

# ON THE MORAL AND CONSTITUTIONAL PERVERSITY OF COURT-ORDERED APOLOGIES

Michael Hristakopoulos\*

INTRODUCTION .....	365
I. FIRST AMENDMENT ANALYSIS .....	368
A. Conscience and Silence as Fundamental Rights .....	369
B. Civil Apologies .....	372
C. Criminal Apologies .....	374
1. Misuse of the Rehabilitation Standard.....	375
2. Further Issues with Rehabilitation .....	377
II. EIGHTH AMENDMENT ANALYSIS.....	378
III. EQUITY.....	381
CONCLUSION.....	384

“It was a full page of stiff and stilted writing . . . just awful. I hated that I participated in the humiliation and coercion of this other person. It didn’t help me. Did it help him? I doubt that very much.”

–E.S., recipient of a court-ordered apology.<sup>1</sup>

## INTRODUCTION

A young man ostensibly brought to justice stands before his victim in a detention center in Montgomery County, Maryland.<sup>2</sup> This is part of his court-ordered punishment and, although he knows that his freedom is at stake, he refuses to comply with the demands of the tribunal. Stubbornness is nothing new in the criminal-justice system, but many people would agree that what he has been told to do falls outside the boundaries of civilized society. In fact, it borders on medieval: He must get down on his knees and apologize, begging forgiveness until the spectators are satisfied with his

---

\* Associate Professor of Political Science, Valencia College; J.D. 2021, Barry University School of Law; M.A. 2013, University of Central Florida; B.A. 2011, University of Central Florida. The author would like to thank Eang Ngov for her extraordinary support, wise advice, and uncommon kindness. Thoughtful contributions from Mitchell Frank, Daniel O’Gorman, Kimberly Breedon, and Lee Taft were also instrumental in guiding this piece. I am endlessly grateful to my friends and family for their love and to the devoted staff of the *Vermont Law Review* whose judgment was so often better than my own.

1. Interview with E.S., Barry University School of Law, in Orlando, Fla. (Oct. 17, 2019).

2. Pat Wingert, *The Return of Shame*, NEWSWEEK (Feb. 6, 1995), <https://www.newsweek.com/return-shame-185216>.

honesty. Somewhere in the room, a camera waits, running to capture it all for the reeducation of future offenders. “I won’t do that,” he says, “[t]ell the court, forget it.” After several refusals, he is returned to detention.<sup>3</sup>

When it hands down a prison sentence, can the court demand that an inmate serve jail time “like she means it”? May the law distinguish between the begrudging payment of a fine and a genuinely remorseful one? To this day, court-ordered apologies remain available to judges at law and in equity.<sup>4</sup> Although civil courts have generally been reluctant to tread into the obvious constitutional quagmire, some civil<sup>5</sup> and a fair number of criminal<sup>6</sup> judgments have turned a blind eye toward the remedy’s troubling conscientious implications. In American law, all that is required to violate a defendant’s most jealously guarded freedom of conscience is a flimsy pretext, usually a “rational” need for rehabilitation.<sup>7</sup>

In *Justice Through Apologies*, Nick Smith examines the various roles apology plays in the law, and he concludes that none is more susceptible to abuse than the apology as legal remedy.<sup>8</sup> “Given the underlying confusion regarding the basic objectives of punishment [in the U.S. legal system],” Smith writes, “legal agents rarely make explicit the intentions of court-ordered apologies.”<sup>9</sup> Consequently, this remedy creates opportunities for grandstanding judges to appear “tough” without engaging in a measured consideration of those apologies’ propriety or value.<sup>10</sup> Of course, in some forms, apologies have a positive effect. Empirical evidence suggests that a more open culture of apology would substantially lower the amount of litigation clogging U.S. courts.<sup>11</sup> Judges already consider apologies in sentencing,<sup>12</sup> and a few state statutes attempt to promote forgiveness by

---

3. *Id.*

4. *See, e.g.*, *State v. K H-H*, 353 P.3d 661, 665 (Wash. Ct. App. 2015).

5. *Id.*

6. *See* Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 634 (1996) (citing public announcements of sexual assault and theft convictions, and a court-ordered apology by a car thief to a church congregation).

7. *K H-H*, 353 P.3d at 665.

8. NICK SMITH, *JUSTICE THROUGH APOLOGIES: REMORSE, REFORM, AND PUNISHMENT* 57 (2014).

9. *Id.* at 58.

10. *Id.* at 93.

11. Brent T. White, *Say You’re Sorry: Court-Ordered Apologies as a Civil Rights Remedy*, 91 CORNELL L. REV 1261, 1269–71 (2006) [hereinafter White, *Say You’re Sorry*] (discussing the 37% of medical malpractice plaintiffs who claimed they would not have filed suit against doctors who apologized for wrongdoing).

12. Stephanos Bibas & Richard A. Bierschbach, *Integrating Remorse and Apology into Criminal Procedure*, 114 YALE L.J. 85, 93 n.19 (2004) (citing Federal Sentencing Guidelines, § 3E1.1(a)). The Supreme Court has upheld the constitutionality of evaluating subjective beliefs in sentencing, as in *Wisconsin v. Mitchell*, when it upheld a state hate crime statute that imposed a harsher

shielding parties from tort liability for inculpatory apologies.<sup>13</sup> Even so, none of these voluntary acts present the same problems as their enforced, parodic counterparts.

On the one hand, it is a relief that the striking excesses of the Montgomery County episode—the kneeling, for example—are uncommon. But the coerced apology itself is what should be most disturbing. No matter what quantum of relief this theatrical display affords the victim, the practice is at odds with fundamental themes of American law: The dignity of the individual, the freedoms of speech and conscience, and the normally stringent standards that government must surmount before abridging them.<sup>14</sup> Compelled apologies imply that our justice system, usually limited to regulating the objective actions of people in the external world, may go somewhere much more sacred and private. Court-ordered apologies aim to reach into a human being and tamper directly with their beliefs.<sup>15</sup> The unwilling defendant brought before a judge on these terms is pierced on the fork of a moral trilemma, forced to violate the order of the court, disavow their beliefs, or—most frighteningly—become sincere.

Though there are few, if any, absolute rights in American law, the freedom of conscience so deeply implicated by forced apologies is as close to absolute as any other.<sup>16</sup> Due to the substantial risk that court-ordered apologies violate this paramount obligation and the diminution of their value through coercion, I conclude in Part II that nearly all court orders requiring an individual to apologize against their will violate the First Amendment of the United States Constitution and the moral predicates of

---

penalty at sentencing. Such practices hinge on different rationales from those that make coerced apologies objectionable. *Wisconsin v. Mitchell*, 508 U.S. 476, 484–85, 490 (1993)

13. Jay M. Zitter, Annotation, *Admissibility of Evidence of Medical Defendant's Apologetic Statements or the Like as Evidence of Negligence*, 97 A.L.R. 6th 519 (2014).

