Justice Through Apologies: Remorse, Reform, and Punishment

Nick Smith

Cambridge University Press: New York, 2014

Reviewed by Hon. Gilles Renaud[*]

At one time I volunteered as a book review editor with the New York *Library Journal*, where I struggled with the editorial requirement of identifying—by means of designating a "starred review"—a text that was a must-read for the target audience. It had to be groundbreaking in the field, well-written and academic in the sense that it contributed in a signal fashion to other research. Thus, it had to be exhaustive—not a superficial study—and it had to be lively, not dry. The difficulty I encountered was that too few books met this demanding test, and yet it was often thought that certain authors always produced such stellar works.

For anyone vitally interested in the reform of sentencing in America and the common law world, Professor Nick Smith's multidisciplinary and multi-layered approach in *Justice Through Apologies: Remorse, Reform, and Punishment*[1] is worthy of this "starred" accolade. Professor Smith's book provides fine-grained analyses of complex issues such as remorse and reform, and fills a gap resulting from the lack of academic attention drawn to apologies in traditional criminology. Professor Smith, who teaches philosophy at the University of New Hamphsire, should be commended for his signal research, which embraces most of the leading writers on this subject from a critical and searching perspective.

In brief, *Justice Through Apologies: Remorse, Reform, and Punishment* lays bare a great number of the errors in theory and practice that surround the subject of contrition in the criminal sphere. This great result is achieved within the first 240 pages. The subject of apologies in

[*] BA (History), LLB (Ottawa), called to the Ontario Bar 1983, appointed to the Ontario Court of Justice in 1995.

1. Nick Smith, *Justice Through Apologies: Remorse, Reform, and Punishment* (New York: Cambridge University Press, 2014).

civil litigation is addressed just as fully in the second half of the book. Professor Smith also includes over 100 pages of endnotes to provide readers with additional sources on the subject. I further commend the author for his skilled writing and the editors for the pains they have obviously taken in producing a near flawless text. All of the chapters are introduced by excellent discussions and each subchapter is made plain and interesting by well-honed opening paragraphs. Additionally, each chapter and subchapter is well-closed-off by means of detailed summaries serving to introduce the next set of issues and insights. In short, this book is a massive study of this subject, and the author richly deserves to be described as having penned a magisterial study that will be an excellent resource for years to come.[2]

From the opening paragraphs—with reference to a letter of apology addressed to a victim of sexual violence, sent decades after a terrible crime by one who seemed both penitent and apologetic—the author succeeds in describing the subtleties of the victim/offender paradigm and how an apology, as a manifestation of remorse, may be the best and true first step towards the transformation of a criminal, leading to the reform of the wrongdoer and thus to the protection of the community going forward.

Professor Smith's initial discussion also lays bare the real fear that throughout the trial, actors in the criminal justice system will twist an accused's apology—and, by extension, their apparent feelings of remorse and hope for reform—until the apology bears no resemblance to its former self.[3]

The result, quite predictably, is that the apology is shorn of its essential and positive elements, becoming the instrument whereby additional harm is visited upon the victim and causing the offender to appear guilty of a greater crime than the original delict. Instead of being a statement that once embraced introspection, acceptance of responsibility and a

2. There is a wealth of academic interest on the subject of remorse of late. See generally Richard Weisman, *Showing Remorse: Law and the Social Control of Emotion* (Farnham, UK: Ashgate Publishing, 2014); Hannah Maslen, *Remorse, Penal Theory and Sentencing* (Portland, Or: Hart Publishing, 2015).

3. See e.g. *R v MM*, 2014 MBPC 23 at paras 27–31, 307 Man R (2d) 65 (in a case of prolonged sexual abuse of a young girl by her grandfather, Curtis J takes into account the accused's apology as a mitigating factor but places greater emphasis on the fact that he admitted to everything and was fully cooperative with police, ultimately concluding that the aforementioned factors should not mitigate the accused's sentence).

concomitant resolve to undo the harm, the apology is transformed into a "lawyered" and "layered" conditional and equivocal expression of some responsibility that reads something closer to a watered down "I am sorry if you think I did wrong." This leads to the victim being harmed again, to a degree that is far from negligible, making it almost as if the offender has committed the crime anew by some measure.

If, however, the criminal justice profession takes to heart the teachings of Professor Smith, we may very well improve this process to promote both the victim's chance for retribution and the offender's chance for rehabilitation,[4] thus reducing the likelihood of recidivism.

