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Political Apologies: Collective Responsibility and Political Ritual

Danielle Celermajer

**Submitted in partial fulfillment of the
Requirements for the degree
Of Doctor of Philosophy
In the Graduate School of Arts and Sciences**

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ABSTRACT

Political Apologies: Collective Responsibility and Political Ritual

Danielle Celermajer

In the last fifteen years of the twentieth century the political apology appeared in the repertoire of strategies for dealing with systematic human rights violations in the past. Understood as individual expressions of an inner regret, appropriate to the sphere of personal relationship or religion, their appearance on the political stage has been seen as a type of category mistake. In so far as apologies imply both collective and in some cases inter-generational responsibility, they also appear to contravene fundamental liberal principles.

To make sense of their proliferation in the political sphere, one needs to recognize that collective apologies represent a distinct form. Unlike the individual, personal apology, they are not representations or expressions of an internal, subjective emotion (regret), but are rather a form of public symbolic action directed to shifting political norms. This public, collective trope, though largely displaced in popular imagination by the individual, internal trope has a long and well-etched institutional and conceptual history both in Judaism and Christianity, and the contemporary phenomenon draws on this alternative grammar.

Political apologies provide a means for picking up on the collective dimension of responsibility for systematic violations, particularly those with a strong identity component, that is wrongs committed against particular groups. They address the background public norms that underpin violations by failing to recognize certain groups as full and equal members of the polity. By recognizing that the political apology works at the level of the collective norms that orient individual action, it is possible to build up a more complex conceptualization of responsibility where collective and individual dimensions are not in conflict.

Moreover, apology does not simply describe the normative problem but itself performs the normative shift. Ideally, the apology assumes responsibility for the wrong, condemns the problematic norms and so legitimizes the alternative norms and provides political recognition of the victim group and its experience of violation.

Understood as a form of collective ritual action, the political apology suggests a rethinking of the distinction between the modalities of religion and those of modern politics and of theoretical conceptions of the sphere of the political itself.

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Introduction: The Apology and political theory

In October 1997, thousands of Australians each planted a green, red, blue, yellow black or white plastic hand on the lawn in front of Parliament House, the seat of federal government and symbol of the state. With each hand they were signaling that they wanted to apologize to Aboriginal people for almost a century of state sanctioned, forcible removal of Aboriginal children from their families. In the following five years, tens of thousands more added their 'hands' to a growing 'Sea of Hands' which, like the apology movement, swept across the country - a national ritual saluting the children who had been shoved into institutions and foster homes and to the broken families and communities.¹

The "apology wave" has been the most significant social movement in Australia since the Vietnam War. Tens of thousands of Australians have spoken the words of apology at 'sorry occasions', or written their words of apology in specially bound 'Sorry Books' which traveled across the country, ending their journey in designated archival resting places in the nation's capital. Hundreds of government and non-government organizations, including every state and territory parliament, police forces, churches, school groups and immigrant community councils have issued formal apologies.

¹

At the time of writing, 250,000 people had sponsored a hand. The Sea of Hands has been planted in different forms in a range of significant public spaces across Australia. The sites include Bondi beach, the walk to Sydney Harbour Bridge, Alice Springs and Uluru (Ayers Rock). Information on the Sea of Hands, including pictures is available at http://www.antar.org.au/SOH_sub.html

That the apology movement gathered so much force in Australia and the debate became so contentious is difficult to understand, given that, on the surface at least, it seems to be a matter of ‘mere words’, or if not mere words then words that belonged in a personal relationship or the church, but certainly not in politics.

At one time, this type of public repentance in the political realm was not such an anomaly. Indeed, in 1863, President Lincoln declared a day of “National fasting, humiliation and prayer”, on which the nation as a whole would repent its national sins and recognize its disconnection from the source of its blessings by remembering the God that created it. The hoped for outcome of national repentance would be “no less than the pardon of our national sins, and the restoration of our now divided and suffering country, to its former happy condition of unity and peace.”²

Today Lincoln’s words strike us as particularly out of place in the political realm, at least as contemporary citizens of liberal secular polities imagine it. Yet the apology is very much alive in contemporary politics. The Australian apology is not an isolated phenomenon but representative of an astonishing trend that emerged in the last fifteen years of the twentieth century. There has been a spate of apologies from European countries for violations against Jews during the Holocaust, from colonial and post-colonial nations for violations against Indigenous peoples, and from a range of nations for systematic abuses against particular racial or ethnic groups, both domestically and across

² The context of Lincoln’s declaration was of course the civil war. He suggests in this declaration that the “awful calamity of civil war, which now desolates the land, may be but a punishment inflicted upon us for our presumptuous sins, to the needful end of our national reformation as a whole People.”

borders. Some concern atrocities in the remote or more distant, past, others violations in the immediate past.

Whereas only twenty years ago the political apology was not even on the menu of options contemplated by political actors facing the prospect of dealing with large-scale historical wrongs, today it has taken its place as one of the basic strategies in the toolbox of “dealing with the past”. The sudden and striking emergence of apology as a distinct form of political action and its unprecedented international proliferation over the last fifteen years demands evaluation. And yet it has received only scant conceptual analysis.

This is odd, given that contemporary political theorists have avidly taken to the study of other institutions for dealing with the past and transitional justice (trials, truth commissions, public memorials and reparation schemes). Perhaps it is the unquestioned assumption that apologies are ‘mere words’, and probably ingenuous ones at that, which has led to theorists relegating them to the ‘light-weight’ end of the spectrum of responses to serious public wrongs. Perhaps also, it is our dogmatically held assumptions about the appropriate modes of politics on the one hand and the nature of apology on the other that lead us to conclude that apology has no place in public, secular political life. Yet, looking up from the books and around the world, it is clearly premature to dismiss the political apology as a “mere” or “mistaken” apology.

Beyond apology’s dynamic and eccentric entrance onto the political stage, what makes it particularly tantalizing and puzzling from the point of view of a political theorist, is

precisely that it represents a very unusual approach to 'doing politics'. Unlike criminal trials or compensation schemes, it does not work within classical, liberal understandings of wrongdoing, responsibility and 'justice', but suggests another approach to 'dealing with the past'. Rather than focusing on the individual wrongdoer, its currency is the responsible community. In lieu of justice through punishment or compensation, it suggests the path of repentance.

The first of these turns, from the responsible individual, to the responsible community is an old chestnut for political theory, but in contemporary international politics one with a very pressing relevance. In an era where nation after nation is facing its history of systematic, state sponsored violations, it is no longer possible to skirt around the argument that responsibility goes beyond the individual who wielded the machete or drove the child away. Punishing individual perpetrators is certainly a necessary condition for fully addressing systematic violations, but even after we have done with this justice, we are still left with the sense that the massive body of the society that condoned the violations (albeit perhaps silently) is there in the shadows. Yet modern liberal political communities and theorists have still not found a way of institutionalizing or conceptualizing collective responsibility in a manner consistent with fundamental principles and institutions of individual liberty. Part of the work of this dissertation is to shed light on the limits of traditional liberal approaches to responsibility, to build up an alternative conceptual scheme, and to link this with the work of apology as a collective political act.

The second turn, from traditional liberal institutions and conceptions of justice to the dynamic of repentance is more novel to political theory, but equally pressing, given the failure of existing modalities to make sufficient inroads into the systematic patterns of group based violations that wrack societies and relations between nations. Rituals of repentance may at first strike us as an odd supplement. If however, one moves outside the sphere of politics narrowly defined as the modern secular state to the sphere of religion, and in particular the public, regulatory dimension of Judaism and Christianity, one finds that the principal means for addressing wrongdoing in the past is precisely through public, ritualized repentance.

Indeed, in her bird's eye analysis of the human condition and the modalities of human sociality, Hannah Arendt characterized forgiveness as the sole human reaction that makes freedom from the past possible.³ While her direct reference was to forgiveness and not apology, Arendt's thesis suggests that this 'repentant mode' of action, apparently so anomalous in politics, might represent the desperately sought after resource for getting beyond pasts filled with compulsive and entrenched cycles of horrific political and social abuse. Just as Aeschylus dramatized Athena curtailing the endless cycles of revenge by assimilating the vengeful Furies into the civil institutions of justice, so too perhaps civic rituals of apology might put a break on the perpetual insults and injuries that drive collective violations.⁴ For forgiveness, as Arendt suggests, represents a genuinely *new*

³ Hannah Arendt, *The Human Condition*, Chicago: University of Chicago Press, 1958, p. 236ff.

⁴ The reference is to Aeschylus' Third play in the Orestes cycle, *The Eumenides* where he dramatizes Athena's intervention in the trial of Orestes, casting her deciding vote so as that:
 "Nevermore these walls within
 Shall echo fierce sedition's din
 Unsaked with blood and crime;

action, the insertion of something that was neither previously present nor even derived from past action, but actually created and thus uniquely potent.

Unlike the claims about the role of justice and civic punishment however, this suggestion that repentance might constitute a unique and vital *political* strategy challenges the very definition of the political. It implies that political action is moving and should move beyond the standard repertoire of legal and institutional interventions, into the realm of the repentant and the performative.

This suggestion provokes significant resistance on a number of fronts. For most critics, the problem is that apology, they assume, essentially requires a repenting subject with all the qualities of the reflective individual – a particular identity, a soul, an inner life. If this is the case, then collective political apologies are, by definition aberrant forms that distort and fail to meet the basic requirements: they treat the polity as an individual writ large - an individual with a inner emotional dimension that can be transformed through reflection. In this way they fail to recognize that ontological difference between a collective and an individual, fail to distinguish politics from personal relations and are thus do not belong in the sphere of politics.

The thirsty dust shall nevermore
Suck up the darkly's streaming gore,
For civic broils, shed out in wrath
And vengeance, crying death for death!" *The Eumenides* translated by E.D.A.Morshead in Oates,
W. and O'Niell Jr. E. (eds), *The Complete Greek Drama*, New York: Random House, 1938, Vol.
I, p. 305.

For Arendt, the problem is not simply that the dynamic of repentance assumes the individual, but that it assumes the individual in his or her most apolitical dimension. The modality of forgiveness, for all its radical creativity, has no place in the world of politics, because “[O]nly love has the power to forgive..... [And] love, by its very nature is unworldly and it is for this reason, rather than its rarity that it is not only apolitical, but anti-political, perhaps the most powerful of all anti-political forces.”⁵

Even stronger than Arendt’s objection, is the resistance that repentance’s religious associations provoke. Importantly, the most damning objection here is not to the assimilation of the individualistic dimensions of religious practice (the repentance of the single soul), but to the political dimensions of religious practice – repentance as a form of public and collective regulation. Amongst the defining features of modern liberal politics is its the self conscious distinction from the pre-modern, undifferentiated theo-politics that it displaced. In assuming the discourse of apology, modern politics seems to be venturing into the most forbidden zone of all, the zone of religion.

Approached from these habitual frames of reference, apology seems to be some kind of category mistake – substituting the collective for the individual and the political for the personal or the spiritual. And yet, here it is, in the sphere of contemporary liberal politics, and with a vengeance. The political apology presents us with a fascinating puzzle, and one our available conceptual categories seem ill equipped to make sense of or explain.

⁵ Arendt, *op. cit.* p. 242.

One can break this puzzle down into four related questions that will orient this dissertation. First, what type of work is the apology doing? Second, what type of act is the political apology? Third, what can the emergence of the political apology as a strategy for dealing with large-scale political wrongs of the past tell us about the nature of those wrongs, and specifically about our understanding of *responsibility* for those wrongs, and what constitutes a proper response to them? Fourth, what does the emergence of this trend in political behavior indicate about the contemporary political sphere and the nature of *the political*? This question is broader than, but includes the temporal question, ‘why has the apology emerged now?’⁶ Because one needs to understand the act itself before assessing its political or theoretical significance, the first two questions comprise the main exploratory focus of this dissertation.

Methodologically, I pursue these ‘definitional’ questions through a combination of lenses. Principally, I look for the tropes or grammar of apology in the religious sphere. It is here that they have been traditionally located and here that one finds the richest resources for unpacking their significance. A considerable part of the work of this dissertation will be to take the reader through an in depth exploration of Jewish and Christian reflections on, and institutions of apology, exploring religious sources and practices to draw out a grammar of apology that will provide the language for

⁶ The political apology forms part of a more general emergence of political obsession with “dealing with the past” in the last two decades of the twentieth century. As such the specific question about the emergence of *apology* per se can only be fully answered with reference to the broader question of why this turn to the past in general became so much more politically salient - a complex question beyond the scope of this work. Answers are likely to be found in a combination of the aftermath of the Holocaust and its effect on conceptions of the relationship between history, memory and human rights violations and the political shifts affected by a global pattern of regime change (the end of communism, the demise of dictatorships). It is the narrower question of why the political apology appeared now as a particular strategy that will be addressed here.

understanding the contemporary phenomenon. The second major lens is an analysis of contemporary political apologies themselves. Here I look briefly at a large range of apologies, analyzing their wording and performance, and then in detail at the apology debate in Australia.

This is no doubt an unusual methodology for a political theory dissertation, both in my use of religious material, and in my combination of abstract and empirical analysis. However, precisely because apology is a relative newcomer to this sphere and its appearance challenges liberal political theory's definitions of the boundaries of the political, it demands a methodological fluidity unconstrained by disciplinary habits. This movement back and forth allows for an analysis that is conceptually rich, but nevertheless attuned to what is actually going on in the contemporary scene. The movement between the secular and religious spheres and the abstract and empirical also enriches analyses of the broader theoretical questions about the relationship between these spheres and the nature of the political.

Still, by looking for the background trope of apology in the sphere of religion, I might be accused of begging the very questions that are at issue here – the relationship between the spheres and the problem of a religious practice 'migrating' into secular liberal politics. My approach, however, is to suspend the *prima facie* objection that practices belonging to the sphere of religion must be barred from modern secular politics, to notice that they *are* part of modern secular politics and then to draw my conclusions. The facts on the ground demand this: not only apologies, but also the narrative processes that form the core of

truth commissions and the dynamics of forgiveness they evoke are all signs of an emergence of confessional- type processes within the repertoire of mechanisms for dealing with the past in the sphere of modern secular politics.

This approach turns the argument on its head. Rather than assuming the validity of the dichotomies that divide our conceptual map into distinct and completely bounded worlds of action and meaning (e.g. religion and politics, ritual performance and administrative law) and then rejecting the apology as an appropriate mode of modern politics, I look at the practices themselves, as free as possible of presumed classification. One can then use this material both to interpret the practices themselves and to reevaluate our characterization of modern secular politics.

What one actually sees is that modern secular politics is also drawing on processes of symbolic performance and attempting to institute recognition of collective responsibility in a manner that is no doubt *political*, albeit traditionally thought of as the hallmark of ritualistic religion. This fact poses a challenge to the secular and bureaucratic self-image and trappings of modern politics and the dichotomies noted above. Contemporary political theory would do well to allow that such processes can and do partner with modern liberal political institutions and to expand our conception of ‘the political’ to include them.⁷

⁷ This in turn opens the possibility of reconsidering the definition of secularism and the distinction between the secular and the holy as it applies to the conception of political life. Recently, there has been a significant challenge to the so-called Western model of secularism, suggesting that in India for example, secularism does not require the harsh mutual exclusivity that it does in the West. See for example, Rajeev Bhargava, (ed.) *Secularism and Its Critics*, Delhi: Oxford University Press, 1998. What I am suggesting here is that in the West itself, the distinction between religious and secular politics, at the level of processes is also not so absolute.

In making this claim, it is important to be clear that my analysis of apology in the religious context is *formal* not substantive. That is, I look to the religious context to abstract that repertoire of work that apology can do as a form of speech act and not for the content of that work. Distinguishing form and content is crucial in this context, because while I contend that *formally* apology has the capacity to effect shifts that converge with contemporary political problems, *substantively* the apology was associated, in the religious context with thick commitments that are incompatible with fundamental principles of modern liberal polities. Indeed, my argument that such forms are compatible with fundamental principles of modern liberal states requires that the apologetic form need not entail a relationship with the Absolute, nor particularistic moral commitments.

This multi-dimensional analysis of apology reveals that it is a far more complex and *political* phenomenon than one might expect. As I noted earlier, the existing literature assumes that essentially apology is a form of speech representing an inner shift in the individual soul. What this reading of the religious forms of apology reveals, however is that alongside this individual trope there is a distinctly collective, public trope of apology – apology as a distinctly political act, and not a distortion of the true individual form. Interpreting contemporary political apologies in terms of this second trope not only explains the phenomenon, but also provides a far more potent lens for making sense of how they work and the debates that are emerging around them.

This trope, which one sees conceptualized and institutionalized in the texts and practices of Judaism and Christianity, has its own distinct logic and performative repertoire.

Specifically, apology in this mode provides the means for a collective to repudiate the norms it has actually affirmed (in history) and reconnect with those ideal norms that provide it with its identity as a particular community. Through its public repudiation of collectively held norms, the polity acknowledges *its* part in creating the necessary conditions for individuals to ‘sin’ or commit wrongful acts.

As the religious texts and practices make explicit, in those cases where wrongful acts are systematically perpetrated, the problem is not simply individual aberrance. Individuals act against a background of collective and collectively sanctioned norms that determine (at least in part) what they judge to be right and wrong, whether they recognize themselves or other people as fully deserving to be treated as rights holders and members of the political community and what they *do*. If individuals consistently and systematically act in a manner we now judge to be wrong, then one has to conclude that the norms that would condemn such acts were either not present in the political community at that time, or that they had lapsed as subjectively experienced social norms convincing for community members.

Accordingly, fully dealing with such wrongs has to go beyond direct responsibility for the *act* itself (and the individual perpetrator) to the role of the community in providing the orienting norms or necessary conditions for such wrongdoing.⁸ The collective is not

⁸

I draw a distinction here between forms of wrongdoing that themselves clearly require a collective enterprise, for example slavery or treaty breaking, and those which seem to be fully explainable in

responsible for *doing* wrong, but it is, can and should be held responsible for sustaining the orienting norms. In the case of some of the most systematic violations, the collective norms that provided the background for particular violations are not bound to that particular temporal moment, but are more deeply entrenched in the identity of the political community across time. This is most likely to be the case where the norms concern distinctions between members and non-members and the rights that obtain to full membership. This normative continuity is particularly important in explaining how collective responsibility can adhere across time, that is even where concrete actors, both perpetrators and victims are no longer alive.

It is this work, the work of repudiating particular problematic norms, acknowledging that they have been part of the political fabric of this historical political community and committing to different norms that the apology does. Apology affects a dimension of reparative action that attends not to the damage inflicted by the wrongful acts but to the broken norms that underpinned those acts. Moreover, because systematic group based violations wrongs emerge against the background of a broader normative failure to recognize certain 'types' of people (blacks, Jews, indigenous people) as full subjects of rights, the reparation required must itself provide this recognition. The apology, as an intrinsically inter-subjective act acknowledging the normative legitimacy of the other's claim is particularly powerful in this regard. It not only acknowledges that the

terms of discrete actions by individual actors. In the former case, which Dworkin for example calls "communal action", citing Nazism as an example, a collective is clearly responsible. (Dworkin has elaborated this distinction in various places, for example in *Freedom's Law*, Cambridge, MA: Harvard University Press, 1996 cf. p.20ff and "Equality, Democracy, and Constitution", (1990) 28 *Alberta Law Review* 2, 324). It is rather in the latter case, where the full burden of responsibility seems to be taken up by individuals that I am inserting an argument about collective responsibility. As will become evident through my argument, the distinction is itself not so clear.

wrongdoing stood on the ground of a more pervasive failure to recognize members of the violated group as full rights-holders. It also performs that recognition.

At the same time, apologies are not only corrective or backwards looking, but provide the means through which norms are positively established as the subjectively experienced orienting norms of a historical community. Confession or repentance for the wrong is simultaneously the means of profession of the right. By aligning itself with the norms that would condemn such acts, the apology establishes the polity's normative identity as one for which such acts are, by definition, wrong: 'We believe in equality and this means that violating the rights of minorities is wrong, so we do not do that sort of thing here, or at least not any more.' In this sense, the apology is a type of promise, or in political terms a means for covenanting, or re-covenanting the political community to an ideal norm or set of norms that have been contravened by the acts in question.

Given the limits in traditional liberal approaches to justice, and the heightened attention to reconstituting polities after periods of severe violation, it makes sense that apology has appeared at this socio-historical juncture. Apology, along with a range of approaches traditionally excluded from political mechanisms for dealing with past violations (forgiveness, story-telling, ritual memorializing), have emerged to fill the gaps in the available repertoire. More specifically, because they attend to the issues of normative constitution and patterns of recognition that underpin systematic violations, they are particularly appropriate to deal with the identity dimension of human rights violations and social/political conflict that has come to the fore since the end of the cold war.

Following this line of analysis, I would suggest that the emergence of these politically novel processes at this historical juncture is related to broader trends in globalization and in particular the transitional moment in which we find ourselves. As the state recedes as the sole or clearly dominant seat of power, and other super- and sub-state actors emerge as more significant forces in shaping politics, so too do novel approaches to 'doing politics'.⁹

Recognizing how apology performs this work of normative recovenanting not only explains their political salience, but also provides a window into the symbolic dimension of political constitutionalism. What one sees here is the way in which political communities constitute themselves around certain normative principles, and how they revise those principles and therein their political identity. So for example, a political community may claim that the principle of political equality is at the core of its constitution and identity, but historically denigrate particular groups. Through apology, it can acknowledge the gap between the historical interpretation of the norm (indigenous people or blacks or Jews are not fully human) and the ideal norm (all humans must be treated equally), and pull its historical self towards its ideal self.

This raises a range of questions about those norms, for example where the ideal norms come from and the limits of normative change that can be affected through apology. It would seem that, from a purely logical point of view when one apologizes, there must already be an established (ideal) norm against which actions are judged to be right or

⁹ I am grateful to Ruti Teitel for suggesting this link with broader global trends.

wrong. The implication would then be that apology could only ever return a community to the original (albeit poorly realized) norms, but cannot itself affect a more profound reorientation. Apology, on this reading may allow for a progressive interpretation, but is nevertheless essentially conservative. Again, this would follow if one drew on the substantive application of apology in the religious context, where the values in relation to which it referred tend to entail thick existent moral rules.¹⁰

The problem with this approach is that it dichotomizes ideal and historical norms, as if the former constitute a fully articulated Platonic set, existing in some eternal zone, waiting to be recognized. Against, this view, I would argue that ideal norms do not form a closed or fully articulated set, but are in fact realized through the process of history and the lived recognition that certain historical interpretations are wrong. Moreover, that recognition can only occur through the process of confronting and being confronted by the one who has been injured. It is only when a political community faces its other and is forced to hear and acknowledge the way in which *it* experiences a normative category (equality, dignity, humanity) that it has the opportunity to see from outside its embedded normative assumptions, and make a genuine normative shift.

Apology opens the way for this dialogical relationship with the other to enter into political culture and constitution. It is a form of speaking across the boundaries of identity that both allow for a political community to exist as this community, but also constrain its conception of apparently universal principles of right.

¹⁰ I will in fact argue that certain understandings of religious norms and even God allow that the normative content can also be progressive in the religious context. See Chapter 3, section VII.