14. See U.S. CONST. amend. I (forbidding Congress from making laws that prohibit the free exercise of religion or that abridge freedom of speech); *Cantwell v. Connecticut*, 310 U.S. 296, 307 (1940) (declaring that it is in the interest of the United States to protect the freedom of religion and the freedom to communicate opinions); *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (indicating that, when legislation falls within a specific prohibition in the Constitution, the presumption of constitutionality can be narrowed).

15. *State v. K H-H*, 353 P.3d 661, 668 (Wash. Ct. App. 2015) (Bjorgen, A.C.J., dissenting in part) (“The prescription of what must be said, on the other hand, compels what is professed, and with that more closely touches the instruments of thought, more deeply trespasses on our crowning zone of privacy, on the beauties and mysteries of the mind.”).

16. *Cantwell*, 310 U.S. at 303–04; Patrick Weil, *Freedom of Conscience, But Which One? In Search of Coherence in the U.S. Supreme Court's Religion Jurisprudence*, 20 U. PA. J. CONST. L. 313, 318 (2017) (“Since the Court, despite the polysemy of the concept, has applied one interpretation of freedom of conscience, not only as a strong guiding principle in all its decisions since 1943 but as an almost absolute right . . .”).

American society.<sup>17</sup> Moreover, the Eighth Amendment also prohibits such orders from being imposed under its Cruel and Unusual Punishments Clause, which bars punishment on the basis of certain involuntary statuses.<sup>18</sup> This argument, expanded upon in Part III, hinges on the assertion that beliefs, including those about whether a defendant has wronged a victim, are such involuntary statuses.<sup>19</sup> In Part IV, I argue against the notion that courts may have greater discretion to award such apologies when sitting in equity.

The principal aim of this Article is to help usher American law toward a moral boundary that all legitimate legal systems must observe in the end. Court-ordered apologies are a severe affront to the moral autonomy that American government was commissioned to preserve. They make a mockery of the tremendous power that genuine apologies have to heal our endless conflicts, and reduce forgiveness to just another calculated legal transaction. Persons haled into the American courtroom are, and ought to be, protected from the indignity of court-ordered apologies by the First and Eighth Amendments, and by landmark precedents like *West Virginia State Board of Education v. Barnette*, *Cantwell v. Connecticut*, and *Robinson v. California*.<sup>20</sup> Together, these legal guideposts cohere around a deeper moral principle: The journey toward atonement must be made alone, or not at all.

## I. FIRST AMENDMENT ANALYSIS

The apology is an uncommon but accepted remedy in American law.<sup>21</sup> Although forced apologies have been sanctioned in both criminal and civil suits,<sup>22</sup> in practice civil courts rarely deploy them.<sup>23</sup> The following Part argues that the First Amendment rights of conscience and silence implicated by court-ordered apologies are fundamental and can thereby

---

17. See *infra* Part II.

18. See *infra* Part III.

19. *Id.*

20. *W. Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943); *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Robinson v. California*, 370 U.S. 660 (1962).

21. White, *Say You're Sorry*, *supra* note 11, at 1268; Elizabeth Latif, *Apologetic Justice: Evaluating Apologies Tailored Toward Legal Solutions*, 81 B.U. L. REV. 289, 296–97 (2001); Haya El-Nasser, *Paying for Crime with Shame, Judges Say 'Scarlet Letter' Angle Works*, USA TODAY, June 25, 1996 (describing one case where spousal abusers were ordered to apologize to their wives in front of support groups and another where a vandal was made to apologize to students at thirteen different schools).

22. Latif, *Apologetic Justice*, *supra* note 21, at 297.

23. Jennifer K. Robbennolt et al., *Symbolism and Incommensurability in Civil Sanctioning: Decision Makers as Goal Managers*, 68 BROOK. L. REV. 1121, 1147 n.114 (2003) [hereinafter Robbennolt, *Symbolism and Incommensurability*].

only be abridged subject to strict judicial scrutiny. This is followed by a survey of the ways in which civil and criminal case law have diverged from this standard and from each other. Though the civil apology is rare and frequently regarded as improper, it has found some shelter in *Imperial Diner, Inc. v. State Human Rights Appeal Board*.<sup>24</sup> The same reluctance has not prevented criminal apologies from taking more substantial root on a rational basis theory of “rehabilitation,” which gives judges a flawed, but plausible, reason to lower the standard.<sup>25</sup> Finally, this Part discusses certain moral and logical defects in the criminal courts’ concept of rehabilitation.

#### A. *Conscience and Silence as Fundamental Rights*

Evaluating the costs and benefits of an apology is no simple task.<sup>26</sup> To ignore the subjective value of apologies would be like trying to resolve the flag-burning debate on fire safety grounds; bare acts approach irrelevance where human beings are preoccupied with meaning. But, to borrow a phrase from *Baker v. Carr*, it is difficult to see what “judicially manageable standards,” (i.e., objective standards) a court could deploy when weighing the value of an apology, or of an indignant refusal, in its cost-benefit calculus.<sup>27</sup>

Though an apology takes the form of a factual claim (“I am sorry”), it is more properly understood as a declaration of values.<sup>28</sup> An apology condemns the prior actions of the declarant and rejects the beliefs that produced them.<sup>29</sup> At the same time, it affirms the counterposed values of the recipient.<sup>30</sup> This validation is what the recipient of an apology may, in principle, benefit from, coupled with the understanding that the declarant no longer poses a threat to the values he or she has affirmed.<sup>31</sup> When a court imposes an apology on an unwilling defendant, it does not endeavor to

---

24. See, e.g., *Bailey v. Binyon* 583 F.Supp. 923, 933–34 (1984).

25. See, e.g., *State v. K H–H*, 353 P.3d 661, 665–66 (Wash. Ct. App. 2015); *United States v. Clark*, 918 F.2d 843, 848 (1990).

26. See generally SMITH, JUSTICE THROUGH APOLOGIES, *supra* note 8, at 202–326 (advancing several comprehensive theories for the evaluation of apologies in civil and criminal courts).

27. *Baker v. Carr*, 369 U.S. 186, 226 (1962).

28. NICHOLAS TAVUCHIS, MEA CULPA: A SOCIOLOGY OF APOLOGY AND RECONCILIATION 13 (1991); White, *Say You’re Sorry*, *supra* note 11, at 1298.

29. Robbenolt, *Symbolism and Incommensurability*, *supra* note 23, at 1144–47 (discussing how apologies help legitimize the rule that the declarant has violated and reaffirm the parties’ values).

30. *Id.* at 1145; Lee Taft, *Apology Subverted: The Commodification of Apology*, 109 YALE L.J. 1135, 1144 (2000).

31. Robbenolt, *Symbolism and Incommensurability*, *supra* note 23, at 1145.

make known the defendant's beliefs; instead, the court promotes self-condemnation and the abandonment of one value system for another.<sup>32</sup>

Obviously, the government cannot impose criminal penalties merely because of a belief,<sup>33</sup> but just where necessary regulation becomes unconscionable, spiritual meddling is unclear. The First Amendment does not mention freedom of conscience but, unlike religious devotion to which it *does* afford staunch protection, conscience exerts profound influence on every single person engaged in moral reasoning—not just the religious.<sup>34</sup> Perhaps because of this, rights of conscience are sometimes considered a specialized case of religious rights, or vice versa.<sup>35</sup> Article 18 of the U.N. Universal Declaration of Human Rights considers the unified right of “conscience and religion” as a single term,<sup>36</sup> and the two were considered at least partially interchangeable in the era of the American founding.<sup>37</sup> James Madison advocated for a First Amendment right to free “conscience,” which ultimately transmuted into the familiar Establishment Clause.<sup>38</sup> On this basis alone, it is plausible that freedom of conscience is at least as constitutionally fundamental as freedom of religion.

