

## CHAPTER 43

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# RACE, RECTIFICATION, AND APOLOGY

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THE black experience in what is now the United States of America has been one of perpetual racial injustice from the arrival of the first enslaved Africans in the early seventeenth century to the present day. Much of the global community acknowledged the importance of rectifying these injustices after the World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance held in Durban, South Africa in 2001. The conference report acknowledged that “slavery and the slave trade are a crime against humanity and . . . are among the major sources and manifestations of racism, racial discrimination, xenophobia and related intolerance, and that Africans and people of African descent, Asians and people of Asian descent and indigenous peoples were victims of these acts and continue to be victims of their consequences” (United Nations 2002, 11–12). The report “strongly reaffirm[ed] as a pressing requirement of justice that victims of human rights violations resulting from racism, racial discrimination, xenophobia and related intolerance . . . should be assured of having access to justice, including [*inter alia*] the right to seek just and adequate reparation” (United Nations 2002, 24).

Unfortunately, Western philosophy has historically had little concern for rectificatory justice generally, much less with the rectification of the racial injustices perpetrated against Africans and people of African descent in particular. Aristotle’s account of rectificatory justice is generally taken to be Western philosophy’s classic statement on the matter. On Aristotle’s view, rectificatory justice is concerned with rectifying transactions where someone has been treated unfairly, and so unjustly, by another. When one has inflicted harm on another and has thereby profited, it is the aim of rectificatory justice to restore equality between the parties. For Aristotle, what is just in rectification is what is intermediate between loss and profit (Aristotle 1999, bk. V). However, very little discussion of matters concerning rectificatory justice occurred between Aristotle’s time and the twentieth century. According to John Locke, for example, all “men” in the state of nature who have received damage as a result of having a right transgressed have, “besides the right of punishment common to him with other Men, a particular Right to seek *Reparation* from him that has done it” (Locke 1988, 273, bk. II chap. II). And on Immanuel Kant’s view, “in the case of injustice done to others mere repentance is not enough: it must be followed by endeavor to remedy the injustice” (Kant 1963, 131). Most of the relevant literature began to emerge around the middle of the last century (e.g., Lamont 1941) with a noticeable increase in scholarship beginning in

the 1960s (e.g., Ginsberg 1963 and Feinberg 1966), and into the 1970s (e.g., Nickel 1976 and MacCormick 1977–1978), the 1980s (e.g., Arnold 1980 and O'Neill 1987), and the 1990s (e.g., Wheeler 1997 and Askland 1998).

One particular area of concern in injustice theory is the relationship between rectification and apology. Although philosophers have often burdened the notion of apology with emotional requirements and the assumption that reconciliation is the proper aim of an apology, a clarification of rectificatory justice, including a conception of apology that is grounded in justice, shows that emotional requirements are unnecessary, that the assumption of reconciliation as the telos of apology is mistaken, and that the apology to African Americans by the US Congress in 2009 fails as a legitimate apology.

## RECTIFICATORY JUSTICE AND APOLOGY

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The aim of rectificatory justice is to rectify injustice by setting unjust situations right. When rights circumscribe the sphere of justice, the transgression of a right constitutes an injustice. To account for the rectification of these transgressions, a conception of rectificatory justice should include at least four essential elements: restoration, compensation, apology, and punishment. When an injustice occurs, those upon whom the injustice has been perpetrated often-times suffer a loss. Restoration, which calls for the return of precisely that which has been lost as a result of injustice, as in the case of stolen property, is required whenever possible. When restoration is not possible, compensation can address any losses that remain unaccounted for. Compensation is meant to counterbalance an unjust loss with something else that is equivalent in value to that loss. This requirement in justice for rectificatory compensation is often what is meant by "reparation(s)." Since providing compensation means providing something other than the exact thing that was lost, compensation is in this way distinguishable from restoration. Rectification also calls for an apology. Since restoration and compensation can only address unjust losses, an apology is needed in order to effect rectification because it is the apology that addresses the wrong of an injustice. What makes an injustice a wrong is the lack of respect shown to right-holders when their rights are violated. Hence, the righting of a wrong is accomplished by way of an apology—an acknowledgment of wrongdoing that includes the reaffirmation that those who suffered the injustice have moral standing. Punishment is part of a conception of rectificatory justice because, unlike restoration, compensation, and apology, which address what the victims of injustice are due, punishment addresses what may be due to the perpetrators of injustice. Although punishment has been a perennial concern in Western philosophy, when discussed in the context of justice, the concern has typically been with punishment as retribution, not as part of rectification (see Roberts 2002).