Finally, perhaps what is richest about this study of apology is the way in which it points beyond the distinct phenomena itself to broader issues of concern to political theorists. First, the emergence of the apology forces political theorists to consider the limitations of existing processes for dealing with the past, and in particular the ways in which dominant conceptions and institutions of justice have narrowed our attention to the individual and direct dimension of responsibility. By pointing beyond the act itself to the dimension of collective norms, social meanings and patterns of recognition, apology suggests a form of collective responsibility that is not incompatible with liberal principles of protecting the individual from unjust blame. Studying the apology thus also opens a deeper exploration of the relationship between social and political norms and background meanings, political identity and individual acts of wrongdoing.

Second, it opens a rich territory for thinking through the relationship between the existence of a political community and its normative identity (substance and form). The normative orientation of a political community is not something 'added on' to a fully constituted existent entity, but is intrinsic to its constitution as a political community. Accordingly, the work of developing normative orientation or reorientation is also the work of constituting or reconstituting the political community. This is consistent with the empirical fact that apologies often appear at critical constitutional junctures.

Third, the study of apology allows for a practical engagement with theories of social and political recognition. The most powerful or captivating political apologies are those that

deal with widespread, socially sanctioned wrongs against the members of particular groups, who are more generally not accorded full respect as co-equal citizens and legal subjects. These collective patterns of recognition (and non-recognition or denigration) are not incidental, but are deeply embedded in the identity of the political community, often constitutional of what the political community *is*, or in some cases, is in the process of making itself.¹¹ Looking at how calls for apology emerge and apology debates are played out in such political communities allows one to track the mechanisms of non-recognition and the institutions available for altering patterns of recognition that are built into the historical identity of the polity.

Fourth, attention to the apology forces a reevaluation of the distinction between and hierarchization of rhetorical or symbolic acts and ‘substantive’ political acts (laws, economic transfers). The former are often thought of as ‘representing’ the latter, where the latter are the *real* stuff of political action. What one sees here is that symbolic and rhetorical acts do not merely follow the material work, but are themselves substantive mechanisms for reorganizing political life and identity. Understanding the importance of grammatical patterns of meaning as the medium through which individuals judge and make choices about how to act allows one to see the independent importance to politics of symbolic action and implicit patterns of meaning. Certainly, many political theorists from Hobbes and Rousseau through the Frankfurt School to contemporary writers like Claude Lefort have well recognized the centrality of the performative and symbolic in

¹¹ So in some cases, for example those against indigenous peoples, the abuse is indicative of a longstanding pattern of discrimination and exclusion associated with the constitution of the colonial state. In others, for example the violations against leftists in Latin America, the distinction between leftists and nationalists may be introduced or given political salience as part of the process of consolidating a new political order and regime.

constituting polities. Their rich conceptual analysis has, however largely remained remote both from the analysis of responsibility and the practical question of institutional design. Adding this dimension to an analysis of the production of action both provides a language for conceptualizing collective responsibility in a manner consistent with liberal principles and enriches our imagination when it comes to thinking through a full repertoire of responses.

Fifth, the emergence of the apology invites a reconsideration of the definition of the modern political sphere and political action. The close examination of the political dimension of apology in the sphere of religion points to the similarities between the processes and institutions of religious communities and those of secular political communities, challenging the assumed rule that modern secular politics is not done through mechanisms like apology, but rather through impartial law, punishment and compensation schemes. More profoundly, it suggests that behind our failure to recognize the similarities is often a dogmatic insistence that there is a thick and absolute line between the mutually exclusive spheres of modern (Enlightenment) secular politics and the political forms and processes of religious communities.¹² Academic resistance to taking religious discourses and institutionalized processes seriously as social and political mechanisms emerges from an insistence that they are no more than the vestiges of a past we should have transcended. Such dogma is to the detriment of good scholarship.

¹² The exploration of the assumption that the Enlightenment and religion are oppositional categories has become a theme in historical studies. A key text here is Jonathan Israel's *Radical Enlightenment: Philosophy and the Making of Modernity, 1650-1750*, Oxford, 2001. cf. also Jonathan Sheehan, "Enlightenment, Religion and the Enigma of Secularization: A Review essay", *American Historical Review*, Volume 108, no. 4 (2003), 1061-1080.

As the apology and reconciliation movement evidence, this view pays insufficient heed to the important work of sacramental/theological processes in constituting all political communities. Formal laws and legally constituted institutions of justice are certainly a sine qua non of modern liberal democracies, but they alone they may not be sufficient to bind subject citizens to the core orienting norms necessary to sustain the political community and prevent systematic violation.

As Arendt argues in here treatise on the American Revolution, the risks involved in the joint enterprise that is political constitution, especially in the absence of an absolute despotic power are enormous and infinite. Formal agreements, grounded in no more than a contract could not possibly have the fortitude to endure the vicissitudes of human difference and temptation.¹³ They had to be grounded at once in the transcendent and pre-rational and in the felt commitment of citizens. The former implies the need to appeal, albeit in secular language to an Absolute authority or source, the latter to ensure that the norms embodied in the institutions of law must also be the norms that members of the political community subjectively experience as their own. They must provide the orienting grammar through which they understand themselves, recognize others, make decisions about right and wrong and act. As Durkheim already argued, social order depends upon and draws on members' commitments to a set of tacit norms, which are reflected not in legal terms, but in religious, or quasi-religious symbols, beliefs and practices.¹⁴ If this is so, then institutions that operate only at the level of hard institutions,

¹³ Hannah Arendt, *On Revolution*, Penguin Books, 1980, cf. chapters IV and V.

¹⁴ Emille Durkheim, *The Elementary Forms of Religious Life*, NY Collier Books, 1961, see Conclusion.

the structures ‘on top of’ the norms will not be sufficient to affect change all the way down.¹⁵

In this regard, this dissertation forms part of an emerging scholarly critique of the strict dichotomy between the religious and the secular or the holy and the profane that has been assumed in contemporary political theory. I am not suggesting that the distinction should be discarded, but the softening of the boundary on the stage of real politics must surely be the moment to invite a similar willingness to reframe the boundary conceptually.

In the final chapter, I take this challenge up through an engagement with Arendt’s theses on the power of forgiveness and her warnings about the danger of introducing what she saw as the discourse of the heart into political life. Apology, as Arendt herself intimates, and as this study elucidates, opens a territory that falls neatly neither into the intimate sphere of the heart, nor the hard institutional dimension of politics, and neither in the realm of the abstract transcendent, nor the mundane and fully immanent. It rather belongs in the symbolic or the dimension of meaning that both engages people at the most intimate level of subjectivity and organizes public, political space.

¹⁵ As will become evident in chapter 2, my approach is not idealist. That is, the call to move to systems of meaning does not imply that they exist ‘behind’ hard institutions.

Chapter plan

Chapter 1 provides a survey of a range of contemporary political apologies, including historical and transitional apologies. It then looks at the existing literature on apologies and sets out some of the tools from speech act theory that can be used in interpreting what type of act apology is. The latter part of the chapter looks in greater detail at the methodological approach of the dissertation, focusing in particular on the issues raised by my attention to religious practices and narratives.

Chapter 2 locates the apology phenomenon within the context of the institutions of transitional and historical justice and the conceptual debates about ‘dealing with (violations in) the past’. It examines and deconstructs the tension between peace and justice that underpins this institutional and conceptual field and maps this tension against the normative concepts of justice and identity. From here, it focuses on the specific tension between individual and collective responsibility that the collective apology raises, working through the traditional liberal conception and institutionalization of responsibility for wrongdoing to demonstrate their intrinsic limits.

The challenge chapter 2 tackles is to develop a conceptualization of collective responsibility consistent with a normative commitment to protecting individuals from unjust blame. Drawing on the work of Hegel, Meade, Castoriadis and Jaspers, I argue that one can harmonize these apparently competing conceptions of responsibility by locating the collective within the register of meaning, rather than within the register of action and

intention, which is fully occupied by individual actors. The collective does not commit a wrong, but is responsible for creating and maintaining the normative frames within which actors judge what is right and wrong and act. Because these frames of meaning about right and wrong are structured around identity and identity differences, this schematization also mediates the tension between the normative fields of identity and justice.

Chapters three and four are devoted to exploring the background themes of apology, looking at apology in the text and practice of Judaism and Christianity respectively. Chapter 3 explores in detail the stories, texts, institutions and conceptualizations of collective apology in Judaism. These practices and conceptualizations indicate that it is an institution that links subject members of the community with norms that are not only fundamental to that community, but are the foundation of its constitution and identity. This chapter will also take up the question of the place of God, or a higher order principle in the work of apology and the relationship between the vertical (human-God) dimension and the horizontal (human-human) dimension. I suggest that the structural place occupied by God in the Jewish institution of apology provides a template for understanding the relationship between higher order principles (the constitution, international law or the international community) and relations between citizens or groups of actors.

Chapter 4 similarly sets out and explores the collective and public institutions and conceptualizations of repentance that were prevalent and fundamental in the early Church and which have been retained or revived in different branches of contemporary

Christianity. It counterposes these with the common conception that Christian models of apology and repentance are individualized and internal. The main focus of the chapter is on the trajectory of repentance in the Roman Catholic Church and the marginalization and eventual foreclosure of this public and collective trope from its canon. Here I trace the history of the disappearance of the collective trope from both the official canon of practices and its representations and its 'rediscovery' and re-institutionalization in the Vatican II period. The chapter looks briefly at the existence of collective and public forms of repentance in the Protestant churches, despite the common conception that Protestant forms of Christianity even more than Roman Catholicism deals exclusively with the individual and their direct relationship with God.

Chapter 5 re-engages the theoretical concerns and hypotheses of chapters 2 to 4 by looking at the debates that took place around a concrete contemporary case - the apology for the removal of Aboriginal children from their families in Australia. I locate the particular apology debate against the background issues of race, identity and the political constitution of Australia to show how dealing with injustices against indigenous Australians required reference to broader questions of identity.

The chapter traces the arguments made in favor and against the apology and shows how proponents of the apology derived a conception of collective responsibility that maps well to the conception developed in chapter 2. It argues that reading the apology as a form of normative reconstitution (as derived in chapters 3 and 4) allows one to make sense of the explosion of the apology phenomena in Australia. By contrast, if one insists

on seeing apology as a form of individual repentance writ large, it is difficult to understand why it took hold so strongly in the political sphere. The final part of this chapter will look at critiques that accept this understanding of apology, but then fault it for covering over the very real and ongoing fractures in identity and the distribution of rights with a unifying narrative that becomes a form of recolonization. The objection here is that in the very act of re-instituting a normative framework that apparently includes the excluded other and integrates them into the circle of rights holders, the apology renders invisible the structural disparities and injustices in that system itself. Ironically, the overt forms of inequality it apparently annuls were the very thing that kept open the possibility of this deeper contestation or challenge to the normative assumptions of the national constitution.

Chapter 6 synthesizes the analyses of the previous chapters, looking back through the different lenses to take up both practical or policy oriented questions and the more abstract questions about the nature of political sphere. Specifically, I ask what a successful apology would look like and under what circumstances an apology is most suitable. More abstractly, I return to the questions raised in this introduction and by implication through this dissertation's methodological hybridity about the relationship between politics and other spheres of action. Engaging with the range of objections raised throughout this dissertation, and most directly with Arendt's concerns about guarding political space against inappropriate forms of action, I ask whether apologetic discourse ultimately erodes liberal democratic politics or whether it is compatible with contemporary forms and core liberal principles, or even a much needed supplement.

CHAPTER 1: The Apology Phenomenon

I. The international trend of political apologies

1. Types of apologies

The class of acts I am dealing with here comprises public, collective (representative), political apologies for a significant public wrong or wrongs committed against members of a specific group in the past. The different examples of apology are all variants on the basic structural form - the speaker assumes the role of the one giving the apology, speaking in a representative capacity, and addresses the party to whom the apology is rhetorically directed. The apologies are all articulated (or at least called for) at a public level and both the 'apologizer' and 'apologizee' are collective subjects.¹

At the same time, they differ along a number of dimensions. These include the nature of the wrong, the time lapse between the wrong and the apology, the boundaries of, and relationship between the apologizing and victim communities (national, international) and the status of the speaker articulating the apology. All speak to wrongs committed by or in the name of the apologizing political community, but most often the individuals who directly perpetrated the wrongs and the direct victims are no longer alive.

¹ Thus, I am not concerned with apologies concerning discrete individual wrongs, the type one sees frequently in defamation cases for example.

Their significance in the political landscape of the country in question also varies tremendously. Some apologies speak to issues that are very much alive in terms of the stabilization and constitution of the contemporary polity; others raise issues that are apparently of concern only to a minority. In some cases they have deeply engaged the broader community provoking strong allegiances or oppositions; in others they have been relatively unnoticed sideshows.

They also use a wide range of formulations, locating the speaker and recipient in different positions and linking them in different ways (through different verbal forms). Given that they are public, political forms of speech, the particular choice of words is certainly not random or accidental, but the outcome of significant attention and forethought. Later in this chapter I will explore in detail the types of act they represent in terms of speech act theory so as to lay the ground for entering into the significance of the different formulations and exploring the considerable internal diversity within my chosen filter of apology.

A survey of the trend provides a sense both of its scope, and of what might be at stake when an apology is called for, given or withheld. While not comprehensive, this survey does portray the pervasiveness of the trend as well as the multiplicity of circumstances under which the apology has emerged and the internal diversity of the phenomenon itself.

Because they vary along a number of dimensions, apologies do not self evidently fall into distinct categories or types. For the purposes of organizing the material here, I use

the dimension of time to classify the apologies into two large groups: inter-temporal or historical apologies dealing with wrongs in the more remote past and transitional apologies dealing with wrongs in the immediate past. As will become evident (perhaps surprisingly, given the additional identity problems such apologies present), inter-temporal apologies have been far more prevalent and politically alive than those offered in transitional justice scenarios. Theoretically, this distinction is salient in the sense that apologies for events committed in the more remote past raise particular issues concerning the identity of both victim and perpetrator groups. Moreover, I will argue that the deep normative re-constitutive work that political apologies can do is best suited to situations where the wound is not so fresh. In the more immediate transitional situations, other pressing concerns of individual justice and direct suffering trump the more subtle work of apology, and in fact its appearance at this stage may strike actors motivated by these stronger affects as a failure to recognize the gravity of the wrongs.

I. 2. A survey of apologies

(i) Inter-temporal apologies

Within the former, inter-temporal group, I have set out apologies for the wrongs committed against Jews during WWII first and then apologies concerning wrongs in other contexts.² This distinction does not imply a qualitative difference, but rather

² Notably, almost all apologies concerning Nazism deal exclusively with violations against Jews. As detailed below, there has been an apology to homosexual victims, and only now at the time of writing is the question of Romani victims gaining a public profile with the emergence of a group action compensation case.

evidences the historical genealogy typical in the field of institutions for dealing with gross violations of human rights. As in the case of trials for war crimes, public memorials and reparation schemes, the institutions developed in response to the crimes of Nazism (the Nuremberg trials, German/Jewish reparation schemes, Holocaust memorials) have provided the templates for later institutional developments.³

(a) Holocaust apologies

Post World War II Germany is often held up as the template for the modern movement of remorse. The trajectory from the reaction of the German state immediately following WWII to today maps the extent of the shift in the rhetoric of regret. When, in the Bundestag in 1952, a German leader (Chancellor Adenauer) gave the first state address concerning the “attitudes of the Federal Republic towards the Jews”, he only went so far as saying that crimes had been committed *in the name of* the German people. He neither posited the German people as the *active and responsible* subject of those crimes, nor did he express any remorse.⁴

The first initiative towards a more repentant “reconciliation” came from outside government, in a 1965 memorandum from the German evangelical church - and then dealing not with German-Jewish, but with German-Polish relations. The letter

³ The reference back to the apology is rarely explicit, although in some cases it is. Thus for example, when the Algerian President Abdelaziz Bouteflika presented his call for an apology from France for its violent colonial actions in Algeria, he told the National Assembly in Paris that France owed Algeria the kind of apology for its occupation of his country that it had offered for its role in the Holocaust. See below.

⁴ Joseph Stern, *The Whitewashing of the Yellow badge: Anti-Semitism and philosemitism in postwar Germany*, Pergamon Press, 1992. Throughout this survey, it is useful to take note of the different ways in which the subject of the apology is framed, as the people, as the state, as committed the name of the people and so on. I take up the distinction between state and society in chapter 2.

suggested that healing between the Polish and German nations could not be left to politicians, but rather had to occur between the two societies. One month later, the Polish bishops responded in a letter to West German church leaders: “We extend a hand to you, granting you forgiveness, and asking you for forgiveness.”⁵

It was in fact a full twenty years after Adenauer’s first statement before a German political leader would take the repentant position - and then quite literally. Visiting the Warsaw Ghetto for the first time in 1970, Chancellor Willie Brandt spontaneously went down on his knees before the Memorial to the Victims of Nazi Oppression. His body, though not his words, gestured repentance.⁶ Years later, in his memoirs, Brandt commented that he did what people do when speech fails. He quoted a newspaper report filed at the time: “Then he knelt, he who had no need so to do, for all those who should have knelt, but did not do so - either because they did not dare to, or could not, or could not dare to”.⁷

The *kniefall*, as it came to be known, was photographed and reproduced all over the world. Perhaps because it represented such a rupture of expectations and stereotypes -

⁵ Norman Davies, *God’s Playground: A History of Poland, Volume II: 1795 to the Present* (Oxford: Clarendon Press, 1981), pp. 591-3. Although it might seem odd that the interchange did not actually include the apology one might suppose should precede forgiveness, this reflects the Christian theology from which it emerges.

⁶ The particular significance of this apology was first brought to my attention in a paper presented by Ruti Teitel at the Apologies conference at Claremont College in 2002. the paper will be published as Ruti Teitel, “The Transitional Apology” in Elezar Barkan (ed.), *Taking Wrongs Seriously: Apologies and Reconciliation*, Stanford University Press, forthcoming.

⁷ Willie Brandt, *Erinnerungen*, (Frankfurt am Main: Propylaen Verlag) 1989, p. 214.

the man of power on his knees, the German leader bowed below the memory of the murdered Jews - this symbolic act broke from the sphere of quarantined symbolic performance or personal action and into practical political relations. "Morality became a political force".⁸ The *kniefall*, the simple gesture of repentance is counted as one of the catalysts in the transformation of German-Polish relations after WWII,⁹ and according to some, the reshaping of Eastern European politics more generally.¹⁰

Interestingly, although Germany - more than any other country - has memorialized the Holocaust and paid extensive restitution schemes, it was only in late 1999, in a private ceremony marking an agreement on compensation for victims of Nazi forced labor that Johannes Rau, the German President *spoke* the words of apology: "I pay tribute to all those who were subjected to slave and forced labor under German rule and, in the name of the German people, beg forgiveness." A month later, at the dedication of the Holocaust memorial in Berlin, Eli Wiesel (himself a symbol of the Jewish Holocaust experience) urged the German parliament to pass a resolution formally requesting, in the name of Germany, the forgiveness of the Jewish people for the crimes of Hitler. "Do it publicly", he said. "Ask the Jewish people to forgive Germany for what the

⁸ Peter Bender, *Die Neue Ostpolitik und ihre Folgen. Vom Mauerbau bis zur Vereinigung*, fourth revised edition, (Deutsche Taschenbuch Verlag, 1996), p. 182.

⁹ This is not to say that other elements, both forward looking and with respect to the crimes of Nazi Germany, were not required to transform the relationship more fully. See Adrian Hyde Price, *Building a Stable Peace in Mitteleuropa; The German Polish Hinge*, Institute for German Studies Discussion Paper, 2000/18, p. 8f.

¹⁰ "...after forty years, the whole rationale of the Soviet Alliance is beginning to fall apart. The key event I think was in 1970, when Willy Brandt went to Warsaw. The sight of a German leader, kneeling in expiation for the crimes of the wartime period, is a sight which no Pole, I think, would ever forget". Norman Davies, in Michael Charlton ed., *The Eagle and the Small Birds*, 1984.

Third Reich had done in Germany's name. Do it, and the significance of this day will acquire a higher level. Do it, for we desperately want to have hope for this new century."¹¹ The connection Wiesel draws between an apology for past wrongs committed by one collective against another, and the prospect of *hope* in their future relationship is particularly notable here.

A month later, the German Rau did in fact apologize in an address to the Israeli Knesset,¹² actively picking up on Wiesel's trajectory into the future: "I ask forgiveness for what the Germans had done, in the name of myself and my generation, and for the sake of our children and grandchildren, whom I'd like to see intertwined with the children of Israel". Using language reminiscent of Brandt's bodily action 30 years earlier, he said that he bowed his head in humility before those murdered in the Holocaust during World War II.¹³ In just a little under fifty years, the language had shifted from responsibility in the name of the German people, to the German people themselves.

In December 2000, after a long campaign, the Bundestag, the German Parliament's lower house, officially apologized to gays for persecution under Paragraph 175, a

¹¹ "Wiesel urges Germany to ask forgiveness", *New York Times*, January 28th, 2000.

¹² Note here that the victim community is now made synonymous with the State of Israel. This interchange is admittedly in part grounded in the ambiguous status of "Israel" as people and state, but also evidences the shifting status of the victim community. The community that was the victim of the crime is not identical to the recipient of the apology.

¹³ National Christian Leadership Conference for Israel Website news, Government of Israel, "Germany Apologizes to Knesset" (2/17) at http://www.nclci.org/news/Israel_gov_news.htm

Nazi-era sodomy law. Once again the wording of the apology makes explicit its backward and forward-looking aspects, this time highlighting the constructive work the apology is thought to effect: “Parliament is convinced that the honor of the homosexual victims of Nazism must be *rebuilt* and apologizes for the harm done to homosexual citizens up to 1969 in their human dignity, their coming out and their quality of life”.¹⁴ Again, this apology raises the question of whose honor is at stake here, or more generally, who is being addressed. The apology is apparently addressed to the direct victims of Nazi persecution of homosexuals, but has in its sights contemporary German homosexuals. Although the laws of the past did not compromise the rights of gay men and women today, the failure of the contemporary state to condemn its past violations against homosexuals as a group leaves ambiguous the status of this group in contemporary political life. Correlatively, its condemnation of past violations affirms that it now recognizes homosexuals as full rights bearing citizens.

Moving beyond Germany itself, the crimes of Nazism have been one of the major provocations for political apologies elsewhere. In all cases, the apology was given nearly half a century or more after the end of WWII.

In November 1994, during the first visit by an Austrian head of State to Israel, President Klestil apologized for his country’s role in the Holocaust and said that his countrymen have belatedly recognized that “many of the worst henchmen in the Nazi dictatorship were Austrians.” Speaking in front of the Israeli Knesset, and invoking

¹⁴ Amnesty International, *Outfront; Human Rights and sexual Identity*, International Briefs. The emphasis is mine.

imagery reminiscent of the *kniefal*, he said “No word of apology can ever expunge the agony of the Holocaust.....On behalf of the Republic of Austria, I bow my head with deep respect and profound emotion in front of the victims.”¹⁵

The fact that the head of the Austrian state chose an apology as the very first political act he would take representing his country for the first time in the State of Israel, the Jewish state, evidences the value he places on the public expression of regret and acknowledgment as a means of confronting and overcoming the legacy of past wrongs - a value different from and in excess of punishing wrongdoers or paying compensation to victims (which Austria had also done). While his statement explicitly sets out what is *beyond the reach* of the apology, (namely undoing the pain occasioned by the violation), his failure to articulate what it does achieve is typical of the sense one gets that political leaders themselves are unsure of the significance of their apologies.¹⁶

When, in January 2000 Federal Chancellor Viktor Klima of Austria reiterated the apology on behalf of his country, this time not in Israel but in Europe at the Stockholm

¹⁵ Associated Press, November 15, 1994.