Beyond this general overview of apologies and their place in the criminal justice system, the book's greatest value may well rest in Professor Smith's ultimate analysis and able demonstration of the potential value of apologies in relation to rehabilitating offenders and the protection of our communities. He illustrates the legal backtracking and leger de main attempts by lawyers to recast both heartfelt admissions of wrongdoing and the spirit in which they are advanced in order to serve partisan interests. These illustrations provide the reader with numerous insights into the potential for social advancement flowing from a recast perspective on apologies and a powerful argument for the transformation of this area of the adversarial system. Professor Smith succeeds in gaining and retaining our attention as he skillfully discusses these issues, and then divides them into a legion of subissues with verve. He captivates the reader with his flair for language, marked by wit and wry irony, fashioned upon the anvil of the academy's best contributions in the field of philosophy, psychology, criminology and sentencing.

Having expressed myself in general terms thus far, I will now address quite precise issues and elements of Professor Smith's discussion. I begin by pointing again to Professor Smith's lengthy and insightful analysis of rehabilitation, which he takes up at various points in a variety of contexts, expressing rehabilitation as both emanating from the desire to apologize and as manifestated by the expressions of such contrition. He succeeds not only in laying bare our traditional black-letter understanding of

4. For further discussion on the subject of rehabilitation, see also Francis T Cullen, "Rehabilitation: Beyond Nothing Works" in Michael Tonry, ed, *Crime and Justice in America 1975–2025* (Chicago: University of Chicago Press, 2013) 299, Crime and Justice, vol 42.

the subject, but also in revealing far more subtle areas of interplay and antagonism in terms of other sentencing objectives. The result, even without references to displays of apology and remorse, is a rich and lively debate on the vital subject of sentencing and a better understanding of how to place apologies, remorse and reform on a correct philosophical foundation block.

Smith leaves no stone unturned in his mission to transform the common law world's view of apologies and of the remorse that may be channeled as a result. He skillfully and repeatedly attacks the subject of retributivism from a number of different perspectives and in light of a great number of critical writings.[5] Even while condemning retributivism, he sustains a defence of the reform inherent in a true and complete apology while maintaining an unceasing and adept condemnation of deterrence theory.[6]

The next major area that I wish to underscore surrounds the author's able analysis of the issue of a sentence reduction or increase in accordance with the presence or absence of an apology, leaving aside other indications of remorse. Professor Smith's analysis is a welcome addition to the literature on this subject, especially given the uncertainty that arises when appellate courts defer to trial judges to determine an offender's remorse. In *R v Ramage*,[7] for example, the trial judge accepted the appellant's remorse as genuine. At the appellate level, Doherty JA was comfortable with a "deferential standard of review on sentence appeals" and recognized the trial judge's "advantage over the appellate court when it comes to balancing the competing interests at play in sentencing".[8]

5. My only criticism of Professor Smith's book is the curious absence of any writings by Professor Michael Tonry on this subject. See e.g. Michael Tonry, ed, *Retributivism Has A Past: Has It a Future?* (New York: Oxford University Press, 2012).

6. For an influential discussion on deterrence theory, see Mirko Bagaric & Theo Alexander, "The Capacity of Criminal Sanctions to Shape the Behaviour of Offenders: Specific Deterrence Doesn't Work, Rehabilitation Might and the Implications for Sentencing" (2012) 36:3 Crim LJ 159; Mirko Bagaric & Theo Alexander, "(Marginal) General Deterrence Doesn't Work: And What It Means for Sentencing" (2011) 35:5 Crim LJ 269; Mirko Bagaric & Richard Edney, *Sentencing in Australia*, 2nd ed (Sydney, NSW: Thomson Reuters, 2015).

7. 2010 ONCA 488, 265 OAC 158.

8. *Ibid* at para 71.

Justice Doherty's reasons for deference are as follows:

> The trial judge gains an appreciation of the relevant events and an insight into the participants in those events—particularly the accused—that cannot be revealed by appellate review of a transcript. *For example, in this case, the appellant's remorse was accepted as genuine; however, at no time did he offer any explanation for what had happened. The trial judge was much better positioned than this court to evaluate these arguably inconsistent features of the appellant's response to the tragic events.*[9]

The decision in *R v Ramage* suggests that remorse may manifest not only through an apology, but also through the trial judge's evaluation of the sincerity of any markers of contrition. The case makes plain that this is quite controversial, to say the least. Having reviewed many cases on the issue of remorse and how best to assess whether the professed remorse is genuine, especially in the course of sentencing surveys found in a number of postings on Alan D. Gold's Netletter in Quicklaw, I conclude that a number of judges appear to ascribe different elements to this type of analysis and that the jurisprudence offers very little guidance other than the notion of "I know remorse when I see it!" Of course, the converse is also true: Expressions of remorse are rejected on no better or weaker a foundation, and a truly remorseful offender may lose out on the ascription of mitigating points due to stoicism, difficulty in communication, shyness, cultural barriers in expression or a multitude of other factors.

