

**Corrective Justice and the Possibility of Rectification**

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**Abstract** In this paper, I ask how – and whether – the rectification of injury at which corrective justice aims is possible, and by whom it must be performed. I split the injury up into components of harm and wrong, and consider their rectification separately. First, I show that pecuniary compensation for the harm is practically plausible, because money acts as a mediator between the damaged interest and other interests. I then argue that this is also a morally plausible approach, because it does not claim too much for compensation: neither can all harms be compensated, nor can it be said when compensation is paid that the status quo ante has been restored. I argue that there is no conceptual reason for any particular agent paying this compensation. I then turn to the wrong, and reject three proposed methods of rectification. The first aims to rectify the wrong by rectifying the harm; the second deploys punitive damages; the third, punishment. After undermining each proposal, I argue that the wrong can only be rectified by a full apology, which I disaggregate into the admission of causal and moral responsibility, repudiation of the act, reform, and, in some cases, disgorgement and reparations, which I define as a good faith effort to share the burden of the victim's harm. I argue, further, that only the injurer herself can make a full apology, and it is not something that can be coerced by other members of society. As such, whether rectification of the wrong can be a matter of corrective justice is left an open question.

**Keywords** Corrective justice · Rectification · Apology · Harm · Compensation · Injury · Rights · Punishment · Reparations

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**1 Introduction**

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A theory of corrective justice must be composed of at least three parts. First, we need a conceptual analysis of injury, to provide us with the object of corrective justice. Second, we need to identify the goal of corrective justice, by analysing the method of rectification. Finally, we need an argument to take us from the object of corrective justice to its goal. In this paper, I discuss rectification, the goal of corrective justice, focusing on two key questions: how is rectification possible, and who must be its agent?<sup>1</sup>

The very possibility of rectification is often called into question on both moral and practical grounds. On the conventional legal account, rectification aims to restore the *status quo ante culpum* (Chapman 1995).<sup>2</sup> However, while this is morally plausible, it is invariably practically impossible, as we can only rarely recreate a state of affairs that has passed: we cannot turn back the clock. We need, therefore, some currency in which to express the bads produced by the injury, and to compensate them. However, the practical feasibility of this method of rectification is undermined by its moral insensitivity when taken too far – the belief that all losses can be compensated might entail a gross conflation of categorically different values, such as money and human life; it might also imply that the payment of compensation renders the injury permissible. A successful account of the method of rectification, then, must be both morally and practically defensible.

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The question of who should be the agent of rectification is considered, by some, to be crucial not only to the analysis of corrective justice, but also to its justification (e.g. Weinrib 1995). The principal difference between corrective justice and its competitors for remedying injuries – criminal and distributive justice – is to whom they ascribe remedial responsibility. Roughly speaking, in a society composed of persons A–Z, when A injures B, distributive justice focuses on A and C–Z’s duties to B, criminal justice emphasises A’s duties to B–Z, and corrective justice concentrates on A’s duties to B alone. If we could show, then, that rectification is impossible except when effected by the injuring agent, then the case for remedy in corrective, not criminal or distributive justice, would be made through analysis alone, with little need for further argument. If, however, the means of rectification do not analytically require any specific agent, then we must defend corrective justice with more substantial moral reasons.

In this paper, then, I aim to show how the rectification of an injury can be achieved, and by whom. Building on a conception of injury as composed of distinct elements of harm and wrong, or disrespect, I argue for the rectification of these two components separately.<sup>3</sup> In Section 2 I defend the practical and moral plausibility of rectifying harm through pecuniary compensation. In Section 3 I add to this that there is no conceptual reason why any particular agent should foot the bill of compensation. In Section 4 I turn to the rectification of the wrong, and argue against three different accounts, before settling on my own alternative, which focuses on the concept of full apology. In Section 5, I argue that full apology can only be effected by the injuring agent, and consider the consequences of this conclusion.

<sup>1</sup> I discuss the other two elements in Lazar (2006).

<sup>2</sup> This can also mean setting the victim as he would have been *now* had the injury not occurred; if anything, this is *less* practically plausible, because it depends on indeterminate counterfactuals. I do not, however, explore this contrast further here.

<sup>3</sup> I defend this conception of injury in Lazar (2006).

## 2 How Can We Rectify the Harm?

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In this subsection, I describe pecuniary compensation for harms, and explain why it is practically viable. In Subsections 2.2–2.3 I identify its limitations, which render it morally viable.

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On the interest-based theory of rights, harm is damage to a person's interests. Money, meanwhile, is a means for furthering our interests. Pecuniary compensation, then, mediates between the harmed interest, and either the same interest in restored form, or another, equally valuable interest that money can satisfy.<sup>4</sup> The first type of compensation would be appropriate in a case of damage to property; the second when the damage renders the harmed interest unfulfillable. Compensation, then, is practically viable: we can identify how far a person's interests have been set back, and compensate accordingly.