¹⁶ Eight years later, in April 2002 Klestil made a more specific apology for the experimentation on mentally ill and handicapped children during WWII. His apology took place during the ceremonial return of the final remains of the 789 deformed or mentally handicapped children who were used for medical experiments and murdered at the children's clinic, *Am Spiegelgrund*. Although the children were murdered between 1940 and 1945, their preserved brains continued to be used for medical experimentation and research as late as 1998, helping to make the post-war reputation as a leading neurologist of a former doctor at the clinic, Heinrich Gross. Only in 1997 did a researcher reveal the source of Gross's medical library. See “At long last, Vienna remembers“, Steven Erlanger *The New York Times*, Monday, April 29, 2002.

International Forum on the Holocaust, he was remarkably explicit about its purpose:

“The aim has to be to clear up the facts without reservation, to reveal the structures of injustice and to pass on this knowledge to coming generations as a warning for the future.”¹⁷ The wording of his apology also made clear the instrumental role he believed it could play. Identifying the Holocaust as “one of the most monstrous crimes in the whole history of mankind”, he went on: “Anyone who does not say this clearly and unambiguously is unsuitable to be entrusted with any responsible public position, either national or international. Any such person has no role to play in political life or in government service. Any person who denies or minimizes the Holocaust does not have the basic human qualities that are a precondition for any responsible activity in politics.”¹⁸

In this case, the contemporary context clearly provides the key to understanding the apology. On the surface, the apology is directed to Australia’s complicity in Fascism fifty years in the past; now it appeared at the precise historical juncture where the extreme right in Austria had once again become a matter of international concern. The Austrian Chancellor was well aware that this fascist resurgence, now occurring in a Europe with a heightened sensitivity to the political right, threatened Austria’s aspirations to become a fully-fledged member of the increasingly powerful European

¹⁷ As we see in many apologies, Klima explicitly connects the apology with the heart, saying: “And when I now pause in my speech for a few heartbeats, every heartbeat stands for tens of thousands, hundreds of thousands, millions of murdered human beings, fathers, mothers, children.”

¹⁸ Remarks by Federal Chancellor Viktor Klima at the Stockholm International Forum on the Holocaust A Conference on Education, Remembrance und Research Stockholm, 26 January 2000 at http://www.holocaustforum.gov.se/conference/official_documents/messages/klima_eng.htm.

community. His apology accordingly underlined Austria's moral qualification as a country standing against fascism and thus legitimate in the eyes of the European community. He said as much explicitly: "One of the standards by which the next Austrian federal government will be judged internationally is how sensitively and fittingly it addresses these difficult and painful questions of Austria's Nazi past."

When, as one of his first gestures as President of France (July 1995), Jacques Chirac apologized for the wrongs of the Holocaust, he similarly emphasized the connection between the apologetic stance and the political status of the apologizing nation. Like Klestil, he was careful to articulate what lay beyond the reach of apology. He declared that the French people and the French state must bear some responsibility for the Vichy Government's treatment of Jews, but described the responsibility as a "debt which can never be repaid". Nevertheless the 76,000 deported Jews must be commemorated by the French people: "France, the homeland of the Enlightenment and the rights of man, a land of welcome and asylum, on that day committed the irreparable.....Those dark hours dishonor our history for ever and are an insult to our past and our traditions."¹⁹

Chirac's apology illuminates the contradiction contained in every apology: In one gesture the speaker takes on the identity of the wrongdoer and distances him or herself from that identity, moving to redemption through the assumption of guilt. In this case,

¹⁹ "Mr. Chirac Honors the Truth" (admission of responsibility for deportation of French Jews during World War II; editorial) *New York Times* (Late New York Edition) July 18 '95, p. A12. More narrowly, but in a similar vein, President Chirac explicitly apologized to the descendants of Dreyfus, the French Jewish army captain who was wrongly arrested and convicted for spying in

Chirac's willingness to draw a continuous line between the Vichy regime and the subsequent Republic and society broke with the last fifty years of French national history. Up to this point, the official line had been that Vichy represented an exceptional moment - an interruption in the story of *la France* - a story resumed again once she was liberated from external control. Nevertheless, like his Austrian political counterpart, even as he acknowledged the historical nation's wrong, he redeemed the contemporary nation. In fact *through* acknowledging the historical nation's wrong, Chirac weaves into the apology a reassertion of the essential, true identity of France as the homeland of enlightenment and asylum from wrong. The apology leaves the ideal self of France firmly in tact, perhaps even sures it up in the face of threat.

Once again here, what is foremost in his apology is the national identity of the *apologizing nation*, not the recipient of the apology (the victim). Even as the apology is formally addressed to the Jewish victims, it speaks far more to *La France* and to the damage *it* has suffered because of these wrongs than to Jews. This relative emphasis will provide important data in our thinking about who the main addressee of the apology is, and in locating the site at which it does its most important work.

The Presidential apology was followed by a number of other apologies emanating from different spheres, each with a slightly different emphasis. On 30 September 1997, the 57th anniversary of the passage of the first anti-Semitic ordinance by the Vichy government, the French Bishops' association issued a statement repenting the

the 1890s. Alexander Chancellor, Forward to "Pride and Prejudice: Easier said than Done", *The Guardian*, London, January 17, 1998, 8.

French Church's official inaction regarding the plight of Jews during the war. The statement, read at Drancy, the concentration camp from which thousands of Jews had been deported said that: "The time has come for the church to submit its own history, during this period in particular, to a critical reading, without hesitating to acknowledge the sins committed by its sons and to ask forgiveness from God and from men.....Today we confess that silence was a mistake. We beg God's forgiveness and ask the Jewish people to hear our words of repentance."²⁰ The explicit reference to breaking silence here illuminates the importance of apology as public speech against a historical background of complicit silence.

The following week, the National Union of Uniformed Police apologized for the active role police played in the deportation of 76,000 Jews from France during the war.²¹ Union leaders said: "Since then, we policemen have born an extremely heavy burden which we must shed without ever forgetting that it existed,"²² and asked "pardon for those who forgot that *before being police, they were men ...* pardon for those who said, "I was obeying orders."²³

²⁰ See World Jewish Congress, "Vichy France and the Jews: After fifty years, regrets emerge", *Policy Dispatches* No. 20, October 1997. Note that in this apology, it is God who is the addressee of the call for forgiveness, with Jews themselves accorded the role of witnesses.

²¹ The deportations began with the infamous July 16, 1942 "Vel d'Hiv swoop" in which 13,000 Jews were rounded up at a Paris indoor cycling stadium before being placed on trains.

²² Andre Lenfant, head of the National Union of Uniformed Police Officers (SNPT), reported in *French Police Apologize for Jewish Swoops*; Reuter, Oct 07, 1997.

²³ Letter of apology by union leader Christophe Gros, reported in "Trial to Revisit French Role in Holocaust", *CNN*, October 7, 1997, italics mine.

Both of these apologies work by renouncing the claims to a special status that had rendered the perpetrators immune from criminal prosecution, thus stripping away the layers of excusatory identity that had shielded them from fully bearing responsibility as humans who failed to recognize right. In this, they are reminiscent of the classical religious image of the repentant laying himself naked before God, now humble and stripped of all earthly protection.²⁴

In May 2001, Polish Bishops apologized for the role of the Church in the persecution and genocide perpetrated against Jews during WWII, and in particular for the role of Poles and Catholics in the massacre at Jedwabne.²⁵ As part of a requiem service and dressed in black Cassocks, the bishops gathered as the Archbishop said that “[T]he victims of this crime were Jews, while the perpetrators included Poles and Catholics, people who had been baptized..... We grieve deeply at the wrongs committed by those who through the ages, especially in Jedwabne and elsewhere, caused the Jews to suffer and even brought about their deaths. We also refer to that crime with the intention that we may be able effectively to assume the responsibility for overcoming all evil present in the world today. The effort for the sake of “cleansing the memory” turns for us into

²⁴ In the story of David, the first person in the Old Testament to repent, the fact that he was a King and yet repented was particularly important.

²⁵ The apology took place amidst a vigorous and at times bitter debate which had been catalyzed several months earlier by the release of *Neighbours*, the Polish born, New York based sociologist Jan Gross’ “exposé” of the role of Poles in the massacre of the Jedwabne Jews in the Summer of 1941. The book’s claim that Polish residents of Jedwabne, and not German Nazis had been responsible for the massacre provoked a tumultuous public response in Poland, and subsequently internationally.

the difficult task of “cleansing the conscience.” We undertake this task and once more condemn all manifestations of intolerance, racism and anti-Semitism as ungodly”.²⁶

Approximately one month after the church’s apology, Polish President Alexander Kwasniewski went to Jedwabne to deliver his very public and controversial apology: “For this crime we should beg the souls of the dead and their families for forgiveness This is why today, as a citizen and as the president of the Republic of Poland, I beg pardon. I beg pardon in my own name, and in the name of those Poles whose conscience is shattered by that crime”.²⁷

Again, the apology is explicitly concerned with the damage to the perpetrator, and not only with the stated victim. The apology frames the scene in such a way that not only Jews, but also Poles, *whose conscience is shattered*, become the injured party – the one in need of repair/restoration. But this can only take place through the narrative relationship with the wronged party.

This apology was highly contentious, with polls showing only 50% of Poles supporting it. Critics to his right accused him of “trying to curry favor with Israel and Jewish circles in the West”, and Cardinal Jozef Glemp, Poland’s most senior churchman suggested Jews should also apologize to the Poles for collaborating with

²⁶ “A Bishop’s Apology”, *The Warsaw Voice*, Jun 3, 2001, No. 22.

²⁷ “Poland Apologizes to Jews”, *BBC News*, July 10, 2001.

the Soviet occupiers.²⁸ The dramatic tension of the apology was heightened when people living in the town made their own symbolic statement - darkening their windows and visibly boycotting the apology ceremony.

Croatian President Stipe Mesic' apology before the Israeli Knesset in November 2001 poignantly illustrates the difficulties inter-temporal apologies pose in terms of the identity. Although he eventually gave a full apology, he initially gave only a qualified apology, saying that: "I profoundly and sincerely deplore the crimes committed against the Jews in the area controlled during the Second World War by the collaborationist regime which, unfortunately, carried the Croatian name." What stopped him giving an unqualified apology was the strongly held belief that contemporary Croatia is not the successor to the fascist state that ruled that territory between 1941-1945, and is thus in no position to apologize for its actions.²⁹ However, after it was pointed out to him that Israel expected a fuller apology, he said to the Knesset: "I take every opportunity to ask forgiveness from those who were hurt by Croats any time and any place, but first of all from the Jews."³⁰ One sees a parallel here with the French case where Chirac shifted France's traditional line that Vichy had been an exception and did not represent a link in the inherited chain of the nation. In

²⁸ "Analysis: Poland divided on Massacre", *BBC News*, July 10, 2001.

²⁹ On this point, David Miller argues that one necessary condition for attributing collective responsibility to a nation is that it be self determining, and that it may lack this where it is subject to imperial rule from the outside. This is more or less what lay behind Mesic's claim. Cf. David Miller, "Holding Nations Responsible", *Ethics* 114 (January 2004): 240-268, at 259.

³⁰ "Croatian president Mesic apologizes to Jews from Knesset podium", *Jerusalem Post*, November 1, 2001.

both cases, the question of how this moment of horrific violation was represented in the narrative history of the nation raised larger questions about the character of the nation, essentially and into the future.

More than fifty years after the end of WWII a number of other European countries, including Switzerland,³¹ Belgium,³² and Finland³³ apologized for Holocaust atrocities. In June 2000, President Fernando de la Rúa of Argentina also apologized for his country's role in providing sanctuary to Nazis after World War II.³⁴

Although spoken by the head of the Catholic Church, and so not neatly falling within the category of political apologies, Pope John Paul II's apologies for the role of the Vatican during WWII have attracted particular attention, and have certainly formed

³¹ In 1995, on the occasion of the 50th anniversary of the end of the War, President Kaspar Villiger apologized to world Jewry for the 1938 accord with the Nazis and for its wartime actions.

³² On 6th October 2002, at a ceremony held to commemorate the 60th anniversary of the start of the expulsions the Belgian Prime Minister offered an official apology in his country's name for the collaboration of Belgian Government officials in the expulsion of thousands of Jews to the Nazi extermination camps during the Holocaust. He said that his country had to recognize its past actions and to take responsibility for them. "There were too many collaborators in Belgium. We must have the courage to say that, recognize this and bear [the responsibility]". Reported by the *Coordination forum for reporting Anti-Semitism* at <http://www.antisemitism.org.il/showArticle.asp?ID=3156>.

³³ Prime Minister Lipponen offered a public apology in November 2001 for the extradition of eight Jews to Germany - exceptions to the general pattern of complete refusal to extradite.

³⁴ Referring to the way in which Nazis were smuggled into Argentina or received visas, he said "I apologize that this was allowed to happen. ... This we regret with a deep feeling of pain." Harry Dumphy for Associated Press, "De la Rúa apologizes for Nazi Role", June 13, 2000 at <http://codoh.com/newsdesk/2000/000613ap4.html>

part of the apology trend.³⁵ In 1998, in its statement on the Holocaust, “We Remember: A Reflection on the Shoah”, the Vatican expressed its “deep regret [for] the errors and failure of those sons and daughters of the church” for failing to take more decisive action in challenging the Nazi regime during World War II to stop the extermination of more than 6 million Jews.³⁶ Although the expression of regret broke a long and much criticized silence, in some quarters it was still viewed as not going far enough, particularly insofar as the Pope’s words fell short of an explicit assumption of responsibility and active apology.³⁷

In this apology, the pontiff takes care to distinguish between the actions of *people* in the church and the ideal church. The apology is made on behalf of the former only, while the church as the representative of Christ on earth is dissociated from the wrongdoing. This distinction, similar to the one Chirac drew between the ideal of *La France* and the actions of a historical French government was even more pronounced in the pontiff’s extensive apology delivered at a special millennial Mass in March

³⁵ The Pope’s status in this regard is ambiguous, in the sense that he is the head not only of the Church but also of the Holy See, which in many ways enjoys the status of a state at international law. The Catholic Church in this sense is an odd hybrid of politics and religion. I will argue that this hybridity is in fact a broader characteristic of all modern political entities.

³⁶ “Vatican Gives Formal Apology for Inaction During Holocaust”, *Washington Post*, March 17, 1998.

³⁷ Of particular concern here is also the Vatican’s defense of the specific role of the Vatican and Pope Pius XII himself, both of which it continues to defend. There are now a number of books dealing with this subject. See for example, James Carroll, *Constantine’s Sword: The Church and the Jews*, Houghton Mifflin; John Cromwell, *Hitler’s Pope: The Secret History of Pius XII*, Penguin; Susan Zuccotti, *Under His Own Window: The Vatican and the Holocaust in Italy*, Yale University Press; and Daniel Goldhagen, *A Moral Reckoning: the Catholic Church During the Holocaust and Today*, Knopf, 2002.

2000.³⁸ There he apologized on behalf of the people of the Catholic Church for sins committed in its past, including “sins in the service of truth”, *sins which have harmed the unity of the body of Christ (the church)*. This linguistic formulation allows him to simultaneously condemn the actions and confirm the ideal identity of the body in whose name he apologizes.³⁹

(b) Other historical apologies

Once the political apology became an international phenomenon, it quickly spread beyond the Holocaust to other international and domestic atrocities.⁴⁰ While the subject matter of these apologies is certainly more diverse than the Holocaust apologies, the vast majority are concerned with wrongs associated with colonialism or other forms of racial,

³⁸ The apology was backgrounded by an International Theological Commission Report, “Memory and Reconciliation: The Church and the Faults of the Past.”, and prompted by over 100 requests for apology during the life of the pontificate.

³⁹ He also apologized for sins committed in actions against love, peace, the rights of peoples and respect for cultures and religions, sins against the dignity of women and the unity of the human race and sins in relation to the fundamental rights of the person. In this extensive apology, he more explicitly and strongly took up the Vatican’s role during WWII. Pope John Paul II has in fact made a wide range of apologies. He explicitly apologized to Greek Orthodox Christians for sins of action and inaction committed by Catholics. During a meeting with the Archbishop of Athens and All Greece Christodoulos, the Pontiff stated that “for the occasions past and present, when the sons and daughters of the Catholic Church have sinned by actions and omission against their Orthodox brothers and sisters, may the Lord grant us the forgiveness we beg of him.” In his 2001 visit to the Ukraine, he urged the Catholic and Orthodox churches to ask forgiveness of each other, an appeal underwritten by an explicit apology from the leader of the Ukrainian Catholic Church for conscious and voluntary evil, including collaboration with the Nazis.

⁴⁰ Notably omitted here is any treatment of Japan’s military aggression and colonial legacy in Asia from 1910 to 1945, and specifically its role in WWII, which have been concentrated sites extensive debate over apology and where there have been various and many different types of apology. I explain this omission in detail in my discussion of methodology, but the basic reason is that my analysis of the significance of the act does not encompass the background cultural significance of apology in the Japanese context. This does not mean that the analysis has no application to the Japanese case, but understanding it would require specific attention to the significance of apology in its own cultural context, specifically to issues of honor.

ethnic or religious discrimination.⁴¹ In some cases, the apologies crossed state borders. In others they were concerned with domestic wrongs. They all stress the contemporary importance of acknowledging that actions in the past diminished the social, political and legal status of the wronged group. At the same time, one sees in the formulations of these apologies how their concern reaches beyond the direct victim to the moral legitimacy of the post-colonial nation, or the broader political community itself.

Consistent with his apologies regarding the Holocaust, Pope John Paul II has made numerous apologies for the Church's imperialistic actions in various regions. On a visit to Benin in 1993 he apologized for the Church's historical ridiculing of African cultural beliefs.⁴² In 2001 he apologized to China for "errors" in the Roman Catholic Church's missions there.⁴³ A month later, in a message posted on the Internet, he "apologized unreservedly" to Australia's Aborigines and other indigenous peoples of Oceania for past "shameful injustices" of the Roman Catholic Church, "especially where children were forcibly separated from their families".⁴⁴

⁴¹ An exception, not treated here because of my exclusion of Japanese cases is the issue of the Japanese apology to comfort woman, some of whom were Korean, but many of whom were themselves Japanese, and the Japanese government's formal apology in May 2001 for the pain and suffering endured by leprosy patients confined to remote sanitariums decades after a treatment was available. "Oshima Journals: After 90 Years, Small Gestures of Joy for Lepers" *The New York Times*, July 5, 2000.

⁴² Adu Kwabena-Essem, "A New Look at Ju-Ju; The Pope's Apology to Africans", *Djembe*, No. 13, July 1995.

⁴³ See "The Pope Apologizes for the Catholic Church's 'Errors' in China, *New York Times*, October 25, 2001.

⁴⁴ The first apology came in a report by the special Synod on Oceania held in the Vatican in 1998. See "Pope says sorry to Aborigines", *The Age*, November 23, 2001.

Along similar lines, President Clinton expressed regret for US support of African dictators during the Cold War, and for the fact that the US had “dealt with countries in Africa... more on how they stood in the struggle between the United States and the Soviet Union than how they stood in the struggle for their own people’s aspirations to live up to the fullest of their God-given abilities.”⁴⁵ More generally, he said “perhaps the worst sin America ever committed about Africa was the sin of neglect and ignorance. We have never been as involved with you, in working together for our mutual benefit, for your children and for ours, as we should have been.”⁴⁶ He makes a point to finesse the language of this apology to make explicit the recognition of the (African) other as a subject – one which is not only there for the benefit of the dominant nation, but with its own aspirations and the right to be a partner in developing social and political institutions. This act of recognition, shifting the other from material to political subject is the core of this apology.

Algeria has not been successful in extracting an apology from France for its colonial crimes in that country. In June 2000, Algerian President Abdelaziz Bouteflika told the National Assembly in Paris that France (which had ruled Algeria as a colonial power for 132 years until 1962) owed Algeria the kind of apology for its occupation of his country that it had offered for its role in the Holocaust, thus making explicit the influence of this

⁴⁵ Although the United States’ relationship with other countries is rarely considered one of colonialism, the pattern of relating to other countries overwhelmingly from a position of self-interest is consistent here.

⁴⁶ “Clinton apologizes to Africans for Slavery”, *Oklahoma Daily*, 25 March 1998 (AP)

more general historical precedent.⁴⁷ France has not seen fit to accede to this request, despite the fact that a majority of French citizens think that a formal apology should be issued by the Prime Minister or President.⁴⁸

Britain's Queen Elizabeth II signed an apology in November 1995 expressing regret for the seizure of Maori land in New Zealand by the British colonizers in 1863.⁴⁹ Indian groups working in both India and Great Britain were however, unsuccessful in their attempt to get Queen Elizabeth to apologize for the 1919 Jallianwala massacre during her 1997 visit to India.⁵⁰ Notably, the latter apology was not supported by the Indian Government, which distanced itself from the campaign.⁵¹

In the Belgium/Congo case, by contrast, the apology to the Congolese people for the 1961 assassination of Patrice Lumumba (Congo's Prime Minister) followed directly from the Belgium Government's own parliamentary commission's finding that Belgium had

⁴⁷ "France disappoints Algeria's Bouteflika", United Press International, June 17, 2000

⁴⁸ Some 56% of respondents were in favor of an official apology by either Mr Jospin or Mr Chirac. Reported in "French politicians in Firing line for role in Algeria", *The Guardian International*, May 11, 2001. It was against this background that a case was brought against a French General who had admitted to torturing and executing dozens of Algerians during the colonial war (1954-1962). In 2002, he was successfully sued, not for the acts, but for the spoken attitude. The 1968 amnesty precluded criminal charges being brought against him for the acts themselves. He could, however, be charged with the crime of trying to justify the war. The motivation for the suit was not simply that he had published his account of the war, in which he detailed his own role, but his lack of remorse. The case does not fit clearly into the type I am examining in so far as it is individual, but it is also political and public. Nevertheless, it highlights the salience of the trope of repentance in these issues. Cf. "French General in Algerian Torture Claim", *BBC News Online*, May 14, 2001.

⁴⁹ CNN world News, November 5, 1995.

⁵⁰ The Jallianwala massacre in which hundreds of unarmed civilians were killed by British troops is considered one of the major events and a symbolic moment in British colonialism and Indian moves to independence.