Nonetheless, the weight of conscience in American law is not gleaned entirely from its prestigious associations. The Supreme Court of the United States “has identified the [unenumerated] freedom of conscience as the central liberty that unifies the various Clauses in the First Amendment.”<sup>39</sup> In *Cantwell v. Connecticut*, the Court considered it explicitly, concluding that the First Amendment did in fact encompass a freedom to believe and act on conscience, stating that “[t]he first is absolute but, in the nature of things, the second cannot be.”<sup>40</sup> This claim merits reflection for its strange structure: The Court first declares a sweeping and absolute right, only to immediately undercut it. Why? It is a widely shared opinion, even among the Court, that rights are rarely, if ever, absolute.<sup>41</sup> Furthermore, even if it is

32. This is strongly evinced by perennial claims that coerced apologies may be critical to the rehabilitation of criminal offenders, an argument examined more closely in Part II, subsection on Criminal Apologies.

33. *Am. Commc'n Ass'n, C.I.O. v. Douds*, 339 U.S. 382, 408 (1950) (“Of course we agree that one may not be imprisoned or executed because he holds particular beliefs.”).

34. Rex Ahdar, *Is Freedom of Conscience Superior to Freedom of Religion?*, 7 OXFORD J. L. & RELIGION 124, 126–27 (2018).

35. *Id.* at 126.

36. G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

37. Rafael Domingo, *Restoring Freedom of Conscience*, 30 J. L. & RELIGION 176, 177 (2015).

38. *Id.* at 178.

39. *Wallace v. Jaffree*, 472 U.S. 38, 50 (1985).

40. *Cantwell v. Connecticut*, 310 U.S. 296, 303–04 (1940) (emphasis added).

41. Louis M. Natali, Jr. & Edward D. Ohlbaum, *Redrafting the Due Process Model: The Preventive Detention Blueprint*, 62 TEMP. L. REV. 1225, 1247 (1989); Alan Gewirth, *Are There Any Absolute Rights?*, 31 PHIL. Q. 15, 15 (1981).

true that pure belief ought to be absolutely free, beliefs are involuntary<sup>42</sup> and as of yet remain outside the technical reach of government interference.<sup>43</sup> It makes little sense, then, to speak of a “right” that people cannot exercise and that the government cannot violate. This wayward absolute appears to be not so much an attempt to articulate a true legal right, but rather a limit toward which government action may only approach without ever reaching, and always under greater pain of justification.<sup>44</sup> This comports with the conventional, but crude, heightening of judicial scrutiny for the class of rights designated “[f]undamental.”<sup>45</sup>

It is also uncontroversial that acts of conscience can include silent resistance to “refrain from accepting the creed established by the majority,” as courts clearly do when they declare whose actions deserve condemnation and whose victimhood deserves apology.<sup>46</sup> Academic literature cites cases like *Wooley v. Maynard* for the proposition that the free-speech umbrella covers “the right to refrain from speaking at all.”<sup>47</sup> In that case, the defendant was charged under a New Hampshire statute for covering up the state motto “Live Free or Die” on his license plate because it conflicted with his “moral, religious, and political belief[]” that the government’s grant of liberty was less valuable than God’s offer of eternal life and, therefore, not worth dying for.<sup>48</sup> Overturning his fines and jail sentence, the Supreme Court of the United States held that the “First Amendment protects the right of individuals to hold a point of view different from the majority *and to refuse to foster . . . an idea they find morally objectionable.*”<sup>49</sup> Yet, it is not always clear how courts distinguish the

42. Jonathan Bennett, *Why Is Belief Involuntary?*, 50 ANALYSIS 49, 87–89 (1990); René van Woudenberg, *Belief is Involuntary: The Evidence from Thought Experiments and Empirical Psychology*, 22 DISCIPLINE FILOSOFICHE. REV. SEMESTRALE 111, 130 (2013); Robert J. Hartman, *Involuntary Belief and the Command to Have Faith*, 69 INT’L J. FOR PHIL. RELIGION 181, 181 (2011).

43. Nick Smith, *Against Court-Ordered Apologies*, 16 NEW CRIM. L. R. 1, 7 (2013) [hereinafter Smith, *Against Court-Ordered Apologies*].

44. See *State v. K H–H*, 353 P.3d 661, 668–69 (Ct. App. Wash. 2015) (Bjorgen, A.C.J., dissenting) (relating the applicable level of constitutional scrutiny to how closely the government action touches defendant’s private sphere of conscience) (“The prescription of what must be said . . . compels what is professed, and with that more closely touches the instruments of thought, more deeply trespasses on our crowning zone of privacy, on the beauties and mysteries of the mind. To guard these treasures, the compulsion of attitude . . . should be allowed only if the strict standards of *Barnette* are met.”).

45. *Janus v. Am. Fed’n of State, Cty., and Mun. Emps.*, 138 S.Ct. 2448, 2460 (2018).

46. *Wallace v. Jaffree*, 472 U.S. 38, 52 (1985). The Supreme Court has gone further, remarkably holding that the First Amendment even protects against the compelled statement of some objective facts. *Riley v. Nat’l Fed’n of the Blind of N.C.*, 487 U.S. 781, 797–98 (1988).

47. Robbenolt, *Symbolism and Incommensurability*, *supra* note 23, 1147 n. 114 (quoting *Wooley v. Maynard*, 430 U.S. 705, 714 (1997)).

48. *Wooley*, 430 U.S. at 707–08 nn.2–4.

49. *Id.* at 715 (emphasis added).

moral objections of parties forced to apologize from the type of objection that *Wooley* protects. That case extended logically from the earlier holding of *West Virginia State Board of Education v. Barnette*, where the Court declared that students could not be compelled even to salute the flag and recite the Pledge of Allegiance; as an “affirmation of a belief and an attitude of mind,” mandating even the most routine acts of American patriotism improperly “invade[] the sphere of intellect and spirit which it is the purpose of the First Amendment” to protect.<sup>50</sup>

Such applications of the First Amendment track closely the circumstances of the court-ordered apology and strongly suggest that they apply to the conscientious objector there as well—wrong, indignant, and pompous though he may be. If so, the fundamental rights of conscience and silence implicated by court-ordered apologies can only be abridged subject to the strict judicial scrutiny required for all fundamental rights.<sup>51</sup> Government acts limiting them require: (1) justification by a compelling state interest; (2) narrow tailoring to achieve that interest; and (3) achievement of that interest by the least restrictive means.<sup>52</sup> Though the analysis certainly cannot end there, it is often remarked that this standard is “‘strict’ in theory and fatal in fact” as it indeed proves to be here.<sup>53</sup>

### B. Civil Apologies

A few state statutes have authorized civil apologies without regard for the probable First Amendment barrier,<sup>54</sup> usually as part of antidiscrimination measures that characterize the remedy as a form of “affirmative action” and task state civil-rights agencies with their administration.<sup>55</sup> When parties challenge awards of civil apology on appeal, courts usually set them aside on the reasoning that they are counterproductive to the stated ends of their authorizing legislation and there is great risk that they will be implemented in an arbitrary, oppressive, or “unreasonably burdensome” manner when compared to their benefit.<sup>56</sup>

---

50. *W. Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 633, 642 (1943).