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However, for compensation to be morally plausible, it must have certain limitations: it is a truism that some harms can never be compensated. I focus on two boundaries in particular: the discontinuity, and constitutive incommensurability, of money and harm. First, discontinuity: two values are discontinuous when, although a trivial amount of  $x$  can be outweighed by a lot of  $y$ , once  $x$  passes a threshold of intensity there is no amount of  $y$  that can outweigh it.<sup>5</sup> Now, money is not a universally fungible mediator between interests: self-evidently, it is not useful to every interest, nor can it limitlessly further those it does aid, since its usefulness diminishes at the margin. Conversely, nothing besides death limits harm. Priceless interests, and interests inherently resistant to the usefulness of money, can be harmed, and harm to mundane interests can be of unthinkable severity. Sometimes, therefore, there will be aspects of harm, even entire harms, which money cannot rectify.

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For example: a professional footballer has been negligently run over, breaking his legs. If the harm is such that he will completely heal, then, other things equal, full rectification will be possible through compensation for lost earnings, and so on. If, however, a threshold of severity is crossed, and his legs will never completely heal, arguably no amount of pecuniary compensation could rectify the harm suffered. The harmed interest is of unique importance, as a crucial site for his autonomy, and money cannot buy goods of this sort, nor make up for quality with quantity, because of its diminishing marginal utility. Therefore, the harm and the means of compensation are discontinuous: even though a less severe version of the injury might be rectifiable, once the threshold of severity is crossed, only the least significant aspect of the harm (the lost earnings) can be rectified.

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The second limitation on pecuniary compensation is that it is constitutively incommensurable with the harm. Two values are constitutively incommensurable when they cannot be reduced to a common metric, such that the difference between them is only quantitative, not qualitative (Raz 1986, p. 348; Sunstein 1997). Even if we judge them equally valuable, one could not substitute for the other without loss. This relationship holds between pecuniary compensation and harm: the payment of compensation does not 'annul', or 'negate' the harm, because the harm has happened, and been experienced by the victim.

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<sup>4</sup> Goodin (1991) calls these means-replacing, and ends-displacing forms of compensation. Constraints of space prevent me discussing Robert Nozick's (1974, Chap. 4) influential account of compensation, though his description of full compensation as rendering the victim indifferent between {harm, compensation} and {no harm, no compensation} is equivalent to my account, provided (a) the victim's indifference between the two sets does not make them *qualitatively*, as well as *quantitatively* equivalent, (b) we are not restricted to the victim's subjective assessment of his interests alone, and (c) we recognise that for some harms no compensation is sufficient.

<sup>5</sup> Griffin (1986, p. 85), grounds and develops the concept of discontinuity, a task too complex to be assayed here, where I rely on its intuitive plausibility.

Compensation provides the victim with a benefit to offset that harm, but it cannot make the world as though the harm had never taken place: a harm is not a hole in the beach, that when filled in with sand simply disappears.<sup>6</sup> As such, we can recognise that a world in which harm *x* has happened, and been compensated, is *ceteris paribus* worse than one where *x* never happened. One could not argue, then, that by rendering harms compensable we undermine the prohibition on injury: compensation is morally viable because it provides proportionate redress – an appropriate counterbalancing benefit – not because it erases the harm.

### 3 Who Should Rectify the Harm?

Who should be the agent of rectification? In this subsection, I present a common-sense answer; in Subsection 3.2 I present and criticise an alternative.

Given my account of pecuniary compensation, I can join those writers who have, in Jules Coleman's terms, separated the "grounds of recovery" from the "grounds of liability" for rectification (Coleman 1992, Chap. 15; see also Honoré 1995, pp. 78–9). As Coleman argues, there is nothing in the conceptual nature of the harm (the grounds of recovery), or the method for rectifying it, which entails that a specific agent should be liable. On my account, the effectiveness of pecuniary compensation in mediating between the victim's interests is completely unrelated to the origin of the money: whether compensation is paid by the state, the offender, or the offender's rich aunt is irrelevant to its capacity to rectify the harm. We must, then, settle this matter by argument.

This account, however, is surprisingly contentious. The main alternative view derives from Aristotle's discussion of rectification, but has been defended by contemporary theorists such as Ernest Weinrib, and James Gordley. I present, then criticise this aspect of their account.

The argument begins with Aristotle's claim that in a just transaction both parties begin and end with the same value of holdings (Aristotle 2000, Chap. V:5).<sup>7</sup> In unjust transactions, conversely, one party gains, and the other loses. Since Aristotle conceived of holdings as stable throughout the transaction, ignored the possibility of damage or destruction, and held other things equal, he inferred that the gain always equals the loss. He then generalised this account, believing it representative of everything from theft, to assault, to enticing away another's slave. In each case, the offender's gain equals the victim's loss, and rectification therefore requires transfer of that gain to the victim – i.e., the offender must be the agent of rectification. In some of his work, Weinrib (1992, p. 410) has deployed a literal interpretation of Aristotle: "because the defendant has realised a gain correlative to the plaintiff's loss, the correction entails a loss to the defendant that is simultaneously a gain to the plaintiff".<sup>8</sup> Gordley (1995, p. 157) makes the same point, arguing that "one who has voluntarily harmed another, even if he has acquired nothing, has gained in the sense that he has pursued his own objectives at another's expense. He must pay for any loss he has

<sup>6</sup> This is true even in the most simple cases of restitution: if A steals *x* from B, and subsequently returns it, he still cannot *remove* the setback to B's interests of the initial theft, or the harmful experience of being the victim of a theft.