⁵¹ "Queen not welcome at Amritsar says Gujral", *The Indian Express*, Monday August 18, 1997.

indeed been “morally responsible” for Lumumba’s death.⁵² In February 2002, during a parliamentary debate on the findings, the Foreign Minister expressed his government's “profound and deepest regrets” for Lumumba's death, admitting that some members of the Belgian government of the time “carry an irrefutable part of the responsibility”.⁵³ ‘Responsibility’ was clearly intended to refer to the historical situation, but one might reflect on how the willingness to accept this responsibility could or should be linked in with responsibility for the contemporary, apparently local human rights violations that now wrack former Belgian colonies – the Congo and Rwanda being the clearest examples.⁵⁴

Delivered during a period of intense negotiations over the political status of Ireland (vis a vis Great Britain), Tony Blair’s “apology” for the great potato famine in Ireland is particularly interesting for its framing. In 1997, in a letter to the organizers of a commemoration of the great famine in Ireland, British Prime Minister Tony Blair wrote: “those who governed in London at the time failed their people through standing by while

⁵² When, in 1999 the government commenced a parliamentary inquiry the Belgian foreign minister said that his government should apologize to the Congolese people “if it appeared that the Belgian authorities were involved in the assassination.” The Commission of Inquiry released its report in 2001 and concluded that Belgium bore a “moral responsibility” but left it to Parliament and the government to decide whether Belgium owes the Congolese people an apology. “Report reproves Belgium in Lumumba’s death”, *New York Times*, November 17, 2001.

⁵³ The apology was accompanied by the establishment of a Patrice Lumumba foundation worth over US \$3 million, plus a yearly grant of over US \$430,000 to be spent on projects in the Congo involving conflict prevention, or in the form of study grants. “Belgium apologizes for Lumumba Killing”, *UN Integrated Regional Information Networks*, posted on the web, February 6, 2002.

⁵⁴ Mahmood Mamdani has explicated this link between colonial histories and the contemporary conflict in Rwanda at length in *When Victims Become Killers: Colonialism, Nativism, and the Genocide in Rwanda*; Princeton University Press, 2002.

a crop failure turned into a massive human tragedy” and labeled this “a defining event in the history of Ireland and of Britain.....that still causes pain as we reflect on it today.”⁵⁵

Here Blair acknowledges the continued pain, thus bringing the past relationship closer to the present, but carefully retains the distinction and thus holds the distance between the material wrongdoer - “those who governed in London at the time”, and his own contemporary government or contemporary Britain. The impression one gains here that the British leader was not prepared to associate contemporary England with the ongoing wrongs against the Irish. His near simultaneous refusal to apologize for more recent wrongs committed against Ireland only confirms this hypothesis.

In 1998, announcing a new independent Inquiry into the “Bloody Sunday” shooting of 14 men in a Londonderry riot in 1972, Prime Minister Blair came short of apologizing but expressed the sentiment that “Bloody Sunday was a tragic day for all concerned. We must wish it had never happened. Our concern now is simply to establish the truth, and close this painful chapter once and for all.”⁵⁶ Interestingly, in 1998, in a little reported act, Gerry Adams (leader of Sinn Fein, the political wing of the IRA) said, while on a tour of the US: “the IRA have done wrong and I deeply regret that.”⁵⁷ Subsequently, in July 2002 (marking the anniversary of Bloody Friday), in a statement in the republican

⁵⁵ “Blair apologizes to Ireland for Potato Famine”, *Electronic Telegraph*, June 2, 1997.

⁵⁶ “We must find Bloody Sunday Truth”, *BBC News*, January 29, 1998.

newspaper *An Phoblacht* (Republican News), the IRA offered its “sincere apologies” to the civilian victims of its campaign of violence. The statement continued: “We also acknowledge the grief and pain of their relatives. The future will not be found in denying collective failures and mistakes or closing minds and hearts to the plight of those who have been hurt. “That includes all of the victims of the conflict, combatants and non-combatants.”⁵⁸

Perhaps the strangest in this round of ‘apologies for imperialism’ was the *Reconciliation Walk* repenting the crusades and more generally the wrongs of Christendom.⁵⁹

Commencing in Cologne, the same city where the Crusades had begun 900 years earlier, over 2,150 Christians, mostly evangelical Protestants, retraced the steps of the Crusades, going from town to town and offering their apology for the crimes committed in the name of Christ since that time: “Nine hundred years ago, our forefathers carried the name of Jesus Christ into battle across the Middle East....On the anniversary of the first Crusade, we also carry the name of Christ. We wish to retrace the footsteps of the first Crusaders in apology for their deeds and in demonstration of the true meaning of the Cross. We deeply regret the atrocities committed in the name of Christ by our predecessors. We

⁵⁷ Adams apologized during a speaking tour of the US. See “Sinn Fein Leader visits CT”, *Yale Daily News*, October 20, 1998

⁵⁸ “IRA Apology a Building Block”, *BBC News*, July 17th, 2002.

⁵⁹ While this apology was not delivered by the authorized political leadership of a nation, and so does not neatly fit into the class of acts I am considering, it certainly forms part of the trend of representative apologies for acts of the past.

renounce greed, hatred and fear, and condemn all violence done in the name of Jesus Christ.”⁶⁰

Once again at the forefront of this apology is the public assertion of the ideal identity of the apologizing party. In the very movement of acknowledging its failure to live up to certain standards of rightful behavior it reasserts that those are in fact its orienting standards, and recommits itself to them. In this case, Evangelic Christians are reclaiming the identity of the community of Christ – an ideal identity sullied by wrongful use, but now once again established as the constitutional identity of this historical community. In Canada in January 1998, the Federal Minister of Indian Affairs made a formal apology to Aboriginal Peoples across Canada for the government’s policies of assimilation, and in particular its role in the residential schools’ program, under which Aboriginal children were removed from their families and communities. Her statement of reconciliation included the words: “The Government of Canada acknowledges the role it played in the development and administration of these schools..... Particularly to those individuals who experienced the tragedy of sexual and physical abuse at residential schools, and who have carried this burden believing that in some way they must be responsible, we wish to emphasize that what you experienced was not your fault and should never have

⁶⁰ Reported in Michel Rolph-Trouillot, “Abortive Rituals; Historical Apologies in the Global Era”, *Interventions*, Vol. 2(2), 171-186.

happened. To those of you who suffered this tragedy at residential schools, we are deeply sorry.”⁶¹

In the eyes of many people, the fact that Prime Minister Jean Chretien did not deliver the apology himself, even though he was in Ottawa (the capital) that very day detracted from the value of the apology. As in the Australian case, this points to the significance of the status of the speaker in the construction of the apology’s work.

The dramatic quality of apology is well illustrated by the apology that the Sahtu Dene (Aboriginal people) of Great Bear Lake in the North West territories of Canada offered the Japanese. Members of the community traveled to Japan to deliver their apology for their unwitting role in transporting uranium mined from their home and later used to make the nuclear bombs dropped on Hiroshima and Nagasaki.⁶² No doubt playing with dramatic irony, their apology came at the very same time as they were pressing the Canadian Government for a land settlement and apology for its abuse of their traditional rights. Their apology is highly unusual in that, as documented here, virtually all others are given *by* the politically dominant party *to* the minority. In this case, the apology from a relatively weak minority was no doubt designed to cynically enact the irony of their being prepared to accept responsibility for a small part in others’ suffering, while the

⁶¹ The Honorable Jane Stewart, Minister of Indian Affairs and Northern Development on the occasion of the unveiling of *Gathering Strength* - Canada's Aboriginal Action Plan January 7, 1998 Ottawa, Ontario.

⁶² “Deline Leaders Want to Apologize to Japan for Wartime Use of Uranium”, *CBC Radio*, May 28, 1998. The story was told in Peter Blow’s 1999 film, *Village of Widows*.

more powerful Canada would not accept its responsibility for land theft and systematic non-recognition.

As noted above, a formal apology from governments and churches for the forced removal of Aboriginal children was one of the key recommendations of the Australian *National Inquiry Into the Separation of Aboriginal Children from their Families*. Every state legislature has issued an apology, as have an array of church and other representative bodies. The federal government offered a belated and much criticized expression of regret for the practice.⁶³ The push and pull over the apology has become the centerpiece of the broader racial tensions which dog Australian social and political life, and will be the subject of chapter 5.

The Waikato-Tainui Deed of Settlement, signed in October 1995 by representatives of the Tainui (Maori) people of the Waikato District in New Zealand and the Government of New Zealand included, alongside land and financial agreements a formal apology for the confiscation of Tainui land. The second article of the treaty provided that: “The Crown expresses its profound regret and apologizes unreservedly for the loss of lives because of the hostilities arising from its invasion, and at the devastation of property and social life which resulted.” It went on to say that “the Crown recognizes that the lands confiscated

⁶³ The motion of reconciliation can be found at http://www.mrcld.org.au/uploaded_documents/M2s7.pdf.

in the Waikato have made a significant contribution to the wealth and development of New Zealand.”⁶⁴

In 1993, President Bill Clinton signed Public Law 103-150, the “Apology resolution” to Native Hawaiians, marking the 100th anniversary of the overthrow of the Kingdom of Hawaii. The law provided that “The Congress apologizes to Native Hawaiians on behalf of the people of the United States for the overthrow of the Kingdom of Hawaii on January 17, 1893... and the deprivation of the rights of Native Hawaiians to self-determination; expresses its commitment to acknowledge the ramifications of the overthrow of the Kingdom of Hawaii, in order to provide a proper foundation for reconciliation between the United States and the Native Hawaiian people; and urges the President of the United States to also acknowledge the ramifications of the overthrow of the Kingdom of Hawaii and to support reconciliation efforts between the United States and the Native Hawaiian people.”⁶⁵

Yet neither Clinton, nor any other US President has apologized to (mainland) Native American Indians. The only representative apology was the one given in 2000 by Kevin Grover, the Assistant Secretary for Indian Affairs, for the wrongs committed by the Bureau of Indian Affairs.⁶⁶ That he was both only an Assistant Secretary, appointed not

⁶⁴ “The Tainui Settlement”, *Maori Law Review*, May 1995

⁶⁵ United States Public Law 103-150, 103d Congress Joint Resolution 19 Nov. 23, 1993.

⁶⁶ “Remarks of Kevin Grover, Assistant-Secretary Indian Affairs, Department of the Interior at the Ceremony Acknowledging the 175th Anniversary of the Establishment of the Bureau of Indian Affairs, September 8, 2000.”

elected and himself a Native American Indian highlighted the absence of an apology from a high level representative of the US Government. Grover's explicit comment that he did not, and could not speak for the United States - that being the province of the nation's elected leaders – only highlighted the gap. In the eyes of many Native Americans, that space remains to be filled, but there is no indication that a further apology is being considered at high levels of government.

On August 10, 1988, again following significant lobbying by representatives of the Japanese American community, President Ronald Reagan signed into law the Civil Liberties Act of 1988 that was to grant a formal apology and \$20,000 in compensatory redress to each survivor of America's Second World War program of mass exclusion and detention of 125,000 Japanese Americans. The *Civil Liberties Act* contained a declaration by the US Government that historical injustices ought to be amended.⁶⁷ In 1990, President George Bush issued a letter of apology to Japanese Americans receiving compensation. It stated that “neither a monetary sum nor words alone can restore lost years or erase painful memories, nor can they convey our Nation’s resolve to rectify injustice and restore the right of individuals....[but] we can take a clear stand for justice and recognize that serious injustices were done to Japanese Americans during World war II”.⁶⁸

⁶⁷ US department of Justice, Civil Liberties Division, *The Civil Liberties Act of 1998, Redress for Japanese Americans*.

⁶⁸ Letter from President George Bush, October 1990. Subsequently, in 1999, compensation was paid to surviving Japanese American internees by the US, and President Clinton wrote “I offer a sincere apology for the actions that unfairly denied you fundamental liberties during World War II....We understand that our nation's actions were rooted in racial prejudice and wartime hysteria, and we must learn from the past and dedicate ourselves as a nation to renewing and strengthening

This apology makes explicit the declaratory dimension of apology I noted in other examples. In the act of condemning injustices committed by the state in a former incarnation, the contemporary state provides for itself the occasion to publicly establish its moral and political legitimacy. For in declaring the actions wrong, it displays the fact that it is now aligned with the principles of justice that render the original act wrong. In this sense, the apparently negative apology is a positive statement of fidelity to the polity's orienting values, here most notably equality of treatment.

Slavery and the systematic discrimination against African Americans is of course the gaping whole in the record of US apologies. President Clinton did give a specific race-related apology in 1997 when he apologized on behalf of the US government to the eight surviving of the four hundred black men who unknowingly went without treatment for decades in the federally financed Tuskegee experiment on long-term effects of untreated syphilis.⁶⁹

This highly circumscribed apology for an event that clearly belonged to a far broader pattern of racial targeting only highlighted the absence of a broader apology. Neither President Clinton, nor any other US leader for that matter has taken up the ongoing demand for an apology to the descendants of slaves for slavery in the USA. In 1997, House Concurrent Resolution 96, apologizing for slavery in the US was introduced to

equality, justice and freedom", "US to pay Japanese Latin Americans held during WWIP", *CNN*, June 12, 1998.

⁶⁹ This apology was accompanied by a financial compensation package. Families Emerge as Silent Victims Of Tuskegee Syphilis Experiment, *New York Times*, May 12, 1997.

Congress. The wording of the resolution was: “Resolved by the House of Representatives that the Congress apologizes to African Americans whose ancestors suffered as slaves under the constitution and the Laws of the United States until 1865.”⁷⁰ The resolution went no further.

The closest that has been achieved was Clinton’s 1997 address before thousands of school children (as well as international television cameras) in Uganda where he said that Europeans and Americans had “received the fruits of the slave trade. And we were wrong in that”⁷¹ Notable here is the location of the apology - Africa, not the US, and its corresponding slanting towards *Africans* as distinct from *African-Americans*.

Finally, the salience of apology as displayed in each of these bi-lateral cases moved to a truly global level when a collective, international apology for slavery and the slave trade rose to become one of the key issues and points of contention during the United Nations World Conference on Racism in Durban in 2001. In its closing days, the debate scattered the nations of the world into patterns of alliance and antagonism, and threatened to bring the conference to halt.

The final declaration fell short of the explicit apology for which many non-governmental organizations and African States had been pushing. It did, however, acknowledge that

⁷⁰ Introduced by Congressman Tony P. Hall of Ohio. See 143 Congressional record H3890-H3891, 105th Congress, 1st Session (June 18, 1997).

⁷¹ *Ibid.*

“slavery and the slave trade...were appalling tragedies in the history of humanity ...and crimes against humanity...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.” The Declaration went on to say that the World Conference “profoundly regrets the massive human sufferings and plight of millions of men, women and children caused by slavery.”⁷²

Of course, this was not the only contentious question over which the gathered nations argued.⁷³

The fact, however that apology was such a central issue for the first UN world conference of the new millennium confirms the salience of the apology in the contemporary political landscape. At this first global conference of the new millennium, the call for an international apology signified the need for a declaratory statement by the international community that certain forms of international action were illegitimate, and no longer part of its normative fabric.

⁷² Final Declaration, World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance, Durban, South Africa, September 2001, available at <http://www.unhcr.ch/html/racism/>

⁷³ As has come to be *de rigeur* in UN conferences where race or discrimination is an issue, the question of Israel and Palestine was also a central sticking point.

I. 2. (ii) Transitional apologies

The second category are apologies appearing in transitional situations, that is where countries are dealing with significant human rights violations from the immediate past as part of the process of moving out of periods of intense conflict towards political consolidation and stabilization. In this context, apology occurred as one of the novel or transformed strategies which emerged during the last quarter of the twentieth century as principally Latin American and Eastern European countries (and South Africa) moved out of periods of totalitarian or despotic rule and faced the challenge of reconstituting themselves as viable, stable political communities. Other approaches include truth commissions of various styles, domestic and international criminal trials (with a new emphasis on human rights violations), public commemorations, reparation schemes and lustration.⁷⁴ While the term transitional justice usually refers to the processes that a particular country undergoes, I include within this category apologies offered by other nations for their role in the conflict, although their intervention does not strictly fall within the transitional mechanisms.

As this survey indicates (and as I noted in my juxtaposition of the British apology for the Potato Famine and silence over Bloody Sunday) apologies have been less forthcoming in this context than in the context of wrongs in the more remote past. Interestingly, as the lapse of time between the violations associated with the pre-transition regimes grows, we are also beginning to see a new round of apologies, notably in Argentina and Guatemala.

⁷⁴ I come back to examine the apology in this context of different mechanisms for dealing with the past in chapter 2.

In March 1991, at his televised presentation of the findings of the Report of the National Commission on Truth and Reconciliation, Chilean President Aylwin asked for the forgiveness of the victims' relatives. He also appealed to the Armed forces, the security forces and all who participated in the excesses to recognize the pain they have caused, and cooperate in healing the wounds.⁷⁵ This speech took place in the very football in which many of the atrocities had occurred, and as he spoke, the names of victims were flashed on a giant screen.

The performative power of the scene is striking, particularly in its implications regarding the role of 'ordinary Chileans'. Now, the eyes of all Chile were trained on the names of those who had died at the hands of the military, displayed in the very same place that had been 'invisible' to them when those murders were occurring.

Other than the Chilean case, in the immediate aftermath of the Latin American transitions there was a marked absence of apologies. More recently, however apologies have begun to emerge for the pre-transition violations, now that the political conflicts of which they were part were no longer so volatile. In March 2004, the President of Argentina, Nestor Kirchner offered the first Presidential apology for the violations committed during the military dictatorship. This apology was delivered in the dramatic poignancy of a ceremony transferring a former torture camp, a symbol of barbarism and irrationality" in the words of the head of the Argentine military, to its new role as site of a museum

⁷⁵ *Chilean President's Address and Comments on Human Rights Violations Report*, BBC Monitoring, Summary of World Broadcasts (March, 1991).

dedicated to the memory of the atrocities and the promotion and defense of human rights.⁷⁶ Before the ceremony, the head of the military, Admiral Jorge Godoy had ordered the removal of the portraits of military leaders associated with the dictatorship, marking the military's symbolic transition from being the core perpetrator of human rights violations to a new role as a protagonist in building "a prosperous, sovereign nation with social justice." At the ceremony, the president asked pardon in the name of the state for the "sinister and macabre acts" taken during the years of military rule⁷⁷ and for the state's silence over the atrocities during its twenty subsequent years of democratic rule".⁷⁸

Two months later the Catholic bishops of Argentina released an official document in which they too asked "forgiveness of God and of our brothers", because the Church's actions in the defense of human rights during the 1976-1983 military rule, "was insufficient to detain the illegal repression which left thousands of death and disappeared people in the country". The statement went on: "We are deeply sorry for our incapacity to relieve the pain generated by such a drama" but expressed solidarity "with those who may feel hurt for that reason."⁷⁹

⁷⁶ This description was contained in a speech by Jorge Godoy on March 3rd. The transfer was authorized by the Convenio N° 8/04, Acuerdo entre el estado nacional y la ciudad autonoma de Buenos Aires para la construccion del "Espacio para la memoria y para la promocion y defensa de los derechos humanos" En el predio de la "ESMA", 24 de Marzo de 2004, Publicación: *Boletín Oficial*, 26 de Marzo de 2004.

⁷⁷ "Americas Argentine President Announces Plans for Victims of Military Dictatorship" *VOA News*, March 24, 2004.

⁷⁸ Godoy mandó descolgar un retrato de Emilio Massera, *Página 12*, May 7, 2004.

⁷⁹ "Argentine Bishops Release Historic Plea for Forgiveness", *Catholic World News*, May 7, 2004.

In April 2004, following recommendations from the inter-American Court of Human Rights, the government of Guatemala formally apologized for its role in the 1990 killing of anthropologist Myrna Mack. In a ceremony at the Presidential Palace, President Oscar Berger and the heads of Congress and the Supreme Court asked forgiveness for the brutal murder. Although the apology was circumscribed to her death, it clearly provided acknowledgement of the state's role in the more widespread repression.⁸⁰

President Wahid of Indonesia offered and unprecedented apology in relation to East Timor after the Indonesian military unleashed violence against East Timorese when they voted in favor of secession in UN run elections. In March 2000, on a visit to East Timor eighteen months after the elections, President Wahid said "We as a nation have made mistakes.....If we do not apologize as a nation for the mistakes that were made, the problem will never end".⁸¹ His rhetoric of laying the past to rest occurred while people laid wreathes both at the site of a massacre of Timorese by the Indonesian military, and at a cemetery for Indonesian military killed in the 1975 invasion of East Timor.

The wording or the framing of the victim and perpetrator groups here is highly revealing. Although Wahid's apology is directed to both groups – East Timorese and Indonesians, his language insists upon the distinction between them: "I would like to apologize for the sins that have happened in the past, to the victims or the families of Santa Cruz and those

⁸⁰ "Guatemala's three branches of government apologize for state role in human rights activist's slaying", *San Diego Union Tribune*, April 23, 2004.

⁸¹ "Indonesia Wahid Welcomes Resumption Of Timor Air, Sea Link", *Associated Press*, March 1, 2000.

friends who are buried in the military cemetery”.⁸² The military victims are ‘friends’, part of the Indonesian self, for whom Wahid is also speaking. In contradistinction, the East Timorese is the victim, distinct from and politically outside the Indonesian perpetrator. This rhetorical framing is markedly different from the pre-election insistence that East Timor was an integral part of Indonesia. In this case the distinction plays an interesting role, perhaps marking respect for the newly established independence, rather than signifying the failure full recognition that such self/other distinctions usually mark.

In her first address to the nation in August 2001, President Megawati Sukarnoputri (Wahid’s successor) apologized for Indonesia’s rights’ abuses in two other rebel provinces still part of Indonesia - Aceh and Irian Jaya: “We convey our deep apologies to our brothers who have long suffered as a result of inappropriate national policies.”⁸³ In this case, the apology came not after the conflict had been resolved, but amidst ongoing violence. Again, her use of the familial form (our brothers), frames Indonesia as a unified and even intimate entity, albeit one with internal conflict.

In another ongoing conflict in the same region, during the Bougainville peace talks in 1998, Prime Minister Skate of New Guinea sent an open letter to the people of

⁸² Editorial, *Straits Times*, March 6, 2000. Note here, that although he apologized both the East Timorese victims and members of military who were killed in the conflict, he refers to only the latter as “friends”.

⁸³ “Megawati’s apology for rights abuse in 2 states”, *The Tribune*, August 17, 2000.

Bougainville and Papua New Guinea, apologizing for the pain and suffering experienced by everyone involved in the nine year civil war.⁸⁴

In the closing days of a disastrous election campaign in January 2001, President Ehud Barak of Israel apologized for the deaths of 13 Arab Israelis shot by police during protests to support the Palestinian Infitada.⁸⁵ In front of an audience of Arab Israelis in the country's largest Arab city he said: "I want to say to the families I want to meet you and want to tell you as prime minister and as an Israeli citizen, the majority of the Jewish people do regret and give their condolencesThe blood of Arab Israelis *is the same as ours*".⁸⁶

Although Barak is playing with the metaphor of blood – used here to mark blood spilled, rather than the blood of identity per se, this highly visceral reference to the same blood is striking in a field where racial (religious) difference has not only been the basis of the conflict, but of the constitution and identity of the Israeli state itself. The apology here conveys a recognition not only of shared humanity in general, but a forthright affirmation

⁸⁴ "Lincoln Agreement on Peace, Security and Development on Bougainville", *The National (PNG)*, 22/1/98 and Radio Australia, 26 January, 1998.