51. *Wallace*, 472 U.S. at 50.

52. Richard H. Fallon, *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1315–16, 1327 (2007) (discussing various formulations of the test, including the role of the least restrictive means criterion which is sometimes omitted and sometimes included under the aegis of narrow tailoring); *Shelton v. Tucker*, 364 U.S. 479, 488 (1960).

53. Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

54. 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).

55. *Id.*

56. *Id.*



On even rarer occasions, the remedy has been awarded civilly with no statutory authority by courts sitting in equity.<sup>57</sup> This inconsistency has generated some limited conflict over the constitutionality of civil apologies and how best to interpret those few instances where they have been awarded.<sup>58</sup> The emerging consensus against civil apologies, however, rests on sound reason given the tremendous value of individual conscientious judgment, and this should be the starting point of all First Amendment analyses of the remedy, both civil and criminal.

Nevertheless, there has been no definitive, nationwide ruling on whether the First Amendment shields civil litigants ordered to apologize. Much of what legitimacy exists for apologies in the civil sphere derives from the single case *Imperial Diner, Inc. v. State Human Rights Appeal Board*, in which the New York Court of Appeals held that a woman could recover monetary damages and an apology from her former employer after being harangued with ethnic slurs in front of coworkers.<sup>59</sup> This reading of the case, however, is not entirely persuasive. Insofar as *Imperial Diner* informs a constitutional reading, it does so tangentially. The primary question on appeal was whether the factual record supported a finding that the plaintiff-appellant was constructively discharged under a New York State employment-discrimination statute.<sup>60</sup> The matter of the remedy is addressed once in the final paragraph, wherein the court draws the limited conclusion that the apology fashioned by the New York Human Rights Commissioner was “reasonably related to the discriminatory conduct which he found to exist,” and not specifically that the relevant provision of the authorizing statute could withstand a constitutional challenge.<sup>61</sup> Furthermore, the First Amendment question is explicitly sidestepped in the decision’s lone footnote.<sup>62</sup> Later case law and academic literature touting *Imperial Diner* as a valid constitutional exemplar of civil apology

---

57. See, e.g., Richard Monastersky, *Former Professor Wins \$5.3-Million in Lawsuit Against Fairleigh Dickinson U.*, CHRON. HIGHER EDUC. (June 01, 2001), <https://www.chronicle.com/article/former-professor-wins-5-3-million-in-lawsuit-against-fairleigh-dickinson-u/> (citing the plaintiff whistleblower’s award of a “formal written apology” for retaliatory actions taken by his employer).

58. See White, *Say You’re Sorry*, *supra* note 11, at 1262; *contra* Latif, *Apologetic Justice*, *supra* note 21, at 296–97; Recent Cases, *State v. KH-H*, 353 P.3d 661 (Wash. Ct. App. 2015), 129 HARV. L. REV. 590, 590 (2015) (examining the reasoning of courts that have found court-ordered apologies constitutional); *Imperial Diner v. State Human Rights Appeal Bd.*, 417 N.E.2d 525, 529 (N.Y. 1980) (Meyer, J., dissenting) (opining that the First Amendment protects both the right to speak and the right to remain silent).

59. *Imperial Diner*, 417 N.E.2d at 527–28.

60. *Id.* at 528.

61. *Id.* at 529.

62. *Id.* at 529 n.1 (“The dissenter’s contention that the apology ordered by the commissioner might violate the First Amendment has not been raised by the petitioners and thus is not before us.”).

mischaracterize the case by asserting that authorizing statutes need only pass rational-basis review.

As the only plausible interpretation of the court-ordered apology's constitutional dimension, it is unsurprising that a majority of legal scholars and practitioners adopt the same view as the dissent did in *Imperial Diner*.<sup>63</sup> The opinion of Judge Meyer, dissenting in part, sees the implied First Amendment question of the case as inevitable and for that reason declines to sustain the Commissioner's order under the precedent of *Barnette*.<sup>64</sup>

### C. Criminal Apologies

None of the cases generally cited by courts striking down apologies in the civil arena observe any obvious distinction between the civil and criminal contexts.<sup>65</sup> Consequently, an inference can be made that the same rationale employed in the civil context extends a constitutional prohibition into the criminal sphere. However, criminal courts have awarded this remedy for theft, drunk driving, embezzlement, and a wide array of other charges,<sup>66</sup> usually on a theory of "rehabilitation."<sup>67</sup> In fact, both *Barnette* and *Wooley*—the cornerstone cases of the compelled-speech doctrine—addressed the grievances of people who were exposed to *criminal* prosecution,<sup>68</sup> suggesting that compelled-speech rights are of particular import to persons embroiled with the criminal courts. Oddly, those rights criminal in their inception have been largely expunged from their native context. The criminal courts continue to indulge the false premise that, so long as rehabilitation is a rational aim, no constitutional problem exists.<sup>69</sup>

---

63. See White, *Say You're Sorry*, *supra* note 11, at 1262 (claiming that the U.S. civil legal system does not provide a mechanism to force recalcitrant defendants to accept responsibility by apologizing); Robbenolt, *Symbolism and Incommensurability*, *supra* note 23, at 1147 n.114 (noting that the First Amendment raises obstacles to civil juries seeking to award apologies as a remedy).

64. *Imperial Diner*, 417 N.E.2d at 529 (Meyer, J., dissenting).

65. See White, *Say You're Sorry*, *supra* note 11, at 1270 (discussing the apparent interchangeability of legal reasoning between civil and criminal contexts); see generally *W. Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943); *Wooley v. Maynard*, 430 U.S. 705, 714 (1977).

66. Kahan, *What Do Alternative Sanctions Mean?*, *supra* note 6, at 635.

67. See *United States v. Clark*, 918 F.2d 843, 848 (9th Cir. 1990).

68. *Barnette*, 319 U.S. at 645 (Murphy, J. concurring) ("The offender is required by law to be treated as unlawfully absent from school and the parent or guardian is made liable to prosecution and punishment for such absence. Thus not only is the privilege of public education conditioned on compliance with the requirement, but non-compliance is virtually made unlawful."); *Wooley*, 430 U.S. at 706-07 ("The issue on appeal is whether the State of New Hampshire may constitutionally enforce criminal sanctions against persons who cover the motto 'Live Free or Die' on passenger vehicle license plates because that motto is repugnant to their moral and religious beliefs.")

