fault, allowing victims to feel secure that the offense won’t happen again, validating the victims’ experience, and evening the score.<sup>74</sup>

First, apologies help victims regain their sense of self-worth and dignity, both of which are essential aspects of psychological well-being.<sup>75</sup> When an individual is slighted, insulted, or otherwise mistreated, he or she typically feels humiliated and devalued.<sup>76</sup> For example, Mr. Dasrath explained that when the pilot forced him off the plane, “it was belittling, very belittling. I was embarrassed, angry, and confused. How could they associate me with terrorists who would kill thousands of human beings? I was in New York on 9/11. I saw it. I felt it. I could smell it in the air. I don’t want to be lumped in with terrorists.”<sup>77</sup> As Mr. Dasrath’s comment suggests, individuals who have been devalued and belittled experience a variety of psychological distresses, including anxiety, anger, and powerlessness. Some experience self-loathing for having “let” themselves become victims of such mistreatment.<sup>78</sup>

Apologies facilitate recovery from this psychological distress by restoring the victim’s dignity through a symbolic transfer of humiliation and power between the offender and victim.<sup>79</sup> By apologizing, offenders admit to being immoral, insensitive, or mistaken. And as anyone who has ever offered a difficult apology can attest, such an admission of guilt can be humiliating. In addition, the offender, having origi-

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ages: *Recognizing the Dignitary Interest and Referential Loss*, 41 SAN DIEGO L. REV. 1521, 1549–50 (2004) (concluding that the ideal of “complete compensation” includes dignitary damages and noting that apologies may assume a greater role in achieving complete compensation); Taft, *supra* note 41, at 1136–37 (discussing a widow’s anger at not having received an apology after her husband died due to medical malpractice).

<sup>73</sup> LAZARE, *supra* note 22, at 44.

<sup>74</sup> See *id.*

<sup>75</sup> See *id.* at 45.

<sup>76</sup> See Interview with Michael Dasrath, *supra* note 61.

<sup>77</sup> *Id.* The emotions expressed by Mr. Dasrath are similar to those expressed by a British pilot of Arab origin who was imprisoned for five months in London due to the FBI’s false allegation that he helped plan 9/11. After being released for lack of evidence, the pilot protested, “My family doesn’t deserve to be labeled as terrorists and I didn’t deserve five months in prison.” LAZARE, *supra* note 22, at 51. He sought an apology from the United States Department of Justice, which, not surprisingly, it refused to provide. “The man wanted his dignity restored and was willing to accept an apology as the mode of that restoration. However, when the government refused to apologize, he was forced to seek a different remedy.” *Id.*

<sup>78</sup> See *id.* at 58.

<sup>79</sup> See *id.* at 45–53 (discussing restoration of self-respect and dignity as one way in which apologies heal damaged relationships).

nally abused his or her power in hurting the victim, is placed in the vulnerable position of giving the victim the power to absolve the wrongdoing or not to do so.<sup>80</sup> While a compelled apology works somewhat differently, as the offender may not care about being absolved, the victim still has the power to accept or reject the apology.<sup>81</sup> Moreover, the exchange of humiliation may be even more pronounced because the offender is forced to admit his faults publicly.<sup>82</sup> "This exchange of humiliation and power between the offender and the offended may be the clearest way of explaining how some apologies heal by restoring dignity and self-respect."<sup>83</sup>

Second, compelled apologies can be effective in assuring victims that they are not at fault. In searching for an explanation for why they were singled out for mistreatment, victims often turn inward and wonder if they were somehow to blame.<sup>84</sup> A compelled apology corrects for this tendency by apportioning responsibility where it belongs. The need for this type of reassurance is especially important in cases of sexual abuse—including abuse by state officials.<sup>85</sup> David Shuman ex-

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<sup>80</sup> See *id.* at 52.

<sup>81</sup> Victims can sometimes heighten their superiority over the offender by accepting the apology. Consider, for example, First Lady Laura Bush's gracious acceptance of Teresa Heinz Kerry's apology for incorrectly stating that the First Lady had never held a "real job." Mrs. Bush replied, "She didn't have to apologize. I know how tough it is. And actually I know those trick questions." See *Laura Bush Brushes Aside Heinz Kerry's Remarks*, CNN.COM, Oct. 21, 2004, <http://www.cnn.com/2004/ALLPOLITICS/10/21/laura.teresa>. The effect of this apologetic exchange was to confirm Mrs. Bush's status as a very likeable First Lady. It also called into question Heinz Kerry's acceptability to replace her.

<sup>82</sup> See LAZARE, *supra* note 22, at 38–42 (comparing public and private apologies noting that public apologies are those between individuals in the presence of a broader audience).

<sup>83</sup> *Id.* at 52; see also Des Rosiers et al., *supra* note 49, at 444 (explaining that in the sexual violence context, "the [litigation] process often has symbolic meaning for the survivor, who may seek to reclaim, in a protected environment, the power that she lost to the aggressor"). The ability of an apology to facilitate the healing process has been explained by equity theorists. See, e.g., Elaine Walster et al., *New Directions In Equity Research*, 25 J. PERSONALITY & SOC. PSYCHOL. 151, 156, 163 (1973). Equity theory posits that whenever individuals find themselves in unequal relationships, they become emotionally distressed. But the symbolic exchange of humiliation and power can rebalance the relationship and restore equity. The restoration of equity in turn helps eliminate the psychological distress. See *id.* at 156, 163.

<sup>84</sup> See LAZARE, *supra* note 22, at 58. For example, Mr. Dasrath stated, "People think I should just take it. Their attorney asked me in the deposition, don't you think you should accept that stuff like this is going to happen given the need to be cautious about terrorism?" Interview with Michael Dasrath, *supra* note 61.

While Mr. Dasrath feels strongly that "it's not right," my interpretation is that he needs to hear confirmation that he doesn't have to endure such mistreatment and that he isn't being selfish by complaining about bearing the brunt of the "war on terror."

<sup>85</sup> See LAZARE, *supra* note 22, at 58–59 (discussing the value to two sisters of an apology from the Vermont Social and Rehabilitation Department for "failing to protect them from being repeatedly raped by their stepfather," and noting one sister's statement that the apology was about "getting over the feeling that I was the bad girl").



plains the therapeutic value of apology in helping victims avoid self-blame:

By explaining to the victim that he or she did not cause what happened (i.e., attributing responsibility for the harm externally rather than internally), apology, like fault based liability determinations, may serve as a moral gyroscope clarifying responsibility for harm. The apology tells the victim, "It wasn't your fault," avoiding misconstrued self-blame or criticism.<sup>86</sup>

Third, compelled apologies may help victims feel safer by correcting the notion that they deserved to be mistreated.<sup>87</sup> Offenders, who also feel psychological distress when they mistreat others, often attempt to relieve their discomfort by justifying their mistreatment of the victims, both to themselves and to others.<sup>88</sup> If left uncorrected, these justifications can be unsettling to victims because they signal that the offender is likely to repeat the offense:

[T]he victim must realize that the harm-doer is likely to justify the victim's suffering. This is not a pleasant prospect. The exploiter's justifications are potentially dangerous to the victim. The harm-doer who justifies his actions will end up with a distorted and unreal assessment of his actions. If he distorts the extent to which the victim deserved to be hurt, for example, or minimizes the victim's suffering as a consequence of the act, he may commit further acts based on these distortions. When a harm-doer uses the justification technique, then the victim is left in sad straits. Not only has he been hurt, but the probability has increased that he will be hurt again.<sup>89</sup>

Victims, who intuitively understand the danger of the offender's unchecked rationalizations, need the offenders to know that their actions were indefensible.<sup>90</sup> Apologies serve this function, because part of an apology is admitting that there was no excuse for one's behavior. While a voluntary apology is obviously superior in assuring the victim that the offender realizes his actions were unjustified, even a compelled apology can help the victim feel safer in knowing that the offender is at least somewhat less likely to use the same rationale as an excuse for hurting her in the future.<sup>91</sup>

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<sup>86</sup> Shuman, *supra* note 35, at 183.

<sup>87</sup> See LAZARE, *supra* note 22, at 60 (noting that apologies "restore a sense of control over physical and psychological safety to the offended parties").

<sup>88</sup> See, e.g., Walster et al., *supra* note 83, at 162.

<sup>89</sup> *Id.*

<sup>90</sup> See *id.* at 104. As Mr. Dasrath explained, "I realize that they feel it's justified. They just don't get it. And if they don't get it, they're gonna keep doing it." Interview with Michael Dasrath, *supra* note 61.

<sup>91</sup> See, e.g., LAZARE, *supra* note 22, at 60. But cf. ELAINE PINDERHUGHES, UNDERSTANDING RACE, ETHNICITY, AND POWER: THE KEY TO EFFICACY IN CLINICAL PRACTICE (1989) (suggesting that long-term cultural mistreatment can lead to the perpetuation of feelings of defensiveness even when the risk is diminished or removed).

For example, when the City and County of Honolulu excluded PFLAG from the Family Day Parade, it justified its actions by claiming that gays might dress in sexually suggestive costumes inappropriate for a family event. The underlying message was that discriminating against gays is acceptable because they are sexual deviants. The television media lent credence to this suggestion by repeatedly flashing images of gays in risqué costumes worn as part of a Gay Pride Parade, as if PFLAG members would dress the same for a family event. Similarly, the Hawaii Christian Coalition, with whom the City co-sponsored the parade, defended its actions by maintaining that homosexuality was unnatural and that only traditional families belonged in the parade.<sup>92</sup> To the extent the City failed to disavow these justifications for discrimination, gays and lesbians can assume that the City and those who follow its example will continue to discriminate on the basis of similar rationales. By contrast, a compelled apology would have forced the City to renounce any rationale for excluding gay families from the parade. This in turn would have helped gays and lesbians feel safer in knowing that the City was less likely to publicly espouse or act upon such justifications in the future.

Fourth, compelled apologies help victims heal by validating their experiences.<sup>93</sup> By publicly apologizing, the offender tells a narrative in which he or she committed a wrong that harmed the victim and for which the offender owes the victim an apology:

[A] call for an apology entails, among other things, a description or documentation of the material facts and attendant circumstances of the offense. In this recounting, moreover, the offender comments about what occurred. In these terms, an apology attests to, validates, confirms, records, and also objectifies—to the extent that what it refers to is “objective” for all concerned parties—truth or an accurate view of social reality.<sup>94</sup>

In apologetic discourse, the “victim is assured that the offender, and sometimes a broader audience, knows the nature of the offense . . . . [T]he victim [also] receives validation that the offense really happened, that he or she did not distort reality or memory.”<sup>95</sup>

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<sup>92</sup> See Gima, *ACLU Files Suit*, *supra* note 6 (reporting the director of the Hawaii Christian Coalition’s opinion that the parade was about having role models for children and that he did not “believe the gay lifestyle fits that description”).

<sup>93</sup> See LAZARE, *supra* note 22, at 67 (citing Martha Minow, *Truth Commissions*, in *BETWEEN VENGEANCE AND FORGIVENESS* 68 (1998) (quoting a commissioner of the United Nations Truth Commission for El Salvador stating that for victims, “the mere act of telling what had happened was a healing emotional release, and that they were more interested in recounting their story and being heard than in retribution”)); see also Robbenolt et al., *supra* note 2, at 1141 (explaining that tort plaintiffs care as much about “a chance to ‘tell their story,’ as about the actual monetary outcomes at stake”).

<sup>94</sup> TAVUCHIS, *supra* note 1, at 57.

<sup>95</sup> LAZARE, *supra* note 22, at 68.

A public apology, compelled or not, thus validates the victim's emotional pain and offers an avenue for cathartic healing.<sup>96</sup> When the offender finally acknowledges the suffering of the victim, the victim can begin to move on.

Finally, compelled apologies can satisfy the need of some victims to see offenders suffer.<sup>97</sup> Though perhaps not the loftiest desire, victims sometimes need to feel that the score is even.<sup>98</sup> Thus, victims often feel better knowing that the offender also suffered by having to apologize and accept responsibility for her inappropriate behavior.<sup>99</sup>

## B. Court-Ordered Apology and the Promotion of Social Justice

Legal remedies serve an expressive function.<sup>100</sup> When a court orders a defendant to pay damages to a plaintiff or to modify certain policies or practices, the court sends a message about what is and isn't acceptable behavior. This power of a court order to convey a message is its "expressive utility."<sup>101</sup> But not all court orders have equal expressive value. For example, consider the case where a court finds that a municipality violated protesters' speech rights but awards only nominal damages because the protestors did not suffer any economic loss.<sup>102</sup> The message of such a decision is ambiguous at best, and contradicts core constitutional values at worst. While the court may have found that the municipality violated an important constitutional right, awarding only nominal damages leaves the distinct impression that the municipality's actions weren't all that serious and didn't cause any

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<sup>96</sup> *Id.* (noting "the many ways in which the victims' participation in the [apologetic] dialogue . . . has a healing or therapeutic impact" and how the opportunity for the victim to tell his story "results in a kind of catharsis").

<sup>97</sup> *See, e.g., id.*

<sup>98</sup> *Id.*

<sup>99</sup> *See* Robbennolt et al., *supra* note 2, at 1139 (arguing that one of the benefits of an apology is that "the victim may experience some retributive justice in seeing the offender suffer through stating the offense").