Not only is the identification or rejection of remorse fraught with peril, in Canada, a significant minority of judges assign aggravating weight to the perceived lack of remorse in an offender. For example, in the recent case of *R v W(RS)*, the Court remarked: "In addition to the factors set out in s. 718.2(a)(ii.1), (iii) and (iii.1), I have considered the prior criminal record and the lack of remorse to be aggravating factors. As well, the assaults occurred on more than one occasion."[10] And yet, a Quicklaw search of "lack of remorse—not aggravating" will produce about two-thirds to one-third split as between judgments declaring categorically that remorse is mitigating and ones declaring that lack of remorse is not aggravating. The result is that an offender never knows how the judge will meet a not guilty plea, or a refusal to assume responsibility once a finding of guilt has been made, when their sentence is delivered.

9. *Ibid* [emphasis added].

10. 2015 NLTD(G) 31 at para 24 (*sub nom R v RSW*), 364 Nfld & PEIR 113.

The case law in Canada does draw a valuable distinction, however, between the merits of punishing any perceived lack of remorse and the fact that a claim of innocence at the end of the trial may elicit belief that individual deterrence may not be fully secured without a jail term or other similar severe punishment. In *R v G(S)*, Leach J provides useful guidance on this point:

> Mr. G.'s ongoing assertion of innocence certainly is not an aggravating circumstance, although I note that it does leave the court without a basis for inferring that Mr G. has insight into his sexually assaultive behavior, and the absence of insight may be relevant to the need for specific deterrence and/or Mr G.'s prospects for rehabilitation.[11]

In light of this doctrinal obstacle, we have much to learn from *Justice through Apologies: Remorse, Reform, and Punishment*. In one respect, Professor Smith's book skillfully discusses whether any form of reduced punishment for categorically apologetic offenders is warranted on the foundation that apologies demonstrate both remorse and a resolve to act responsibly, thus enhancing the likelihood of rehabilitation. Included in this quite detailed and insightful discussion is the oft-overlooked issue of the leniency arising from the apology as a manifestation of the offender's capacity and insight surrounding the victim, especially as a moral interlocutor. True respect and feelings for the victim augur a reduced degree of recidivism, Professor Smith suggests, all other things being equal.

In addition, the author sets out and answers a series of valuable questions on the corollary issue of what should be the consequences in sentencing of a failure to apologize, to manifest remorse or repentance. For example: the impact this might have on future parole hearings, or on the lessening of any civil restrictions or disqualifications, such as the ability to frequent public parks or to vote. In doing so, he touches upon the corollary issue of the consequence of a failure to apologize and to manifest remorse and repentance. A host of other issues are also addressed, from the question of whether remorse and apologies are categorical (like death and pregnancy) to what does one make of statements equal to "I love you" on a first date?[12]

11. 2014 ONSC 6309 at para 38 (*sub nom R v SG*), 117 WCB (2d) 94 [citations omitted].
12. See Smith, *supra* note 1 at 98.

Over and over again, the author counsels the reader to be wary of the consequences of assigning leniency to the apparently contrite and apologetic offender, as such incentives might lead to "inauthentic" apologies and reward those who cry more easily or who are savvy enough to display sentiments of shame at sentencing. Professor Smith also expresses real concerns about any judge's ability to discern what truly passes in the soul of the offender, and he discusses the merits of assigning no weight to such exercises lest they result in unwarranted sentencing disparities.[13] But difficulties in gauging factors (such as: risk of reoffending, evidence of intoxication, provocation, and premeditation versus spontenaity) do not block us from our task in many other instances and should not deter us from attemping to make this distinction, Professor Smith explains. Thus, a more nunanced understanding of the science of sentencing is needed in this regard. In exploring the nuances of apologies in the context of sentencing, the author points to and reviews ably the controversies surrounding situations of an accused who "might protest drug policies, for instance, by admitting to breaking the law while rejecting the law's moral authority".[14] In this case, there is no "remorse" despite the fact that the accused's moral blameworthiness may be in question. The learned author no less skillfully addresses the question "what are the badges" of remorse or the absence of remorse in the same fashion as he delineates what constitutes a true apology as opposed to a deficient one.