69. See, e.g., *Clark*, 918 F.2d at 848 (demonstrating the Ninth Circuit's emphasis on rehabilitation in its constitutional analysis).

### 1. Misuse of the Rehabilitation Standard

Little direct support for the constitutionality of criminal apologies exists, though one line of cases has unconvincingly attempted to bridge the gap. In 2015, the Washington Court of Appeals heard *State v. KH-H*, which challenged the legality of the criminal apology.<sup>70</sup> The defendant, having been convicted of a sexual assault, was sentenced to three months of community supervision and ordered to write a “sincere” apology in which he also admitted wrongdoing.<sup>71</sup> On appeal, the defendant objected to the order citing the U.S. and Washington State Constitutions, but the Court of Appeals affirmed the trial court’s disposition.<sup>72</sup> In doing so, it appeared to apply a form of rational-basis review that conflated the mere fact of the state’s rehabilitative interest with prima facie constitutionality:

[T]he “letter of apology” condition . . . requiring KH–H to apologize to the victim of the offense that he was adjudicated guilty of committing *is reasonably related to the rehabilitative purpose of the JAA. Accordingly, we hold that the condition did not violate KH–H’s rights under the First Amendment.*<sup>73</sup>

There are several textual bases for rejecting this reasoning and its apparent rational-basis standard. Notice that, under the court’s reading, any state action reasonably related to a rehabilitative purpose is constitutional wholly by virtue of being so related, and no subsequent or intermediate step guides the application of this standard. In this way, the *KH-H* court propagates an incorrect standard also found in one of its controlling precedents, *United States v. Clark*.<sup>74</sup> In *Clark*, the court similarly reasons:

Neither Clark nor Jeffery have admitted guilt or taken responsibility for their actions. Therefore, a public apology may serve a rehabilitative purpose. . . . *Because the probation condition was reasonably related to the permissible end of rehabilitation, requiring it was not an abuse of discretion.*<sup>75</sup>

The test obviously intends to give substantial leeway to trial courts, and is articulated in both *KH-H* and *Clark* as “whether the [condition was]

---

70. *State v. KH-H*, 353 P.3d 661, 665 (Ct. App. Wash. 2015).

71. *Id.* at 663.

72. *Id.* at 665–67.

73. *Id.* at 666 (emphasis added).

74. *Clark*, 918 F.2d at 848.

75. *Id.* (emphasis added) (citations omitted).

primarily designed to affect the rehabilitation of the probationer,”<sup>76</sup> but context strongly suggests that mere rehabilitative intent does not liberate the government from the strict-scrutiny standard. Where *KH-H* and *Clark* err is that they do not admit the possibility of improper purposes ancillary to rehabilitation. The source of this test, *United States v. Terrigno*, presupposed rehabilitation as the goal and then offered it as a means of judging the constitutionality of the rehabilitative measures implemented. Of the test in question, *Terrigno* states:

This test is applied in a two-step process; first, this court must determine whether the sentencing judge imposed the conditions for permissible purposes, and then it must determine whether the conditions are reasonably related to the purposes. . . . if conditions are drawn so broadly that they unnecessarily restrict otherwise lawful activities they are impermissible.<sup>77</sup>

Properly construed, this test does not uphold all restrictions of constitutional rights simply because their putative purpose is rehabilitation; rather, it divides the category of all possible rehabilitative measures into “permissible” and, impliedly, “impermissible,” only then asking whether the restriction is reasonably related to a permissible rehabilitative purpose. Indeed, if the *KH-H* and *Clark* courts’ readings were correct, then the test as applied in *Terrigno* would be tautological—it would simply define “permissible” rehabilitation as any measure whose purpose is rehabilitation.

Notice also that, in the excerpt above, the *Terrigno* court cautions against “unnecessarily restrict[ing]” the defendant’s rights, adding later that any restrictions should be “narrowly drawn.”<sup>78</sup> These phrases clearly suggest a concern for elements of the familiar strict-scrutiny framework that *KH-H* and *Clark* shed: narrow tailoring and least restrictive means. Though it is not explicitly stated in the case, this alternative reading explains why *Terrigno* so conspicuously leaves room for strict judicial scrutiny. Presumably, only constitutional rehabilitation could be permissible under *Terrigno*. This is entirely consistent with the reasoning in that case, as it held that the trial court *did not* limit the defendant’s First Amendment rights by preventing her from receiving payments to recount the story of her crime.<sup>79</sup>

---

76. *KH-H*, 353 P.3d at 665 (quoting *Clark*, 918 F.2d at 848).

77. *United States v. Terrigno*, 838 F.2d 371, 374 (9th Cir. 1988) (emphasis added).

78. *Id.*

79. *Id.*

The *Terrigno* test's unusual flexibility was meant to account for the vagaries of human psychology that a judge must consider when fashioning conditions of probation and rehabilitation, not give them *carte blanche* to disregard the Constitution: "[T]he standard for determining the reasonable relationship between probation conditions and the purposes of probation is necessarily very flexible precisely because 'of our uncertainty about how rehabilitation is accomplished.'"<sup>80</sup> Nonetheless, American criminal courts have erroneously taken this small pragmatic concession to mean that the First Amendment need not apply.

## 2. Further Issues with Rehabilitation

The rehabilitation exception for court-ordered apologies stakes a lot on the certainty of our good intentions. One scholar invites the poignant question, what if Martin Luther King Jr.'s *Letter from a Birmingham Jail* had been a court-ordered apology, penned to George Wallace and "sincerely" disavowing the civil rights program?<sup>81</sup> Some people, present author included, would regard this as a whole separate crime committed by the state. But extravagant hypotheticals aside, a legal theory abridging constitutional rights in the name of rehabilitation poses an especially knotty problem, as it likely contravenes the fundamental ideal that people should be free to determine their own values.

By definition, rehabilitation assumes a preexisting system of values.<sup>82</sup> Without one, there would be no standard against which defendants' progress could be gauged. Consequently, a judge fashioning a rehabilitative remedy makes claims about the whole system of values, which it is the job of courts to protect, and about whether rehabilitation is subordinate to those ends or independent of them.<sup>83</sup> Eventually, the question will come up: If it is possible to inculcate American sociolegal values into a criminal by decidedly *un-American* means—or to violate that defendant's rights in order that the defendant cease violating the rights of others—are these contortions loyal to the Constitution or not? Though it is tempting to regard any nominally rehabilitative measure as legitimate from a utilitarian

---

80. *Id.* (quoting in part *United States v. Consuelo-Gonzalez*, 521 F.3d 259, 264 (9th Cir. 1975)).

81. Smith, *Against Court-Ordered Apologies*, *supra* note 43, at 15.

82. Andrew Day & Tony Ward, *Offender Rehabilitation as a Value-Laden Process*, 54 INT'L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 289, 291 (2009).

83. See Tony Ward & Roxanne Heffernan, *The Role of Values in Forensic and Correctional Rehabilitation*, 37 AGGRESSION & VIOLENT BEHAV. 42, 47–49 (2017) (arguing that rehabilitation theories contain epistemic, ethical, social, and prudential values).

viewpoint, rehabilitative intent cannot bootstrap the government up from its constitutionally entrenched mores.