<sup>100</sup> *See, e.g.,* Robbennolt et al., *supra* note 2, at 1131 ("Another class of goals that may influence legal decisions is related to the expressive functions such decisions can serve. The law functions expressively to the extent that its role is more symbolic than instrumental, as it focuses on 'making statements' as opposed to controlling behavior directly.").

<sup>101</sup> Kahan & Posner, *supra* note 29, at 380 (defining "expressive utility" as the power of a punishment to "convey desired social meanings").

<sup>102</sup> *See, e.g.,* Memphis Cmty. Sch. Dist. v. Stachura, 477 U.S. 299, 310 (1986) (holding that "damages based on the abstract 'value' or 'importance' of constitutional rights are not a permissible element of compensatory damages in [§ 1983] cases," and thus, regardless of the importance of the right at issue, courts cannot award more than nominal damages when there has been no actual injury); *see also* *California Protesters Win Pepper Spray Lawsuit*, FREE REPUBLIC, Apr. 29, 2005, <http://www.freerepublic.com/focus/f-news/1393865/posts> (reporting that a jury awarded eight plaintiffs \$1 each when "[l]aw enforcement officers from two northern California counties were found liable Thursday for using excessive force by swabbing pepper spray in the eyes of logging protesters in 1997").

"actual" harm.<sup>103</sup> The court inadvertently sends the message that violating constitutional rights is merely a technical violation.

In contrast, if a municipality were ordered to apologize publicly when it violated citizens' rights, the message would be far less equivocal. The expressive utility of apology has been recognized by a variety of scholars. Janet Holmes explains: "[B]y observing what people apologize for, we learn what cultural expectations are with respect to what people owe one another' and we also learn 'about the rights and obligations that members of a community have toward one another. . . .'"<sup>104</sup> Jennifer Robbennolt suggests that "while offering an apology may not be the best mechanism by which to achieve compensation, it may be a better mechanism by which to express the proper relative moral positions of the parties than is a monetary award."<sup>105</sup> Stephanos Bibas and Richard Bierschbach note that "[a]pology, expressions of remorse, and other mea culpas are secular remedial rituals. They both teach and reconcile by reaffirming societal norms and vindicating victims."<sup>106</sup> And Dan Kahan and Eric Posner laud the power of forced apologies "to express publicly valued social meanings."<sup>107</sup> In short, due to their high expressive utility, apologies—both voluntary and forced—offer a powerful alternative to commodified compensation, and can be an effective means of sending messages about acceptable behavior and desired social norms.

Plaintiffs' attorneys frequently implore juries to "send a message" by imposing large punitive damages on unrepentant offenders. Juries sometimes respond to such appeals with disproportionately large verdicts. The efficacy of using punitive damages to send messages, however, is limited. Punitive damages are not available against the state, local, or federal government, or against officials acting in their official capacities.<sup>108</sup> Additionally, rather than send the message that the de-

<sup>103</sup> See *Stachura*, 477 U.S. at 310; see also *Farrar v. Hobby*, 113 S.Ct. 566, 573 (1992) ("[T]he basic purpose of a § 1983 damages award should be to compensate persons for injuries caused by the deprivation of constitutional rights. For this reason, no compensatory damages may be awarded in a § 1983 suit absent proof of actual injury." (citations omitted)); ERWIN CHERMERINSKY, *FEDERAL JURISDICTION* § 8.11, at 516 (2d ed. 1991) (concluding that "it seems clearly established [from cases such as *Stachura*] that recovery of damages under § 1983 is limited to compensation for actual injuries suffered"); Mark Morrell, *Who Wants Nominal Damages Anyway?: The Impact of an Automatic Entitlement to Nominal Damages Under § 1983*, 13 REGENT U. L. REV. 225, 228 (2001).

<sup>104</sup> Janet Holmes, *Sex Differences and Apologies: One Aspect of Communicative Competence*, 10 APPLIED LINGUISTICS 194, 210 (1989) (quoting Nessa Wolfson, *The Bulge: A Theory of Speech Behaviour and Social Distance*, in *SECOND LANGUAGE DISCOURSE: A TEXTBOOK OF RESEARCH* (Jonathan Fine ed., 1988)).

<sup>105</sup> Robbennolt et al., *supra* note 2, at 1147.

<sup>106</sup> Bibas & Bierschbach, *supra* note 29, at 113.

<sup>107</sup> Kahan & Posner, *supra* note 29, at 365.

<sup>108</sup> See, e.g., *City of Newport v. Fact Concerts*, 453 U.S. 247, 271 (1981) (holding that municipalities enjoy absolute immunity from liability for punitive damages under 42 U.S.C. § 1983).

fendant engaged in deplorable behavior, disproportionately large verdicts often send the unintended message that the civil system has run amok—that it unjustly enriches some individuals at the rest of our expense. This message does little more than lend support to those who advocate limits on damages.

Were juries allowed to order defendants to apologize, some of the “pressure to convert all damages into dollars” might be relieved.<sup>109</sup> Juries could then fashion awards that both adequately compensated victims and expressed their moral outrage and sympathy for the victims without calling into question the legitimacy of our entire system of civil compensation. While some might object that court-ordered apologies let defendants off easy, victims value apologies and frequently settle for lower monetary damages if defendants agree to apologize.<sup>110</sup> Likewise, defendants often will pay substantially more in damages rather than admit wrongdoing.<sup>111</sup>

As a valued component of dispute resolution, apologizing is not equivalent to getting off scot-free. Imagine, for example, that in addition to being ordered to pay a reasonable amount of damages to the now infamous eighty-one-year-old woman who suffered third-degree burns from its coffee,<sup>112</sup> McDonald’s had been ordered to post a public apology in its restaurants. Such an apology, among other things, would necessarily acknowledge that although McDonald’s knew that over 700 people had suffered serious burns from its coffee,<sup>113</sup> McDonald’s chose to do nothing about it because a statistician found that the number of hot-coffee burns was statistically insignificant compared with the amount of coffee sold.<sup>114</sup> One could guess that McDonald’s might rather pay a significant amount of money than apologize because an apology might cost more than monetary damages alone. One could also surmise that such an apology would send the message the jury intended to convey more effectively than its \$2.9 million award to just one woman, who has become a symbol for tort reform and the butt of late-night-television jokes.

While this example concerns a hypothetical corporate apology, a compelled apology would work similarly with a governmental actor in a civil rights case. It’s particularly important to set the public record

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<sup>109</sup> Wagatsuma & Rosett, *supra* note 2, at 488.

<sup>110</sup> See Shuman, *supra* note 35, at 180 (noting that tort plaintiffs often claim that an apology “was the most valuable part of the settlement”); Bolstad, *supra* note 2, at 551 (relating the story of a Dalkon Shield plaintiff who explained that for the company to “apologize to me . . . would be worth millions”).

<sup>111</sup> See Shuman, *supra* note 35, at 180–85.

<sup>112</sup> See, e.g., Andrea Gerlin, *A Matter of Degree: How a Jury Decided That a Coffee Spill Is Worth \$2.9 Million*, WALL ST. J., Sept. 1, 1994, at A1.

<sup>113</sup> See *id.*

<sup>114</sup> See *id.* (reporting an expert’s statement at trial that McDonald’s sells 1 billion cups of coffee per year).

straight and place moral responsibility where it belongs when the government commits a moral or legal wrong:

Municipalities are capable of wrongful and even reprehensible acts, and when they engage in such acts, it is important to place the responsibility, and indeed the stigma, where it belongs. To do so holds the entity responsible for the public meaning of its actions, affirms the importance of the rights at stake and puts the moral onus where it belongs—upon those who collectively failed to avoid abusing the public trust.<sup>115</sup>

This is so because moral—and immoral—messages sent by the government, the “omni-present teacher” of morality,<sup>116</sup> have particular resonance:

How “uniquely amiss” it would be . . . if the government itself—“the social organ to which all in our society look for the promotion of liberty, justice, fair and equal treatment, and the setting of worthy norms and goals for social conduct”—were permitted to disavow liability for the injury it has begotten.<sup>117</sup>

Compelled apologies, more than perhaps any other legal remedy, require the government to face its wrongs squarely and accept public responsibility for violating legal norms. Under the current system, when the government is ordered to pay substantial damages or make significant policy changes, it contests the validity of the court’s order and vows to appeal—whether or not it ever does—and never accepts public responsibility for its actions. A compelled apology, on the other hand, would require the government to recognize its wrongdoing publicly. Even if the government tried to disavow the apology, the public message would have been sent. The very fact of apology sends the unequivocal message that the government committed a wrong. And as even a child who has been forced to apologize knows, the moral script of apology, once enacted, can hardly be taken back.

Compelled apologies not only have the power to reinforce moral and legal norms, they could also transform those norms. As societal notions of right and wrong evolve, abuses previously ignored or justified are properly recognized as human injustices.<sup>118</sup> Apologies could

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<sup>115</sup> Susan Bandes, *Not Enough Blame to Go Around: Reflections on Requiring Purposeful Government Conduct*, 68 BROOK. L. REV. 1195, 1211 (2003).

<sup>116</sup> See *id.* at 1210 (quoting *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting)).

<sup>117</sup> *Id.* (quoting *Owen v. City of Independence*, 445 U.S. 622, 651 (1980)).

<sup>118</sup> In *The Age of Apology*, Roy Brooks lists a number of human injustices that are deserving of apology:

[T]he violation or suppression of human rights or fundamental freedoms recognized by international law, including but not limited to genocide; slavery; extrajudicial killings; torture and other cruel or degrading treatment; arbitrary detention; rape; the denial of due process of law; forced refugee movements; the deprivation of a means of subsistence; the denial of univer-

serve as barometers and agents of this social change.<sup>119</sup> When governments apologize for past injustices, they acknowledge these evolving norms and establish a new social contract.<sup>120</sup> For example, recent apologies made by the U.S. government—to Japanese Americans for internment during World War II, to native Hawaiians for forcefully annexing Hawaii, and to African Americans for failing to criminalize lynching until 1968—reflect the fact that there is “an evolving social contract that expands to include the rights and needs of these groups.”<sup>121</sup> Furthermore, these apologies indicate that “formerly powerless groups are now demanding respect and denouncing behaviors that devalue them.”<sup>122</sup>

Additionally, when social minorities or excluded groups pursue litigation to raise awareness of social injustice, compelled apologies force governmental actors to recognize the validity of the plaintiff's cause. For example, in Japan, where a compelled apology is an available legal remedy, plaintiffs pursue apologies as a means of redefining social norms:<sup>123</sup>

The plaintiffs in the pollution and drug-related lawsuits did not seek apologies by the government or the defendant firms as a means of maintaining the status quo or preserving social harmony. They instead demanded apologies as a recognition of redefined social norms and as an act of submission to a shifting hierarchical order. The apologies acknowledged the legitimacy of protest and protesters. With an altered moral and social authority thereby confirmed, the lawsuits were more important in forcing the apology than in

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sal suffrage; and discrimination, distinction, exclusion, or preference based on race, sex, descent, religion, or other identifying factor with the purpose or effect of impairing the recognition, enjoyment, or exercise, on an equal footing, of human rights and fundamental freedoms in the political, social, economic, cultural, or any other field of public life. In sum, a human injustice is simply the violation or suppression of human rights or fundamental freedoms recognized by international law.

Brooks, *supra* note 28, at 7. This list encompasses a wide range of acts that would also violate rights and freedoms recognized by state and federal laws in the United States.

<sup>119</sup> See TAVUCHIS, *supra* note 1, at 13.

<sup>120</sup> See LAZARE, *supra* note 22, at 181 (“The last group of apologies includes those motivated by a new understanding or a new application of an ethical ideal, who perhaps see for the first time that their actions violate an important moral value.”); see also TAVUCHIS, *supra* note 1, at 13 (“As symbolic barometers, apologies register tensions and displacements in personal and public belief systems, that is, the contraction and expansion of interdictory motifs—what calls for an apology and what does not—that either precede or follow changes in social behavior and cultural expectations.”).

<sup>121</sup> TAVUCHIS, *supra* note 1, at 13. Elizabeth Rush argues that an apology for slavery would serve a similar function, by confirming the accepted societal consensus that slavery was immoral and a blight on our country's history, as well as reinforcing the notion, still contested by some, that because the effects of slavery continue today, the government should act to redress continuing inequality. Rush, *supra* note 51, at 51–52.

<sup>122</sup> LAZARE, *supra* note 22, at 55.

<sup>123</sup> Haley, *supra* note 2, at 503.

modifying the legal rules on negligence or proof of causation or the damage awards. These lawsuits of the 1970s accordingly marked a turning point for postwar Japan, a shift in social values and the political order in which, I believe, apology played a role.<sup>124</sup>

While references to Japan inevitably invite protests that Japan is too culturally different for the United States to learn from, such objections “buttress a false sense of immutability of culture and obscure important parallels.”<sup>125</sup> As previously discussed,<sup>126</sup> Americans have a deep-seated interest in apology, and like plaintiffs in Japan, those in the United States often pursue litigation as a means of fostering social change.