⁸⁵ In September 1997 Ehud Barak also apologized on behalf of his party "over the generations" for the treatment of to Jews from Arab countries who immigrated at the founding of the State.

⁸⁶ "Barak Apologizes for October Deaths", *AFP*, January 25, 2001, italics added. In 1997, at the annual Labor Party Convention, Barak, the leader of the Labor Party had apologized on behalf of the party for the discriminatory treatment of Sephardi Jews during the early years of settlement. See Gil Sedan, "Barak issues apology for Sephardim abuse", Jewish Telegraphic Agency, October 3, 1997.

of commonality directly relevant to questions of nationhood and the distribution of political rights.

Again, the positioning of the victim groups, here so explicitly identified as part of the Israeli nation is significant. In all of these cases, the apologetic rhetoric, and in particular the way the apology frames the relationship between victim and perpetrator groups feeds into larger processes of defining and constituting the state, the states borders and the place of different ethnic or racial groups in these shifts.

The South African case is often identified by the general public as the most significant case of repentance in transitional politics. In fact, however, although truth telling - the confessional aspect of apology, has been at the heart of the South African Truth and Reconciliation process, and many individuals apologized at the Truth and Reconciliation Commission (TRC) hearings, the representative political apology has not played a central role. In August 1993, while still President, F.W. de Klerk apologized for apartheid, followed days later by Nelson Mandela's apology for atrocities allegedly committed by the African National Congress against suspected enemies. De Klerk apologized again in 1996, this time before the nation's for the "pain and suffering" caused by the disgraced system of racial separation, but not in the capacity as head of state. The absence of a post transition representative apology may be explained by the fact that the new South African government under the leadership of Nelson Mandela was so explicitly identified with the

victim group - an apology from Mandela as new head of state would seem absurd given his former role and identification as the heart of victimization under apartheid.⁸⁷

Heads of the states of the former Yugoslavia have given a number of apologies. The first apology was from Montenegrin President Milo Djukanovic for the “pain and damage” suffered by the Croats. “On my behalf and on behalf of all the citizens of Montenegro, I want to apologize to all citizens of Croatia, particularly in Konavli and Dubrovnik, for all the pain and material damage inflicted by any member of the Montenegrin people.” He went on to say: “We have paid in the lives of our people, the severance of traditional good ties between Croatia and Montenegro and our banishment from the international community”.⁸⁸ Then, in late 2003, the presidents of both Serbia-Montenegro and Croatia apologized for the actions of their citizens in the 1991-95 war between those two countries. After Serbian President Svetozar Marovic apologized “As a president of Serbia-Montenegro...for all the evils any citizen of Serbia and Montenegro has committed against any citizen of Croatia”, Croatian President Mesic rewrote his prepared speech to include an apology on the part of his county: “In my name, I also apologize to all those who have suffered pain or damage at any time from citizens of Croatia who misused or acted against the law.”⁸⁹

⁸⁷ I take up this issue of the status of the representative in chapter 6. Interestingly though, in July 1998, the Natal Law Society of South Africa, unconditionally apologized for its action, one hundred and five years earlier, in trying to keep Mohandas K Gandhi from practicing law because he was “not of European descent”. “For Gandhi (d.1948), a Long Due Apology.” *New York Times* July 29, 1999.

⁸⁸ “Djukanovic Apologised to Croatia”, *AIM Zagreb*, June 29, 2000, www.aimpress.ch/dyn/trae/archive/data/200007/00704-001-trae-zag.htm

⁸⁹ BBC NEWS, 10/9/2003, <http://news.bbc.co.uk/go/pr/ft/-/2/hi/europe/3095774.stm>

Just 2 months later, on a visit to Sarajevo, the President of Serbia and Montenegro apologized to Bosnia. Using a form of words very similar to his earlier apology, he apologized for “any evil or disaster” that anyone from his country had caused to anyone in Bosnia. In both apologies, the phrasing was carefully drafted to underline individual responsibility and Marovic repeatedly emphasized that it was individuals who had committed crimes. This emphasis was no doubt designed to avoid compromising the position of Serbia or Montenegro, both of which are facing actions before the International Court of Justice from Bosnia and Croatia for genocide and war crimes and with them the prospect of being required to make huge compensation payments.⁹⁰ Nevertheless, the fact that he offered both apologies as head of state marked a recognition that even if it need be restrained by legal considerations, apology had an important role to play in reshaping relations between these states.

In Ethiopia in August 2003 thirty-three former government officials on trial for genocide wrote a letter asking Ethiopia's people to forgive them for crimes they committed during the former regime of exiled dictator Mengistu Haile Mariam. The letter, sent to Ethiopian Prime Minister Meles Zenawi, and published by Ethiopia's *Reporter* said: “We, the few who are being tried for what had happened, realize that it is time to beg the Ethiopian public for their pardon for the mistakes done knowingly, or unknowingly..... We are the people who remain from the regime, our actions had the support of the majority of the

⁹⁰ “Belgrade’s Cautious Apology”, *BBC News*, November 12, 2003. <http://news.bbc.co.uk/go/pr/fr/-/1/hi/world/europe/3268405.stm>

people who benefited, while we believed it was also the cause of the civil war that has consumed the life of the people and destroyed property”.⁹¹

These last two cases raise important questions about the relationship between apology and other processes for dealing with the past, most notably criminal prosecution. In chapter 6 I will take up this question of whether apology requires or precludes criminal punishment and how one might see them as part of a sequence of justice.

There have also been a number of debates around apologies from third parties for their role in domestic conflict. Cambodian students were unsuccessful in their attempt to obtain an apology for China’s role in the Cambodian genocide from Chinese President Jiang Zemin during his trip to Cambodia in August 2000. In response the Chinese government issued a statement making it clear that it had no intention of acceding to the request.⁹² Third party apologies have however been given in relation to both Rwanda and Guatemala.

In Rwanda in 1998, President Clinton said that “[T]he international community, together with nations in Africa, must bear its share of responsibility for this tragedy, as well. We did not act quickly enough after the killing began. We should not have allowed the refugee camps to become safe haven for the killers. We did not immediately call these

⁹¹ “Ethiopians ask for Mercy”, at *News24.com*, http://www.news24.com/News24/Africa/News/0,,2-11-1447_1477313,00.html. It is not clear whether this apology is in part aimed at achieving some type of legal pardon. The current constitution bars anybody convicted of genocide and crimes against humanity from benefiting from the presidential prerogative of mercy, but Ethiopian parliament is discussing a new bill to empower the president to pardon convicted people.

crimes by their rightful name: genocide.⁹³ We cannot change the past. But we can and must do everything in our power to help you build a future without fear, and full of hope.”⁹⁴ This reference to hope in the future is reminiscent of Wiesel’s linkage between hope and apology in the German/Jewish case – raising once again the role of the apology in constructing a different future, and specifically a different dynamic in the relationship between politically salient groups.

In April 2000, the Prime Minister of Belgium (former colonizer of Rwanda) begged forgiveness in the name of his country and people for their failures during the genocide. To several thousand Rwandans he said: “I confirm that the international community as a whole carries a huge and heavy responsibility in the genocide.....Here before you I assume the responsibility of my country, the Belgian political and military authorities.”⁹⁵

In 1999, in the light of the findings of the United Nations’ independent Historical Clarification Commission report (*Guatemala: Memory of Silence*) that for decades the United States knowingly gave money, training and other vital support to the military regime that committed atrocities as a matter of policy, Clinton expressed his regret for the

⁹² “History Hinders China's Bid to Play Big Brother in Southeast Asia”, Agence France Presse, November 8, 2000.

⁹³ In this reference to how we call crimes, Clinton is underscoring the importance of rhetoric, the names we give to practices. In the Rwanda, the United States administration carefully avoided using the word genocide so as to shield itself from international legal obligations that would have followed.

⁹⁴ Text of President Clinton's address to genocide survivors at the airport in Kigali, Rwanda, on March 25, 1998, as provided by the White House.

⁹⁵ “Belgian apology to Rwanda”, BBC News, April 7, 2000.

US' role. He told Guatemalans that "it is important that I state clearly that support for military forces and intelligence units which engaged in violence and widespread repression was wrong, and the United States must not repeat that mistake."⁹⁶

In a world where major economic disparities and ideological, religious and ethnic divisions are ever present sources of political conflict if not bloody strife, it may seem strange that this linguistic formulation about events in the past would even make it onto the map of international political debate. Yet the many examples set out here, albeit in many ways diverse, testify to the new entry of apology into the canon of contemporary political life.

⁹⁶ "Apologies are U.S.", *Washington Post*, March 14, 1999.

II. Why are apologies interesting?

In the face of this proliferation, in fact in part *because of* their proliferation, apologies have been dismissed by many observers as “a dime a dozen” - relatively trivial political acts - the easiest and least controversial of all responses a contemporary political regime might have to its dark past. This survey challenges this dismissive view by illustrating the richness and complexity of the apology movement. Several aspects of the apology phenomena make it particularly theoretically provocative.

First, until recently it was virtually unheard of for a political leader to apologize for wrongs committed by his or her nation in the past. Admittedly, we are familiar with certain limited types of pro forma apologies in political and legal contexts. Specifically political representatives may apologize for their own ‘unparliamentary remarks’, or for misleading the parliament and in some cases political leaders apologize or are called to apologize for the remarks or actions of members of their party or government. In the civil law, defamation actions often result in apologies and withdrawals as well as a financial settlement. Finally, in the criminal law defendants sometimes apologize as part of the plea for mitigation, and indeed the extent of his or her remorse and public penitence may influence the sentence. The distinct representative apology for broader collective violations is however strikingly novel. This is not because leaders formerly refused and now agreed to apologize, but rather because apology was not part of the usual political repertoire - not only for political leaders, but for non-government organizations seeking redress or recognition for their causes. Its novelty and subsequent contagion indicates that it is an epochal phenomenon.

Second, although critics portray apologies as effortlessly thrown out everywhere and by everyone, in fact, there has been and continues to be significant resistance to saying sorry, particularly in some situations. Some apologies have been given spontaneously, but most are the result of strenuous lobbying by non-governmental organizations or other states and the outcome of negotiations between parties with very different political interests and conceptions. This is evident in the Australian case, where the Prime Minister's ongoing refusal to apologize provoked an extensive campaign, leading to incrementally stronger expressions of regret on his behalf and spawning a rich debate about the significance of apology.

Third, apologies, either given or refused, always receive a mixed and uneven reception. They are variously, and within a single case, celebrated, scorned, ridiculed, rejected as too little and criticized as too much. Nor are the positive and negative responses simply correlated with the victim/perpetrator distinction. Rather, opponents and proponents can be found both amongst those to whom and those in whose name the apology is given, so that "victim" and "perpetrator" groups often find themselves in odd coalitions of opposition or support. One sees this in the Polish case, for example, where opposition to the apology was expressed both by Catholic Poles, declaring they had nothing for which to apologize, and Jews, who saw the apology as a disingenuous and belated gesture. This patterning of response indicates that the apology has a range of meanings and is understood differently by actors in different positions.

Fourth, although there has been a wide proliferation of apologies, they do show a distinct pattern of distribution. First, most are for wrongs committed in the remote but still politically salient past, not for wrongs in the immediate past. Where apologies do appear in transitional justice situations they tend to move to the periphery of public debate and interest. Second, apologies have been concentrated around certain types of wrongs, most markedly those where the particular wrong was embedded in a broader pattern of social and political inequality along the most politically salient axis of identity, frequently race.

Fifth, apologies that are made tend to be intentional productions - the form of words and gesture, the status of the speaker and the context in which it is delivered are the outcomes of careful deliberation and potential objects of controversy. A weak expression of regret (as in the Durban case), or an expression articulated from too low a level, (as in the apology to Native Americans), or in what is perceived to be the wrong context (Clinton's apology for slavery delivered in Africa) can represent more of a slight than a positively received repentant gesture. In this sense they are reminiscent of a dimension of politics that was once central to political thought, but now has all but disappeared – the art of rhetoric. Rather than dismissing this rhetorical turn as hypocritical or superficial politics, we would do well to reopen political theory to the study of political speech.

Sixth, the fact that the political apology hovers at the interface between the apparently distinct spheres of the political, the personal and the religious speech and action should alert us to the broader conceptual questions about the relationship between. Although it is

certainly a well-frequented strategy for dealing with wrongs of the past, apology is usually classified as a moral, emotional or spiritual act, thus finding its 'home' in the interpersonal or religious spheres. Its appearance as part of the *political* repertoire for dealing with the past, where legal, economic and diplomatic means are the norm, strikes us as anomalous. This is evident in the difference between how people react to apologies from political leaders versus those from religious leaders. People may be surprised at the content of the issues for which the Pope is willing to apologize, but his use of the apology as a *means* strikes us as perfectly natural and in keeping with his role as the leader of the Catholic church. Political leaders' apologies by contrast strike us not so much because of the subject matter with which they deal, because of their *form*.

The fact that apologies draw on a rhetorical style that apparently 'properly' belongs in the inter-personal or the religious spheres often leads people to assume that they should not form part of political action or speech. Yet again, the facts on the ground defy this conceptually driven 'should'. In fact, if once one starts to examine the field more closely, one finds that they are not an entirely isolated example after all, but belong to a wider body of political speech acts that move between the highly personal, the religious and the public/political. This is most apparent in the recent proliferation of biographical narrative in truth commissions, but also has an earlier historical precursor in the very personal emotive/spiritual inscriptions on national memorials (particularly but not exclusively war memorials), the "Lest we forget's" and in the language and soaring tunes of the anthems

that citizens sing from early childhood.⁹⁷ A more thoughtful approach would not condemn this slippage but recognize it as a hint that these putatively distinct spheres intersect more richly than we had allowed in our theoretical maps and seize upon it as the opportunity to explore the relationship.

This sense that the apology is oddly placed in the repertoire of political acts is exacerbated by the discomfort we feel about our political leaders speaking for us as a *collective* responsible for wrongdoing – even more so when the collective identity stretches across time. A political act that assumes collective responsibility for past wrongs seems to contravene fundamental principles of liberal politics, namely shielding individuals from collective attribution and ensuring their recognition in the public sphere as *persons*. Their appearance demands that political theorists revisit this question and ask whether it is possible to reconceptualize collective responsibility in a way that harmonizes it with principles of individual integrity and so elucidate this institutionalized assumption of collective responsibility.

Why are political leaders all over the world drawing on the language of repentance in this new way? Why are they speaking on behalf of and to groups? Why are we witnessing the

⁹⁷ The emotive/spiritual rhetorical style of apology might be thought of as what Ajume Wingo has called “veil politics”. By this is describing a range of political institutions, including public memorials, flags, anthems and even coins that operate to establish the oft-neglected affective dimension of civic allegiance. The theme of the importance and neglect of symbolic action in politics will weave through the dissertation and be taken up most explicitly in the religious chapters and again in chapter 7. See Ajume H. Wingo, *Veil Politics in Liberal Democratic States*, Cambridge University Press, 2003.

emergence of another type of discourse or another category of action in the political sphere?

To date, there have been three principle responses to these apparent anomalies. First is the disparaging, ‘this is a category mistake’ reaction: when politicians apologize they are acting *un-politically*, inappropriately or erroneously drawing on a discourse that properly belongs in personal relationships or the church.⁹⁸ Second, they provoke more strident condemnation for operating according to a repugnant political ideology (collectivism). Third, the apologetic discourse is dismissed as a cynical rhetorical move, and in this sense very much “political”, where the latter term is synonymous with disingenuous pragmatics designed to minimize costs to the speaker or the interest group they represent.

The facts of the phenomenon, however, belie these dismissive responses. While analysts continue to assert that the apology is “unpolitical”, or that it runs contrary to core principles of liberal political community, or that it is trivial, political leaders in liberal polities continue to apologize, and their apologies continue to engage the broader population. Rather than continuing to assert that the apology does not belong in politics, the facts on the ground should prompt political theorists to reconsider our understanding of the political sphere itself.

⁹⁸ One heard this frequently in the Australian debate, where many people saw the apology as a nonsensical or confused act. It was also in evidence in some of the critiques of Clinton as the apologizing President, portraying him as over-personalizing the presidential office.

The emergence and sustained use of apology as a form of political action is a symptom of a more generalized blurring or shifting of the boundaries between the *political* and the moral, ethical or religious. Conceptually, this shift must invite reconsideration both of how those boundaries are drawn, and more substantively how one thinks about the *political* in the contemporary world. This broader theoretical invitation makes the political apology a particularly rich subject for theoretic investigation and reflection.

Moving back to the real world, there is in fact significant support for this reevaluation. Alongside critique and resistance, acceptance and even celebration of these “troubling” aspects of the apology are evident. For many, including those in whose name an apology is sought as well as those who would be the beneficiaries of the apology, its “religious” or symbolic quality and the way in which it recognizes the collective dimensions of identity, victim-hood and responsibility offer a much needed supplement to the more traditional approaches to wrongdoing - approaches which seem to leave something important out.

Once one allows that the political apology represents a distinct type of political action and analyses it as such, its workings illuminate some fundamental concepts and problems in political theory. The analysis of the dynamics of apology sheds light on questions concerning the constitution and reshaping of political identity, state building and the construction of civic allegiance, the relationship between the ethical and the political and the ever troubling tension between individual and collective responsibility and identity.

The apology is, in other words, not only ill understood, but also an untapped theoretical resource.

III. Treatment of the political apology in the literature

Despite extensive interest in strategies and mechanisms for dealing with past wrongs, until very recently the apology, as a distinct political response to systematic or large scale public wrongs has received virtually no analysis. Apology, as an interpersonal act, has received limited analysis from a sociological perspective, and other political/legal mechanisms for dealing with the past, such as truth commissions, criminal trials, reparation and lustration have been the subject of extensive analysis in political theory in recent years.⁹⁹ In the majority of texts on transitional justice it rates at best a few pages, and at worst total omission. Where it does appear, it is generally embedded in the discussion of some other institutional response, such as a truth commission (truth telling) or reparation schemes. At times it is categorized as a form of symbolic compensation - one of a number of measures towards the achievement of “restorative justice”. At other times it is seen as a variant of a personal act of healing, or placed under the broader rubric of “reconciliation”.¹⁰⁰ Through omission or elision, political apologies have either been

⁹⁹ The literature on mechanisms for dealing with human rights violations is far too extensive to cover here. Leading texts in the field of transitional and historical justice providing extensive references include Neil Kritz' 3 volume collection, *Transitional Justice*, Washington, US Institute of Peace Press, 1995; James McAdams (ed) *Transitional Justice and the Rule of Law in New Democracies*, Notre Dame: University of Notre Dame Press, 1997; Minow, Martha, *Between Vengeance and forgiveness*, Boston, Beacon Press, 1998; Hesse, C and Post, R. (eds), *Human Rights in Political Transitions: Gettysburg to Bosnia*, New York, Zone Books, 1999; Ruti Teitel, *Transitional Justice*, Oxford University Press, 2000; Priscilla Hayner, *Unspeakable Truths*, New York: Routledge, 2000; Rotberg, R. and Thompson, D. *Truth versus Justice*, Princeton: Princeton University Press, 2000.

¹⁰⁰ These terms, reparative justice and reconciliation, which have themselves become very much state of the art, will also need to be unpacked.

dismissed as relatively unimportant in the scheme of other responses, or analytically collapsed into one or other alternative.

Only very recently has the apology as a specific political act attracted more focused analytic attention. Nicholas Tavuchis' 1991 text devoted specifically to the sociology of the apology remains the major reference text in the field, but was written without explicit attention to the political apology, and before much of its recent proliferation.¹⁰¹ Amongst the more prominent recent contributions dealing with the contemporary phenomena have been the Haitian scholar Michel-Rolph Trouillot's contribution to the 2000 Sawyer Seminars on History and Memory later published as part of a journal issue dedicated to the apology,¹⁰² Jacques Derrida's 1999-2000 seminars and subsequent publication on forgiveness,¹⁰³ and Paul Ricoeur's treatment of pardon as a form of justice.¹⁰⁴ At the beginning of 2002, political scientists, historians, sociologists, theologians, psychoanalysts, comparative literature academics and anthropologists gathered for the first inter-disciplinary conference specifically dedicated to the apology.¹⁰⁵ Also in 2002,

¹⁰¹ Nicholas Tavuchis, *Mea Culpa; A sociology of apology and reconciliation*, (Stanford: Stanford University Press, 1991).

¹⁰² Published as "Abortive Rituals; Historical Apologies in the Global Era", *Interventions*, Vol. 2(2), 171-186. This issue includes several other essays on political apologies.

¹⁰³ Published as *On Cosmopolitanism and Forgiveness*, New York and London: Routledge, 2001.

¹⁰⁴ Paul Ricoeur, "Sanction, Rehabilitation and Pardon" in *The Just*, David Pellauer (trans.). University of Chicago Press, April 2000.

¹⁰⁵ *Apologies Conference*, Clairemont Graduate University, February 7-10, 2002.

Marina Warner's Amnesty Lecture on Human Rights was dedicated to an analysis of the apology.¹⁰⁶

In this work are the beginnings of a more focused exploration of the phenomenon of the political apology - but they are beginnings with an unstable foundation. In general analysis of the political apology takes as its starting point a set of (usually implicit and uncritical) assumptions about what an apology is, and then assesses its suitability or usefulness in doing the work of dealing with past political wrongs - thus presuming also that one knows what this work is. In simple terms, the result often looks something like: "apologies are a way of dealing with feelings and relationships between people, but violations of people's rights demand justice." Or perhaps, "apologies are supposed to make up for a wrong - but grave wrongs require far weightier forms of compensation". In this way, analytic or evaluative questions are answered according to a set of criteria that have not themselves been interrogated or evaluated. To do justice to important questions like "can a collective apologize?", "what are the conditions for an apology to be effective?" or "is the apology sufficient to the demands of reconciliation, compensation, healing or justice?" require prior analysis of the apology itself and the work associated with apology - analysis which has not occurred.

A brief survey of criticisms leveled against the coherence or efficacy of political apologies elucidates the problem to which I am pointing. One main objection holds that

¹⁰⁶ The lectures are reproduced in full on the Open Democracy web site: "Sorry: The Present State of the Apology", *Open Democracy*, 2003. An abbreviated version was published as Marina Warner, "Who's Sorry Now" *Times Literary Supplement*, August 1, 2003, pp. 10-13.

apologizing is insufficient by way of compensation - something more is needed, monetary restitution, or reparations in kind. The assumption at work here is that apology is a form of compensation equivalent to these more traditional forms. This assumption carries with it the implicit logic of substitution - apology, as compensation is there to make up for, and is thus in some sense must be equivalent to the damage inflicted. Accordingly, its suitability or success can be assessed according to a measurement of sufficiency - is there a *quid pro quo*?¹⁰⁷ The prior questions, 'is apology (in this context) a form of compensation?' and if so, 'what is it seeking to compensate?' were never open to examination.¹⁰⁸

Alternatively, apology is seen as a means of relational healing. The dominant model at work here is the personal act of reconciliation - two subjects, each with a self adhering across time and endowed with the capacity to reflect, and even more importantly to *feel*, enter into a transformative face to face encounter so as to reestablish a lost connection *between them*. In her Amnesty lecture Marina Warner makes this assumption explicit. There she declares that apology unites two forms of speech - the theological/sacramental language of atonement and the psychoanalytic 'talking cure' - both of which, she argues are "deeply intertwined with ideas about self examination and self disclosure."¹⁰⁹ In

¹⁰⁷ Tavuchis explicitly sets out this understanding of apology: "...the apology itself - without any other objective consideration - constitutes both the medium of exchange and the symbolic *quid pro quo* for, as it were, 'compensation'." *op. cit.* p. 33f.