One conclusion the Washington Court of Appeals might have drawn in *KH-H* is that, regardless of whatever “rehabilitation” meant in the case law, it could not have supplanted the very values upon which that rehabilitation was predicated. Instead, the court preferred a reading that has become a crutch for the violation of defendants’ rights. American constitutional government goes to great lengths to respect private conscience, and a reasonable judiciary would require similar lengths before allowing trial-court judges to dispense with it. For the time being, however, court-ordered criminal apology stands.<sup>84</sup> Highlighting the constitutional tension, the dissent in *KH-H* cautioned against sacrificing the First Amendment so easily, warning that “only the presumed best intentions of our system stand in the way of disquieting comparisons with other attempts at forced thought,” and criticizing the majority’s lax standard in favor of a much more stringent one.<sup>85</sup> The *Harvard Law Review* also regarded *KH-H* as avoiding obvious constitutional issues through “unsubstantiated applications of criminal punishment theory.”<sup>86</sup>

That in the name of “rehabilitating” criminal defendants into the system of American values, the government-as-disciplinarian might depart from them defies logic. Unfortunately, this exception has swallowed the strict-scrutiny rule for fundamental rights and a basic principle of American culture along with it.

## II. EIGHTH AMENDMENT ANALYSIS

In addition to concerns about the First Amendment, court-ordered apologies may also be vulnerable to the Eighth Amendment’s Cruel and Unusual Punishments Clause. In 1962, the Supreme Court issued a landmark decision in *Robinson v. California* that recognized a constitutional prohibition on the criminalization of certain involuntary statutes.<sup>87</sup> The defendant, Lawrence Robinson, was stopped by California State police and found to have lesions on his arms consistent with prior drug use.<sup>88</sup> Despite not being under the influence or in possession of any

---

84. *State v. KH-H*, 353 P.3d 661, 668 (Wash. Ct. App. 2015) (Bjorgen, A.C.J. dissenting in part) (“[T]he luster of the principles followed in *Barnette* and *Wooley* demands that their sacrifice rest on something more than a presumed rational basis. Yet that is all that the State or the majority offer.”).

85. *Id.*

86. Recent Cases, *State v. KH-H*, *supra* note 58, at 590.

87. See *Robinson v. California*, 370 U.S. 660, 667 (1962) (stating that a narcotics addiction cannot be deemed criminal behavior under the Fourteenth Amendment).

88. *Id.* at 661.

controlled substance, Robinson was convicted for violating a California State statute that imposed a minimum ninety-day incarceration on anyone “addicted to the use of narcotics . . . .”<sup>89</sup> A subsequent ruling by the California Superior Court affirmed his conviction and specifically construed the statute to require no *actus reus*. The status of addiction was itself the crime.<sup>90</sup> Writing for a 6-2 majority, Justice Potter Stewart struck down the statute on the grounds that it violated the Eighth Amendment’s prohibition on Cruel and Unusual Punishments.<sup>91</sup> Prior to that time, the Cruel and Unusual Punishment Clause had never placed substantive limits on what could be criminalized; it simply forbade certain forms of punishment that were regarded as disproportionate.<sup>92</sup> This new turn suggested not only that the constitutionality of a criminal penalty could be informed by context, but that a fundamental moral norm is transgressed by penalizing certain involuntary conditions.<sup>93</sup> In the words of the majority, “[e]ven *one day* in prison would be a cruel and unusual punishment for the ‘crime’ of having a common cold.”<sup>94</sup>

The court-ordered apology should be abolished on these precise grounds. It is well-established in philosophical and psychological literature that beliefs are involuntary.<sup>95</sup> As an expressive act, an apology proclaims a belief about one’s values and internal consciousness.<sup>96</sup> If indeed the precedent set by *Robinson* bars the criminalization of involuntary statuses, then the courts can no more penalize someone for their lack of repentance than for being sick.

One likely objection to this line of reasoning is that, because *Robinson* and its progeny speak at such length about physical illnesses like drug addiction and the common cold, the holding must only apply to a narrow class of involuntary medical infirmities. But, in subsequent cases, it became clear that the volitional element of crime is truly at the heart of *Robinson*. Just six years later, the Court revisited this logic in *Powell v. State of Texas*,

---

89. *Id.* at 660 n.1, 662–63.

90. *Id.* at 665.

91. *Id.* at 666.

92. Robert L. Misner, *The New Attempt Laws: Unsuspected Threat to the Fourth Amendment*, 33 STAN. L. REV. 201, 222 n.139 (1981). Most cruel and unusual punishment cases have struck down death penalties, and the courts rendering those judgments normally compare the imposed punishment with others levied by the same jurisdiction for crimes of comparable severity. In *Robinson*, however, the Court precluded any punishment at all, effectively vacating the crime itself. *Robinson*, 370 U.S. at 666.

93. *Powell v. Texas*, 392 U.S. 514, 550 (White, J. concurring).

94. *Robinson*, 370 U.S. at 667 (emphasis added).

95. Jonathan Bennett, *Why Is Belief Involuntary?*, *supra* note 42, at 49, 87–89; Woudenberg, *Belief is Involuntary: The Evidence from Thought Experiments and Empirical Psychology*, *supra* note 42, at 130; Hartman, *Involuntary Belief and the Command to Have Faith*, *supra* note 42.

96. Robbenolt, *Symbolism and Incommensurability*, *supra* note 23, at 144–47.

where a 5-4 majority narrowly upheld the conviction of a chronic alcoholic on charges of public drunkenness.<sup>97</sup> This affirmation critically hinged on the factual finding that chronic alcoholics could still exercise their will not to appear drunk in public, proving that medical illness was neither a necessary nor sufficient condition.<sup>98</sup> Had it not been for this finding, Justice White made clear that he would have sided with the four dissenters, all of whom strongly asserted that, under *Robinson*, involuntary acts do not suffice for criminal liability.<sup>99</sup> The Ninth Circuit Court of Appeals also affirmed this interpretation in *Jones v. City of Los Angeles*, holding that it is unconstitutional to punish a person “for who he is,” including immutable “conditions, either arising from his own acts or contracted involuntarily . . .”<sup>100</sup> Indeed, whether because of their own acts or involuntary contraction, some people are simply not sorry for what they have done.

A counterargument can be made that, while beliefs regarding the morality of an action or one’s subjective remorse may be involuntary, apologizing or refusing to apologize are voluntary actions properly within the ambit of the law. Under this theory, whether the defendant “believes” the apology is irrelevant—and the court need not compel that.<sup>101</sup> Advocates of the court-ordered apology point out that people may still “value apologies that they know are less than sincere.”<sup>102</sup> Unlike in other cases of immutable statuses, all the unrepentant subject of a court-ordered apology

---

97. *Powell*, 392 U.S. at 535.