For instance, PFLAG’s battle with the City of Honolulu seeking an apology for the City’s exclusion of gay families from the Family Day parade was essentially a contest over the evolving definition of a “family.”<sup>127</sup> One version of the apology sought by PFLAG read: “The City and County of Honolulu sincerely regrets excluding gay and lesbian families from the Family Day parade. Despite any message to the contrary conveyed by our actions, the City and County of Honolulu values all families, including gay and lesbian ones.”<sup>128</sup> A later version read simply: “The City and County of Honolulu regrets that gay and lesbian families were excluded from the Family Day parade.”<sup>129</sup> The City rejected even this empathetic statement, because it still defined “family” to include lesbian and gay families.<sup>130</sup> Given the particularly strong influence of the Christian Coalition on Honolulu’s mayor at the time, the City would not even agree that lesbians and gays could form families, much less agree to apologize for excluding them.

A court-ordered apology to PFLAG would have sent two important messages: First, gays and lesbians can form families; second, it’s wrong to discriminate against gays and lesbians. While a declaratory judgment might have served a similar function, an apology has significantly more expressive utility. As legal jargon, a declaratory judgment

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<sup>124</sup> *Id.* at 503–04.

<sup>125</sup> *Id.* at 503. Comparing our legal system with others provides “examples of different ways of dealing with common social problems.” Hilary K. Josephs, *The Remedy of Apology in Comparative and International Law: Self-Healing and Reconciliation*, 18 EMORY INT’L L. REV. 53, 54 (2004) (citing JOHN HENRY MERRYMAN ET AL., *THE CIVIL LAW TRADITION: EUROPE, LATIN AMERICA, AND EAST ASIA* 1 (1994)). Due to its cultural traditions, Japan is a particularly helpful reference because its legal system frequently comes up with different answers than the U.S. legal system does. On the other hand, “Japan is one of few prosperous democracies in Asia with a legal system that functions on a high level of professionalism and incorruptibility. Second, Japan’s legal system is perhaps the only one in Asia that legal scholars classify as truly ‘Western,’ squarely within one of its recognized lineages.” *Id.* at 56.

<sup>126</sup> *See supra* Part I.

<sup>127</sup> *See* materials prepared for litigation (on file with author).

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*



often conveys little more to the *public* than who won the case.<sup>131</sup> Apologies, on the other hand, are culturally embedded moral signifiers that convey clear messages of right and wrong, ones that even young children are taught to understand.<sup>132</sup>

Beginning as children, people learn apologies as moral scripts, enacted time and again, whenever one person harms another.<sup>133</sup> Apologies thus have special educational value:

While a sincere apology is the ideal, we shouldn't underestimate the educational value of a formal apology, whether or not we believe it to be sincere. Parents routinely tell their misbehaving children to "say you're sorry," without any real hope of sincerity. Why? Because the exercise itself teaches a valuable lesson. The emphasis in apology rituals can be as much on the ritual as on the apology. When we violate a rule of social intercourse and have no excuse or justification for our conduct, the proper response is to accept responsibility for our actions and to try to make amends, if only by making a simple apology.<sup>134</sup>

This pedagogic arrangement need not consist of a parent and children, but can be recreated whenever an authority figure certifies "an offense as apologizable," directs the offender to apologize, and "appraises matters of form and timing."<sup>135</sup> In the pedagogy of apology, the authority figure apprises the wrongdoer of "the distinction between accountable and unaccountable actions," alerts the offender "to the existence of an offense gradient or standard of severity," and admonishes the wrongdoer "for conduct that specifically calls for an

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<sup>131</sup> For example, in 1999, the ACLU of Hawaii challenged an ordinance banning street performers from Kalakaua Avenue, the main pedestrian thoroughfare in Waikiki. The ACLU sought declaratory and injunctive relief. The court eventually issued a decision granting both. The media, however, reported only that street performers could continue to perform in Waikiki, with no explanation of the court's decision or the First Amendment rights at stake. See David Waite, *Waikiki Performers' Show Will Go On*, HONOLULU ADVERTISER, Dec. 29, 2001, at A1. On the other hand, if the City had been ordered to apologize for violating the speech rights of street performers, the press would very likely have reported the apology. Such an apology would have had much greater expressive value than a declaratory judgment read by only a few interested individuals. See generally Stanley Ingber, *Rethinking Intangible Injuries: A Focus on Remedy*, 73 CAL. L. REV. 772, 835 (1985) ("Even declaratory judgments . . . are inadequate [in the defamation context]. Often they cannot restore the injured party's reputation in the community because they are insufficiently publicized, especially in comparison with the defamatory statement.").

<sup>132</sup> See TAVUCHIS, *supra* note 1, at 64.

<sup>133</sup> See *id.*; see also Bibas & Bierschbach, *supra* note 29, at 143 ("The very act of apologizing teaches, which explains why parents make their children apologize (grudgingly) for hitting a sibling or taking a toy. In other words, the ordeal of expressing remorse and apologizing, even if done initially for the wrong reasons, may in time promote genuine repentance.").

<sup>134</sup> Garvey, *supra* note 29, at 792-93 (citations omitted).

<sup>135</sup> TAVUCHIS, *supra* note 1, at 50-51.

expression of remorse, in lieu of, or in addition to, other forms of restitution.”<sup>136</sup>

In other words, much as a parent educates a child, a court can teach the offender, the victim, and the broader social audience valuable lessons about right and wrong by requiring offenders to apologize.<sup>137</sup> For example, if courts required police departments to apologize publicly every time they engaged in or encouraged racial profiling, each time the police department enacted the apologetic script, the wrongfulness of racial targeting would become more ingrained in the public psyche. The continuing failure of police departments to acknowledge or apologize for racial profiling signals that African Americans and other people of color are inherently suspect and are worthy of neither equal treatment nor an apology when mistreated.<sup>138</sup> A court-ordered apology could counteract this destructive message by condemning such discrimination.

### C. Court-Ordered Apology and the Restoration of Social Equilibrium

In addition to conveying important social messages, public apologies would help to heal ruptured social relations and restore social equilibrium.<sup>139</sup> Just as being mistreated causes victims to feel devalued, the offense also sends a public message that those like the victim are less valuable than others.<sup>140</sup> This message distorts social equilibrium to the extent that it contradicts accepted or desired notions of equality. The disruptive effect is especially pronounced when entire groups of people are diminished by the offense. In such cases, public anger, particularly among the offended group, can create or exacerbate public instability.<sup>141</sup>

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<sup>136</sup> TAVUCHIS, *supra* note 1, at 65.

<sup>137</sup> Bibas & Bierschbach, *supra* note 29, at 143.

<sup>138</sup> See, e.g., Greg Bonnell, *Eastern Ontario Cops Release Study Disputing Allegations of Racial Profiling*, CANADIAN PRESS, June 7, 2005 (reporting an Ontario Police Association spokesperson's statement that calls for an apology for racial profiling were “unfounded and premature”).

<sup>139</sup> See Robbennolt et al., *supra* note 2, at 1144–47; *id.* at 1147 (“[I]f civil decision makers were allowed to compel an apology as part of their verdict, they might choose to do so as a better way by which to restore equity.”).

<sup>140</sup> Mr. Dasrath explained that part of the reason he wants an apology is to send a message that it's unacceptable to treat people of color the way he was treated:

I want to help other people like me, Indians, so it doesn't happen to them. People shouldn't have to worry that they are going to get treated like that. I've seen it happen to other people. It makes you anxious every time you fly. When they're searching us, they're actually looking for something, not like with a white person. It just feels different.

Interview with Michael Dasrath, *supra* note 61.

<sup>141</sup> For an example of both the public instability caused by offenses that diminish groups and the power of an apology to restore social equilibrium, consider a reported incident involving former Supreme Court nominee Harriet Miers. See Jo Becker, *The Right*

Unfortunately, aside from a few well-publicized cases, the modus operandi for most governmental organizations, particularly police departments, has been to deny wrongdoing and steadfastly refuse to apologize.<sup>142</sup> Moreover, even in rare cases where governments do offer apologies, they are often phrased passively and carefully crafted by lawyers as statements of regret rather than real apologies that accept responsibility and acknowledge the extent of the harm caused.<sup>143</sup> The cumulative effect of the government repeatedly denying responsibility and refusing to offer apologies can devalue whole communities and seriously disrupt social stability.

Another message sent by public officials who refuse to apologize is that "those who hold real positions of power in society need not humiliate themselves by apologizing."<sup>144</sup> The result can be a palpable sense of powerlessness among individuals and groups that are treated with disrespect by governmental actors, but are unable to secure even symbolic redress. As explained earlier, court-ordered apologies would work in part by enacting a symbolic exchange of humiliation and power between the offender and victim.<sup>145</sup> By providing this redress, court-ordered apologies could set visible limits on abuse of power by government officials and could help ensure a proper balance between the government and the public.

#### D. Court-Ordered Apology as Inducement for Changed Behavior

A number of shaming advocates have seized upon forced apologies and other shaming penalties as a means of changing individual

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*Result was Key to Miers*, WASH. POST, Oct. 8, 2005, at A1. When Miers was a member of the Dallas City Council, the city was on edge after a series of police shootings that killed innocent African American men. In the wake of the shootings, an African American county commissioner was arrested after an altercation with a white off-duty police officer who called him a racist name. More than 1,000 demonstrators marched on City Hall and many feared violence. Harriet Miers grabbed a microphone and said, "If it means anything to you, I want to apologize. . . . I want to apologize to the African American community of this city for an unprovoked and unexcusable [sic] attack on one of their elected leaders." *Id.* Reportedly, her apology met with applause from the crowd and played a key role in defusing the tension. *See id.*

<sup>142</sup> But see, e.g., Marquez, *supra* note 1. Publicized exceptions include police officers apologizing in Boston for killing a twenty-one-year-old woman with rubber bullets while trying to subdue a rowdy fan after the Red Sox won the World Series, in Philadelphia for arresting and handcuffing a ten-year-old girl who came to school with scissors in her backpack, and in Los Angeles for indiscriminately firing 120 bullets at an unarmed suspect, damaging the homes and risking the lives of members of the predominately African American community. *See id.*

<sup>143</sup> *See id.* (noting that the apology by the Los Angeles County Sheriff's Department "was not expected to prompt severe repercussions in any potential lawsuits because it was carefully worded as an expression of sympathy, not an admission of guilt").

<sup>144</sup> Bolstad, *supra* note 2, at 563.

<sup>145</sup> *See supra* notes 79–83 and accompanying text.

behavior.<sup>146</sup> These scholars implicitly rely on the cognitive dissonance theory of social psychology.<sup>147</sup> At the risk of oversimplifying a complex and controversial theory, cognitive dissonance theory maintains that individuals have a psychological need for their cognitions—which include beliefs, feelings, and actions—to be consonant with each other.<sup>148</sup> If such consonance is lacking, individuals experience psychological discomfort and are motivated to bring their cognitions back into congruence. Thus, when individuals' actions are out of line with their beliefs or feelings, they will either change their actions or adjust their beliefs and feelings to regain cognitive congruence.<sup>149</sup>

According to this theory, individuals will either harm others out of a prior belief that such behavior is acceptable or seek to justify their behavior *ex post* by developing beliefs and feelings congruent with their actions.<sup>150</sup> This often consists of devaluing the harmed individual as deserving of mistreatment; it could also consist of minimizing the harm caused or the offender's role in causing the harm. For instance, the movie *Bully* tells the true story of the killing of high school student Bobby Kent by a group of his peers.<sup>151</sup> The group first decides that Kent deserves to die because he is a bully and a rapist. Out of this anger, the group plan the murder and then converges on Kent, stabbing him repeatedly and beating him with a baseball bat. Almost immediately after the murder, each participant seeks to minimize his

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<sup>146</sup> See Garvey, *supra* note 29, at 751 (“[P]ublicity and its potentially attendant shame can deter wrongdoing in three ways. First, they impose . . . some limitation on the offender’s freedom. . . . Second, and more importantly, they produce (if they work) an unpleasant emotional experience for the offender, which potential offenders will want to avoid and actual offenders will want to avoid repeating. Third, depending on the nature of his communal attachments, he may suffer adverse consequences from members of the community, who may gossip about him or refuse to engage in various forms of social and economic intercourse with him.” (citations omitted)); Kahan & Posner, *supra* note 29, at 377 (“Shaming penalties and other sorts of sanctions can, in theory, be used to change beliefs as well as behavior . . . .”); Sharon Lamb, *The Psychology of Condemnation: Underlying Emotions and Their Symbolic Expression in Condemning and Shaming*, 68 BROOK. L. REV. 929, 955 (2003) (“[W]e hope [the act of apologizing] will influence [criminals]. . . .”); Latif, *supra* note 33, at 313 (“[A]n ordered apology can deter future transgressions.”). *But see* Massaro, *supra* note 29, at 1933–34 (“At best, [shaming sanctions] are likely to prove futile, even silly, responses to crime. At worst, they may become highly destructive, state-imposed assaults on human personality.”).

<sup>147</sup> See, e.g., Kahan & Posner, *supra* note 29, at 377 (stating that the authors have used the cognitive dissonance theory of Leon Festinger, see LEON FESTINGER, A THEORY OF COGNITIVE DISSONANCE (1957), in an “impressionistic way”).