## ARE EMOTIONAL REQUIREMENTS NECESSARY FOR A LEGITIMATE APOLOGY?

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Many philosophers think that a necessary condition for a legitimate apology is that it be sincere and that sincerity requires emotions like sorrow or regret and a commitment to behavioral reform. On Kathleen Gill's view, for example, there are five necessary conditions

for a legitimate apology, two of which are these sincerity conditions. Insofar as feelings are concerned, the person apologizing “must have an attitude of regret with respect to the offensive behavior and a feeling of remorse in response to the suffering of the victim.” Insofar as behavioral reform is concerned, since the apologizer’s behavior following the apology serves as a test of sincerity, the person receiving a sincere apology “is justified in believing that the offender will try to refrain from similar offenses in the future” (Gill 2002, 114). In what Nick Smith calls a categorical apology, conveying regret “in the sense that the offender wishes that the transgression could be undone,” is “[m]ore important than its sympathy, sorrow, or guilt[.]” For Smith, apologizers explain that they regret their actions because the actions are morally wrong, because they wish they had done otherwise, and because they will never make the same mistake again (Smith 2005, 483). On Trudy Govier’s view, when wrongdoers sincerely apologize, they cancel or “unsay” the message of moral worthlessness toward the victim caused by their wrongful acts. For Govier, when apologies are insincere, they just add moral insult to the already injured victim (Govier and Verwoerd 2002a, 70, 79; 2002b, 142; Govier 2006, 69). But is sincerity in the sense that there are emotions like sorrow and regret and a commitment to behavioral reform really necessary for an apology to be legitimate?

In sharpest contrast to those who think that legitimate apologies are necessarily sincere, Louis Kort thinks that insincere apologies are “full-fledged apologies nonetheless.” He posits five conditions that are separately necessary and conjointly sufficient for an apology, one of which is the condition that individuals must express regret about the wrongful act. However, on Kort’s view, the apologizer need not have any actual regret. Rather, they “can, and frequently do, apologize, and so express regret, with no genuine regret about whatever they are apologizing for” (Kort 2002, 107). His approach is also absent any requirement for behavioral reform. Richard Joyce also endorses the idea of insincere apology. Even though he thinks that sincerity in an apology is “usually a desirable feature,” he does not think that the expression of regret in an apology needs to include actually having regret (Joyce 1999, 167). According to Joyce, “[s]incerity is not a necessary component of an apology” and he doubts that “we really require the formal apologizer to feel particular emotions” when offering an apology (Joyce 1999, 167, 166). For him, apologies do not necessarily include a commitment to behavioral reform. On this view, apologizers who have every intention of repeating the same wrongful act can still insincerely apologize for that act. However, in addition to being insincere, Joyce finds this sort of apology infelicitous and usually “malicious in the same way as falsely promising is usually a malicious action” (Joyce 1999, 166). Like Kort and Joyce, Glen Pettigrove thinks that an insincere apology does not fail to be an apology. However, like Joyce, he thinks that apologies without attitudinal states like regret and remorse are “morally deficient” and “infelicitous.” Moreover, Pettigrove thinks that an apology “indicates one’s intention to refrain from similar actions in the future.” For him, an apology without this intention may have “so explicitly deviated from the implicit conditions of an apology that it would fall beyond the pale” (Pettigrove 2003, 323, 324). Although we would still have an apology without intending behavioral reform, like an apology without the appropriate attitudinal states, Pettigrove finds such apologies infelicitous.