98. *Id.*

99. Misner, *The New Attempt Laws: Unsuspected Threat to the Fourth Amendment*, *supra* note 92, at 219.

100. *Jones v. City of Los Angeles*, 444 F.3d 1118, 1133 (9th Cir. 2006). The constitutional ban on bills of attainder may be influenced by this rationale as well but has an independent constitutional basis in U.S. CONST. art. I, § 9, cl. 2. “Immutable” here does not mean “permanent” in the sense of race or sex, though these certainly are included; it should be read to encompass transient conditions not subject to voluntary control (e.g., the common cold).

101. For the purposes of this counterargument, we set aside the many aforementioned instances of orders that include “sincerity” or some variant thereof as a requirement of the apology. *See, e.g., supra* Part I notes 1–3 with accompanying text and Part II.C.1 note 71 with accompanying text.

102. White, *Say You’re Sorry*, *supra* note 11, at 1296. While *Barnette* did not resolve its compelled speech issue on Eighth Amendment grounds, it clearly recognized that coerced parties do not necessarily “forego any contrary convictions of their own and become unwilling converts” simply because of outward manifestations to the contrary. *W. Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 633 (1943). This fact notwithstanding, the Court preferred not to rest the legitimacy of coerced actions on the fact of their dissonance with the defendant’s subjective beliefs, seeing the Constitution largely as defending individual “intellect and spirit . . . from all official control.” *Id.* at 642. The Court’s weariness to second-guess subjective meaning ascribed to external acts in First Amendment cases is instructive here.



must do to avoid the punishment that has been unjustly imposed on them is lie.<sup>103</sup>

Under oath, lying in a courtroom would be a crime; required by order of a judge, the lie masquerades for justice so easily as to lend plausible deniability to this Eighth Amendment constraint. If lying were not an option, the court-ordered apology would obviously criminalize the condition of not believing what you have been ordered to say. The defendant would be caught between the Scylla of violating a legal mandate and the Charybdis of spontaneously changing their belief. If this metaphor deserves extending, then the third option of court-ordered lying is a Siren beckoning us to crash upon her rocks.

Lying has become so mundane that to bridge a constitutional argument with the simple observation that *people should not lie* seems quaint. Still, a legal system which incentivizes lying has obviously made a mockery of traditional moral notions.<sup>104</sup> The conscientious objector who refuses to utter a falsehood will be punished even as the phony opportunist is rewarded. Any positive effect a judge may hope to extract from the court-ordered apology is weighed against a perverse incentive.<sup>105</sup> Given this small concession to moral clarity, the conclusion that court-ordered apologies violate the Eighth Amendment follows.

### III. EQUITY

Equity has been described as a system parallel to law that subsumes a variety of remedies not available at law and whose application fills gaps in the administration of justice.<sup>106</sup> Clearly, the court-ordered apology is one form of a widely recognized equitable remedy: the injunction. Injunctions mandate or prohibit action by a party,<sup>107</sup> and court-ordered apologies mandate that a party deliver words of apology. First developed in English courts of extraordinary jurisdiction, the key attribute of the historical

---

103. Smith, *Against Court-Ordered Apologies*, *supra* note 43, at 9–10.

104. See John 8:44 (King James) (“Ye are of your father the devil . . . there is no truth in him. When he speaketh a lie, he speaketh of his own: for he is a liar, and the father of it.”); THE QUR’AN, Surat An-Nahl 16:105 (Sahih Int’l) (“They only invent falsehood who do not believe in the verses of Allāh, and it is those who are the liars.”); AMBALATTHIKA-RAHULOVADA SUTTA, MN 61 (Thanissaro Bhikkhu trans.) (“[W]hen anyone feels no shame in telling a deliberate lie, there is no evil, I tell you, he will not do.”); Immanuel Kant, *On a Supposed Right to Lie Because of Philanthropic Concerns*, in BERLINISCHE BLAETTER (1799) (“To be truthful (honest) in all declarations is, therefore, a sacred and unconditionally commanding law of reason that admits of no expediency whatsoever.”); Paul Faulkner, *What Is Wrong with Lying?*, 75 PHIL. & PHENOMENOLOGICAL RES. 535, 535 (2007).

105. Smith, *Against Court-Ordered Apologies*, *supra* note 43, at 45.

106. 30A C.J.S. *Equity* § 1 (2020).

107. *Injunction*, Black’s Law Dictionary (11th ed. 2019).

equitable system was its flexibility, and its boundaries remain necessarily incomplete.<sup>108</sup> In some cases, parties seeking court-ordered apologies cite statutes that generally authorize equitable relief, such as the Civil Rights Act of 1971, which commands that “[e]very person . . . depriv[ed] of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, *suit in equity*, or other proper proceeding . . . .”<sup>109</sup> In other cases, parties seeking apology do so purely on equitable grounds and with no statutory basis.

While the system of equitable remedies has limits, its pliability makes it possible to legitimize in equity what is not allowed under a more formal application of law. The judiciary has advanced various guidelines for awarding equitable remedies like injunctions, sometimes in the form of elements<sup>110</sup> or maxims of application,<sup>111</sup> but of these guidelines Samuel Bray writes:

None is airtight. All are discretionary, and the discretion to invoke them is committed to the very judge they are intended to constrain—the judge deciding in the first instance whether to give an equitable remedy. This may cause some to deny that they are actually constraints. Surely they would not work for a judge who was intent on abuse of power.<sup>112</sup>

It can therefore be difficult to discern whether a given remedy overextends the equitable authority of the court. Regardless of any nuanced ambiguities, it is clear that equitable remedies are all still circumscribed by one ultimate limit; even equity cannot exceed the Constitution. The courts of the United States were granted their equitable jurisdiction by the

108. 30A C.J.S. *Equity* § 1 (2020).

109. 42 U.S.C. § 1983 (emphasis added).

110. *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006) (listing the elements of a permanent injunction as (1) irreparable injury, (2) inadequacy of available legal remedies, (3) a “balance of hardships” favoring relief, and (4) no overriding concerns of public interest).

111. Samuel L. Bray, *The System of Equitable Remedies*, 63 UCLA L. REV. 530, 582 (2016).

It is worth noting that, where an injunction orders an unrepentant person to apologize “sincerely,” the court likely runs afoul of one such well-established maxim of equity, namely that “equity will not act in vain” (i.e., require an act which is impossible, futile, or useless). *See, e.g.*, 55 N.Y. JUR. 2D EQUITY § 88 (“Thus, a court will be reluctant to grant equitable relief in the form of a set-off where the party entitled to such a remedy fails to claim or assert it.”). According to the *Corpus Juris Secundum*, a court sitting in equity will not “grant a decree that does not confer a benefit, that is impracticable to enforce . . . or that is ineffectual because compliance is impossible.” 30 A C.J.S. *Equity* § 16 (2020). Requiring a “sincere” apology from someone who is not sorry seems to fall in this category. *See, e.g., supra* Part I notes 1–3 with accompanying text and Part II.C.1 note 71 with accompanying text. Of course, this problem does not manifest where a court remains indifferent to the lies of the enjoined party.