¹⁰⁸ In my discussion of the United Nations Study on Reparations and Compensation for Gross Violations of Human Rights, in the context of the Australian apology in chapter 5, I will look in some detail to the way in which apology is framed as a distinct form of reparation, there classified *satisfaction*.

¹⁰⁹ Warner, *op. cit.*, p. 10.

either case, the background model assumed here draws on the notion that personal expression, and more specifically verbal expression is a means for overcoming past trauma and clearing space for unencumbered development in the future.

The influence of this assumed model is evident in the most common critiques, which fault collective apologies on their lack of authenticity, their failure to speak from the heart of a real subject, and the absence of a proper subject qualified to apologize or receive an apology.¹¹⁰ By assuming that the political apology is simply a version of this deeply interior, individual model writ large, carrying along with it the weight of authenticity and feeling and a particular, thick conception of the apologizing subject, collective apologies are, from the outset, deviant.

This model of ‘apology as healing through feeling’ was articulated most fully and influentially in Nicholas Tavuchis’ sociological study on the apology and reconciliation, *Mea Culpa* - the text most often cited as the source of analysis of apologies. The greater part of this text is spent developing a model that firmly grounds the apology in an emotive interaction, in which the feeling of regret becomes the essential and defining feature of the ideal type apology. If this model is taken as the template, other apologies, specifically those involving collectives are seen as deviations from the type, and missing essential ingredients.

¹¹⁰ As discussed below, this is the assumption Trouillot makes in his critique.

Tavuchis himself in fact opens the space for recognizing that this model may not be sufficient to fully account for public collective apologies. In a brief section at the end of the book he argues that the collective-to-collective apology has a different dynamic to the inter-personal apology, and as such cannot be evaluated according to the same criteria.¹¹¹ He analyzes a small number of collective apology cases, expanding his analysis to include the public and social dimensions of apologies. He concludes that apology in this form should be judged in terms of “the remedial and reparative work it accomplishes”, not its success in expressing sorrow or remorse: “to demand more is to mistake its task and logic”.¹¹² Yet it is precisely this demand that comes through again and again in the claim that the political apology fails for want of authenticity.

In an apparently little read or noticed section of the book, Tavuchis actually offers a fascinating analysis of the dilemma of the collective apology, which will prove very useful in considering the political apology. Here he argues that the problem with collective-to-collective apologies is that they are caught between two discursive structures, each with its distinct form and purpose. This “strained interplay of dual orientations” is, according to Tavuchis precisely the organizing dynamic of the collective apology. These few crucial lines of the text are suggestive of a structural complexity and tension *within* the different dimensions or types of apology. Unfortunately, he leaves his comments at this, and does not further elucidate the two orientations, nor explore their

¹¹¹ Tavuchis, *op. cit.* pp. 108-9.

¹¹² *ibid.* p. 117.

interplay.¹¹³ Interestingly, in his concluding remarks to the book, dedicated to unfinished business and future research, Tavuchis points to the specter of religious confession as the unexplored affinity - “a topic that has haunted our discussion at virtually every point”.¹¹⁴ Much of the work of this dissertation will in fact be an elaboration on these two hereto unfulfilled suggestions.

The influence of Tavuchis’ analysis is apparent in Trouillot’s widely cited, albeit brief work on the political apology. Of the analytic work on the apology to date, Trouillot’s goes furthest in trying to make sense of the phenomenon. It distinguishes itself from the work mentioned above in that it starts by considering the public and political apology as a distinct category and as an essentially public act - although in the end Trouillot’s attention to the particular dynamic of the collective apology falls short of Tavuchis’ little known work a decade earlier.

In recognition of its essential publicity, Trouillot appropriately reads the apology as ritual, where the latter is understood in the “anthropological sense of a regulated, stylized, routinized and repetitive performance that tends to have both demonstrative and transformative aspects.”¹¹⁵ Having thus defined the field, his central claim is that the political apology is, *essentially and necessarily*, a failed or in his terms an “abortive”

¹¹³ Nor does Tavuchis take up the suggestion he himself quotes from Arendt, that plurality is a condition for forgiveness (and by analogy apology). He interprets her as only confirming his view that “the bedrock structure of apology is binary”, *ibid.* p. 46. As I will argue, her suggestion points up beyond the dyad as the essential structure of the apology.

¹¹⁴ *ibid.* p. 123.

¹¹⁵ Trouillot, *op. Cit.*, p. 184.

ritual. This is so, according to Trouillot (but closely tracking Tavuchis), because the apology hovers between two incompatible types of subjects. On the one hand, he argues, the apology uses a discourse that assumes the subjectivity of the modern liberal subject, with all the internality and continuity across time and experience this implies. At the same time, however, it projects this discursive structure onto a collectivity - the political or national or racial or religious group - that is not capable of experiencing itself as a collective subject across time. Hence this collectivity is neither convinced nor transformed by the ritual act.

The argument is strong, initially appealing, and in part correct. Yet, notice the assumptions built into his argument. First, he assumes that the apology essentially, necessarily *and exclusively* belongs to the discourse of the liberal individual (thus extrapolating from the psychoanalytic model). The question of whether the apology may operate according to other logics is never raised, even to be dismissed. Second, he assumes that the identity of the political, or racial or religious group operates according to a particular logic - one that he does not elaborate, but which is presumably incompatible with the discursive structure of apologizing. With these assumptions in hand, he can then establish the incompatibility between a practice appropriate for certain types of (individual) subjects and actual modern collectivities.

The problem with his thesis is that he assumes the very argument he requires to prove his case - that the apology belongs – and belongs exclusively - to the discourse of the

individual, and that the political collective cannot properly assimilate or act according to this logic. Not even going as far as Tavuchis in recognizing that the collective apology is a distinct form, he fails altogether to consider whether what is going on here is more than a case of mistaken identity. Moreover, he misses the opportunity to mine the fact that apologies *are* being sought and offered in the name of groups in the context of contemporary political organization, as a resource to reopen important questions about what type of entity a group or political collective is. Critiques of these two assumptions form the orienting starting points of this work, and elaborations of what might follow once they are suspended its essential substance.

With respect to the first assumption, that we already know what an apology is, the insistence that so complex a practice can be subsumed within a single and simple discursive frame is premature, and in view of the persistence of collective apologies, unwarranted. No doubt many of the uses already associated with apology - as an act of acknowledgment, recognition, humility, taking responsibility, altering the dynamic of the relationship, ending estrangement and hostility and so on - are at work in the political apology. Undoubtedly apologies do belong, at least in part, to the discourse of the modern individual, thus carrying with them assumptions about the nature of the apologizing subject. This would account for much of the disjuncture which people experience in trying to make sense of political apologies, and for the uneasy reception which they always have.

What is missing in these treatments of the apology is a more complete and prior analysis of the different types of apology that underscore the *political* apology. Tavuchis and Trouillot provide some suggestive directions for this task, but without sufficient attention to the range of forms. Warner also opens up the possibility of a broader reading insofar as she links the political apology to sacramental action, and the political leader to the priest. Even then, however, her theological analogy is typified by Augustine's highly personal *Confessions* that, as she herself argues, conform with the psychoanalytic model of the subject seeking personal redemption through speech.

Perhaps it is the very familiarity of the common form of practice (people saying sorry to each other, or in religious contexts individually seeking to cleanse themselves of their sins) that has convinced us that there is no need to elucidate the apology. Apparently we already all know what it means to apologize - and so we all know what it means for states or their representatives to apologize. But, as I shall argue, it is only the automatic acceptance of such a thin understanding of the apology, and the failure to enter into its complexity that allows commentators to assert so boldly that this is the only register on which it operates. Our spontaneous associations, valuable as they are, do not substitute rigorous analysis. This is particularly so where the empirical facts on the one hand (here the persistence of the practice), and the prevalent analysis on the other (that apology is inadequate/unsuitable to this context), move in contrary directions.

IV. Treatment of apology in speech act theory

Although the political apology per se has not been considered in the speech act theory literature, speech act theory has looked at the apology as a form of rhetorical action and provides some very useful tools for approaching the second of my questions, what type of act is the political apology?

First, speech act theory draws a fundamental distinction between *constatives* – forms of speech that convey information or name or state that something is so – and *performatives* – speech acts that themselves bring a state of affairs into being.¹¹⁶ Distinguishing the performative as a distinct form of speech is particularly useful in elucidating the political apology in so far as it provides language to explain why an apology is not merely a verbal representation of the real or essential act that is in fact going on elsewhere, an internal state of contrition for example or a relation or exchange between the perpetrator and victim parties.¹¹⁷ To give an apology is not (or at least not only) to make a statement about the subject's thoughts, feelings or intentions but also to bring about a shift in the relationship between the parties and alter the moral character of the subject.

Beyond this basic distinction, speech act theory also examines what type of work different forms of speech do – what one does *in* saying something and *by* saying

¹¹⁶ J. L. Austin, *How to Do Things With Words*, Cambridge, Mass.: Harvard University Press, 1962, cf. in particular Lecture I.

¹¹⁷ The relationship between the apology and the internal state of the apologizing party is itself one of the major problems treated in this work. The religious chapters in particular will elucidate its distinctly performative, as distinct from representational, character.

something.¹¹⁸ These questions cannot of course be completely answered without context, but this formal analysis does provide one tool for getting into how speech does its work.

To this end, Austin classifies apologies as what he terms a *behabitive*: what one is doing *in* apologizing is expressing an attitude to, or feeling about certain states of affairs. The form of words used in many apologies – begging for forgiveness, expressing deep regret – certainly seems to fit with this categorization. However, apologies also take a number of other rhetorical forms, suggesting a wider range of illocutory and perlocutory forces. Specifically, beyond their *behabitive* illocutionary force, they work to commit the speaker, or the collective on behalf of which the speech act is made to a certain course of action, or way of being (what Austin terms *commissives*). It may be that the work of these forms of speech better captures the distinct work of apology in its political mode. At the same time, the forms of words used in political apologies are certainly multi-valent, both at the level of particular apologies and in the field of political apologies as a class of acts. This formal linguistic ambivalence helps to explain their uneven reception.

¹¹⁸ Beyond his original distinction between constative and performative speech acts, Austin disaggregated every speech act into three dimensions – the locution – the act *of* saying something, the illocution, what one is doing *in* saying something and the perlocution, what one is doing *by* saying something. See Austin, *ibid.* p. 98ff.

IV.1 The forms of speech of political apologies

My analytic starting point was that all the forms of speech included in my inventory fell into a single broad phenomenon, which I called political apology. Empirically, however, they represent a range of speech forms. This raises the question whether there is an ‘ideal type’ political apology or various qualitatively distinct acts. Were it the former, would the ideal apology harmoniously integrate the various dimensions, in its perfected form including as many of those dimensions as possible and to the greatest degree? If the latter, what would be relationship between the different types of speech act?

Looking over inventory of political apologies set out above, there are a considerable number of different formulations. These include:

- * Apologizing (in one’s own name, in the name of the people, unreservedly);¹¹⁹
- * Expressing regret *for* the wrongs;¹²⁰
- * Expressing regret *at* or *about* the wrongs;¹²¹
- * Begging forgiveness;
- * Asking for forgiveness (from God; from the victims; without a referent);¹²²
- * Asking for pardon;¹²³

¹¹⁹ For example Croatian President Mesic apologized in his own name, Serbian President Svetozar Marovic apologized “As a president of Serbia-Montenegro”, the Pope “apologized unreservedly” to Australia’s Aborigines and other indigenous peoples of Oceania.

¹²⁰ The Vatican expressed its “deep regret [for] the errors and failure of those sons and daughters of the church” in relation to Nazism.

¹²¹ The Prime Minister of Australia expressed regret at or about the history of Aboriginal child removal.

¹²² The French Church *begged God’s* forgiveness and *asked the Jewish people* to hear our words of repentance.

¹²³ The French union of police asked for pardon for its role during WWII.

- * Confessing,¹²⁴
- * Acknowledging past events;¹²⁵
- * Acknowledging the suffering of the victims;¹²⁶
- * Committing to take responsibility for the ramifications of wrongdoing (into the future);¹²⁷
- * Deploring/Condemning the wrongs and the ethical failure they exhibited;¹²⁸
- * Paying tribute to the suffering of the victims;¹²⁹
- * Stating a desire for a certain type of future (involving a different relationship with the victim group, or different status for the victim group, or a different status for the perpetrator group);¹³⁰
- * Asserting a certain relationship between the act of apologizing and the future;¹³¹
- * Expressing grief or some other deep emotion about the wrongs of the past;¹³²

- ¹²⁴ Again, the French church confessed to its role. This language seems to be limited to religious authorities, although Clinton also used the terminology of *sin*.
- ¹²⁵ Chirac's apology was in the main an acknowledgment of France's role in the persecution of Jews.
- ¹²⁶ The Canadian apology to Indigenous children removed includes explicit acknowledgement of their suffering.
- ¹²⁷ The New Zealand apology included in the *Tainui* Settlement includes this linkage.
- ¹²⁸ In his apology to Guatemala, President Clinton said, "it is important that I state clearly that support for military forces and intelligence units which engaged in violence and widespread repression was wrong."
- ¹²⁹ German President Rau paid tribute to slave and forced labor.
- ¹³⁰ German President Rau's apology before the Knesset and Clinton's apology to Africans for slavery both explicitly referred to a vision of a different future.
- ¹³¹ Austrian Chancellor Klima explicitly made this link between apologizing and contemporary legitimacy.
- ¹³² The Polish Archbishop referred to deeply grieving the wrongs committed against Jews.

* Expressing an emotional response with reference to a bodily gesture of repentance, shame or humility.¹³³

Going a step further, one can identify several basic forms of speech underpinning the various formulations, in particular:

1. Saying sorry;
2. Expressing regret about a situation;
3. Asking for forgiveness;
4. Acknowledging the truth of the past (including the victims' suffering and the role of one's own group);
5. Taking responsibility for the harm or wrongdoing;
6. Articulating and committing to a different future.

The actual apologies sometimes comprised only one of these and sometimes combined several, for example the statement of apology, the explicit acknowledgement of responsibility and suffering and a commitment to a different future. They also displayed a quantitative dimension - stronger and weaker forms of apology: saying sorry, expressing deep regret.

Attending more closely to their meaning, certain formulations cannot be combined or added up in this way, but are in fact mutually exclusive. For example, when a political leader expresses regret *that* an event occurred, by implication he is refusing to actually

¹³³ President Klestil of Austria said that he bowed his head with deep respect and profound emotion in front of the victims.

say sorry, presumably because the latter would have implications for responsibility and direct involvement not entailed by the former. One can thus think of the different formulations as representing both different types of act (taking responsibility and begging forgiveness for example) and different degrees of the same type of act (apologies expressed with different degrees of emotion and contrition).

IV. 2 What type(s) of speech act?

If one analyzes this list in terms of Austin's categories of performatives, one sees that in fact they represent a number of types of speech act. Austin would certainly assume that the apology – actually saying sorry, (or 'I apologize') is what he terms a *behabitive*, a class of acts that primarily express a response to, or attitude about some event. Although he does not include it in his list, *seeking forgiveness* would probably also belong here. However, those forms of speech that condemn past acts would be *exercitives*, speech that advocates for or favors a certain course of action. Commitments to a different future are *commissives*, forms of speech that actually commit to a course of action.

This suggests at minimum that political apologies, as a form of speech are doing more than expressing a response or attitude. Moreover, as Austin was well aware, a proper understanding of how actual speech acts work has to go beyond this schematic appraisal to look more closely at what is actually being done in any particular context. What actors can do and are doing with their words is patterned according to these schemas but not determined by them. To this end, it will be important to keep this repertoire of speech

acts or forces of speech in mind when looking at what apologies actually do on the political stage.

Tavuchis approaches the question from the other side, asking what a full apology would entail from a sociological point of view and from here deriving the components of speech required.¹³⁴ He claims that a full apology comprises three components, or stages. First, one must name the act as one for which apology is appropriate or required, as something that the parties agree is wrong. Implicitly, this entails several of the dimensions of speech listed above, specifically acknowledging events, suffering and responsibility.¹³⁵

The act of actually speaking this narrative of history and giving voice to the victims' experience of events will be particularly important where there has been a history of denying both the facts and victims' perspectives and suppressing them through other versions of the past, specifically the version that denies any wrongdoing on the part of the dominant group. When the political representative of that group narrates this history as truth, he ascribes legitimacy to it and gives it the stamp of the state – it becomes a unifying story and provides an official line on political/ethical standards.

Second is the apology itself, which he defines, consistent with his focus on interpersonal sphere, as the expression of sorrow and regret. The final stage in what he calls the 'equation' of the apologetic speech act is the response of the injured party. They might

¹³⁴ Nicholas Tavuchis, *op. cit.*, p. 22ff.

¹³⁵ As I will set out in chapter 4, a similar requirement exists in Jewish practices, as set out in Maimonides' prescriptions for complete *teshuvah*, which requires a full inventory of the wrongful acts and an acknowledgement of responsibility for them.

“accept and release” by forgiving, refuse and reject the apology, or acknowledge the apology and defer their decision.¹³⁶

His analysis assumes that the objective of the apology is to attain forgiveness. In Austin’s terms, the successful or happy performance of apology involves securing a certain *uptake*, which in the case of apology would be forgiveness.

At first glance, this relationship between apology and forgiveness seems to hold in the class of articulations I set out. As we saw, the apology is often framed in precisely these terms: as the request for forgiveness. If, however, one looks to the actual circumstances in which political apologies are given, this link seems more rhetorical than empirical. The easiest way to see this is to ask what a successful uptake would look like? If the objective really is to attain forgiveness, then who would grant it, and how? Would it be another act of representative speech given on behalf of the victim group?

Quite apart from any practical problems of representation (who is authorized to speak for the victim group?), this type of uptake is often precluded by the more fundamental problem that the injured group has dispersed or no longer exists as a group. This of course throws into question to logic of the act itself – how can one ask forgiveness from (or even apologize to) a certain group if there is no substantive group on the other side?

¹³⁶ *ibid.* p. 23.

To avoid this problematic conclusion, one needs to differentiate between those identity requirements relevant for the purposes of being the referent of the apology and those for granting forgiveness. In the former the group need only operate as a subject in a story; in the latter it actually has to *act* as a group *now*. The former is clearly far less demanding and its very minimal requirements need not and often do not translate into the degree of contemporary coherence or organization sufficient to provide a definitive uptake.

Indeed, if one looks to the actual apologies, one sees that the rhetoric of seeking forgiveness is not matched by an expectation of actual forgiveness. Despite the extensive orchestration that goes into the linguistic formulation and performance of apologies, in not one case was the scenario managed to structure in an act of corresponding forgiveness by, for example inviting (and perhaps prepping) a representative of the victim group to complete the apology with their forgiveness or refusal to forgive.¹³⁷ This is not to say that individuals or representatives may not have some response at a later time, but those responses take place independent the ritual itself.¹³⁸ One has to conclude from this that forgiveness by the victim group is not the principle type of uptake relevant to determine whether the performance of a political apology had been happy or successful, at least from the point of view of those who stage the apology.

¹³⁷ In Canada, the five indigenous leaders were invited and handed scrolls of the reconciliation statement at the ceremony on Parliament Hill in Ottawa but not given the opportunity to respond verbally.

¹³⁸ Four of the five representatives in Canada later dismissed the apology as being too weak.

This is not to deny that the victim group may be a key participant in the conversation, nor that the speech act of apology does not impact on their status in the political space occupied by both groups. Their presence in the conversation is however, primarily on the other side— as the main or first advocate for the apology, the one who requests an apology. In this sense, the apology can constitute a form of recognition of the group and the legitimacy of its claim even if the apology does not require their positive response.

This suggests the more far-reaching hypothesis that the primary target of the speech act of the political apology is not the victim group at all, or certainly not the satisfaction of some need that the victim group has. Linking this with Austin's categories, if one asks what type of *perlocutory* act a political apology is – what one is doing *by* apologizing, it seems that one is not, primarily seeking to evoke forgiveness from the victim group. How then would one describe its perlocutory force?

Again, going back to the apologies themselves, two main themes appear. In some, for example German Chancellor Rau's apology in Israel or Clinton's in Africa, the speaker referred specifically to a shift in the relationship between the groups, a greater binding between them. In others, not even the relationship seemed primary – rather the speaker underlined the moral status of the political community in whose name he was speaking. Thus, for example, even as they acknowledged that France, Austria and the members of the Church had committed grave wrongs against certain groups, Chirac, Klestil and the Pope all insisted upon and thus reinvoked the 'essential' identity of France, Austria and the Church as morally upstanding communities. In the act of apologizing they once again

performed, and thus affirmed that the historical community and the ideal community coincided.

In this sense, political apologies, including the request for forgiveness fall more squarely in the Austinian category of *commissives* – a category in which he includes promising, covenanting, contracting, declaring an intention, dedicating oneself to and declaring for. This is certainly consistent with the sixth form of speech listed here – articulating and committing to a different future. Indeed, if one looks beyond the rhetoric of the apology itself to the broader institutional context, one sees that they are always located within some more comprehensive project of moral reconstruction. Again, this is not to say that the status victim group is irrelevant to the apology. Their relevance is however not in their power to give or withhold the uptake that would form the third stage of the successful apology. Rather, they form a necessary part of the story through which the perpetrator group performs its transformation, a transformation which is effected through its redefining the status of the victim group: we treated them abominably then; we redeem ourselves by treating them respectfully now (the apology) and therefore we experience and show ourselves restored to our ideal normative identity.¹³⁹ The victim other is a necessary part of the speech act in so far as they form part of the drama where the ethical status of the dominant political group is tested, assessed and exhibited.

¹³⁹ As I will discuss below, a full performance of the act may entail further acts of political recognition and ethical action.

This reframing of the role of the victim also makes sense of what now seems to be an anomalous inclusion of the request for forgiveness. The perlocutory force of this plea to the other is not to evoke a response. Rather, by begging forgiveness one is making oneself vulnerable to the judgment of the wronged other, now showing oneself standing before the wronged other with a countenance of shame and humility. The judgment itself is less important than the act of submitting oneself to judgment. The request for forgiveness, and even more begging for forgiveness, combined with an acknowledgment of the others' suffering is a way of performing one's own reformed status. Nowhere was this more poignantly demonstrated than in the image of the German leader, the one occupying the same symbolic position as the leader who had made Jews into nothing, getting down on his knees before the symbol of the Jew. When I beg the one who I have harmed and dominated for forgiveness, I am giving over my previous immoral identity not only substantively but also formally. The position of submission, as much as the content of the words, signifies and performs this shift.