<sup>148</sup> See, e.g., Eddie Harmon-Jones & Judson Mills, *An Introduction to Cognitive Dissonance Theory and an Overview of Current Perspectives on the Theory*, in COGNITIVE DISSONANCE: PROGRESS ON A PIVOTAL THEORY IN SOCIAL PSYCHOLOGY 3–21 (Eddie Harmon-Jones & Judson Mills eds., 1999).

<sup>149</sup> See *id.*

<sup>150</sup> See *id.*

<sup>151</sup> *BULLY* (Lions Gate Releasing 2001). For a literary portrayal of the Bobby Kent story, see JIM SCHUTZE, *BULLY: A TRUE STORY OF HIGH SCHOOL REVENGE* (1997).

or her role. One protests that "all" he did was stab Kent once in the back of the neck, and that the knife "only went in a few inches."<sup>152</sup> Another "just" helped throw him face down into a canal after he was probably dead already.<sup>153</sup> Another merely watched.<sup>154</sup>

Throughout the movie, one can see the process of cognitive negotiation at work. The feeling comes first: The high school students hate Kent because he has abused them, and they want to see him die. The students then have to justify murdering him by developing a belief that he deserves it. Only then can they act. When the act creates unexpected feelings of guilt, they minimize their guilt by downplaying their actions and then develop the belief that they are being prosecuted unjustly.

The story has been simplified here to illustrate how a change in one's belief, feeling, or action can have a ripple effect on the other two and how this process of interaction among cognitions is ongoing. The story also illustrates what cognitive dissonance theorists have shown in experiments: that by deliberately manipulating one cognition, it's sometimes possible to cause other cognitions to adjust.<sup>155</sup> For example, when researchers induced individuals to make statements they did not believe by threatening punishment or offering rewards, the researchers observed that these individuals would adjust their beliefs and feelings to correspond with what they were required to say.<sup>156</sup> In other words, from a theoretical standpoint, being compelled to apologize for wrongdoing without feeling sorry could be a first step in cognitively acknowledging wrongdoing and in adjusting one's future actions and attitudes to conform to this new belief.<sup>157</sup>

Shaming advocates rely heavily on this theory in advancing forced apologies.<sup>158</sup> For example, Katherine Baker suggests that college date rapists should be forced to stand in front of classrooms and apologize as a way of understanding the wrongfulness of date rape:

If these men were forced to apologize for what they did, if they were forced to articulate how rape carelessly used women, they might begin to think twice about their actions, just as most people now think

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<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> *See id.*

<sup>155</sup> *See* Harmon-Jones & Mills, *supra* note 148, at 4-5; Leon Festinger & James M. Carlsmith, *Cognitive Consequences of Forced Compliance*, 58 J. ABNORMAL & SOC. PSYCHOL. 203 (1959) (discussing the effects on a person's private opinion of being forced to do or say something contrary to that opinion).

<sup>156</sup> *See, e.g.,* Festinger & Carlsmith, *supra* note 155, at 203. This process is known by cognitive psychologists as the induced-compliance paradigm. *See* Harmon-Jones & Mills, *supra* note 148, at 8-10.

<sup>157</sup> *See, e.g.,* Latif, *supra* note 33, at 314.

<sup>158</sup> *See* Baker, *supra* note 58, at 704 (discussing the efficacy of forced apologies in the context of date rape).

twice before having another beer when they have to drive home. Apologizing forces people to admit their wrongdoing in a way that criminal punishments often do not.<sup>159</sup>

Similar rationales underlie punishments such as forcing drunk drivers to publish apologies in local newspapers, wife batterers to apologize in front of women's groups, and racists to apologize to African American congregations for burning down their churches.<sup>160</sup> Moreover, anecdotal and empirical evidence suggests that forced apologies sometimes do produce the desired change in beliefs and attitudes.<sup>161</sup>

Several important caveats are in order, however. First, one counterargument to the induced-compliance paradigm posits that while some offenders might respond to forced apologies by coming to terms with the wrongfulness of their actions and changing their belief systems, others might respond by hardening their positions and elevating their resistance through either overt or covert actions.<sup>162</sup> For example, a physically abusive prison guard might respond to forced apology by heightening the psychological abuse of prisoners, whom the guard now holds responsible for his public humiliation. An individual's response to forced apology thus might depend largely on personality, including any sociopathic tendencies the individual may harbor. Since courts are not experts in psychology, ordering offenders to apologize in hopes of favorable behavioral changes could be risky.<sup>163</sup>

Second, it's overly simplistic to think that changing someone's beliefs, attitudes, or behaviors is as easy as forcing them to apologize. Apart from individual personality characteristics, the effect of a compelled apology will depend on the dissonance ratio—in other words, the quality and quantity of other cognitions pushing in the opposite direction.<sup>164</sup> To draw on Baker's example, if a date rapist's support system consistently tells him that women say no when they mean yes,

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<sup>159</sup> *Id.*

<sup>160</sup> See Antkowiak, *supra* note 36, at 1012 (discussing a Texas federal court's decision to force wife batterers to apologize to their spouses in front of women's groups); Latif, *supra* note 33, at 312 (discussing a Kentucky judge who forced white defendants to apologize for arson of a church founded by freed slaves to the church's congregation); Shuman, *supra* note 35, at 187 (discussing an Illinois judge who forced drunk drivers to publish apologies in local newspapers).

<sup>161</sup> See Bibas & Bierschbach, *supra* note 29, at 143; Garvey, *supra* note 29; Lamb, *supra* note 144, at 955; Kahan & Posner, *supra* note 29, at 377; Latif, *supra* note 33, at 314; Shuman, *supra* note 35, at 187.

<sup>162</sup> See Harmon-Jones & Mills, *supra* note 148, at 8–10. See generally JEAN-LEON BEAUVOIS & ROBERT-VINCENT JOULE, A RADICAL DISSONANCE THEORY 73–97 (1996) (examining behavioral ramifications of forced compliance).

<sup>163</sup> See, e.g., Massaro, *supra* note 29, at 1920–21 (highlighting the dangers of requiring judges to predict offenders' susceptibility to shame and likely post-shaming behavior).

<sup>164</sup> See generally Harmon-Jones & Mills, *supra* note 148, at 28–40 (discussing cognitions and their role in the context of dissonance theory).

and rewards him with praise for his sexual conquests, a forced apology would probably not change his beliefs, attitudes, or actions.<sup>165</sup> Additionally, other internal cognitions—including the desire for self-affirmation and self-consistency—push the individual to deny doing anything wrong.<sup>166</sup> The likelihood that a forced apology will help change behavior depends largely on the resistance to change created by these and other countervailing external and internal forces.

Third, moral development and educational theory suggest that the only way to effect consistent behavioral change is by encouraging autonomous moral reasoning, wherein wrongdoers come to appreciate the wrongfulness of their actions more or less of their own accord—though external input is certainly part of the process.<sup>167</sup> In contrast, individuals who apologize only when told to are operating at Kohlberg's "pre-conventional level" or Gilligan's "self-interested stage" of moral development, which refer to the level of moral development of an average seven-year-old.<sup>168</sup> Individuals at the pre-conventional or self-interested stage have not developed the capacity for moral reasoning based on the importance of respecting conventional social norms, honoring higher ethical principles, or fulfilling relational responsibilities.<sup>169</sup> Rather, they are simply responding to the threat of punishment or the promise of reward without any principled understanding of why the authority figure is asking them to behave in a certain way.<sup>170</sup> In the context of forced apology, such an individual might refrain from the behavior that precipitated the forced apology as long as the threat level was high enough. As soon as the authority figures were out of the picture, however, he might revert to the harmful behavior. Thus, to the extent that the court is dealing with an individual stuck at the pre-conventional or self-interested stage of moral development, a forced apology is unlikely to create much long-term behavioral change.

One way to partially alleviate some of these concerns might be to adopt a version of a "woodshed" proceeding advocated by Jayne Barnard.<sup>171</sup> Barnard suggests that courts could compel CEOs and other

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<sup>165</sup> See Baker, *supra* note 58, at 704.

<sup>166</sup> See, e.g., BEAUVOIS & JOULE, *supra* note 162, at 58–60.

<sup>167</sup> See Carol Gilligan & Jane Attanuci, *Two Moral Orientations: Gender Differences and Similarities*, 34 MERRILL-PALMER Q. 223 (1988); see also CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT 27 (1993).

<sup>168</sup> See Lester A. Lefton, *Child Development*, in PSYCHOLOGY 349–50 (2000) (discussing Kohlberg's three-tiered model of moral development); see also GILLIGAN, *supra* note 167, at 27.

<sup>169</sup> See Lefton, *supra* note 168, at 348–50.

<sup>170</sup> See *id.*

<sup>171</sup> See Barnard, *supra* note 29, at 965 (advocating a woodshedding process, wherein "a wrongdoer admits his misconduct, recognizes its social significance, pledges corrective ac-

corporate offenders to appear in court for a public woodshedding.<sup>172</sup> During this proceeding, through a dialogue with the judge, the CEO would come to understand and be forced to articulate why the given act was wrong, what went wrong within the corporation that allowed it to happen, and what could be done to prevent it in the future.<sup>173</sup> This type of proceeding would encourage autonomous moral reasoning by requiring participants to “attend to the moral claims”<sup>174</sup> and “embrace and internalize their communities’ behavioral norms.”<sup>175</sup>

A similar proceeding could be used with governmental actors. As an addition to Barnard’s proposal, plaintiffs could be invited to participate, give impact statements, and engage in a conversation with the offender.<sup>176</sup> While plaintiffs could choose whether to participate, the government offender would be compelled to do so by court order. The chance for dialogue and for hearing directly about the offense’s impact on the plaintiff might increase the chance of attitudinal and behavioral change.<sup>177</sup>

Additionally, whereas a court-ordered apology might not change the behavior of an individual defendant, institutional defendants might be a different matter altogether. Shaming scholars have argued persuasively that shaming sanctions, including forced apologies, can serve as effective deterrents against corporate wrongdoing.<sup>178</sup> In a highly regarded study of corporate response to public censure, Professors John Braithwaite and Brent Fisse found that being forced to acknowledge wrongdoing publicly can play an important part in

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tion, and is welcomed back . . . into the community of law-abiding citizens, in the context of corporate crime”).

<sup>172</sup> See *id.* at 973–74.

<sup>173</sup> See *id.*

<sup>174</sup> *Id.* at 974 (quoting JOHN BRAITHWAITE, *CRIME, SHAME AND REINTEGRATION* 9 (1989)).

<sup>175</sup> *Id.*

<sup>176</sup> When asked how he would feel about such a proceeding, Mr. Dasrath replied: I’d really like that. I’d like to tell them how it felt. But I also want to hear from them. Ask them what they were thinking. Would they have done this if I were white? Do they think everyone who is white is in the Klan? I’d like them to understand that what they did was wrong. ‘Cause I don’t think they get it.

Interview with Michael Dasrath, *supra* note 61. Cf. LAZARE, *supra* note 22, at 69 (suggesting that victim impact statements made in the presence of criminal offenders help victims heal by giving voice to their pain).

<sup>177</sup> See Barnard, *supra* note 29, at 974.

<sup>178</sup> Cf. *id.*, *supra* note 29, at 966–72 (observing that in the reputation-conscious corporate world, shaming penalties could be useful deterrents); Garvey, *supra* note 29, at 786 (“[S]haming penalties tend to attract a good deal of media publicity, and so awareness of an offender’s wrongdoing usually reaches a wider audience than it otherwise would.”); Skeel, *supra* note 29, at 1823–35 (discussing generally the potential effects of shaming penalties on corporations).



inducing organizational change.<sup>179</sup> For example, after receiving significant negative publicity for criminal acts, companies in the study improved internal compliance mechanisms, implemented new training and educational programs for employees, and, in some cases, restructured their organization “from the top to the bottom of the corporate hierarchy.”<sup>180</sup>

Despite differences between corporations and governmental agencies, there are also important similarities, including a common institutional desire to avoid negative publicity. Theoretically, this similarity should make compelled apologies an effective means of encouraging governmental change. Yet without additional information on the actual effects of publicity on governmental agencies, one can only make an educated guess that court-ordered apologies would be an effective means of inducing organizational reform.<sup>181</sup> Moreover, negative publicity works most effectively to induce institutional change insofar as the governmental entity violates accepted social or moral norms—by abusing and sexually assaulting young children in custody, for example.<sup>182</sup> But negative publicity is less effective as a sanction—and may in fact be completely ineffective—when a majority of the population seems to agree with the wrongful act, such as with the racial profiling of “Arab-looking” men at airports.<sup>183</sup>

These caveats are not intended to undercut the value of compelled apologies. Rather, they are intended to suggest that courts must carefully tailor court-ordered apologies to aid victims’ psychological healing processes and should design compelled apologies to convey important social or moral messages to the broader social audience, rather than to teach offenders by shaming them. Shaming

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<sup>179</sup> See BRENT FISSE & JOHN BRAITHWAITE, *THE IMPACT OF PUBLICITY ON CORPORATE OFFENDERS* 233 (1983) (noting the behavior-influencing “sting” of negative publicity for corporations through “loss of corporate prestige, loss of prestige in the community for top management, trauma for executives in facing cross-examination about the scandal, distraction of top management from normal duties, and decline in employee morale”).