112. Bray, *The System of Equitable Remedies*, *supra* note 111, at 584.

Judiciary Act of 1789, Congress's first statute, subject not only to the traditional limitations of English precedent but to the same constraints as all American law.<sup>113</sup> Though equity stands apart from law substantively, most judges intuitively apprehend the risk of meddling with apologetic discourse under the warrant of their own discretion.

In *Campbell v. District of Columbia*, the court provisionally rejected an equitable argument awarding an apology on the grounds that the party bearing *moral* culpability was not named in the suit.<sup>114</sup> This appeared to leave the door open for instances where the true transgressor faces the brunt of the penalty: "Absent an apology from the most culpable individuals, an apology letter from the District is not a remedy tailored to fit the constitutional violation in this case. Accordingly, the Court will deny [the] request for equitable relief."<sup>115</sup> At the same time, this rationale would be criticized by many legal scholars,<sup>116</sup> and it has not found much favor in other jurisdictions. Putting it succinctly, the Ninth Circuit retorts: "We are not commissioned to run around getting apologies."<sup>117</sup> When one incarcerated *pro se* litigant requested an apology from the Western District of Kentucky, the request was denied on the grounds that "it is questionable whether the Court even has the equitable power to order such relief."<sup>118</sup> Similarly, the United States District Court of New Jersey claimed that court-ordered apologies are not cognizable under statute "or as a general legal remedy that a court has the power to order, under *any* provision."<sup>119</sup> Perhaps the most decisive appellate-level decision on this question, however, comes from the Sixth Circuit, which concluded that, in spite of courts' "broad and flexible equitable powers to fashion a remedy that will fully correct past wrongs," awarding the remedy remained an abuse of

---

113. See *Grupo Mexicano de Desarrollo, S. A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 318 (1999) (explaining that the grant of jurisdiction "over 'all suits . . . in equity' . . . is an authority to administer in equity suits the principles of the system of judicial remedies which had been devised and was being administered by the English Court of Chancery at the time of the separation of the two countries.") (first quoting Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 79; then quoting *Atlas Life Ins. v. W.I. Southern Inc.*, 306 U.S. 563, 568 (1939)); see also *Trump v. Hawaii*, 138 S. Ct. 2392, 2426 (2018) (Thomas, J., concurring) (stating that "district courts' authority to provide equitable relief . . . must comply with longstanding principles of equity that predate this country's founding.").

114. *Campbell v. District of Columbia*, 161 F. Supp. 3d 117, 119 (D.D.C. 2016).

115. *Id.*

116. Recent Cases, *State v. KH-H*, *supra* note 58, at 593–94.

117. *McKee v. Turner*, 491 F.2d 1106, 1107 (9th Cir. 1974).

118. *Cisco v. Myers*, No. 4:19-CV-P118-JHM, 2020 WL 1033546, at \*2 (W.D. Ky. Mar. 3, 2020) (citing *Woodruff v. Ohman*, 29 F. App'x 337, 346 (6th Cir. 2002)).

119. *Kitchen v. Essex Cty. Corr. Facility*, No. 12-2199 JLL, 2012 WL 1994505, at \*4 (D.N.J. May 31, 2012) (emphasis added) (citing *Woodruff*, 29 F. App'x at 346).

discretion because the law was not intended to “make morally right a legal wrong done to the plaintiff.”<sup>120</sup>

#### CONCLUSION

Authoritarian political and religious institutions have coerced people into orthodoxy with torture, brainwashing, and extortion since long before the American Constitution envisioned a world without these abuses.<sup>121</sup> That document does not speak directly of a freedom of conscience, but it has clearly been construed as a paramount organizing principle of the First Amendment, which affords ever greater protection to increasingly symbolic acts.<sup>122</sup> Remedial court-ordered apologies are highly prized for their symbolic content.<sup>123</sup> Consequently, the laws of the United States may only circumvent this limitation subject to strict judicial scrutiny, and neither rehabilitation nor any other rationale has been proposed that rises to this notoriously stringent standard. No matter how inconvenient a defendant’s beliefs may be, the government is rarely, if ever, empowered to compel their disavowal by means of a sanctioned apology.

At the same time as the First Amendment protects conscience, the Eighth Amendment’s Cruel and Unusual Punishment Clause prohibits punishment of people simply for who they are. It is widely accepted that beliefs are the involuntary product of an individual’s innate nature and environment, including beliefs about one’s own past behavior and the victims of one’s criminal acts.<sup>124</sup> To penalize a person for his or her lack of remorse, then, is to penalize a characteristic placed off-limits by the Eighth Amendment’s prohibition of Cruel and Unusual Punishments. The fact that people can easily lie about those beliefs in court, notwithstanding a credible moral theory of the Constitution, requires this interpretation.

Any legal system predicated on the primacy of the individual must remain vigilant to preserve human dignity as it maintains public order.<sup>125</sup> Victims often express a need for apologies to help correct the tragic sense that they somehow deserved to be mistreated, and judges understandably

---

120. *Woodruff*, 29 F. App’x. at 346 (quoting *Smith v. Town Clarkton*, 682 F.2d 1055, 1068 (4th Cir. 1982)).

121. See MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY: VOLUME I*, 59 (Robert Hurley trans.) (1978) (“Since the Middle Ages, torture has accompanied [confession] like a shadow, and supported it when it could go no further: the dark twins.”).

122. *Wallace v. Jaffree*, 472 U.S. 38, 50 (1985).

123. Raffaele Rodogno, *Shame and Guilt in Restorative Justice*, 14 PSYCHOL. PUB. POL’Y & L. 142, 156 (2008) (“[D]uring restorative justice conferences the apologies of the offender to the victim are an essential part of symbolic reparation.”).

124. See *supra* note 42.

125. Domingo, *Restoring Freedom of Conscience*, *supra* note 37, at 184.

want to foster this healing.<sup>126</sup> But, sincere apologies may always be freely given, and the government cannot effectively telegraph respect for the law while violating its ideals. Furthermore, the intended ends of apology could often be better served by a court speaking in its own right, rather than through a ventriloquist's dummy. Society's message is sent quite strongly by an adequate fine or prison sentence and, though the society is empowered to explain its moral reasoning through a judge, it may not speak its own message by a defendant.

Nonetheless, it is possible to imagine alternatives that more fully incorporate apology into our legal framework without running afoul of the Constitution. Legal persons like cities, universities, and businesses may not be protected by the First or Eighth Amendments in precisely the same way as natural persons, thereby potentially rendering them subject to court-ordered apologies.<sup>127</sup> Perhaps an objective, factual finding, or declaratory judgment that the victim was owed an apology could be issued by the court without the threat of further sanctions for failure to follow through. This would place aggrieved victims' well-deserved moral vindication on the public record without trampling the rights of defendants to preserve their conscientious autonomy. Whatever the conclusion, defendants must not be deprived of their opportunity to partake in—or denounce—the values of society for themselves.

---

126. White, *Say You're Sorry*, *supra* note 11, at 1276.

127. Dai-Kwon Choi, *Freedom of Conscience and the Court-Ordered Apology for Defamatory Remarks*, 8 *CARDOZO J. INT'L & COMP. L.* 205, 215 (discussing the applicability of constitutional theories of conscience to legal persons).