This analysis implies that contrary to the initial impression that the speech of apology gives, political apology works more as a commissive than as a behabitive: it commits the subject (here a political collective) to a certain course of action, or more accurately a certain moral identity. *In* apologizing one is announcing or promising to be a certain way, to be committed to certain moral principles – principles that in turn have implications for permissible action within the political realm. This characterization successfully subsumes the basic variations in linguistic formulation – acknowledging the wrong, taking responsibility, begging forgiveness, saying sorry and articulating a different future can be

reframed as components of this performance of a promise or commitment. This is not to say that the other illocutory dimensions are absent. In fact, their continued presence is what makes the political apology so confusing.

IV. 3 Happy and unhappy apologies

Apologies will also differ in their strength and their ability to achieve their ideal illocutory and perlocutory force. Several performative defects can stymie the success of apology. It will be valuable to keep these in mind when thinking about how actual apologies play out on the political stage.

Speech act theory again provides some particularly useful analytic tools for evaluating apologies. Most fundamentally, Austin originally observed that as performatives, apologies are not appropriately assessed as true or false. Rather, he suggested that they can be evaluated according to the dimensions of ‘happiness’ or ‘success’ and went on to articulate the conditions for success.¹⁴⁰

His set of conditions for a performative to be happy or successful still provides the most useful starting point elaborating the terms of this assessment. The first four are that:

- * There must be a conventional procedure including the uttering of certain words by persons;

¹⁴⁰ This does not mean truth is completely irrelevant. One could for example make a false statement within an apology by, for example misrepresenting historical facts.

- * In the actual delivery or performance the circumstances and the persons have to be appropriate to that convention or procedure;
- * The procedure must be executed correctly by all participants;
- * The procedure must be executed completely by all participants.

Austin terms the failure to meet these criteria *misfires*, meaning that if they are not met, the speech act is not achieved.

He then lists two further criteria for success, which need not be met for the speech act to be achieved, but which are necessary for it to be considered genuine or, if not achieved render the act hollow. These he calls *abuses*:

- * If the procedure involves the expression of certain thoughts or feelings or the initiation of certain actions, the speaker must have those thoughts or feelings or a genuine intention to carry out those actions and;
- * Where the speech act initiates certain actions, the person must carry them through.

In chapter 6, I will come back to think through how these criteria of success apply to the political apology and use them to probe why apologies are more or less successful. At this stage, I want to draw particular attention to the assumptions we will tend to make about the application of these last two criteria, the abuses. In the same way as I criticized existing sociological and political theory approaches for assuming that the basic template for assessing the political apology was the individual form, one can see here how the

application of traditional speech act theory conditions our expectations about political apology.

First, the idea that an apology involves certain feelings and requires certain actions translates into the expectation that in the absence of such authentic feelings, a political apology is fraudulent. But then the assumptions that speech act theory would bring to bear place us in the same dilemma as Rolph Trouillot's formulation. If authentic feelings are required, a polity cannot apologize, period.

Second, even as Austin insists that apologies are performatives, bringing about a certain state of affairs themselves, this last condition can easily reduce the apology to a constative, a signifier of the real action taking place elsewhere. This tendency to understand the apology as a mere signifier – a tendency that emerges from speech act theory itself, and to lose sight of its distinct performative potential will be a recurrent theme through this dissertation.

V. The analytic gap and finding a method to explore it.

Evidently, the treatment of the apology to date has too quickly assumed the very questions we need to be asking to explore the phenomenon and exploit its rich potential as a door into broader questions about the nature of political action and responsibility.

This dissertation invites the reader to suspend the assumed definitions that inform interpretations and assessments of the political apology. Assume rather that we do not yet know what type of act the political apology is, the particular objectives the ideal apology

would achieve - and ask rather what those are.¹⁴¹ To make space for this broader questioning requires a fresh exploration of the different types of apology that form the background, or the interpretive grammar from which the contemporary practice draws.

In contradistinction to the virtual dearth of conceptual analysis or institutional experience of collective apology as a distinct type of action in the sphere of politics, the sphere of religion, and in particular Judaism and Christianity provides copious reflection and institutional experience. Here, sacramental public and collective apology are not a derivative of the individual, internalized repentance but exists a distinct *sui generis* form that has the subject of long and extensive conceptual elaboration and institutional experience. Moreover, and particularly powerfully for this analysis of the apology in the sphere of politics, this form of sacramental apology is not concerned with cleansing the individual soul via confessional speech but is primarily concerned with the normative constitution and formation of the community. In this sense, they are already intrinsically political.

This reappraisal of the political apology then provides the basis for critiquing the second assumption - that modern political collectives operate according to a certain logic or that only certain types of institutions are compatible with modern secular politics and justice. The repertoire of political action that modern political forms make available is very spare when it comes to this type of symbolic performative action. And, as moderns attached to

¹⁴¹ This statement already raises questions about how one understands “the meaning” of social practices, and specifically, whether one understands meanings as actor intention or objectively held in the practice itself. I will return to this methodological conundrum below.

the idea that *real* political change or real justice can only occur through certain types of institutions (punishment, economic exchange and even individual internal transformation), we are cynical about performative symbolic action. The very idea of performative ritual suggests hypocrisy. Authentic political action must have content – either internally in the form of the ‘real feelings’ (at the individual level) or externally as substantial action – punishment, compensation or amendments to the law.

The emergence and sustained use of an apparently ‘unpolitical practice’ evidences both the breadth of the political beyond these assumed boundaries *and* the failure of contemporary political theory to adequately take into account the role of ritual and performative action in the work of justice and the formation and normative reconstitution of political community. As well as formal laws and constitutions that establish the polity, regulate public action and mediate the attribution of individual responsibility, a political community requires symbolic ascriptive acts, through which it declares and binds itself to the principles of right which provide its political identity and orient its public behavior. In this regard, Marc Gopin writes of the Middle East conflict: “Although the West has long been attached to the rational-actor mode of decision making, it is important to recognize that formal ceremonies can solidify emotions and moments of transformation in ways rational dialogue can rarely achieve.”¹⁴²

¹⁴² Marc Gopin, “Judaism and Peacebuilding in the Context of Middle Eastern Conflict”, in Douglas Johnston, (ed), *Faith Based Diplomacy*, Oxford University Press, 2003, p. 93.

The previously latent repertoires of meaning and sacramental institutional forms such as the collective apology emerge in response to this shortfall in the institutions of justice that traditionally ‘belong’ in modern secular politics. Then, once they enter the repertoire of political acts (as they did when Brandt first knelt down in the Warsaw Ghetto) they are further elaborated as distinctly political forms of action.

The remainder of this first chapter lays out the methodological approach I take in examining the significance of apology: a redemptive critique in the spirit of Benjamin - a sea dive to pull up to the surface a range of meanings which, while obscured by time (or otherwise), continue to shape understanding and practice, and which can illuminate the visible phenomena.¹⁴³

V. 1 The “meaning” of social practices

The appropriate methodological path to uncover the meaning or significance of apology will be the one fitting the type of practice it is. As a social practice, it does not lend itself to abstract philosophical or linguistic deduction (like an analytic concept), but rather accrues its meaning through its socially contextualized usage. The significance of apology accrues through its being used, interpreted and transmitted in concrete social

¹⁴³ In her introduction to Walter Benjamin’s *Illuminations*, (Harry Zohn (trans.), New York, Schocken Books, 1968, p. 38.) Hannah Arendt quotes Shakespeare’s, *The Tempest* (1,2):

Full fathom five thy father lies,
Of his bones are coral made,
Those are pearls that were his eyes.
Nothing of him that doth fade,
But doth suffer a sea change
Into something rich and strange.

Unfortunately, other than suggesting the vagaries of “*flanneurie*”, wondering without direction, Benjamin offered little counsel as to how to conduct such an archeology.

contexts. Also, apology is an intentional practice; that is, a person or institution apologizes in order to obtain some higher order objective (healing, reconciliation, release from obligation and so on) which they both value and want to achieve, and which they believe can be effectively achieved by an apology. This means that its particular historical signification will depend on how the actors giving, receiving *and* witnessing the act assume or select from the repertoire of potential significations.¹⁴⁴ The meaning of apology is located in this movement between the objective or ‘fixed’ and subjective or ‘contingent’ poles.¹⁴⁵

The picture is complicated still further by the vast historical sweep of its usage, and by the range of situational contexts in which people apologize - in personal encounters, in religious systems, and now in politics. Certainly, there are signs by which an apology is recognized, most prominently the verbal expression “I/We am/are sorry”,¹⁴⁶ and at least the presence of the subject giving the apology and an issue for which the apology is being made. Someone (or ones) is always apologizing for something.¹⁴⁷ But it is not clear how apologies in the different contexts are related, whether there is a basic form of apology

¹⁴⁴ I intentionally leave open the possibility that the meaning of apology exceeds the subjective understanding of the actor. What the practice means, and what it means to the one apologizing, must be kept distinct.

¹⁴⁵ The terms fixed and contingent are problematic here, and used so as to indicate two tendencies rather than two absolutes.

¹⁴⁶ As is evident from the examples given above, however, even this is subject to variation. Does one count the request for forgiveness, or the expression of deep regret as apologies?

¹⁴⁷ Tavuchis places a greater emphasis on these structural aspects. He says, for example: “The heart of apology consists of a speech act that responds to a compelling call about something that can be neither forgotten nor forsaken”, Tavuchis, *op. cit.*, p. 34. As I shall argue, I find his structural characterization too narrow.

and variations, a historical genealogy, variations with a family resemblance or distinct types of apology in each sphere of application.

This all means that understanding the significance of apology in the contemporary political context will require a good deal of methodological flexibility. Clinging to the pole of fixed significations will be overly rigid; but one cannot throw meaning up to the utter contingency of the moment. Rather, meaning lies in this play between determinism or historicity and contingency - or as Bakhtin framed his understanding of linguistic acts: it is in part constituted through its historical trajectory, but it is always “unfinalizable”.¹⁴⁸ Understood in these terms, particular apologetic practices draw their meaning through what we might call, again borrowing from Bakhtin, ‘genre contact’ - creatively assimilating and transforming the organic logic of the genre to which they belong.¹⁴⁹

¹⁴⁸ “For Bakhtin, discourse is never either purely objective, as it is for the mainstream linguistic tradition, or purely subjective, as it is for the Romantics; it is always ideologically dialogized, bringing collective ideological structures and tonalizations into each individual's speech and individual accents into collective ideology, speaker into listener and listener into speaker in a continuous recycling of personally and socially accented or inflected words. Bakhtin stresses the groundedness of all speaking *between* speaker and listener in the dialogical interchange that mediates between them and generates out of that mediation community. If language speaks us, it speaks us as social, as internally and externally dialogized; it “double-voices” us, and we each other, as (inter)active, participatory, transformative events in an ongoing exchange.” See Gary Saul Morson and Caryl Emerson, *Mikhail Bakhtin: Creation of a Prosaics*, 1990; and the essays by Emerson, Stewart, and Holquist in Morson, ed., *Bakhtin: Essays and Dialogues on His Work*, 1986.

¹⁴⁹ Cf. Bakhtin, Mikhail and Pavel N. Medvedev, *Problems of Dostoevsky's Poetics*, C. Emerson (ed. and trans.), Minneapolis: University of Minnesota Press, 1963.

V. 2 Discourse theory

Discourse theory, as articulated in contemporary sociology/anthropology provides useful language for framing my theoretical approach. Using this terminology, apology is best understood as a discursive practice.¹⁵⁰ By the latter I mean that it has a linguistic structure which organizes action and actors according to particular logics or patterns, and which is carried but also transformed by the use actors make of it and the institutional forms it takes. This is not equivalent to saying that it has an objective structure that lies outside actors and mechanically organizes their understandings and actions. That would be old-style objective structuralism. Rather, discursive meaning refers to some thematic patterns or logics (of which there may be more than one), while rejecting the rigidity of structuralism and the abstract timelessness assumed in a pure philosophical analysis of the concept. At the same time, it does not imply that meaning resides entirely in the subjective state of mind of the actor who uses a concept or adopts a practice, thus collapsing meaning into pure individual subjectivism. Nor can it be captured in a particular institution or historical instantiation. It rather implicates persons and institutions as active transmitters and transformers of meanings of which they are not the unique source.

¹⁵⁰ The approach I am adopting here is influenced by the practice or interpretive approach in anthropology and sociology, which was initially developed precisely as a “third way” to cut through the untenable objective/subjective dichotomy which had plagued those disciplines. For a full elaboration of the “practice approach” I am taking see Sherry Ortner, “Theory in Anthropology since the sixties” in *Comparative Studies in Society and History*, Vol. 26, No. 1, 1984; Diane Crane (ed.), *The Sociology of Culture: Emerging Theoretical Perspectives*, Oxford: Blackwell, 1994 and; Jeffrey Olick and Joyce Robbins, “Social Memory Studies: From “collective memory” to Historical Sociology of Mnemonic Practices”, *American Review of Sociology*, 1998, 24: 105-40.

Where a concept or practice has a discursive structure, neither the subjective and objective, nor the abstract and instantiated dimensions can be abstracted from one another *because the practice is formed through their practical relationship*. Applying this framework to the analysis of collective memory, for example, sociologists have argued that it is neither an entity created or composed by experience and history, nor an independent entity that creates and composes history and experience. Rather the terms stand in a dynamic and mutually constitutive relationship with each other. Discussing collective memory in this frame Schwarz' metaphor captures the interactive quality I have in mind: "[it is] both a mirror and a lamp - a model of, and a model for society".¹⁵¹ Similarly, adopting a discursive or practice approach to political culture, Olick and Levy write: "[T]he relationship between remembered pasts and constructed presents is one of perpetual but differentiated constraint and negotiation over time, rather than pure strategic intervention in the present or fidelity to (or inability to escape from) a monolithic legacy....exigency and commitment, interest and ideal - that is, myth and reality - are not entirely independent logics. They are two sides of a coin, mutually constitutive and, at the limit, each non-sensical without the other."¹⁵²

If apology is conceptualized in this way, it can neither be read exclusively in concrete practices, nor distilled exclusively through normative analysis, each independent the other. Rather, the normative definitions and empirical material must be held - to borrow

¹⁵¹ Personal communication, reported by Olick and Robbins, *ibid.*, p. 124.

¹⁵² Olick, J. and Levy, D., "Collective Memory and Cultural Constraint: Holocaust Myth and Rationality in German Politics", *American Sociological Review*, 1997, Vol. 62 (December: 921-936), p. 934.

Rawls' phrase - in reflective equilibrium. The proper analysis of a discursive social practice, as I have defined it will comprise a dynamic movement between these two poles of orienting norms and institutional practices. Analysis of particular practices becomes the occasion for revising, expanding and adjusting orientations or types initially identified.

To illustrate what I have in mind, consider the jurisprudential analysis of punishment in the criminal law system. When normative legal theorists try to answer the question, 'what is punishment?', they begin by articulating the proper objectives of criminal prosecution, thus leaning to the pole of absolute meaning. Their disagreements concern whether its fundamental objective is retribution, sanctioned vengeance, general or specific deterrence, incapacitation or the generation of authoritative norms.

Their debates allow one to enter deeply into the significance of punishment vis a vis theories of justice, but the problem with this purely normative approach is that it abstracts from actual contextualized institutions. The realist critic, leaning to the side of contingency, then asks why not simply stick to punishment as it actually exists in real institutions and construct a definition on the basis of a set of unmediated observations. The problem with this 'natural science' methodology, with its promise of unmediated data gathering is that if rigorously applied, it could not produce anything that looked like a meaningful definition. Without some interpretive frame which tells one what to look for and which provides a hermeneutics of reading institutions, the search would amount to no

more than a statistical inventory of properties. Moreover, even assuming for the sake of the argument that one could, through inductive reasoning, abstract the definition of punishment, it would lose its critical edge and could in no way be used to evaluate institutions. If an institution that called itself punishment failed to conform to the definition, it would be the definition, and not the institution that would fall short and have to be adjusted.

The significance I am looking for is more than a description - apology as a form of address (or punishment as putting people in prison or inflicting pain), but also comprises a normative component - the ideal types or basic logics of apologies. At the same time, because the meaning of apology is a social fact, it is through examination of the institutions or historical instantiations, and through what people think about those historical instantiations that normative conceptualizations are generated. The point is that one needs a hermeneutics for reading those institutions and practices.

But doesn't this just return us to the initial dilemma? On the one hand, I have rejected an entirely abstract analysis of the apology as a normative concept and insisted that it is only possible to distill its meaning in its applied contexts. On the other, the very act of reading historical instantiations, making sense of them and abstracting from them assumes a certain interpretive frame, already informed by a set of normative understandings of apology. Yet, the point of looking to the historical instantiation was to expand and revise those frames and the repertoire of interpretations with which one approaches the reading

of history. The discourse approach offers a way out of this apparently vicious methodological circle by insisting that these two moments co-constitute significance.

In practical terms, a typology of apology, as a discursive practice, can best be distilled by (a) identifying the basic themes, logics or “working templates”, (b) looking at instantiations of apology across a broad historical sweep, and (c) moving back and forth between these two so as to adjust the conceptualizations.

The first methodological decision is how and where to identify the systematic patterns, or basic grammars of apology – the ‘historical accretions’ that provide the repertoire from which historical actors draw.¹⁵³ In the case of political apologies, one finds these patterns in the stories, histories and practices of apology and repentance in Judaism and Christianity. These bodies of religious history/practice and conceptualization provide key domains in which we can locate the basic genre types from which contemporary practices draw significance. I will return to the question of why it is *these* bodies of practice and conceptualization (and not others) that are fundamental below, but first, it is important to be clear about how I conceive the relationship between these ‘historical’ practices or spheres of action and the meaning of contemporary practices.

¹⁵³ Applying Bakhtin’s ideas to the context of social memory, Olick refers to the material from which the actors in a particular context draw their meanings as “historical accretions - the results of long developmental processes as well as of relational contexts rather than formally defined features of an atemporal system.” Jeffrey K. Olick, “Genre memories and memory genres: A dialogical analysis of May 8, 1945 commemorations in the federal republic of Germany”, *American Sociological Review*, June 1999.

V. 3 History as story, religion as story

*“To articulate the past historically does not mean to recognize it ‘the way it really was’ (Ranke). It means to seize hold of a memory as it flashes up at a moment of danger.”*¹⁵⁴

The patterns of meaning developed through historical practices and can be identified by looking at historical instantiations and the conceptual elaborations that accompanied them. But, the model at work here is not genetic and this is not an exercise in the socio-scientific derivation of meaning. Meaning does not move from these real, foundational, essential events and then down across (linear) time through objective historical developments and deviations to determine how social practices will work or what they will mean. In the discursive model, patterns of meaning develop through historical instantiations and institutions and some of those patterns are persistent and *generic*. These patterns or tropes form a repertoire of meaning, but the way in which actors in a particular and novel historical context take up that repertoire will depend at least as much on their conditions and what they do with them as on the content of the repertoire itself. In this sense, their means of transmission is more like story-telling than it is genetics and the relationship between the different sites of apology is metaphoric, not foundational.¹⁵⁵

¹⁵⁴ Walter Benjamin, “Theses on the Philosophy of History”, in *Illuminations*, Hannah Arendt (ed.), Harry Zohn (trans.), Schocken Books, New York 1969, p. 255.

¹⁵⁵ As distinct from the claim that the political apology is essentially, or at its core religious with other layers of meaning applied at the periphery. One might still see meaning as deriving from some psychological property of human beings. One Jewish teaching suggests a way of avoiding the question of origins altogether, by positing *teshuvah* or repentance as one of the things which preceded the creation of the world. My approach leaves the matter of “foundations” or ultimate source open. This also leaves open the possibility that there are a set of meanings of apology which stem from more universal principles regarding human relations and human community, and that it is these which one comes to by looking at their religious manifestations. This would support the argument that apology as it has arisen in Japan, for example, a country which does not have a predominantly Judeo-Christian history is based on similar tropes.

The literary conception of the transmission of meaning provides a far better model than the social scientific model and there is good precedent for its application to precisely this type of exercise in, for example Freud's and Hegel's use of Greek tragedy. To make sense of the patterns of family relations and the development of the psyche Freud looked to Sophocles' *Oedipus Rex*. To map competing conceptions of justice Hegel looked to *Antigone*. They understood these stories as archetypal moments or representations in which one sees, stripped of all obfuscation, fundamental patterns of human social behavior or key turning points or transitions in which old patterns are displaced and new ones institutionalized. A number of political philosophers wrote about *Antigone* because they recognized in it a core structural tension between civic conceptions of justice on the one hand, and the requirements of familial/traditional loyalty and obligation on the other. Jurisprudential philosophers similarly have recognized the vengeful underpinnings of civic conceptions of justice in the dramatic tensions of Aeschylus' *Eumenides* (the third play in the *Orestes* cycle). These sources have persisted in holding human attention through the millennia precisely because they provide such a stark and resonant portrait of the essential quality of an important concept or practice. And they do so with a clarity inaccessible to us as we look out from within the messy particularity of our own lives. One sees in them the core mnemonic patterns of a practice or concept stripped back and illuminated. As such, they provide the rich mines for meaning.

It is with this understanding that I turn to the stories and histories of the apology in Judaism and Christianity. The prose, the gestures and the rhythms of religious apology provide the templates that create the very possibility of later apologetic performances.

Religious text, interpretation and practice are bodies tell and retell, in word and ritual action, these basic tropes or patterns, and I visit them by way of listening out for significant themes.

In fact, this way of understanding the way in which text and practice transmit meaning or inform history is a familiar hermeneutic technique for understanding religious historical story and practice. The Akedah, for example, the story in which Abraham is on the verge of sacrificing his son Isaac, is read for the way in which it poignantly captures something essential about the tension between faith in a transcendent being and our deeply felt human attachments.¹⁵⁶ Or the story of Adam and Eve eating the fruit from the forbidden tree is read to understand something persistent about human beings' struggle for radical independence. It is not because these stories *actually happened* at a more 'real' or powerful time that they tell us something about our tendencies in thought and action, but because we continue to tell them.¹⁵⁷ If asked to make sense of a contemporary act of "giving in to temptation" or sacrificing the personal for the absolute higher calling, one might look to these Genesis stories, not as the histories of blood relatives whose behavioral patterns we inherited though a genetic blue print, but as stories of patterns enacted across human history.

¹⁵⁶ In Islam, it is Ishmael, not Isaac who Abraham is asked to sacrifice.

¹⁵⁷ Of course, there are other religious hermeneutic traditions that do not draw this distinction but see biblical text as a literal report of the past events.

So too, in relation to practices and stories of apology in religious history, without discounting truth value altogether, the most important question in this context is not whether the stories are about actual events or historical instantiations of the practice. What is important is the persistence of the story and the practice, and their continued hold on human imagination. As Benjamin writes: "To articulate the past historically does not mean to recognize it "the way it really was" (Ranke). It means to seize hold of a memory as it flashes up at a moment of danger."¹⁵⁸ It is the meaningfulness of the story to those who continue to tell it, or practices to those who take them up in their own practice, and not their veracity in real historical time that attests to its significance as a site of generic meaning.

One of the real advantages of this discursive model is that allows for and explains the indeterminacy or flexibility in the way meanings will coalesce in a particular context. In this case, the patterns of meaning of apology developed in the context of religion provide a very important part of the available repertoire of meaning, but they do not provide the limits or determine the full substantive content of its future use. At different historical moments, different parts of the repertoire will enter the popular lexicon (i.e. people will understand apology and use it in certain ways). Also the repertoire is not closed to *this* set of meanings but is open to sources or sites other than these religious bodies and will change through new historical instantiations of the practice.