## JUST APOLOGY

The popularity of the two sincerity conditions may be explained by the extent to which theorists have conceived of apology within the context of the whole of morality. Smith, for

example, takes his idea of "categorical apology" to be representative of "the *maximally meaningful* apology" (Smith 2005, 473). For Govier, the concern is with "full-fledged moral" apology (Govier and Verwoerd 2002a, 73). Justice, however, is not the whole of morality. Rather, it is only a particular segment of it (Hart 1994, 157; see also Mill 2001, 49). Hence, the content of apologies in response to injustice is prescribed first and foremost by justice, not by the whole of morality. When an apology is given following an injustice, it is not an apology all things considered that justice requires, that is, not in a general sense what might be called a *moral apology*. What is specifically required is a *just apology*.

Contrary to those who think that when rendering a legitimate apology one must *really* be sorry for that which he or she is apologizing, the just apology does not include as a necessary condition that those who apologize have certain feelings. Just apologies need only be sincere in the sense that the person uttering the words is making a true statement about the unjust act and making a commitment to providing or at least earnestly attempting compensation. Would it be better if the person apologizing was racked with guilt, shame, sorrow, and regret when uttering the words? Of course it would. Would this being the case make the apology a more substantive acknowledgment of the victim's moral worth than just making a statement? Perhaps. In any event, justice is not in the business of prescribing which feelings people ought to have and when they ought to have them. Rather, it is in the business of prescribing the way we ought to act toward one another. Justice is that sphere of morality which functions as the primary arbiter of social behavior. While we might agree with John Stuart Mill that the moral rules of justice "are the main element in determining the whole of the social feelings of mankind," this is far from thinking that *the rules of justice themselves* require that particular feelings be held (Mill 2001, 59). It may be that morality in a general sense calls for feeling regret or remorse when we have committed an injustice, but there is no ground for this requirement in the specifics of justice.

The idea of justice, or of an action being just, always includes some consonance with principles of moral right. When rights circumscribe the sphere of justice, acting rightly insofar as justice is concerned means respecting the rights of others. We demonstrate our understanding that all individuals are equally worthy of respect by respecting everyone's rights. Therefore, when we fail to show the proper respect due another, we treat that person unjustly. The *wrong* of injustice is the disrespect shown to another when that person's rights are violated. Acknowledging that what one has done is wrong entails an acknowledgment that the person affected by the act is undeserving of the treatment given. By apologizing the perpetrator reaffirms that the victim is a person and is therefore worthy of respect. The just apology includes a statement that expresses an acknowledgment by the actor, or the actor's representative, that the action was wrong. It is in this way that an apology addresses the wrong of an injustice. Consequently, an apology is due after an injustice whether or not the victim has sustained any unjust loss. However, this is not to deny the essential relationship between apology and compensation where the latter legitimizes the former. Since rectificatory justice requires that unjust losses be restored or compensated for, apologies purported to be given in cases where compensation is due but not provided (or at least earnestly attempted) are illegitimate. This is so because, in such cases, one's actions are (at best) inconsistent if one acknowledges the injustice perpetrated but fails to provide an equivalent in value for the losses sustained by the victim as a result of that injustice. Moreover, in cases where there is an unjust loss, it is in large part by way of fulfilling (or earnestly attempting to fulfill) the restorative or compensatory requirements of rectificatory justice that a perpetrator's apology is rendered sincere.

Since face-to-face speech is the most effective and the most personal way in which we communicate complex ideas to each other, just apologies ought to be given verbally and face-to-face by the perpetrator whenever possible, or by the perpetrator's representative when it is not. As Nicholas Tavuchis observes, verbal face-to-face communication is apology's "energizing medium." Without it, one misses the "sociological core of apology" (Tavuchis 1991, 23). Beyond one-on-one apologies where groups are involved, all members of the groups concerned should have a reasonable chance of hearing the apology. In state-rendered apologies for major injustice, for example, the number of relevant parties may run into the millions. In such cases the apology ought to be broadcast widely. The apology should also be widely published, both for the record and so that any relevant parties who did not hear the apology have a reasonable chance of reading it.