<sup>7</sup> The exchange value is the same; obviously the use value of the holdings is different for the two parties, otherwise they would not exchange at all.

<sup>8</sup> I look in greater depth at the distinction drawn by Weinrib between "normative" and "factual" gain and loss in Lazar (2006).

caused". The conclusion is simple: the offender's gain and the victim's loss are correlative, therefore rectification must be correlative. 148  
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Correlativity is not, however, necessary to the rectification of the harm contained in an injury, which corrective justice is not, so I contend, uniquely qualified to perform. Even if we accepted the premise that the offender's gain always equals the victim's loss, this would not entail that rectification of the harm is only possible if the injurer is liable. That question remains open, and one could still defend, for example, state compensation combined with a public fine against the offender, even while maintaining that in fact the offender's gain equals the victim's loss. 150  
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However, we should not accept this Aristotelian premise. We cannot identify a correlative gain and loss in all injuries, as even Aristotle (2000, p. 87) acknowledged, writing that these concepts are inappropriate to discussion of assault. As with assaults, so with vandalism, and, indeed, with negligence: what does a dangerous driver A gain from harming pedestrian B? Perhaps she has saved whatever amount of time and money it would have cost for her to be safe, but this bears no relation to the severity of the harm done. The Aristotelian account of rectification, it seems, is only suited to those economic transactions with which it began, and cannot be generalised to cover injuries. 157  
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I conclude, then, that whether the state, the offender, or some other party should rectify the harm is an open question, which we must solve by argument, not conceptual analysis. 165  
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#### 4 How Can We Rectify the Wrong? 167

Rectification of the wrong is more difficult than that of the harm. I must first specify the conception of wrong, by briefly outlining the conclusions of other work on the conceptual analysis of injury (Lazar 2006). I there defend restricting cases of injury to cases where the victim's rights have been violated, and then argue that, when A injures B, violating his right, her action – even if merely careless, rather than intentional – imputes that B is beneath the protection of that right, and so degrades his status as an equal member of the moral community.<sup>9</sup> This disrespect for B's moral status constitutes wrong, and is as important to the rectification of the injury as is the setback to the victim's interests that constitutes harm. 168  
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In this section, I consider four ways of rectifying the wrong. According to the first, the wrong is subordinate, and is in fact rectified whenever we rectify the harm. The second proposes that an additional payment is required, as punitive damages, but that the wrong can nonetheless be rectified by the same method as the harm. The third looks to punishment for rectification of the wrong, while the fourth account, which I defend, proposes that only full apology can rectify the disrespect contained in an injury. 177  
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The notion that rectifying the harm also rectifies the wrong is suggested by the common experience of those who, awarded damages in civil suits, feel vindicated by that award, as though not only the harm, but also the disrespect had been rectified. Feinberg, accordingly, suggests that compensation "functions not only to repair the damage but also to 'restore the moral equilibrium'". Compensation, he continues "'sets things straight' or 'gives satisfaction'", and is also "the acknowledgment of a past wrong, a 'repayment of a debt', 183  
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<sup>9</sup> Evidently there is greater disrespect involved in intentionally injuring someone than in negligently doing so, and more in negligence than in mere carelessness. Even carelessness, however, does impute insufficient respect for the victim's equal status: had it been properly acknowledged, the injurer would not have been careless.



and hence... the redressing of the moral balance or the restoring of the *status quo ante culpum*” (Feinberg 1970, pp. 74, 76).<sup>10</sup> Feinberg’s metaphors are suggestive, but we must explain this phenomenon more explicitly. One possible argument is that by imposing the costs of rectifying the harm on the offender, society vindicates the victim’s rights: the offender A has wronged victim B, disrespecting him; C–Z refute A’s disrespect by imposing on her the cost of rectifying B’s harm, thereby reasserting B’s status as a full member of the moral community. Thus, rectification of the harm rectifies the wrong.

There are three major problems with this argument. First, if the purpose of rectifying the harm is to rectify the wrong, we are essentially defending a retributive theory of rectification, and as such, we must surely impose an equal burden of rectification for equal wrongs.<sup>11</sup> However, the relation between harms and wrongs is largely contingent: specifically, a moment of carelessness can lead to a massive loss (Waldron 1995). Though the right violated might be very serious, and the harm done very great, if the injurer was acting merely carelessly, the disrespect manifest in the injury is mitigated. To impose the full cost of compensation on the injurer, in this case, would conflict with the retributive principle this approach is based on.<sup>12</sup>

My second objection is the more fundamental challenge that compensation for the harm alone cannot rectify the disrespect contained in an injury, without eviscerating our theory of rights. Rights do not merely signpost particular important interests, but actively provide them with protection, by making harm to that interest violate the categorical duty to show equal respect to all members of the moral community. If rectification of the harm could rectify an injury, then the violated right is denied its proper moral significance, and the protection that rights offer interests is ignored.