Conversely, interested readers are invited to review Professor Smith's discussion of voluntary apologies, which would seem to prima facie indicate remorse:

> "[O]ne of the most powerful reasons to give serious consideration to voluntary apologies in law lies in the categorically apologetic convict's fulfilled promise to refrain from reoffending.. . . I will argue that the promise to reform that is central to categorical apologies provides some incapacitative value."[15]

Indeed, some of Professor Smith's commentary is so practically useful for judges that I myself have copied into my Bench book the citations found below, for easy incorporation into a judgment, as the need may arise:

13. *Ibid* at 103–04.
14. *Ibid* at 90.
15. *Ibid* at 86.

To summarize my view, court-ordered apologies in criminal and civil contexts produce many costs and few benefits. The consequentialist benefits potentially include very marginal deterrent, rehabilitative, and notification value. Even these benefits are speculative and potentially counterproductive, for instance if an offender finds offering an apology less of a deterrent than an alternative sentence or if the ordered apology alienates rather than reintegrates a convict.. . . Voluntary apologies in criminal contexts . . . present potential for far greater benefits.[16]

Apologies form a vital part of our everyday lives,[17] and, as in all factual controversies in criminal and civil court, it is difficult to know what is sincere and what is a sham and shameful. In this respect, Professor Smith's teachings are valuable and insightful. His text is also invaluable in suggesting how best to incorporate apologies within the sentencing calculus that involves both reform and remorse. The author not only justifies apology reductions in the selection of a fit sanction fully and fairly, he paves the way to a new sentencing calculus that may well be fairer to all concerned and ultimately far better for victims and their recovery.

In the ultimate analysis, there will always be remorseless offenders.[18] But for all of the offenders who apologize for their misconduct as a first step towards acceptance of responsibility and reform and who thus show remorse together with all other actions they undertake and the future misconduct they forebear, surely a new way of evaluating and assessing

16. *Ibid* at 92–93.

17. Even the world of fiction includes references to this fact as a staple element of the art of writing. See e.g. WEG Griffin, *The Berets: Book V of Brotherhood of War*, (New York: Jove Books, 1985). Griffin writes that President Kennedy announces to his Press Secretary Pierre Salinger that he will attend the funeral of a Navy Officer killed during the Bay of Pigs incident. When asked, "is that smart?" the President responds, "I got him killed . . . The least I can do is tell his family I'm sorry". *Ibid* at 65. Of course, the world of fiction also reveals duplicity in apologies. See e.g. Dave Bidini, *Keon and Me: My Search for the Lost Soul of the Leafs* (Toronto: Viking, 2013) ("a few days later Clarke called Seiling and said he was sorry" [in respect to a spearing incident, the author went on to speculate] . . . he must have done while sniggering behind his hand . . . as the captain covered the receiver to stifle the sound of their cruel laughter" at 170).

18. See e.g. *R v Salah*, 2015 ONCA 23, 328 OAC 333.

> In an interview with the probation officer who prepared the Pre-sentence Report for use at the sentencing hearing, McDowell tended to minimize his role in the offence of which he was convicted. *He expressed no remorse about the tragic consequences of the fire he set* . . .. Denunciation and deterrence were paramount

the mitigation inherent in such positive steps is long overdue. The first meaningful step is to learn from Professor Smith's insightful and instructive teachings.

In conclusion, I am vitally interested in sentencing[19] and I delight in acquiring a text that teaches new lessons from a novel perspective. I have no hesitation in stating that it is a rare book that may revolutionize sentencing practices in America and in other common law jurisdictions, and Professor Smith's *Justice Through Apologies: Remorse, Reform, and Punishment* is a splendid example of so rare a contribution to our knowledge.

> The trial judge considered . . . that these factors, neither individually nor cumulatively, warranted a lesser period of parole ineligibility than that which he established. *This is all the more so considering McDowell expressed no remorse and attempted to minimize his role in the underlying conduct.*

Ibid at paras 249, 262 [emphasis added].

19. See e.g. Gilles Renaud, *The Sentencing Code of Canada: Principles and Objectives* (Aurora, Ont: LexisNexis, 2009).

Queen's law journal

Faculty of Law, Queen's University

Volume 41 Number 2 Spring 2016