One advantage of the conception of the just apology is that it makes better sense of the idea of demanding an apology than do apologies in which particular feelings are required. If we think that the person apologizing must be "really sorry" for the injustice in order to render a legitimate apology, then it seems odd that we should ask, much less demand, that one be given. In such cases we would be demanding that people possess certain feelings. What justice requires from the perpetrator is to act justly in the wake of injustice, to endeavor to make things right—not to have particular feelings. To demand a just apology is to demand an acknowledgment of the perpetration of injustice and the taking of responsibility by the perpetrator (or the perpetrator's representative) for ensuring that compensation is provided for any unjust loss. "When we think that a person is bound in justice to do a thing, it is an ordinary form of language to say that he ought to be *compelled* to do it" (Mill 2001, 48, emphasis added). A demand is sometimes necessary because in our nonideal world people may need to be reminded that justice requires an apology following injustice. Like a mother who brings her child face-to-face with someone the child has wronged and commands, "Tell Mr. Jones you're sorry," adults may need to be reminded when an apology is due. This is part of developing what John Stuart Mill describes as the external sanction of "the hope of favor and the fear of displeasure from our fellow creatures" (Mill 2001, 28). Our moral faculty, while "susceptible of being brought by cultivation to a high degree of development," is sometimes too weak to prompt us to act justly on our own (Mill 2001, 31). As Aristotle reminds us, we are not born with prudence and wisdom; they arise in us and grow "mostly from teaching." That is why the possession of these virtues only comes with "experience and time" (Aristotle 1999, 18, 1103a15). It therefore makes sense to think that when an acknowledgment of wrongdoing is "expressed" in an apology, it will sometimes include more than having put the acknowledgment into words. It may also include a sense in which (pursuant to the Latin origin of "express") the acknowledgment is obtained in part by way of pressure; that the apology was pressed or squeezed out of a (reluctant) apologizer.

Another advantage of the conception of the just apology is that it makes better sense of the idea of a national or state-to-state apology than do apologies in which particular feelings are required. Here the concern has been that national or state-to-state apologies require entire groups to feel sorrow, remorse, or regret in order for the apology to be legitimate. On Joyce's view, for example, when a representative of a group expresses regret for some injustice, the sincerity of this expression "depends not on what *she* feels, but on what the group now feels and what the group intends" (Joyce 1999, 167). Since it seems likely that there will be many cases in which everyone in the apologizing group will not have the requisite feelings, an

apology where one or more of those feelings is necessary means that national and state-to-state apologies will often be impossible. Not so with the just apology.

The just apology does not have as a necessary condition that it be sincere in the sense that by apologizing one commits oneself to not repeating a particular wrongful act. Kant suggests this point when he observes that “[a]nyone can be free, as long as I do not impair his freedom by my *external actions*, even though I am quite indifferent to his freedom or would like in my heart to infringe upon it” and thereby perpetrate an injustice (Kant 1991, 56). Wronging a person and then wanting to wrong that person again in the very same way may speak ill of my character, but it is not unjust (on apologizing for failures of character, see Pettigrove and Collins 2011). Although I acted unjustly toward you in the past, my present desire to do so again is not itself an injustice. It is therefore difficult to see how a commitment to refrain from the performance of a particular wrongdoing can follow from an acknowledgment of having perpetrated that wrongdoing. Smith, for example, thinks that apologies “promise to never repeat the offense because they denounce their transgression as morally wrong” (Smith 2005, 485). On his view, the promise of behavioral reform is entailed in the expression of regret and the declaration of the wrongness of the transgression (Smith 2005, 484, 483; cf. Waller 2007; Verdeja 2010). But why should we infer a *promise* not to repeat an act from the mere fact of having denounced the past performance of that act? There is no obvious reason why we should. Of course, even when we have not apologized, if X is an injustice for which an apology is due, then X is a rights violation that we already had a duty not to do in the first place. Hence, *a fortiori*, we ought not to do X again.