Finally, successful plaintiffs in civil suits do not, I contend, feel vindicated merely because compensation is awarded to rectify the harm. If there were no judicial process, but the injurer simply paid the cash without adding any symbolic content to it, then one could surely not believe the wrong to have been rectified. What matters is that the judicial process invests the rectification of the harm with symbolic meaning, making it part of a broader procedure of rectification, which, I suggest below, amounts to the enforcement of those aspects of full apology that are indeed publicly enforceable. Rectification of the harm alone, however, does not rectify the wrong.

On the second account, we can acknowledge and rectify the disvalue of the wrong by enforcing additional pecuniary compensation. I briefly outline the case for punitive damages, then effect a critique.

One could defend punitive damages by arguing that the victim has an interest in being respected, which the injury has damaged, and which an injurer can counterbalance by providing the means to realise an equivalently valuable interest. Thus Richard Wright, for example, argues that rectification of the “discrete dignitary injury” of wrong is achieved through “the imposition of private retribution in the form of punitive damages that [the offender] herself must pay” (Wright 1995, p. 175; see also Simons 1996, p. 297). Punitive damages, then, work identically to pecuniary compensation for the harm, but are targeted specifically at the wrong.

<sup>10</sup> Feinberg’s terminology is different from mine; he uses ‘reparations’ where I use ‘compensation’, and gives the latter a special meaning. I have adapted the paraphrase accordingly.

<sup>11</sup> In the classic defence of retributivism in criminal justice, Hegel (1991, Sect. 101R) stresses the need for this equality.

<sup>12</sup> As Honoré (1995) notes, when defending such a principle. Of course, if we do not defend the retributive principle then disproportionality between harm and wrong is not a problem.

There are two objections against the use of punitive damages to rectify the wrong. First: 231  
money is insufficiently valuable to rectify disrespect. I argued, in Subsection 2.1, that some 232  
harms cannot be rectified by any amount of compensation. This, I suggest, is true for almost 233  
all wrongs. For example, if A injures B, then gives him enough money to rectify the harm, 234  
and more to rectify the wrong, but adds no symbolic meaning, would we consider the 235  
wrong rectified, however much A pays? A disrespected B, degrading his moral status, and 236  
she offers just cash to rectify that degradation: this is surely an appropriate point to reflect 237  
that people, as Kant said, have dignity, not price (Kant 1996, p. 186–7). Money is a useful 238  
mediator between interests, but it surely cannot buy out disrespect. Moreover, imagine the 239  
consequences of injuries being fully compensable by money alone: those with sufficient 240  
resources could injure others almost without restraint, since they could always pay full 241  
compensation for both harm and private wrong (Gaus 1991).<sup>13</sup> Moreover, on this account 242  
people without much money could never rectify the injuries they do, which seems equally 243  
objectionable. 244

My second objection derives from a potential counterargument. An advocate of punitive 245  
damages might challenge that, in fact, individuals do weigh their interest in avoiding 246  
disrespect against other interests, and sometimes do believe them equally valuable. For 247  
example, a prostitute might believe avoiding disrespect less valuable than what he can buy 248  
with the money he earns thereby. What, then, stops money mediating between the interest 249  
in equal respect and other interests? My response charges that this objection misconstrues 250  
what is a fundamental category difference between disrespect and harm. Disrespect, I 251  
suggest, is not simply another object of an interest, like those protected by rights, rather, it 252  
is itself constitutive of the protection that rights provide interests. The purpose of 253  
identifying an interest as the object of a right is not merely to signpost the importance of 254  
that interest, but to provide it with some protection – specifically, that afforded by the 255  
morally fundamental imperative to treat others with equal respect. Punitive damages can 256  
only rectify the wrong if the interests that money serves are commensurable with the 257  
disvalue of disrespect; however, the protection that rights provide interests is grounded in 258  
the rejection, or at least problematisation, of that commensurability. We can see this 259  
problematisation at work in the case of the prostitute: he cannot weigh the instrumental 260  
value of money against the disvalue of disrespect, because for him to consent is to alienate 261  
the right that would otherwise be violated, meaning that he is not, in the relevant sense, 262  
being disrespected. He cannot compare {no disrespect, no compensation} with {disrespect, 263  
compensation}, because the latter set is internally incoherent.<sup>14</sup> Despite being an eminently 264  
practical solution to the problem of rectifying the wrong, punitive damages are therefore 265  
morally objectionable. 266

The third proposal is to rectify the wrong by punishing the offender. In this subsection, I 267  
outline the positive argument, then effect my critique. 268

In the corrective justice debate, the argument that punishment rectifies the wrong is more 269  
assumed than made by its principal advocates. Naturally, since their primary concern is to 270  
analyse and justify corrective justice, Jules Coleman and Stephen Perry cannot devote much 271  
space to exploring exactly how punishment rectifies the wrong. Coleman (1992, p. 325) 272  
simply states that “annulling moral wrongs is a matter of justice: retributive, not corrective, 273

<sup>13</sup> The public dimensions of injury would undoubtedly play a role here.