<sup>180</sup> Barnard, *supra* note 29, at 1006.

<sup>181</sup> See generally Bandes, *supra* note 115, at 1209 (“There is far too little nuanced information on the ways in which governmental entities make decisions, and the sorts of incentives, legal or otherwise, that would best promote accountability.”).

<sup>182</sup> Compare Richard Borreca, *Reported Abuse of Teens Prompts Probe of Lockup*, HONOLULU STAR-BULL., Aug. 27, 2003, at A1 (reporting Hawaii Governor Linda Lingle’s replacement of top management at the Hawaii Youth Correctional Facility), and Rod Ohlra, *Youth Facility Investigated*, HONOLULU ADVERTISER, Aug. 27, 2003, at A1 (reporting same), with Lynda Arakawa, *Youth Prison Reform Initiated*, HONOLULU ADVERTISER, Jan. 7, 2004, at B3 (reporting the formation of the Hawaii Juvenile Justice Project, whose mission was to change conditions at the youth correctional facility and create alternatives to youth incarceration).

<sup>183</sup> A Gallup Poll taken after 9/11 found that as many as 60% of Americans supported racial profiling of Arabs at airports. See Kari Lydersen, *What Next, Concentration Camps? Racial Profiling in the War on Terrorism*, IMPACT PRESS, Feb. 2003, available at <http://www.impactpress.com/articles/febmar03/racialpro2303.html> (describing the widespread practice and acceptance of racial profiling despite lawsuits by the ACLU and others).

penalties get things wrong by focusing on what will most degrade the offender while ignoring the needs of victims. If, on the other hand, it so happens that a compelled apology designed to heal the victim, promote an important moral value, and restore social equilibrium also happens to change the offender's attitude and behavior—as it very well might—so much the better.

#### IV

##### ANTICIPATED OBJECTIONS TO COURT-ORDERED APOLOGIES AS A CIVIL RIGHTS REMEDY

There are, of course, a few likely objections to court-ordered apologies that deserve discussion, some of which have arisen in the context of forced apologies in criminal proceedings. First, some scholars have argued that court-ordered apologies are ineffective because apologies must be sincere to be of any real value to victims.<sup>184</sup> Others contend that regardless of the value of apologies, forcing individuals to apologize is cruel because it causes the apologizer psychological pain.<sup>185</sup> Still others have argued that the First Amendment would bar any use of court-ordered apologies in civil cases,<sup>186</sup> or that a compelled apology is not an appropriate equitable remedy.<sup>187</sup> Finally, some have suggested that court-ordered apologies would lose their value over time due to the law of diminishing returns.<sup>188</sup> This Part addresses each of these objections in turn.

##### A. The Sincerity Objection

Many legal scholars have argued against compelled apologies in criminal cases and against strategic apologies in civil cases by asserting that an insincere apology is worthless.<sup>189</sup> One of most influential advocates of this objection is ethicist Lee Taft, of the Harvard Divinity School. In *Apology Subverted: The Commodification of Apology*, Taft argues that when civil defendants make apologies either under the protection of statutes that exclude them from admission as evidence or as a “strategic device[ ]” to settle lawsuits, the apology loses its moral dimension:

When lawyers, legislators, judges, and mediators disrupt this [moral dialectic] process by viewing apology in utilitarian terms, they sub-

<sup>184</sup> See Bolstad, *supra* note 2, at 549; Cohen, *supra* note 46, at 849; Taft, *supra* note 41, at 1156–58.

<sup>185</sup> See, e.g., Massaro, *supra* note 29, at 1942–43.

<sup>186</sup> See, e.g., Robbennolt et al., *supra* note 2, at 1147 n.114.

<sup>187</sup> See *infra* Part IV.D.

<sup>188</sup> See, e.g., Skeel, *supra* note 29, at 1864.

<sup>189</sup> See LAZARE, *supra* note 22, at 117–19 (acknowledging that while apologies ideally will be sincere, they need not be in order to be effective); see also Bolstad, *supra* note 2, at 549; Cohen, *supra* note 46, at 849; Taft, *supra* note 41, at 1156–58.

vert the moral potential of apology in the legal arena. When the performer of apology is protected from the consequences of the performance through carefully crafted statements and legislative directives, the moral thrust of apology is lost. The potential for meaningful healing through apologetic discourse is lost when the moral component of the syllogistic process in which apology is situated is erased for strategic reasons.<sup>190</sup>

To Taft, an insincere apology isn't just a "moral wrong"; it's valueless: "The lawyer must know the markers of authentic apology. . . . This is important for the plaintiff's lawyer so that his client is not duped into trading his resentment for the defendant's gain."<sup>191</sup>

Taft's argument is essentially theological: He likens the moral dialectic of secular apology and forgiveness to the religious act of repentance and absolution, where authenticity, remorse, and sorrow are necessary preconditions to the success of the ritual.<sup>192</sup> Inside the arena of interpersonal apology, Taft's argument has merit. But like many legal scholars, he fails to recognize important differences between public and private apologies. While the two follow a similar basic structure—acknowledgment of the offense, expression of remorse, reparations, and a promise of forbearance—their salient characteristics differ profoundly.<sup>193</sup>

Private apologies at heart are personal moral acts of repentance meant to restore a damaged relationship by securing the forgiveness of the other party.<sup>194</sup> As we know from our personal lives, private apologies are most effective when they are sincere. When we are hurt by others, particularly by those about whom we care deeply, we need to know that they understand why we are hurt, that they truly regret having caused us to suffer, and that they will try to avoid doing so in the future. When offered an apology that we sense is insincere, we are inclined to reject the apology and heighten our demand that the offender acknowledge our suffering and offer a sincere apology. The sincerity of the emotion, rather than the exact words, matters most.<sup>195</sup> Private apologies can be nonverbal, such as giving flowers to convey: "I

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<sup>190</sup> Taft, *supra* note 41, at 1157.

<sup>191</sup> *Id.* at 1159. Ironically, despite his central theme that apology has been commodified, this quotation suggests that Taft has no problem with commodifying a client's resentment, which the lawyer should trade for valuable compensation rather than an inauthentic apology.

<sup>192</sup> Taft establishes this framework from the beginning of his article, where he observes that "apology is valuable because it offers the offender a vehicle for expressing repentance and the offended an opportunity to forgive." *Id.* at 1138. Throughout his article, Taft describes apology as an act of repentance. See, e.g., *id.* at 1139–41, 1144.

<sup>193</sup> See LAZARE, *supra* note 22, at 39–40 (discussing similarities and differences between public and private apologies); see *id.* at 117–19 (arguing that apologies need not be sincere to be effective); see also TAVUCHIS, *supra* note 1, at 70–71.

<sup>194</sup> See LAZARE, *supra* note 22, at 229–33.

<sup>195</sup> See *id.* at 37, 117–19.

was wrong, please forgive me.”<sup>196</sup> As long as the emotion of sincere regret is expressed in a manner that’s understood by the parties involved, the apology serves its purpose, no matter what an onlooker might have understood.<sup>197</sup>

In contrast, it’s imperative that the general audience understand a public apology.<sup>198</sup> Thus, a public apology must be unambiguous. The overriding interest in public apology is “to put the apology ‘on record,’ that is, to extract a public, chronicled recantation that restores those aspects of the collectivity’s [or individual’s] integrity and honor called into question by the offense.”<sup>199</sup> If a public apology accomplishes this goal, the question of sincerity is superfluous. As opposed to private apologies, which are characterized by spontaneity and emotionality, public apologies are often carefully scripted, written by third parties, negotiated, and offered only after considerable pressure has been brought to bear.<sup>200</sup> Because the “sole raison d’être [of public apology] is the record,” sorrow is “ruled out or . . . perfunctory . . . .”<sup>201</sup> Rather, the message of the apology as a performative utterance takes center stage. “[The] public record is the apologetic fact.”<sup>202</sup> This difference between a collective apology and an interpersonal one changes “the very idea of apology.”<sup>203</sup>

Taft misses, or obscures, this point. He repeatedly cites Tavuchis and Lazare for the proposition that “sociologists and psychologists agree that an apology must have as its centerpiece ‘an expression of sorrow and regret,’”<sup>204</sup> but he selectively takes both authors out of context. He generalizes their explanations of the role of sincerity and remorse in interpersonal apologies and applies them to all apologies. In doing so, he misunderstands the nature of public apology:

The function of apology . . . has little, if anything, to do with sorrow or sincerity but rather with putting things on a public record. This . . . is collective apology’s distinctive capacity, its ordinary limits, and the ultimate source of its power to remedy and conciliate, if not completely to heal. Thus to demand more of the form is to mistake its task and logic.<sup>205</sup>

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<sup>196</sup> See *id.* at 35–38 (discussing several anecdotes illustrating the efficacy of brief or nonverbal apologies).

<sup>197</sup> See *id.* at 37, 117–19.

<sup>198</sup> See TAVUCHIS, *supra* note 1, at 71.

<sup>199</sup> *Id.*

<sup>200</sup> See LAZARE, *supra* note 22, at 39–40, 204–06.

<sup>201</sup> TAVUCHIS, *supra* note 1, at 102, 104.

<sup>202</sup> *Id.* at 102.

<sup>203</sup> *Id.* at 104.

<sup>204</sup> Taft, *supra* note 41, at 1140 (quoting TAVUCHIS, *supra* note 1, at 23).

<sup>205</sup> TAVUCHIS, *supra* note 1, at 117. Tavuchis elaborates:

[T]he major structural requirement and ultimate task of collective apologetic speech is to put things on the record, to document as a prelude to reconciliation. And what goes on record . . . does not necessarily express

Indeed, even private apologies made strategically without actual remorse, sorrow, or shame can be effective as long as they satisfy the needs of the victim:

[I]n order to be successful, an apology must meet the needs of the offended party, such as the restoration of dignity, acknowledgement of shared values, reparations, and the like. To believe that a "pragmatic" apology is somehow less truthful or less effective than a more impassioned one is to value style over substance, as if we believe that the manner in which an apology is delivered is more important than [sic] the goals it seeks to achieve. . . . As long as an apology meets important psychological needs of the offended, or, by being public, it reestablishes harmony and reaffirms important social values, we should not diminish its effectiveness by becoming critics.<sup>206</sup>

Taft and others who argue that only a sincere apology will do ignore the fact that plaintiffs value apologies that they know are less than sincere. Plaintiffs understand that when someone apologizes, he or she is likely to have some level of internal dissonance.<sup>207</sup> Still, plaintiffs like to hear defendants say they're sorry, and sometimes feel satisfaction in seeing a defendant make an apology that she did not want to make. Additionally, plaintiffs accept negotiated apologies as valuable and treasured parts of settlements, even when they know that the apology is insincere.<sup>208</sup> While this might make Taft "shudder," suggesting that plaintiffs are being "duped" insults their intelligence and neglects something very real about human experience.<sup>209</sup> This experience tells us that an insincere apology can sometimes be better than no apology at all, because it at least says what we need to hear. Somehow, mysteriously, this makes us feel better. For instance, when asked how he would feel about a court-ordered apology, Mr. Dasrath replied, "I know it wouldn't be sincere. But it's better than nothing. I'd take it."<sup>210</sup>

## B. The Cruelty Objection

A second common objection to compelled apologies is that, because apologizing against one's will can cause psychological anguish,

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sorrow and, except in a pro forma fashion, need not in order to effect reconciliation between collectivities. It is the latter function, then, that is the singular and significant achievement of collective apology.

*Id.* at 109.

<sup>206</sup> LAZARE, *supra* note 22, at 157–58.

<sup>207</sup> See, e.g., Wagatsuma & Rosett, *supra* note 2, at 477, 495.

<sup>208</sup> See Bibas & Bierschbach, *supra* note 29, at 143 ("[V]ictims may find even half-hearted apologies satisfying. . . . This explains why victims negotiate for confessions and apologies as part of settlements or plea bargains, even though the apology is an obvious quid pro quo.").

<sup>209</sup> Taft, *supra* note 41, at 1156, 1159.

<sup>210</sup> See Interview with Michael Dasrath, *supra* note 61.

forcing someone to apologize is cruel and inhumane.<sup>211</sup> Scholars who make this argument typically do so in the context of forced apologies used as shaming mechanisms such as requiring defendants to wear signs around their necks and stand on the sidewalk, making sex offenders put signs in their front yards, and forcing drunk drivers to place their pictures in the newspaper alongside an apology.<sup>212</sup> Such degradation ceremonies are meant to “strike at an offender’s psychological core.”<sup>213</sup> Scholars who object to such practices are exactly right: There is something deeply disturbing about allowing a court to seek out and degrade a person’s psychological core.<sup>214</sup>

This Article does not propose compelled apologies as a means of shaming individual government offenders. Rather, it proposes victim-centered apologies in which victims help craft the apology to say what *they* most need to hear or to convey certain social or moral messages. To the extent that courts craft apologies to help victims—not to maximize offender humiliation—many of the concerns about the cruelty of compelled apologies can be avoided. Additionally, in the context of official apologies, the apology might, but won’t always, come from the individual offender. For example, as will be discussed below, when a police officer abuses a suspect, the apology could come from the police chief as the representative of the police department rather than from the individual officer.<sup>215</sup> In other cases, the apology could be posted on a city bus, billboard, or Web site—without any specific individual having to utter a word.