## JUST APOLOGY AND RECONCILIATION

Some may object to the idea of a just apology because they endorse the popular view that apologies are best understood as aiming at reconciliation (see Joyce 1999, 164; Pettigrove 2003, 323; Zutlevics 2002, 72; Govier 2006, 69). This understanding is often found in public apologies. The 1993 US apology to Native Hawaiians, for example, “apologizes” to the Hawaiian people “on behalf of the people of the United States for the overthrow of the Kingdom of Hawaii . . . and the deprivation of the rights of Native Hawaiians to self-determination.” It “acknowledge[s] the ramifications of the overthrow . . . in order to provide a proper foundation for reconciliation between the United States and the Native Hawaiian people” (US Congress 1993). However, the document does not express a commitment to compensate for the wrongful losses that arose from these injustices. In the reconciliation report drafted by the government seven years after the apology, the notion of reconciliation is seen as a way toward healing that “requires action to rectify the injustices and compensation for the harm” (US Department of the Interior 2000, i) (reconciliation hearings were held on several islands in 1999). However, no compensatory action was ever taken. As Haunani-Kay Trask rightly observes, the question “is one of national injury and national responsibility.” When injustice has been done, “justice must be rendered before reconciliation can be considered” (Trask 2003, 45).

Reconciliatory apologies may not even be possible in many cases. Such apologies are often inapplicable to situations where an apology is otherwise warranted. Aiming at reconciliation assumes that the situation in question is conciliable, that relations between perpetrator

and victim can in fact be made friendly. In those cases where it is not, reconciliation, and therefore the aim of apology, is impossible. Reconciliation also begs the question of a prior friendly relationship. Positing it as the telos of apology assumes that, like many cases of spousal reconciliation, the parties in question had some relationship in the past that should be again. Although “reconcile” and “conciliate” can be taken as synonymous, the former is literally *re* and *conciliare*—a bringing together or making friendly *again*. This idea does not apply when victim and perpetrator are strangers and neither has any desire to be friendly with the other. In short, the reconciliatory approach to apology misses the point. The aim of an apology following injustice ought to be first and foremost to further the rectification of that injustice, not to establish particular feelings or beliefs between perpetrators and victims.

### THE APOLOGY BY THE US CONGRESS TO AFRICAN AMERICANS

Well over a century after the Thirteenth Amendment to the US Constitution ended the enslavement of African Americans, and more than a half century after the end of de jure racial segregation, a Congressional resolution purporting to apologize for slavery and Jim Crow segregation was passed by the US House of Representatives (US Congress 2008). The following year, in 2009, the US Senate, in a concurrent resolution with the House, “[a]pologiz[ed] for the enslavement and racial segregation of African-Americans” (US Congress, S. Con. Res. 2009) (The American government also passed a similarly inadequate apology resolution to Native Americans in 2009; buried inside a DOD appropriations bill, it purports to apologize for the “many instances of violence, maltreatment, and neglect” inflicted on them, US Department of Defense 2010, 3453–3454). The resolution recognizes that “African-Americans continue to suffer from the consequences of slavery and Jim Crow—long after both systems were formally abolished—through enormous damage and loss, both tangible and intangible, including the loss of human dignity and liberty” (US Congress, S. Con. Res. 2009).