<sup>14</sup> Note that the prostitute’s consent may be of dubious value, and the right he alienates might be inalienable, but neither point renders the second set coherent.

justice. There is a legal institution that, in some accounts anyway, is designed to do retributive justice, namely, punishment". Perry (1992, p. 487) likewise affirms that "the obvious remedy" for "culpable wrongdoing" is criminal punishment. There are many different theories that might support Coleman and Perry's arguments here, which I cannot discuss in depth; however, both writers are at least convinced of two things: that punishment "annuls" the wrong, and that it is its "natural" remedy. I can, therefore, focus on these two claims in my critique of their position.

My first objection is that, even if one accepted their claim that punishment annuls the wrong, this would not prove that it should do so. Perry and Coleman ignore the fact that, if both criminal and corrective justice could rectify the wrong, we would have to provide convincing arguments to settle the dispute as to which should do so. Moreover, punishment will not necessarily emerge from this triumphant: even its advocates, from Bentham onwards, have shown that it is a contentious practice, facing serious objections (Bentham 1995).

My second objection, however, challenges that we should not, in fact, accept the premise that punishment 'annuls moral wrongs', because there is no way to understand what this actually means. A injures B, harming and wronging him; punishment is the infliction of harm on A, without wrong. What is the relationship between this harm to A and the wrong she did to B? Even if we deploy the much-derided *lex talionis*, and harm A exactly as she harmed B, how does that rectify the wrong done to B?<sup>15</sup> This harm does not provide B with a counterbalancing benefit, nor does it involve the retraction or repudiation of A's disrespect for B. One might argue that punishment enables the injurer to expiate the wrong that she has done – using a new sense of 'wrong', closer to 'guilt', than disrespect – but this would still mean that punishment is irrelevant to rectification of the wrong.

My third objection is that punishment is singularly unsuited to rectifying the private wrong contained in an injury. Punishment is a necessarily public phenomenon, because it is exemplary, and serves a range of public functions, such as deterrence and reaffirmation of the fundamental rules of society. It must, therefore, be consistent across cases, objective, and it must rectify the wrong done to the victim as a member of society, rather than as an individual. Undoubtedly, rectification of this public wrong is very valuable to the victim, because it constitutes society's expression of solidarity with him, the statement that who injures one of us injures us all. But this does not affect the private wrong, the specific disrespect shown B by A – moreover, this private wrong must be expressly excluded, because punishment cannot be attuned to subjective harms and wrongs without risking its impartial consistency. Thus it is surely possible that C–Z could impose a suitable sentence on A for injuring B, yet the two would still not be on a moral par unless something is done specifically about the disrespect, manifest in the injury, that A showed B alone. If A does not repudiate or regret her action, how can we hold the disrespect rectified?

My final objection is that punishment is too blunt a tool to rectify disrespect. As Feinberg argues, the core elements of the concept of punishment are that it is 'hard treatment', and that it stigmatises the offender.<sup>16</sup> It is a form of collective condemnation, and as such is only appropriate in serious cases (hence the maxim, *de minimis non curat lex*). And yet, as I suggested above, the disrespect involved in an injury can vary greatly, from heinous disrespect to moments of thoughtlessness. One must still rectify an injury involving minimal wrong, but punishment is far too harsh for this purpose. Punishment

<sup>15</sup> Even Hegel ridicules the *lex talionis*, in Hegel (1991, Sect. 101R).

<sup>16</sup> See 'The Expressive Function of Punishment' in Feinberg (1970).



may be defensible when rectifying the public dimensions of the injury; the private wrong, however, is beyond its reach. 319 320

In this subsection, I argue that the only morally and practically plausible means for effecting rectification of the wrong is full apology.<sup>17</sup> It is practically plausible, because it alone properly addresses the disrespect done to the victim; it is morally plausible because it seeks only to set matters right, not to erase the wrong. I elaborate on practical plausibility first, identifying the necessary components of a full apology, and then address moral plausibility. 321 322 323 324 325 326

On my analysis of injury, when A injures B, she violates his right, and in so doing disrespects his moral status, imputing that he does not merit the protection of that right. A can only rectify that disrespect by repudiating her action, and reaffirming B's status as a member of the moral community. This is only possible through a full apology. A full apology is about more than just words: specifically, there are at least six symbolic and material components of apology, the absence of which would justify rejecting the apology as incomplete.<sup>18</sup> The three symbolic components are: acknowledgment of causal responsibility; acknowledgment of moral responsibility; and repudiation of the act (regret). The three material corollaries are: reform; disgorgement of unjust gains; and sharing the burden of harm (reparations). Together, these constitute the only practically plausible way for the offender to reaffirm the victim's moral status, and redress the disrespect shown in the injury. When a full apology is made, we can say that it is reasonable to expect the victim to at least accept the apology, though forgiveness is another matter entirely.<sup>19</sup> In the following paragraphs, I elaborate on each component in turn. 327 328 329 330 331 332 333 334 335 336 337 338 339 340