Even in cases where a court orders an individual official to apologize for wrongdoing, however, concerns about the official’s discomfort should be put into proper perspective. To be sure, apologizing, voluntarily or not, can be psychologically painful. But being excluded from a city-sponsored parade because of your sexual orientation, or raped by a prison guard, or strip-searched and humiliated by a school principal, are even more painful. Requiring unrepentant officials to endure a small amount of psychological discomfort is a small price to pay to help injured individuals get the apology that they need to begin to put their lives back together.

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<sup>211</sup> See, e.g., Massaro, *supra* note 29, at 1942–43 (“When a shame sanction hits home, it is a direct assault on a basic need of all people, the esteem of others.”).

<sup>212</sup> See *id.* at 1881–82.

<sup>213</sup> *Id.* at 1920.

<sup>214</sup> See *id.*

<sup>215</sup> See *infra* Part V.B.

### C. First Amendment Concerns

A third common objection to court-ordered apologies is that they violate the First Amendment.<sup>216</sup> The First Amendment guarantees not only the right to speak, but also the right not to speak.<sup>217</sup> While the Supreme Court originally grounded this negative speech right—known as the compelled speech doctrine—in the right to freedom of thought and conscience,<sup>218</sup> it eventually expanded the doctrine to include the right to refrain from stating an objective fact.<sup>219</sup> This right extends not only to individuals, as one would expect if the right were grounded in freedom of conscience or thought, but also to corporations,<sup>220</sup> which lack a conscience or the capacity for thought.

While there's good reason to question the wisdom both of unmooring the compelled speech doctrine from its grounding in rights of conscience, and of extending negative speech rights to corporations, a critique of the Court's current construction of the compelled speech doctrine is beyond the scope of this Article.<sup>221</sup> It's sufficient to note that the Court's current construction presents a considerable practical and theoretical barrier to the use of court-ordered apologies as a general remedy in all civil cases.<sup>222</sup> As will be discussed below, an

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<sup>216</sup> See, e.g., Robbennolt et al., *supra* note 2, at 1147 n.114 ("The First Amendment raises potential obstacles to compelled apologies in civil cases."). The First Amendment does not generally present a barrier to compelled apologies in the criminal context, however, because trial courts have broad discretion to impose probation conditions, including conditions that significantly burden First Amendment rights. For a discussion and critique of this deferential standard of review, see Andrew Horwitz, *Coercion, Pop-Psychology, and Judicial Moralizing: Some Proposals for Curbing Judicial Abuse of Probation Conditions*, 57 WASH. & LEE L. REV. 75, 114 (2000) (noting the dearth of research into the efficacy of shaming sentences and the fact that judges are increasingly imposing them despite expert theories that "shaming is either totally ineffective or counter-productive as a response to criminality"); Phaedra Athena O'Hara Kelly, Comment, *The Ideology of Shame: An Analysis of First Amendment and Eighth Amendment Challenges to Scarlet-Letter Probation Conditions*, 77 N.C. L. REV. 783 (1999) (discussing the constitutionality of scarlet-letter probation conditions on grounds that such conditions compel probationers to speak).

<sup>217</sup> See *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943); *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) ("[T]he right of freedom of thought . . . against state action includes both the right to speak freely and the right to refrain from speaking at all.").

<sup>218</sup> See *id.*

<sup>219</sup> See *Riley v. Nat'l Fed'n of the Blind of N.C.*, 487 U.S. 781, 782 (1988) (holding that the First Amendment draws no distinction between compelled statements of opinion and compelled statements of fact, because either form of compulsion burdens protected speech).

<sup>220</sup> See *Pac. Gas & Elec. v. Pub. Util. Comm'n*, 475 U.S. 1, 8 (1986).

<sup>221</sup> See generally Nicholas Nesgos, *Pacific Gas and Electric Co. v. Public Utilities Commission: The Right to Hear in Corporate Negative and Affirmative Speech*, 73 CORNELL L. REV. 1080 (1988) (arguing that the *Pacific Gas* Court incorrectly expanded negative speech rights to corporations); David W. Ogden, *Is There a First Amendment "Right to Remain Silent?" The Supreme Court's "Compelled Speech" Doctrine*, 40 FED. B. NEWS & J. 368 (1993) (arguing that negative speech rights should be moored in rights of conscience).

<sup>222</sup> This barrier stems from the fact that when compelling an individual to apologize, the court is necessarily concerned with the content of the speech. See *United States v.*

apology ideally contains a statement of remorse, an acknowledgment of responsibility, and a promise of forbearance.<sup>223</sup> Because such statements strike at the heart of an individual's conscience, ordering an individual to apologize raises core First Amendment concerns.<sup>224</sup>

But these First Amendment concerns do not arise in compelling state actors to apologize, which is the proposal made in this Article. It's true, of course, that any speech by a governmental entity must be conveyed through an agent. If a court compelled a municipality to apologize, it would effectively be compelling an individual to apologize on the municipality's behalf. Alternatively, a court might directly

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United Foods, 533 U.S. 405, 410–411 (2001); *Hurley v. Irish-Amer. Gay Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 573 (1995); *Riley*, 487 U.S. at 795; *Pac. Gas & Electric*, 475 U.S. at 8–18. As opposed to content-neutral burdens on speech, which need only survive an intermediate level of scrutiny, content-based burdens on speech are subject to strict scrutiny. See *Hurley*, 515 U.S. at 573; *Riley*, 487 U.S. at 498. Strict scrutiny requires that the restriction be narrowly tailored to promote a compelling governmental interest—otherwise known as the “least restrictive alternative” analysis—and almost always spells death for the speech limitation at issue. See 16 AM. JUR. 2D *Constitutional Law* § 460 (2005).

<sup>223</sup> See *infra* Section V.A. Cf. LAZARE, *supra* note 22, at 38; Shuman, *supra* note 35, at 185.

<sup>224</sup> As a practical matter, the government regularly forces individuals to speak, such as when filling out tax forms or signing up for the draft. See, e.g., Kelly, *supra* note 216, at 858. The difference, of course, is that filling out tax forms or draft cards merely requires an individual to report objective facts accurately, while a forced apology requires a moral statement. It would seem that the government's interest in requiring an individual to report facts need not be as strong as its interest in requiring an individual to state opinions or beliefs. In other words, the greater the burden on core First Amendment rights, the more compelling the government interest must be. This sliding scale would suggest that in cases in which an apology was the only remedy that could make a severely injured plaintiff whole, a court might be justified in ordering an individual civil defendant to apologize. Additionally, the government interest might not need to be as compelling in ordering corporate defendants to apologize, because corporations lack the capacity for thought. See Choi, *supra* note 2, at 207.

Regardless, this Article leaves such First Amendment questions for another day. Instead, it focuses on the benefits of court-ordered apologies because court-ordered apologies offer the greatest promise as a remedy in civil rights case against state actors. For cases discussing First Amendment concerns with apologies in non-civil rights cases, see *Matchett v. Chi. Bar Ass'n*, 467 N.E.2d 271, 275 (Ill. App. Ct. May 17, 1984) (dismissing a complaint that sought publication of a response, a retraction, or an apology, holding that the defendant could not be compelled to “publish information it has chosen not to publish”), *cert. denied*, *Matchett v. Chi. Bar Ass'n*, 471 U.S. 1054 (1985); *Tackett v. KRIV-TV, No. H-93-3699*, 1994 WL 591637, at \*2–3 (S.D. Tex. May 5, 1994) (granting a Rule 12(b)(6) motion in a defamation action seeking a retraction and apology); *Griffith v. Smith*, No. LT-460-2, 1993 WL 945995, at \*13 (Va. Cir. Ct. Mar 4, 1993) (“First Amendment concerns preclude the Court from ordering the apology originally suggested . . .”), *rev'd on other grounds*, *Roberts v. Clarke*, No. 930781, 1994 WL 16011491 (Va. May 06, 1994). But see *Kicklighter v. Evans County Sch. Dist.*, 968 F. Supp. 712, 719 (S.D. Ga. 1997) (“[T]o require a simple apology for truculent and disruptive in-school behavior falls well within the ambit of an institution's balanced comprehensive authority. If the school board can determine what manner of speech is inappropriate in the classroom, it can also dictate what speech is proper when fulfilling its charge to inculcate the habits and manners of civility . . .” (citations and quotations omitted)).



compel an official to apologize.<sup>225</sup> While such public officials have a First Amendment right to speak, or not, on matters of public concern,<sup>226</sup> these rights can be constrained to promote legitimate government interests in ensuring the proper functioning of public agencies.<sup>227</sup> Governmental employees and agents are not “autonomous persons at liberty to act according to their own moral lights but occupants of institutionally designated offices or positions whose functions are defined and circumscribed by collective goals and interests.”<sup>228</sup>

Individual government officials have a right not to make statements against their personal beliefs or interests in their private lives. But as agents of public collectives carrying out official functions, their official actions and speech may be constrained—and dictated—by public goals and policies.<sup>229</sup> Suppose, for example, that a municipal fire chief conveyed a public message that Arab-Americans were not welcome to apply for positions as firefighters. Were a court to find, as it should, that such a message violates the Equal Protection Clause, the court could use its equitable power to require the fire chief to cease conveying this discriminatory message and instead issue a public statement that the city welcomed applications from those of all ethnicities, including Arab Americans. The fire chief could not hide behind the First Amendment by claiming such a statement was personally offensive to him. Likewise, if the court ordered the fire chief to include in that statement an apology to Arab Americans for discriminating against them, he could not object on First Amendment grounds. The First Amendment simply does not bar a court or legislative body from directing public officials to make certain public statements in carrying out their official duties.<sup>230</sup>

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<sup>225</sup> While the Eleventh Amendment precludes suits against states without their consent, *see* U.S. CONST. art. XI, it does not bar suits against state officials for injunctive relief. *See, e.g.*, 15 AM. JUR. 2D *Civil Rights* § 101 (2005) (“An action in federal court under 42 U.S.C.A. § 1983 against a state official in his official capacity, which seeks only declaratory or injunctive relief, is not barred by the Eleventh Amendment as such actions are not treated as actions against the state.” (citations omitted)).

<sup>226</sup> *See* 63C AM. JUR. 2D *Public Officers and Employees* § 477 (2005); Mike Harper, Note, *Connick v. Myers and the First Amendment Rights of Public Employees*, 16 HASTINGS COMM. & ENT. L.J. 525, 527–29 (1994) (discussing the Court’s four-part test, *see* *Connick v. Myers*, 461 U.S. 138 (1983), for determining whether a public employer’s sanctions of an employee for expression receives First Amendment scrutiny).

<sup>227</sup> *See, e.g.*, 63C AM. JUR. 2D *Public Officers and Employees* § 477 (2005) (“[T]o trigger First Amendment protection, the speech at issue must relate to matters of public interest, and the employee’s interest in First Amendment expression must outweigh the employer’s interest in efficient operation of the workplace.”).

<sup>228</sup> TAVUCHIS, *supra* note 1, at 100.

<sup>229</sup> *See* 63C AM. JUR. 2D *Public Officers and Employees* § 477 (1997); Harper, *supra* note 226, at 527–29.

<sup>230</sup> *See* 63C AM. JUR. 2D *Public Officers and Employees* § 477 (1997).

#### D. Compelled Apology as an Appropriate Equitable Remedy

A fourth concern with court-ordered apologies is whether they constitute appropriate equitable relief under state and federal civil rights statutes.<sup>231</sup> The few courts that have considered this question have done so in the context of state civil rights statutes and have reached divergent conclusions.<sup>232</sup> For example, the Supreme Court of Minnesota overturned an order that required two police officers to write letters of apology to an African American boy whom they had assaulted while using racially derogatory language.<sup>233</sup> The court reasoned that the legislature had intended affirmative relief in civil rights cases to remedy the lingering effects of discrimination, and that writing an apology letter is "calculated to humiliate and debase its writer and will succeed in producing only his resentment—an emotion not particularly conducive to the advancement of human rights."<sup>234</sup> Likewise, a Pennsylvania court overturned an order by the State Human Relations Committee directing the owner of a cemetery to write a letter of apology for refusing to intern the remains of an African American man.<sup>235</sup> The court reasoned that ordering an apology went beyond the commission's power to require "affirmative action" because it "could well lead to varied, arbitrary and even oppressive orders under the guise of giving proper effectuation of the purposes of the Act."<sup>236</sup>

In contrast, the Court of Appeals of New York upheld an order by the State Commissioner of Human Rights requiring the president of a company to apologize in writing to a former employee for "uttering obscene and anti-Semitic remarks."<sup>237</sup> The Court held that the Commission could have reasonably found it essential that the president apologize to remedy the discrimination:

The petitioners' only argument is that an apology is not authorized or appropriate under the circumstances. However, in view of the

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<sup>231</sup> Most federal civil rights cases are brought under 42 U.S.C. § 1983, which authorizes "suits in equity" for "deprivation of any rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C. § 1983 (2000).

<sup>232</sup> See Deborah Tussey, Annotation, *Requiring Apology as "Affirmative Action" or Other Form of Redress Under State Civil Rights Act*, 85 A.L.R.3d 402 (1978) (collecting cases that discuss whether civil rights violators can or should be required to formally apologize).