The apology resolution’s sponsor, Senator Harkin, rightly observed that collective injustices warrant collective apologies. According to Harkin, “[a] national apology by the representative body of the people is a necessary, collective response to a past collective injustice” (US Congress, Cong. Rec. 2009, S6762). Strangely, both Harkin, and the resolution’s co-sponsor Senator Brownback, miss the point. The point is to provide a statement acknowledging the wrongs perpetrated against African Americans, made sincere by a commitment to fulfill (or at least earnestly attempt to fulfill) the restorative and compensatory requirements of rectification. Instead, Brownback thought that the injustice requiring a collective response was not the injustice of slavery and Jim Crow, but the injustice of not having apologized for slavery and Jim Crow in the past. According to Brownback, what the resolution does is to “right that wrong of not offering an apology previously” (US Congress, Cong. Rec. 2009, S6764). As for Harkin, he thought that the collective response required for the injustice of slavery and Jim Crow was not a collective apology and compensatory efforts in favor of African Americans, but that “truly the best way to address the lasting legacy of slavery and Jim Crow” is to “continue to work together to create better opportunities for all Americans”

(US Congress, Cong. Rec., 2009 S6763). Moreover, as the apology resolution itself states, "a formal apology for slavery and for its successor, Jim Crow" is important so that the people of the United States "can move forward and seek reconciliation, justice, and harmony for all people of the United States" (US Congress, S. Con. Res. 2009). So, although the resolution acknowledges that American slavery and its consequences were unjust, its aim is reconciliation, not rectification.

Just apologies rendered by a state ought to be given verbally by a representative and be both widely broadcast and widely published. Unfortunately, there is almost no sense in which the apology resolution was communicated to African Americans. In fact, there is barely a sense in which it was verbally delivered to the Senate. Although the resolution was read by the Senate's clerk, and was passed with unanimous consent, the Senate chamber was nearly empty when the resolution was being considered. Senator Harkin noted that a public apology ceremony would "bring home to all of us and to the American people the enormity of what we have done in terms of finally acknowledging the official role of the U.S. Government in promoting and sanctioning slavery and Jim Crow laws." However, the "fitting ceremony" that Harkin said was "being planned for sometime early in July [2009] that w[as to] take place in the main Rotunda of the Capitol to mark th[e] occasion" never took place (US Congress, Cong. Rec. 2009, S6767). Since it was merely read by the clerk as part of standard Senate procedure, the purported apology was not delivered in person and few Americans had a reasonable chance of hearing it. Indeed, relatively few Americans had a reasonable chance of even hearing that the resolution existed and that it had been passed. Save for a daytime broadcast of the Senate proceedings on the C-Span television network, news coverage of the resolution seems to have been almost nonexistent (as William Douglas observed, the resolution was "sponsored with little fanfare" [2009, A1; see also, Mayes 2008, 28, and Ransom 2009, 11]). As for publication of the resolution, while it is obviously part of the Congressional record, the government has not seen fit to publish it elsewhere.

Finally, the apology resolution makes no mention of compensation for the "enormous damage and loss, both tangible and intangible, including the loss of human dignity and liberty" arising from slavery and Jim Crow segregation. According to Brownback, the resolution "specifically does the apology but deals with nothing else." He says that a disclaimer is included in the resolution "to leave that issue aside" (US Congress, Cong. Rec. 2009, S6767). Senator Burriss, a slave descendant and the only African American in the Senate during the 111th Congress, "want[ed] to go on record making sure that the disclaimer in no way would eliminate future actions that may be brought before [the Senate] that may deal with reparations" (US Congress, Cong. Rec. 2009, S6765). The disclaimer states: "Nothing in this resolution—(A) authorizes or supports any claim against the United States; or (B) serves as a settlement of any claim against the United States" (US Congress, S. Con. Res. 2009). While this does not directly foreclose the possibility of rectificatory compensation for African Americans, since the resolution begins by acknowledging the injustices done, then ends by denying that this acknowledgment can support a claim for the rectification of those injustices, the disclaimer effectively negates any acknowledgment of wrongdoing.

The 2009 US apology to African Americans for slavery and Jim Crow segregation effectively contains no acknowledgment of wrongdoing and makes no commitment to providing compensation for unjust loss. It was not communicated verbally and in person, nor was it widely broadcast or widely published. Consequently, the action taken by the United States fails as a legitimate apology.

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