The first component of apology is A's recognition that she did in fact injure B: that the injury happened, and she was causally responsible.<sup>20</sup> This prevents her from pretending the injury did not happen, or making excuses to downplay her causal agency: without this acknowledgment, an apology would only express hypocritical sympathy with B, saying "I am sorry that you suffered harm x".<sup>21</sup> 341 342 343 344 345

The second necessary component is directly related to the first: just as A must acknowledge that the injury happened, and that she was causally responsible, she must also recognise that it was an injury, that it violated B's rights: she must accept moral responsibility. Just as the first component stops her making excuses, pretending that the injury did not happen, or that she was not causally responsible, this second component stops her attempting to justify the injury. The acceptance of moral responsibility can be more or less fulsome: sometimes it may be required for the injurer to explain what her reasons were for acting, as her degree of moral responsibility will depend on whether there were any exculpating reasons; if her reasons for acting were all objectionable, however, 346 347 348 349 350 351 352 353 354

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<sup>17</sup> This is not an exhaustive theory of apology: apologies may also be appropriate in other circumstances, with different content. I only consider their role in rectifying an *injurious* wrong.

<sup>18</sup> Note that there is a difference between accepting an apology and forgiving the apologiser. Forgiveness is a complex topic, beyond the scope of this paper.

<sup>19</sup> To reject an apology is simply to challenge that it is in some way incomplete. Incomplete apologies are a familiar feature of everyday experience: we all know what it means to say (or be told) "*Really* apologise", or "Say it like you mean it".

<sup>20</sup> Smith (2005) distinguishes, unnecessarily I think, between corroborating the factual record and accepting causal responsibility. I combine the two in this category.

<sup>21</sup> Gill (2000, p. 14) argues that only one of the parties concerned need believe the incident actually occurred, as though it would be reasonable to accept an apology from an offender who continues to deny that the injury actually took place. This is surely false.

then full explanation might add insult to injury, and simple admission of moral responsibility might be more appropriate.<sup>22</sup> Again, this is crucial, because A cannot recognise B's moral status until she acknowledges that her action unjustifiably violated B's rights.<sup>23</sup>

It is still possible reasonably to reject an apology in which causal and moral responsibility are acknowledged. Imagine a case, for example, where A, apologising, admits to having injured B, acknowledges that it was wrong and that B should be her moral equal, but is indifferent to this: B's rights, and his moral status, are meaningless to her. This would hardly count as an acceptable apology, because A must not only acknowledge these things, she must also internalise them, and repudiate her act, for her apology to be symbolically complete. This follows logically from three premises: (1) A acknowledges causal responsibility for the injury; (2) She acknowledges that it violated a right; (3) She is committed to the moral principles that she violated; therefore (C) She must necessarily repudiate her act, and exhibit genuine regret for what she has done. This argument is valid, therefore if the injurer does not regret and repudiate her action, one of the premises must be false: either she does not believe herself causally responsible, she does not think she violated B's right, or she is not genuinely committed to the principles that she violated. If any of these three is true, then her apology is pointless: either it does not reaffirm B's equal moral status, or it imputes that his rights are in fact meaningless.<sup>24</sup>

Just as an apology must have symbolic content, it must also be accompanied by certain practical corollaries. The first is derived as follows: if A acknowledges that she injured B, in violation of B's rights, then she must repudiate the action, and regret it; if so, she will make all possible efforts to ensure that it is not repeated. If she apologises, while continuing to injure B, or repeatedly reoffending, her apology can reasonably be rejected. Assuming A is rational, her refusal to desist indicates that one of the symbolic aspects of apology is in fact missing, and that she has not recognised B's equal moral status.<sup>25</sup> As Smith writes, "an apology gains credibility as time passes without a relapse" (Smith 2005, p. 483).<sup>26</sup>

The second material corollary of apology, disgorgement of unjust gains, is more contingently related to it than reform. Reform is always a corollary of apology, disgorgement is only relevant when the offender has gained through the injury. In such a situation, if A means to apologise to B, she creates an expectation that she will give up any unjust gains acquired through the injury: not to do so would suggest that she did not

<sup>22</sup> Thanks to a reviewer for this Journal for suggesting the importance of explanation as a component of full apology. I think it would prove even more important were we to focus on the conditions of forgiveness, although, again, that takes us beyond the scope of this paper.

<sup>23</sup> Again, Gill (2000) thinks only one of the parties must believe the act inappropriate. If the apologisee does not believe the act wrong, she must at least accept the legitimacy of the victim taking offence. This is surely a mistake: to acknowledge that the act was injurious is to recognise the rights that you violated; to deny this is to continue to impugn the victim's moral status. "I'm sorry that you think I injured you" is not an adequate apology.

<sup>24</sup> Note that this rules out apologies made solely out of self-interest, since they cannot manifest proper commitment to the relevant principles.

<sup>25</sup> Reoffending will sometimes be the product of weakness of will; however, if the reoffender is reasonable and autonomous, this cannot count as an excuse. If she rejects the mantle of autonomy then she poses a different problem.