<sup>233</sup> See *Minneapolis v. Richardson*, 239 N.W.2d 197, 206 (Minn. 1976) ("A letter of apology is not a proper means to effectuate [the reversal of discriminatory effects].").

<sup>234</sup> *Id.*

<sup>235</sup> See *Alto-Reste Park Cemetery Ass'n v. Pa. Human Relations Comm'n*, 298 A.2d 619, 623 (Pa. Commw. Ct. 1972).

<sup>236</sup> *Id.* at 623; see also *State Comm'n for Human Rights v. Lieher*, 277 N.Y.S.2d 589, 591 (App. Div. 1967) (holding that requiring a landlord to apologize for housing discrimination would be "a useless, vain and meaningless gesture"), *rev'd on other grounds*, *State Comm'n for Human Rights v. Lieber*, 23 N.Y.2d 253 (1968).

<sup>237</sup> *Imperial Diner v. State Human Rights Appeals Bd.*, 417 N.E.2d 525, 526 (1980).

commissioner's broad powers to fashion relief as well as the significance the employer's refusal to apologize had in this case, it cannot be said that ordering an apology was not essential to eliminate the particular discriminatory practice the commissioner had found.<sup>238</sup>

These disparate decisions seem to reflect different assumptions about whether compelled apologies are backward- or forward-looking; that is, whether they are retroactive punishment or prospective relief.<sup>239</sup> Because the Pennsylvania and Minnesota courts conceptualized compelled apologies only as a means of shaming the offender, they inevitably concluded that the ordered apology was not prospective equitable relief, but rather impermissible retroactive punishment.<sup>240</sup> In contrast, the New York Court of Appeals recognized that a compelled apology could send a corrective message and thereby rectify past discrimination.<sup>241</sup> Moreover, as discussed above, an apology can also prospectively heal psychological wounds of victims.<sup>242</sup> The fact that courts frequently misuse forced apologies to shame and humiliate criminal defendants does not mean that court-ordered apologies are inappropriate in the civil context. Rather, all that's needed is a paradigm shift in which compelled apologies are crafted not to shame, but rather to provide a prospective remedy to individuals aggrieved by governmental abuse and to send desirable social messages to counteract such abuse.<sup>243</sup>

This last point bears emphasis. For court-ordered apologies to become reality, courts need only start ordering them, because they already have the ability to order apologies as part of their power to

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<sup>238</sup> *Id.* at 529 n.\*. The court declined to consider the dissent's concern that the compelled apology violated the First Amendment. *See id.*

<sup>239</sup> The Eleventh Amendment bars suits against states seeking retroactive *monetary* relief, but not those against municipalities. *See Alabama v. Pugh*, 438 U.S. 781, 782 (1978) (per curiam). Moreover, the Eleventh Amendment does not bar suits against state officials for prospective injunctive relief. *See, e.g., Ex parte Young*, 209 U.S. 123 (1908). *See generally* CHEMERINSKY, *supra* note 103, § 7.5.1 (discussing *Young*). It's an open question whether the Eleventh Amendment bars *non-monetary* retroactive relief against state officials. However, because the underlying purpose of the Eleventh Amendment is to protect state treasuries, the stronger position would be that it does not. *See Edelman v. Jordan*, 415 U.S. 651, 678 (1974) (holding that the Eleventh Amendment bars the retroactive payment of benefits found to have been wrongfully withheld); CHEMERINSKY, *supra* note 103, §§ 7.5.1–2. Nevertheless, because ordering an apology imposes a prospective requirement (as one may not retroactively apologize) there is no need to resolve that issue here. *See Ford Motor Co. v. Dep't of Treasury*, 323 U.S. 459, 464 (1945) (holding that orders that impose prospective requirements, as opposed to retroactive compensation, are permitted), *overruled by* *Lapides v. Bd. of Regents of Univ. Sys. of Ga.*, 535 U.S. 613 (2002).

<sup>240</sup> *See Minneapolis v. Richardson*, 239 N.W.2d 197, 206 (Minn. 1976); *Alto-Reste Park*, 298 A.2d at 623.

<sup>241</sup> *See Imperial Diner*, 417 N.E.2d at 526.

<sup>242</sup> *See supra* Part III.A.

<sup>243</sup> Courts rightly reject apologies that are meant merely to humiliate offenders, including most apologies currently ordered in the criminal justice system and most forced apologies advanced by shaming advocates.

grant equitable relief. Indeed, 42 U.S.C. § 1983 specifically authorizes courts to grant equitable relief, as well as other necessary forms of redress, against state and local governments.<sup>244</sup> Moreover, the Administrative Procedure Act waives the sovereign immunity of the United States in suits requesting equitable relief.<sup>245</sup> While some might object that ordering the executive branch to apologize raises potential separation of powers concerns, compelled apologies pale in comparison with other types of equitable relief that courts commonly order in civil rights cases. For example, courts have taken over school systems that failed to desegregate,<sup>246</sup> subjected prison systems to court control,<sup>247</sup> and placed public mental hospitals under federal receivership.<sup>248</sup> As long as courts continue to have the power to grant broad equitable relief in civil rights cases, a compelled apology certainly falls within the panoply of remedies that courts are empowered to grant.

#### E. The Law of Diminishing Returns

A final common objection to compelled apologies involves the law of diminishing returns. According to this objection, at some point each subsequent apology becomes less valuable than the one before, eventually rendering public apologies meaningless.<sup>249</sup> The public would become so overloaded by apologies that it would simply stop paying attention to them. While this objection has some validity, it overstates the matter to assert that if a court-ordered apology were available as a civil rights remedy, apologies would so flood the airwaves that they would cease to have public meaning.

First, apology, like politics, is local. Apologies send particularized messages about matters of local concern, and regardless of how many apologies state actors make across the country, people care most about what happens in their own communities. It strains reason to assume that people will ignore apologies on matters of great importance in their community just because public apologies become more common.

Moreover, the number of cases resulting in public apologies is likely to remain relatively small. Civil rights cases make up a small fraction of litigation in this country. And most civil rights cases will

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<sup>244</sup> 42 U.S.C. § 1983 (2000).

<sup>245</sup> 5 U.S.C. § 702 (providing that an action that states a claim and involves non-monetary damages shall not be dismissed on the ground that it is against the United States or that the United States is an indispensable party); *see also* CHEMERINSKY, *supra* note 103, § 8.9, at 494.

<sup>246</sup> *See, e.g.,* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971).

<sup>247</sup> *See, e.g.,* Vazquez v. Carver, 18 F. Supp. 2d 503 (E.D. Pa. 1998).

<sup>248</sup> *See, e.g.,* Dixon v. Barry, 967 F. Supp. 535 (D.D.C. 1997).

<sup>249</sup> *See* Massaro, *supra* note 29, at 1930–33; Skeel, *supra* note 29, at 1864.

continue to settle before trial, probably without a public apology.<sup>250</sup> Finally, despite the thousands of news stories on apologies, plaintiffs still file lawsuits everyday in the hopes of receiving them. This persistency of apology suggests that economic arguments of marginal utility may ignore the inherent value of an apology to an individual who has been wronged.

## V

### THE ART OF COMPELLED APOLOGY

#### A. Framing the Apology

Though it can appear simple, a successful apology must be carefully crafted. Few people are good at apologizing, because one's inclination is to offer a "pseudo-apology" that protects one's ego.<sup>251</sup> Some common examples of such apologies include: "I'm sorry if you were hurt"; "If I made a mistake, I'm sorry"; "I'm sorry, but I don't see what you're getting so bent out of shape about"; "I'm sorry, but I was only doing what I thought was best."<sup>252</sup> These pseudo-apologies preserve the apologizer's ego by the using passive voice to obscure the apologizer's role, questioning whether the victim was actually hurt, casting doubt upon whether the offender did anything wrong, minimizing the harm by blaming the victim for being oversensitive, or offering a self-serving justification.<sup>253</sup>

Public apologies often suffer from similar deficiencies. Consider the following example: On April 25, 2005, "Jersey Guys" radio hosts Craig Carton and Ray Rossi were discussing Jun Choi, a Korean American running for Mayor of Edison, New Jersey, on their morning show.<sup>254</sup> Carton mocked Choi by affecting a "Chinese" accent. He stated: "I don't care if the Chinese population in Edison has quadru-

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<sup>250</sup> Conceivably, however, the prospect of being ordered to apologize publicly following a trial will induce more governments to agree to offer apologies to plaintiffs as part of the settlement process. One advantage of litigation for governmental defendants is never having to say they're sorry—even when they anticipate losing at trial. This dynamic is particularly at play where it would be unpopular or embarrassing for the government to concede the plaintiff's point. Even when the government loses, it saves face by vowing to appeal, regardless of whether it ever does. The prospect of a court-ordered apology at the end of the litigation process might change the government's calculation.

<sup>251</sup> See Lazare, *supra* note 22, at 8. Apologies can be so difficult that a string of recent self-help books offer advice on how to give them. See, e.g., KEN BLANCHARD & MARGARET MCBRIDE, *THE ONE MINUTE APOLOGY: A POWERFUL WAY TO MAKE THINGS BETTER* (2003); KEITH MICHAEL HEARIT, *CRISIS MANAGEMENT BY APOLOGY: CORPORATE RESPONSES TO ALLEGATIONS OF WRONGDOING* (2005); SUSAN KENT, *LEARNING HOW TO SAY YOU ARE SORRY* (2001).

<sup>252</sup> See, e.g., LAZARE, *supra* note 22, at 8.

<sup>253</sup> See *id.* at 85–106 (describing the various self-serving ways in which one can undercut an apology).

<sup>254</sup> See Guillermo, *supra* note 20.

pled in the last year, Chinese should never dictate the outcome of an American election, Americans should.”<sup>255</sup>

Outraged, a coalition of over a hundred Asian American and anti-hate-speech groups banded together and demanded a public apology. Initially, the station refused to acknowledge wrongdoing or even meet with the coalition.<sup>256</sup> But after a month of protests and mounting pressure, the station posted the following statement on its Web site:

Some of the humor from our show is satire and parody which, by its very nature, is occasionally cutting edge. It is intended to entertain the listener. It is not—and never will be at this station—intended to play to our baser nature or to encourage or feed prejudices.

Unfortunately, a portion of our April 25th broadcast was offensive and insensitive, particularly to members of the Asian American community. We are genuinely sorry the offensive material was aired. We would like to take this opportunity to assure our listeners of our commitment to respect our diverse communities.<sup>257</sup>

In addition to the station’s written apology, Carton apologized on air to Choi: “Man to man, I’m sorry. The intent was never to hurt you personally or hurt your mayoral campaign.” Carton further “apologized” to any listener who was offended.<sup>258</sup>

While the station’s apology does several things well, it fails as a successful apology in a number of regards. First, by self-servingly calling its programming cutting edge, the station suggests that listeners who were upset simply do not understand satire. Of course, it would be hard for anyone to see what was cutting edge about these racist comments. But the station obscures the offensiveness of the comments with vague language: “[A] portion of our April 25th broadcast was offensive and insensitive, particularly to members of the Asian American community.” Those who read the apology without knowing the original statements would not be able to tell from the reference to “a portion of the April 25th broadcast” how racist Carton’s comments actually were. Next, the station mitigates its responsibility by claiming that it never intended to “play to our baser nature or encourage or feed prejudices.”<sup>259</sup> While it’s again hard to see what else Carton might have intended, the station’s denial of intentionality serves to minimize its and Carton’s culpability. Moreover, given that the station obscured Carton’s racist statement, the reader of the apology is left with the impression that the station really did nothing wrong and is making the apology for the benefit of some oversensitive Asian Ameri-

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<sup>255</sup> *Id.*

<sup>256</sup> *See id.*

<sup>257</sup> *Id.*

<sup>258</sup> *Id.*

<sup>259</sup> *Id.*

cans. Finally, the station fails to take full responsibility for airing the comments. Rather, the station speaks in the passive voice: "We are genuinely sorry the offensive material was aired."<sup>260</sup> The use of the passive "was aired" makes it sound as if the station played no role in the decision to air it.

Carton's apology to Choi is even worse. First, the "man to man" comment can be read to suggest that Choi is acting like a baby. In other words, if Choi were "man enough" he would have been able to take it in the first place and would now let it go without complaint. Second, Carton seems not to fully understand why his comments were wrong. His comments weren't just hurtful; they were racist. People were outraged by Carton not because they thought he was trying to hurt Choi's mayoral campaign, but because of his racist statement, use of a mocking Chinese accent, and suggestion that Asian Americans are not real Americans. He also engaged in yellow perilism by appealing to base fears that "Chinese" are trying to interfere in the political process of "real" Americans.

These deficiencies were not lost on the intended recipients. For example, Choi explained to Carton, "It wasn't that I was offended personally or found your comments hurtful, I believe it crossed a line. By saying these groups were un-American, that was what hurt me."<sup>261</sup> Kai Yu, founder of Asian Media Watch, acknowledged but did not accept the apology.<sup>262</sup> And journalist Emil Guillermo rejected as irrelevant Carton's statement that he did not intend to hurt Choi.<sup>263</sup> Guillermo offered an example of what would have been a more acceptable apology: "I'm sorry I made comments that demonstrated my total and utter ignorance of Asians and Asian Americans. The comments about the community were hurtful, intimidating and racist. I may have meant them to be entertainment, but it was anything but that. It won't happen again."<sup>264</sup>

While this suggested apology is still imperfect, it's much improved. Moreover, by looking at the difference between Guillermo's suggested apology and the actual apologies of the station and Carton, one can decipher the components of a successful apology. First, an apology should acknowledge the wrongdoing in concrete and unambiguous terms, should use the active voice so that the wrongdoer will

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<sup>260</sup> *Id.*

<sup>261</sup> *Id.*

<sup>262</sup> *Id.* When an apology is inadequate for whatever reason—timing, wording, inadequacy compared with the harm suffered—the recipient of the apology often acknowledges the apology without accepting it. In this way, the power remains with the offended party, who can choose when to accept the apology, or not accept it at all. See LAZARE, *supra* note 22, at 178.

<sup>263</sup> See Guillermo, *supra* note 20.

<sup>264</sup> *Id.*

be evident, and should identify the injured party:<sup>265</sup> “I made comments that demonstrated my total and utter ignorance of Asians and Asian Americans.”<sup>266</sup> Second, it should acknowledge the harm done without blaming the victim, minimizing the harm, questioning the legitimacy of the victim’s suffering, or cloaking the harm in conditionality:<sup>267</sup> “The comments about the community were hurtful, intimidating and racist.”<sup>268</sup> Third, it should accept full responsibility and disavow any excuse for the behavior:<sup>269</sup> “I may have meant them to be entertainment, but it was anything but that.” Fourth, it should express remorse:<sup>270</sup> “I’m sorry,” or, “We are genuinely sorry.” Fifth, it should promise to refrain from repeating the offense:<sup>271</sup> “It won’t happen again,” or, in the station’s apology, “We would like to take this opportunity to assure our listeners of our commitment to respect our diverse communities.”<sup>272</sup> Finally, the apologizer should offer reparations or take other measures to make amends.<sup>273</sup> For example, the station fined Carton and donated the money to a charity.

While the most successful apologies will contain all six components, an apology that does even some of these things can have limited success. For example, despite its many failings, the station’s apology expressed deep regret, affirmed its commitment to respecting diversity, and offered symbolic reparations by donating money to charity. As such, the apology was welcomed by some as “gratifying,”<sup>274</sup> and seems to have helped restore the station’s standing in the Asian and Asian American community. Despite his complaints, Guillermo capitulated: “But hey, we’ll take our justice like our pizza. By the slice.”<sup>275</sup> He also characterized the apology as “[n]ot bad.”<sup>276</sup>

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<sup>265</sup> See LAZARE, *supra* note 22, at 88–90; Erin Ann O’Hara & Douglas Yarn, *On Apology and Consilience*, 77 WASH. L. REV. 1121, 1133–36 (2002) (describing three key elements to a successful apology).

<sup>266</sup> Here, the apology should probably also identify precisely what those comments were.

<sup>267</sup> See LAZARE, *supra* note 22, at 91–97; O’Hara & Yarn, *supra* note 265, at 1133.

<sup>268</sup> Even Guillermo’s suggested apology is not quite as clear about who the injured party was as it could be. For example, here he might have suggested, “The comments were racist and hurtful and intimidating to the Asian and Asian American community.”

<sup>269</sup> See LAZARE, *supra* note 22, at 85, 90.

<sup>270</sup> See O’Hara & Yarn, *supra* note 265, at 1134.

<sup>271</sup> See *id.*

<sup>272</sup> Guillermo, *supra* note 20.

<sup>273</sup> See Wagatsuma & Rosett, *supra* note 2, at 487 (“An apology without reparation is a hollow form, at least when the injured person has suffered a clear economic loss and when the actor has the capacity to make compensation.”); see also LAZARE, *supra* note 22, at 127; Eric K. Yamamoto, *Race Apologies*, 1 J. GENDER RACE & JUST. 47, 54 (1997) (discussing apologies and reparations in the context of racial groups’ attempts to redress historical wrongs).

<sup>274</sup> Guillermo, *supra* note 20.

<sup>275</sup> *Id.*

<sup>276</sup> *Id.* He further describes the apology as a significant victory for Asian Americans in general:



As one can see from this example, the precise wording of a public apology is extremely important. The record of the public apology becomes the apologetic fact that might later be read and unconsciously dissected by literally millions of people.<sup>277</sup> And like Lincoln's apology for slavery, it becomes a piece of historical testimony.<sup>278</sup> As such, courts must take care in crafting court-ordered apologies and should do so only after fully understanding the nature of the defendant's actions and the plaintiff's suffering. Any ambiguity or equivocation undermines the effectiveness of the apology and may do more damage than good.

### B. Identifying Who Should Make the Apology

In the case of public collectives, it won't always be clear who should make the apology.<sup>279</sup> While one obvious candidate is the actual offender, this might not always be possible. For example, a police officer facing criminal charges for using excessive force would have a Fifth Amendment right to remain silent. Thus, someone else, such as the police chief, would have to convey the apology. Such an apology is akin to an apology from a parent for a child's misbehavior. Society accepts, and sometimes demands, such apologies because it's commonly understood that a parent is ultimately responsible for the behavior of their child. The parent apologizes not only for the child's failing, but also for their failure to keep a better watch on the child. Similarly, most members of the public would accept an apology from the police chief for the officers' acts, because they ultimately hold the police chief accountable for ensuring that the officers do not abuse their authority.

Sometimes, however, it may be difficult to decide who should apologize because there will be many offenders. At other times, it may be difficult to identify any particular offender because of collective incompetence. In such cases, it may suffice for a government spokesperson to offer the apology. When the offense is severe, however,

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There's victory, sweet victory, in New Jersey! The activists can't gloat. That would be impolitic. So let me go amok for them. We got the apology. Or rather, they did for all of us. After a month of negotiations, a coalition of Asian American and community groups against hate speech received an on-air apology May 25 from Millennium Broadcasting's New Jersey 101.5 FM and its two foul-mouthed DJs who insulted Asian Americans on-air last month.

<sup>277</sup> See generally TAVUCHIS, *supra* note 1, at 105–07 (discussing several public apologies arising from events surrounding World War II that reached many people).

<sup>278</sup> Lincoln's apology for slavery during his Second Inaugural Address is an eloquent and powerful testament to the evil of slavery. See Brooks, *supra* note 28, at 360–61 (reproducing Lincoln's speech).

<sup>279</sup> See generally LAZARE, *supra* note 22, at 40 (contrasting private apologies, where the identification of the apologizer is easy, with public apologies, where it is less so).

sometimes only an apology from the person with ultimate responsibility really counts. For example, even though Secretary of Defense Donald Rumsfeld eventually apologized for abuses at Abu Ghraib,<sup>280</sup> President Bush has been severely criticized for failing to apologize to the Iraqi people as Commander in Chief.<sup>281</sup>

With court-ordered apologies, the question of who should apologize for a particular offense is ultimately a fact-sensitive inquiry.<sup>282</sup> Given that courts are especially qualified to make such inquiries, the question of who apologizes should be left to the court's discretion.

### C. Deciding on a Forum for the Apology

A related question is the appropriate forum for the apology. Some forums are obviously more public than others. Because of the number of possibilities and the variables with each, the appropriate forum for the apology, like the determination of the most appropriate person to deliver it, must be left to the court's discretion.<sup>283</sup> Nevertheless, a number of factors should guide the court's determination, including the targeted audience, the severity of the offense, the extent to which the offense is publicly known, the degree to which the countervailing message is ingrained in the public psyche, and the importance of the value at stake. The key, as for all remedial orders, is proportionality.

Additionally, plaintiffs should have considerable say in choosing the forum for the apology. It should go without saying that if the plaintiff asks for a letter of apology a court should not order the defendant to blast the apology on a billboard. Likewise, if the plaintiff desires the relative quiet of a courtroom apology, a court should re-

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<sup>280</sup> See, e.g., Bradley Graham, *Rumsfeld Takes Responsibility for Abuse*, WASH. POST, May 8, 2004, at A1.

<sup>281</sup> See, e.g., Fred Kaplan, *Why Bush Didn't Apologize*, SLATE, May 5, 2004, <http://www.slate.com/id/2100015/>. While Mr. Dasrath, for example, eventually received a letter expressing regret from Continental customer service, he rejected it because he felt the apology should come from the pilot or at least someone with supervisory authority over the pilot. See Interview with Michael Dasrath, *supra* note 61.

<sup>282</sup> For example, if those at the top ordered or encouraged the abuse, they should apologize. If a supervisor fails in her duty to monitor her subordinates and allows grievous abuse, she has to assume responsibility. On the other hand, if some inadvertent bureaucratic blunder causes the harm, an apology from a government spokesperson could suffice.

<sup>283</sup> For instance, a courtroom is a quasi-public setting, and an apology given in court is likely to be heard by only a few people. An apology in a newspaper can be more visible, but not if the apology is buried alongside other public notices where few people are likely to see it. An apology aired on television could be more prominent, but the number of people who view it depends on what time, what station, and how often it's aired. Other possible forums include Web sites, posters on city buses, billboards, and public notices in government offices. Each of these also presents an additional list of variables, including how prominently the apology should be placed on the Web site, how many city buses it should be posted on, how long left up on the billboard, what size public notice, and so forth.

spect this desire, perhaps in the form of the public woodshedding discussed above.<sup>284</sup> But if the plaintiff has sought an apology to be vindicated publicly, or to send a public message about acceptable and unacceptable behavior, courts should ensure that the forum for the apology is indeed a public one.<sup>285</sup> Though the offenses may have been committed in anonymity—such as a suspect beaten in an alley—court-ordered apologies for such offenses cannot take place in the dark if intended to harness the considerable restorative and remedial power of a public apology.<sup>286</sup>

#### D. The Continuing Need for Other Remedies

Finally, an apology lacking restitution can be a “hollow form.”<sup>287</sup> If you wreck someone’s car, even the most profuse apology, without an offer to repair the damage, is meaningless. As Eric Yamamoto notes in his article *Race Apologies*, dealing with the separate issue of reparations for historical racial injustice, “In some circumstances, acknowledgment of responsibility for a racial group’s historical wounds may itself be enough to foster healing. In other instances, something more may be needed because ‘repentance without restitution is empty.’”<sup>288</sup> This point, of course, is equally true in the case of court-ordered apologies for contemporary civil rights violations. Thus, when a plaintiff has been harmed in some quantifiable manner, courts should also require that defendants provide compensation lest plaintiffs and the public perceive a court-ordered apology as mere words or a way to let the government off easy.<sup>289</sup> A court-ordered apology should be a supplement to, not a substitute for, other remedies.

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<sup>284</sup> See *supra* text accompanying notes 171–75.

<sup>285</sup> Mr. Dasrath noted, “I want them to apologize in public. Maybe issue a press release. Many people know about it because it’s been in the news. I want the public to know what happened and that it was wrong.” Interview with Michael Dasrath, *supra* note 61.

<sup>286</sup> See TAVUCHIS, *supra* note 1, at 70–71 (“[A]pologetic discourse between the One and the Many takes place and unfolds in a public domain from beginning to end, no matter how limited the engaged public may be. It’s this that invests the exchange with new purpose and significance. For publicity, ventilated speech, does more than direct attention to a plurality of offended parties; it situates the offender in a sociolinguistic territory whose logic and economy require a particular kind of display or, more aptly, performance.”).

<sup>287</sup> Wagatsuma & Rosett, *supra* note 2, at 487.

<sup>288</sup> Yamamoto, *supra* note 273, at 54.

<sup>289</sup> While restitution may be necessary, the particular type of restitution will vary according to the harm suffered. At times, reparation will be injunctive in nature, as in the case of affirmative action programs for hiring and promoting individuals of races that have suffered discrimination. At others, in cases where the injury is intangible, symbolic reparation can be offered. See LAZARE, *supra* note 22, at 127. The case of the New Jersey radio station donating money to a charity is one example. See Guillermo, *supra* note 20.

## CONCLUSION

Together with traditional forms of redress, court-ordered apologies offer the possibility of providing complete remedies to civil rights plaintiffs who would otherwise be inadequately compensated for psychological and symbolic injuries. While the countervailing concerns of freedom of speech and conscience likely preclude the use of court-order apologies as a general civil remedy, these concerns are not significant barriers to apologies by official state actors. To the contrary, citizens should look to government officials to set examples as to proper social, moral, and legal behavior. It's thus critically important that courts hold the government responsible when it abuses the rights of citizens.<sup>290</sup> Because of their high expressive utility, court-ordered apologies could be effective in apportioning responsibility for human injustice. Likewise, court-ordered apologies could help heal the psychological wounds of victims, send desirable social messages, reinforce accepted norms, and restore social equilibrium. Moreover, these benefits are immediately realizable, as courts already have the equitable power to compel apologies. Civil rights attorneys thus should start specifically requesting court-ordered apologies in appropriate cases. Furthermore, courts should grant such requests whenever they find that a court-ordered apology is necessary to provide a complete remedy to an aggrieved individual or group.

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<sup>290</sup> See Bandes, *supra* note 115, at 1211.