<sup>26</sup> Gill (2000, p. 14) again opts for a more tentative version, suggesting that "the person to whom the apology is offered is justified in believing that the offender will try to refrain from similar offences in the future". This is not, I think, strong enough: a person who apologises but reoffends may mean well, and merely suffer from weakness of will, but her actions still imply that, deliberately or otherwise, she does not respect B as a right-holder.

recognise the significance of the disrespect she showed B. If, for example, A stole £100 from B, then won £1,000 with it at the bookies', it would surely undermine A's apology if she merely returned the £100 to B, pocketing the remainder.

The final corollary of apology also depends on the specific context of the injury. In some contexts, an apology is reasonably rejectable until the offender has made a good faith effort to share the burden of harm which he imposed on the victim through the injury. We can call such an effort 'reparations'.<sup>27</sup> By 'good faith effort', I mean the amount of reparations required will depend on the context, particularly the offender's capacity to pay, and whether or not some other scheme for rectifying injurious harms already exists. If the injurer is very poor, a good faith effort will be less than if she were rich; and sharing the burden of the harm in a society with a National Health Service, for example, would not require contributions towards medical costs. We can see that this is a material corollary of apology by considering an example: if it is true that A acknowledges causal and moral responsibility, and regrets injuring B, then if B is suffering as a consequence of that injury, and A is in a position to help bear that burden, then if A apologises without making reparations, we can infer, again, that her apology lacks symbolic content. Prosaically put: actions speak louder than words.

It is important to stress the difference between this loose, contextualised conception of reparations, and the account of rectification of the harm, set out in Section 2 above. The amount of pecuniary compensation required to rectify the harm is determined not by these contextual factors, but by the nature of the harm; moreover, anybody with the resources can rectify it. Reparations are different, since they depend on context, and may fall short of fully rectifying the harm; moreover, if there is a compelling argument for rectifying the harm by some other means, then it may be possible to make a full apology without any reparations. It remains, therefore, a matter for argument to determine whether the victim's harm should be met with compensation, reparations, or some combination of the two.

I hope to have demonstrated, in this subsection, that apology is a practically plausible means of rectifying the wrong. I now address its moral plausibility: does the possibility of apologising for wrongs suggest that all wrongs are rectifiable? And does it render wrongs permissible if we apologise for them? The answer to the first question is clear: some wrongs are beyond apology; we must not underestimate the scope of human malice. Moreover, there is a logical reason why, in such cases, apology is impossible: it follows from the argument that the offender should repudiate and regret her action, made above, that her regret should be proportionate to the seriousness of the wrong. Our suspicions would be raised, in particular, about her commitment to the violated moral principle if, despite its seriousness, she treats it as trivially regrettable. Consequently, when wrongs of a certain degree of heinousness are involved, for the offender to make a full apology for the injury, her regret would have to be positively crippling – such that the very fact that she can apologise would show that she did not take the wrong seriously enough.

The answer to the second question is also clear: an apology does not restore the *status quo ante culpum*, erasing the wrong, and does not, therefore, risk rendering the injury permissible. Apologies are not a currency in which we pay for our wrongs, they are a means for us to do the right thing by the people we injure. This is evident, in part, from the fact that making the apology might rectify the wrong done to the victim, but may not restore the offender's moral status. That process of expiation will undoubtedly involve apology, but will require more besides, which I cannot discuss here. However, even in a case where an apologisee rectifies the wrong, expiates her own guilt, and secures the

<sup>27</sup> I stick to this idiosyncratic use of the term throughout.

victim's forgiveness, the *status quo ante* is not restored: the injury is not erased, but expiated and forgiven.

In this section, I rejected the use of rectification of the harm, punitive damages or punishment to rectify the wrong, arguing that despite their practical plausibility each raises moral problems. I concluded that the wrong can only be rectified through a full apology, with all its symbolic, and its pertinent material components, through which alone the offender can recognise and reassert the victim's moral status. Full apology is practically plausible; and because it neither claims to erase the wrong, nor to be sufficient to rectify the most serious injuries, it is also morally defensible.

### 5 Who Should Rectify the Wrong?

It follows from my account of apology that the agent of rectification of the wrong must be the offender herself. In this subsection I substantiate this claim; in Subsection 5.2. I consider a related problem: given my analysis of full apology, is it possible to demand an apology from the injurer, as a matter of justice?

To rectify her wrong, A must reaffirm B's moral status, by acknowledging causal and moral responsibility for the injury, and manifesting her repudiation of the act in meaningful regret, from which the material corollaries of reform, and, depending on the context, disgorgement and reparations follow. Evidently, the identity of the agent is crucial to the success of this means of rectification. It is only when A herself acknowledges and regrets the injury that the wrong can be properly rectified.<sup>28</sup> Consider this example: A injures B, then flees the country. Would it be reasonable for B to accept an apology from C, on A's behalf? No matter how close the relationship between C and A, the former cannot acknowledge responsibility, or regret the action, for the latter, therefore he cannot apologise for her. C can do other things, of course – such as ascribe moral and causal responsibility, sympathise, denounce the act, and disgorge any unjust gains. However, he can only do these things on his own behalf: his efforts may be valuable, but they cannot rectify the wrong done by A. One person could only apologise for another if we could defend a notion of collective agency, according to which all members of a group are causally and morally responsible for the actions of any one of their number. Absent this contentious notion of collective agency, only the offender can rectify the wrong.<sup>29</sup>

If only the offender can rectify the wrong, and she must regret her deed, it is vital to establish whether the victim can demand an apology as a matter of right. By rendering rectification of the wrong morally and practically plausible, have I placed it beyond the scope of justice?

The symbolic content of an apology is its most important part, particularly the offender's recognition of the victim's moral status, in repudiation of her act, and, crucially, regret. Rectification of the wrong, therefore, requires the offender to feel a certain way. As Karl Jaspers argued, however, in his discussion of German atonement for Nazi war crimes, while

<sup>28</sup> One might authorise another to apologise on one's behalf, but only insofar as they merely act as an agent, or messenger.

<sup>29</sup> Gill (2000) argues that an apology only requires that "either the party offering the apology takes responsibility for the act, or there is some relationship between the responsible actor and the apologisee such that her taking responsibility for offering the apology is justifiable". Again, this is not strong enough. Only insofar as we can make an argument for collective agency and collective responsibility, I contend, can we entitle one person to apologise for the action of another.



“punishment and liability” can be imposed, “demands for repentance and rebirth, can only come from within” (Jaspers 2000, p. 39). There is, to my knowledge, no plausible conception of justice which could justify demanding that a person feel a certain way. One cannot demand a full apology as a matter of right.

We must accept, therefore, that full apology is beyond the scope of justice. This leaves us with two alternatives: either forget about arguing, at least with respect to the wrong, for principles of corrective justice; or consider second-best solutions, of which there are two plausible candidates. First, even if a full apology cannot be demanded as a matter of justice, some aspects of apology might be within its scope. For example, a court can *assign* causal and moral responsibility to the injurer, obliging her at least externally to acknowledge them, and can impose disgorgement and reparations on her, as well as providing incentives to reform.<sup>30</sup>

Second, while we may not be able to demand, in justice, a full apology, we can provide, through the civil and criminal courts, a forum in which such apologies can be publicly made and recognised.<sup>31</sup> Whether or not we should provide injurers with incentives to apologise – such as a mitigation of punishment, or civil damages – is a difficult question. As far as corrective justice is concerned, the answer would seem to be ‘no’: what matters is that the apology be genuine, and if it is premised on an incentive then, whether or not it actually is genuine, it will always be suspect.<sup>32</sup> The same may not be true for criminal justice, of course; where this is concerned, incentives to apologise might make more sense, since the role played by apology is probably different from that in corrective justice: for example, expressions of remorse, repudiation of the act, and reform evidently impact on the consequentialist goals of punishment (deterrence, prevention, rehabilitation), and might also serve its expressive function (as the criminal reaffirms the moral code he challenged).<sup>33</sup>

Although full apology cannot be a requirement of justice, then, some of its components might be enforceable, while we can, in justice, provide space in which such apologies can be made and publicly recognised.

## 6 Concluding Remarks

In this paper, I have argued that despite problems of discontinuity and constitutive incommensurability, pecuniary compensation for harm and apology for wrong can rectify, insofar as rectification is possible, an injury. The usefulness of pecuniary compensation to the harm, I argued, is independent of the origin of those resources – therefore anybody, in theory, can rectify a harm. Apologies, on the other hand, are only properly meaningful when they come from the injurer herself. With respect to both the wrong and the harm, I have argued against construing rectification as the restoration of the *status quo ante*, challenging that its goal is rather to set things right than to set them back how they were.

<sup>30</sup> Roberts (2002) argues that argues that we cannot, in justice, demand that an individual change his behaviour, and for this reason excludes apology from the domain of justice. I disagree: courts frequently suspend sentences on condition of individuals not re-offending.

<sup>31</sup> Thanks, for suggesting this second approach, to a reviewer for this Journal.

<sup>32</sup> This might be a logical point: if an apology is genuine, then one would not want or seek any mitigation of the different components of apology, since each follows on from the others.

<sup>33</sup> Further discussion of the role of apology in criminal justice takes me, unfortunately, beyond the scope of this paper.

We must be clear, finally, about which remedial procedures this paper has ruled out, and which remain open to argument. Concerning the harm, it has left open the question of how to distribute the cost of compensation: it could be assigned to the victim, distributed around society, imposed on the offender, or some combination of these. Conceptual analysis provides no grounds for proposing either corrective or distributive justice as a solution to injurious harms. With respect to the wrong, on the other hand, it has closed off more options. We should not look to criminal justice for means to rectify the disrespect suffered by the victim. Punishment may have its place in dealing with public injuries, but it cannot rectify private disrespect. Only full apology can fill that role. Full apology, however cannot be demanded as a right, which leaves us with three options: we could argue that apology is supererogatory, and cannot be demanded under any moral principle; we could challenge that it is morally obligatory, but cannot be demanded by justice specifically; or we could argue that those aspects of apology which can be demanded as a matter of justice should be. Only the last approach would be a defence of corrective justice; the first would consign rectification of the wrong to the same category as heroic self-sacrifice, while the second might provide compelling moral principles for correlative rectification, but not principles of justice.

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