¹⁵⁸ Walter Benjamin, "Theses on the Philosophy of History", in *Illuminations*, Hannah Arendt (ed.), Harry Zohn (trans.), Schocken Books, New York 1969, p. 255.

An important implication of this method of reading religious history is that not only the content of the stories and practices, but the patterns of their dominance or marginalization also carry meaning. So the disappearance (and possible reappearance) of a part of “what actually happened” from history as it is told will be as significant in understanding the grammar of apology in contemporary practice as the presence of other stories. In fact, in my exploration of the apology in Christianity I find precisely such a disappearance of the public corporate apology, and its reappearance in religious practice and discourse at almost the same time as the emergence of the political apology.¹⁵⁹

V. 4 The centrality of religious sites

In his recent text on the politics of forgiveness, Jacques Derrida boldly asserts that “the Abrahamic memory of the religions of the Book” provide the background of meaning for understanding the contemporary practice.¹⁶⁰ His boldness aside, most readers require some further justification for this assumption that the meaning of the contemporary practice of apology in the secular sphere of politics is to be found in the sphere of religion. At the simplest level, they will surely want to know why turn to religion? This methodological uncertainty is exacerbated by the particular challenges this connection raises. If the tropes of meaning are primarily found in the sphere of religion, what does this mean for their infusion into a political practice?

¹⁵⁹ It was my reading about this archaic form, its disappearance and reappearance in the early 1970s that convinced me of the importance of looking to religious histories to understand the political phenomenon.

Looking to Judaic and Christian narratives is clearly a choice, both at the level of choosing religious, as opposed to other contexts, and at the more specific level of turning to Judaism and Christianity and not other religions. No doubt apology has been an important practice at other sites and in other bodies of story and practice, Greek mythology or tragedy, literature or psychoanalysis, as well as in other world religions. But there are compelling reasons for choosing these bodies of religious story and history as the sources of background meaning for the contemporary phenomenon.

First, the religious practices and understandings of Judaism and Christianity are not simply one site amongst others at which apology appeared; correlatively apology is not just one of many topics dealt with in these religions. Rather, apology and repentance lie at the core of religious ritual and self understanding in these two traditions.¹⁶¹ In turn, these two traditions are key sources for the normative and institutional frameworks and background beliefs and understandings in which contemporary Western societies operate and generate practices and interpretations.¹⁶² Judaism and Christianity are - irrespective

¹⁶⁰ "On forgiveness", in *On Cosmopolitanism and Forgiveness*, Mark Dooley and Michael Hughes (trans.), Routledge, London and New York, 2002, pp. 30-31.

¹⁶¹ In Judaism, *teshuvah* or repentance is said to have existed before this world took form, and repentance is said to be the most essential of the teachings of Christ.

¹⁶² This choice to focus on Christianity and Judaism and exclusion of other world religions, notably Islam, Hinduism and Buddhism is consonant with my focus on apologies in the West, where Judaism and Christianity form the dominant religio-cultural background. This does not mean that other religions also practiced in the West or transmitted through global intercourses do not also constitute potential sites and sources of significance. I am also not claiming that in the countries where political apology has been an issue Judaism or Christianity are the only important religious traditions. In fact many of the groups seeking apologies, Aboriginal peoples for example, belong to other traditions. In all cases, however, they have also been steeped in the Judeo-Christian system, and Judaism or Christianity provide the dominant religious background for the group on whose behalf the apology is made. Nevertheless, this methodological choice does place limits on the reach of my analysis. Thus, I do not include any analysis of the apology debates Japan, where

tensions between modern notions of the secular state and religious organization, rationality and faith - major parts of the socio-cultural frame within which modern political communities operate.¹⁶³ They are key sources of meaning in the mnemonic community of modern politics in the West.¹⁶⁴ Certainly, meaning accumulates and shifts in a diversity of sites, but, to paraphrase Schwarz, certain pasts are constitutive of meaning - and here, the religious past holds a dominant note.¹⁶⁵

More specifically, it is in these religious bodies, more than any other body of practice or institution that apology and repentance have been central and constituting tropes. One might go so far as arguing that as redemptive frames on human existence, apology lies at their core.¹⁶⁶ There is no human institution in which apology has been so central, or so prolific, both in practice and self-understanding as in these religious bodies.

neither Judaism nor Christianity have been dominant and where apology carries a very distinct socio-cultural set of meanings. Derrida, by contrast (referring to Japan) assumes that the Abrahamic tradition “imposes itself on cultures which do not have European or ‘biblical’ origins.” *ibid.* p. 31. A next step in this project would be to look at the apology in Buddhism and conduct a comparative study of apologetic tropes in other world religions. In this work, I limit myself to Judaism and Christianity.

¹⁶³ Once again, by rejecting the idea that culture is simply an aggregate pattern of the psychological orientations of particular actors, and rather seeing it as the symbolic dimension of a social situation, embodied in patterns of meaning and institutions, it is not required that a cultural form be subjectively embraced any particular actor.

¹⁶⁴ Here, I borrow Zerubavel’s notion of the mnemonic community and, “sociobiological memory”, that is, the notion that “being social presupposes the ability to experience events that happened to groups and communities long before we joined them”. Cf. Zerubavel, Y., *Recovered Roots: Collective Memory and the Making of Israeli National Tradition*, Chicago: University of Chicago Press, 1996.

¹⁶⁵ Schwarz made the claim that certain pasts are constitutive elements of political cultures in the context of discussing the institutional factors that produce political culture. See Schwarz, B., “Social Change and collective memory: the democratization of George Washington”, *American Sociological Review*, 56 (April) 1991. pp. 221-36.

¹⁶⁶ Judaic text teaches that *teshuvah* came into existence before the creation of the world (Pesachim 54a; Nedarim 39b). Further, Maimonides teaches that the location where David and Solomon built

The second justification lies in the quality of the political apologies themselves.

Despite their professed secular nature, contemporary political apologies are replete with linguistic and performative mnemonics harking back to religious metaphors and concepts. The language in which modern apologies are steeped is heavily religious. Both the major substantive terms - reconciliation, reunification, atonement, repentance, contrition, healing, forgiveness, wholeness - and the verbs which surround them - seeking, approaching, begging, redeeming - all come to us directly from or at least through religious traditions.

Indeed, in what was arguably the catalyzing act of the modern apologetic movement, the German Chancellor Willie Brandt, visiting the Warsaw Ghetto for the first time, spontaneously went down on his knees before the Memorial to the Victims of Nazi Oppression - his body, though not his words, gesturing repentance in a highly religious metaphoric frame.

This link has been accentuated by the fact that in a large number of cases, as noted at the beginning of this chapter, both the state and the church have been main actors in the ongoing apology debate. In some of those cases, including Brandt's *kniefall*, the Polish President's apology for Jedwabne and the apology from the Canadian Government for the treatment of Aboriginal peoples, the State's apology literally followed upon the church's

the Altar in the Holy Temple is the very place where Abraham built an altar and bound Isaac upon it, and where Noah built [an altar] when he came out from the ark, where Cain and Abel brought their offerings and where Adam the First Man offered a *korban* when he was created—and it is from [the earth of] this place that he was created. Thus the Sages have said: Man was formed from the place of his atonement. *Mishneh Torah*, Laws of the Holy Temple, 2:1.

apology, mimicking it, or at least borrowing its process to achieve its distinct ends. In other cases, notably in Australia and in several of the Holocaust apologies, churches and the state were both main actors in the ongoing debate. In several cases, South Africa being perhaps the best known, actors at the center of the apology and reconciliation movement have themselves been heavily and publicly steeped in religious life and undeniably informed by religious understandings.¹⁶⁷

Finally, it is uniquely in the sphere of religious practice that one finds the form of apology with which I am concerned here – public, collective apology. As distinct from inter-personal apology, which is usually taken as the background model, both the modern political apology and apology in Judaism and Christianity work with a collective subject. As I will discuss, this is not always the case in religious practice, and is certainly not widely known to be the case - but it is in these two spheres that we find an institutional predecessor to the collective apology.

What are we to make of this link between the religious and political spheres that the journey of the apology from one to the other implies? Many of apology's critics object on precisely this point and worry that the 'religiosity' of the apology constitutes an inappropriate violation of important boundaries between the religious and political (secular) spheres. One common response to the language of reconciliation and the use of

¹⁶⁷ This was also the case in Australia, where the head of the Council for Aboriginal Reconciliation, Patrick Dodson had been an ordained priest, and the co-author of the National Inquiry into the Forced Removal of Aboriginal Children, Sir Ronald Wilson, was a prominent member of the Protestant Church.

apologetic practice in contemporary political contexts, for example, has been that “its underlying ethic of forgiveness and reconciliation is distinctively Christian and therefore inappropriate to inject into the public sphere of a diverse and democratic society”.¹⁶⁸

From the point of view of my methodology, this type of criticism supports the hypothesis that contemporary apologies are linked with religious practices; but then also it raises normative/evaluative questions about the relationship between religion and politics and the problems that might arise if the “underlying ethic” of political apologies is drawn from the religious sphere.

V. 5 Religion and politics, tensions in political principles

The basic objection to the appearance of a ‘religious institution’ into politics is that this dissolves the boundary between the spheres, or turns politics back into religion. The reason this is such a problem is that the secularization of politics is considered a necessary condition for grounding universal human rights and securing basic principles of the liberal state such as equality of persons.¹⁶⁹ If one maps the progressive

¹⁶⁸ Elizabeth Kiss, “Moral Ambition Within and Beyond Political Constraints: Reflections on restorative Justice” in Rotberg and Thompson, *op. cit.*, p. 85. Kiss points out that this was one of the constant criticisms of the Truth and Reconciliation Commission in South Africa, and was explicitly acknowledged in the commission’s report. Kiss also usefully delineates several different meanings that this concern about the religious basis of reconciliation might have: 1. A fear that a minority (or for that matter majority) religious view is being imposed on a diverse society through the illegitimate use of coercive state power; 2. A concern that a state-sponsored institution (such as the TRC) is endorsing and imposing a religious view which is neither shared by nor necessarily comprehended to other citizens; and/or 3. A concern that as a religious ethic the idea of reconciliation or apology is relevant to personal but not civic or political relationships. p. 86.

¹⁶⁹ My use of the term secularization here should not imply that it is an unproblematic concept. Indeed, the assumption that secularization and modernization of politics go hand in hand and that this involves a complete exclusion of all things religious, including religious forms is one of the main points of contention in this dissertation.

development of politics in this way, then the “infiltration” of religion represents an erosion of the achievements of political liberalism. The concern that apology’s appearance on the political scene provokes is exacerbated by the fact that it is not the only instance in which we are seeing a religious discourse or traditionally religious practices entering political life.¹⁷⁰

The first problem with this objection is that it blurs the distinction between a genetic argument, which would make the apology essentially religious (with later apologies derivations of this essence) and the discursive argument that I am making here. Claiming that the collective apology developed in the sphere of religion does not make it an essentially religious institution. Nevertheless, even without the foundational claim, the particularity of apology’ history and specifically the fact that religious practice and understanding provided the primary context in which the mnemonics of the political apology took form cannot and should not be dismissed. The fact that Jewish and Christian practices have been the primary sites for the discursive elaboration of apology implies that, when transposed into the political context, it will still carry traces of that religious history.

The second problem with the objection, in its broad formulation, is that its sweeping defense of modern politics against ‘religion’ is completely undifferentiated and fails to

¹⁷⁰ By this I am referring to, inter alia, the recent moves in the United States to provide a more direct role in the provision of Government funded services through religious organizations, the greater role religious organizations are playing in political debates - for example in relation to genetic engineering, and the debate alive in Europe at the moment about the inclusion of references to God in a new European constitution.

specify which aspects of the sphere of religion ought to be excluded. Apology may have been a practice primarily associated with religion, but this alone says very little about how much and what part of religion comes along with its transposition to the political sphere (to say nothing of how the categories of the religious and the secular are understood here). There is a great deal more to religion than a set of thick beliefs or commitments that impede the institutionalization and enjoyment of equal citizenship and individual liberty to which modern political communities aspire.

It was this same failure to discriminate within the black box of 'religion' or religious discourse that led Rawls to insist that religiously oriented or sourced speech be excluded from public reason and public speech acts, at least with respect to fundamental political questions.¹⁷¹ Rawls contends that arguments or speech acts with a religious dimension do not meet the necessary criteria for public reasoning in a political space where people differ with respect to their thick moral commitments or thick identities because he assumes that engaging with them demands that the interlocutor share or reject the commitments of the speaker.

Rawls' concern here is with the substantive dimension of religious discourse and he does not address the question of whether speech that has a religious *form*, as is the case with apology, would be similarly ruled out. Let us assume, however, for the purposes of

¹⁷¹ Rawls treats this subject first in Lecture VI, "The Idea of Public Reason" in *Political Liberalism*, New York: Columbia University Press, 1996 and again in "The idea of public reasoning revisited" in *The Law of Peoples*, Cambridge, Mass.: Harvard University Press, 1999, pp. 131-180.

addressing the possible objections that would arise from Rawls' position, that speech that has a religious form is similarly inappropriate for the purposes of public political reasoning.

On first blush, this general rule of exclusion would seem to rule out apologetic speech. If, however, one looks more closely at how apologetic speech can be linked with more general forms of political reasoning, as I will do through this dissertation, it seems to fall within the exceptions that Rawls himself makes for where religious arguments may be admitted. Specifically, he allows that religious arguments may be introduced "provided that in due course proper political reasons" are introduced, which are themselves sufficient to support the position (a condition he calls *the proviso*).¹⁷² This proviso would seem to apply here, because the apologetic form can be explained in terms of the political values of equal recognition and respect for all citizens. The imperative of recognizing the legitimate claims of a group of citizens who have been systematically violated surely meets the duty of civility and presents itself in language that cannot be reasonably rejected.

If this is the case though, one might ask why introduce the problematic religious discourse in the first place? Why not just move directly to the neutral language of recognition? My answer, argued through looking in detail at the religious practices, is that the apologetic form resonates at levels that cannot be completely captured in a cognitive argument using the language of equal recognition. In this sense, its particular

¹⁷² Rawls, *The Law of Peoples*, *op. cit.* p. 152,

power is drawn from precisely this space, traditionally occupied by religion, which Rawls finds problematic. If one insists on excluding these levels of discourse, then the resources they make available cannot be brought in to strengthen the political project – surely to the detriment of that project. Of course, if those religious resonances involve thick and exclusive moral claims, they will be incompatible with the duty of reciprocity in a diverse political community. But this need and will not be the case where the values according to which the apology is oriented are *political* values – equal respect and equal access to the rights of all citizens. It might be if one was asking others to agree to apologize for contravening religious laws – but here, apology is oriented according to agreed upon standards of treatment or rights.

In a similar vein, Waldron points out how arguments that draw on Christian conceptions of social justice include politically fertile conceptions of just distribution (and not only references to passages in the Gospel) and as such can deepen commitment to precisely those political values.¹⁷³ When they are offered up to a diverse political community, non-Christian citizens not only can engage with the conceptions of justice they offer, but can be enriched by doing so – without in any way having to follow the further links into a theological system. Indeed, when he revisits the question of public reason, Rawls seems to make a similar allowance, recognizing that comprehensive doctrines that support reasonable political conceptions give those political conceptions “enduring strength and

¹⁷³ Waldron uses the example of the National Conference of Catholic Bishops’ “Pastoral Letter on Catholic Social Teaching and the US Economy” to raise more thematic objections to Rawls’ wholesale exclusion of religious argumentation, thus opening similar questions about the hard distinction between the sphere of religion and the principles of liberal politics that I raise

vigor” and deepen the commitment to these *civic* values by linking them back to their deeper roots.¹⁷⁴ In a similar vein (though for different reasons), Arendt, who is, as a matter of principle opposed to recourse to the absolute in politics, acknowledges that pre-rational forms of argument (such as Jefferson’s appeal to self evident truths), may be politically useful, if not necessary, to stabilize what would otherwise be a fragile commitment to political (reasonable) values.¹⁷⁵

Nevertheless, the concerns about mixing ‘religion’ and politics carry significant weight in contemporary political theory and public discourse, so require some detailed response. There are four distinct and in some ways incompatible objections to the introduction of apology as a ‘religious institution’. The first, exemplified by Rolph-Trouillot, is that apology, as a religious institution, assumes and erroneously imposes a model of a (deeply reflective and inner) subject onto the political collective. Note, this objection assumes that the trope of apology taken up from religion and into contemporary politics is the apology of the individual confessant bearing their soul - thus missing the public apology which was once so prominent in religious practice. In fact, this trope of the public apology in the sphere of religion was itself highly political. By providing a mechanism to practically and experientially link members of a community to the core principles constitutive of, and necessary to sustain that community, apology provided one of the key institutions for regulating public life and linking members of the community with its

throughout this work. Cf. Jeremy Waldron, “Religious Contributions to Public Deliberation”, *San Diego Law Review*, Vol. 30, 1993, pp. 817-848.

¹⁷⁴ Rawls, *ibid.* p. 153.

norms. The religious chapters are largely devoted to showing that this objection rests on an incomplete understanding of the different forms of religious apology.

Exposing this “other apology” - the public apology – renders this first objection off the mark, but it raises far more difficult questions about the relationship between the two types of politics and the more serious second objection. The problem here is not that the apology was “private” not political, or individual not collective, but that it is political in precisely the way that should be eschewed by liberal politics. The question is no longer, ‘can an apology be political?’, but rather, ‘what type of political principles or assumptions about political community, justice and identity does it entail?’ And are these normatively desirable from the point of view of contemporary political aspirations?

Looking through the lens of modern principles of justice and political order, the problem with the political form associated with the church was precisely that it insisted that the regulation of public life and the processes of governance were inseparable from a set of thick moral values, a relationship with the transcendent and an accompanying thick conception of identity. Presumably, all of these problems bear directly on the apology, because its work in the religious sphere was simultaneously spiritual (transcendent), moral and political – binding members of the community to the principles which constituted the community, defined its relationship with God *and* prescribed thick principles about the right way to live (the good). More specifically, public apology was most prominent in Christian communities precisely where the church played an explicitly

¹⁷⁵ Cf. Hannah Arendt, *On revolution*, Penguin Books, 1990, pp. 190-194. I take up Arendt’s

political role as the arbiter and administrator of rightful action. Under the authority of the church (as distinct from the liberal state) apology fused the public and private dimensions of persons. Norms institutionalized through religious apology engaged members of the church not only as public persons and members of an ordered community, but also in terms of their private and spiritual life.

From the point of view of the modern liberal state, where the private actions and deep spiritual commitments of individuals should be shielded from publicly regulated norms, the church's use of apology as a political tool to regulate members' intimate (private) and spiritual preferences and actions crossed the public-private and politics/faith boundaries in an unacceptable way. One could go so far as to say that the modern state most self-consciously defined itself via this distinction between its form of organization and the conflation between the ethical and the political that characterized the pre-modern institution of the church. A commitment to ensuring a protective space between the individual and socially sanctioned norms and identity is one of the core characteristics that define the modern liberal polity.

This characterization of apology is no doubt accurate of apology in the religious setting. But to conclude from the historical, contextual conflation of the private/personal, spiritual and public that this fusion is intrinsic to the form constitutes a logical error. There is nothing intrinsic about the apology as an institution for dealing with past wrongs that requires that the norms in question be thick or concerned with the regulation of the

ambivalent in detail in chapter 6.

‘private’ or spiritual sphere. My argument - that apology in the two spheres is formally or hermeneutically linked - is distinct from the question of whether the substantive content of that work is the same in the two spheres. By framing the link as formal not substantive and genealogical or generic not genetic, one can coherently argue that the meanings of the contemporary practice are drawn from and illuminated by their religious histories without being committed to the further claim that as they move into the secular sphere, apologies necessarily bring with them the thick moral commitments and relationship with the Absolute that they involved in their religious incarnation.

To give this some content, my argument is that apology *as a form* does certain types of work, some concerned with reconstructing the individual soul, some with reconstructing the normative framework of the collective, but that the *content* of this reconstruction is indeterminate. It may be the case that particular apologies are made with reference back to the Absolute or to thick moral commitments drawn from a religious mandate. Or it may be that the apology refers only to political commitments that are entirely the product of the political community itself, established with no reference to the Absolute and open to ongoing revision. There is nothing in the apology *itself* that requires that its reference or the content of norms around which it is organized be incompatible with the value pluralism or democratic values of modern political constitution. The apology is, in other words, no more than a form that allows individuals and collectives to do certain types of work required for reconstitution and reorientation. The object and content of that reorientation are not tied to the form itself.

This abstraction of the form from its particular substantial content does not, however put an end to the possible concerns. The differentiation between religious and modern liberal forms of political organization does not only bear on *substance* of the principles that should be regulated, but also the *form* of the relationship between principles, action and individuals. In particular, liberalism places paramount importance on the freedom and identity of the individual and eschews the collectivist ontology that characterizes religious communities. One of the main areas that this normative difference plays out is in the institutional priority on protecting the individual from blame for actions that he or she did not personally commit. The collective apology, which seems to attribute blame to the group per se is then consistent with the ontology that characterizes religious communities, but contravenes liberalism's fundamental norms.

This is a serious objection to the political apology, which goes beyond its religious associations, but is at least partially rooted in the ontological and institutional differences between the two spheres. It has to be answered both for practical/empirical and normative reasons. That is, for the collective apology to *make sense* in and to be *normatively acceptable* to modern liberal communities, the conception of collective responsibility that it implies will have to be consistent with the protection of individuals from wrongful attribution. Chapter two works out a conceptualization of collective responsibility consistent with liberalism's concern with wrongful attribution. Chapters 3 and 4 demonstrate that one can read the institution of collective apology in the religious sphere in terms of this conception. Chapter 5 looks at how this conception entered into the discursive elaboration of a contemporary political apology in the Australian case.

The final objection concerns the differences in style or modality of religious and secular political institutions. Apology as a rhetorical or symbolic act does not work in the 'substantial' media of modern forms of politics and justice. The words of apology are fine for the religious sphere, which allows and even insists that 'real' change takes place at the level of transcendent or metaphysical relationships (through sacramental or ritual action and speech). But in the world of secular politics, justice and political reforms can only occur through the 'hard' institutions of justice: punishment, compensation, constitutional or legal reform. In the de-sanctified world of modern politics, apologies are 'mere words' and their drama 'mere theater', meaningful or significant only to the degree that they point to and are backed by *real* action.

Rather than denying that apology is a rhetorical or symbolic act, this dissertation deconstructs the dichotomy between symbolic and real action. It further argues that modern secular politics, despite its self presentation, also works through the modality of symbolic action and requires its own sacraments to achieve core objectives such as the establishment, stabilization and restoration of the rule of law and political cohesion.

These two last and most significant objections then become the starting point for challenging certain assumptions about modern liberal politics. Rather than trying to harmonize the political apology with the secular political sphere by denying that it attributes responsibility to the collective or denying that it works as a form of sacramental or symbolic action, I am insisting that it does both of these things. And because it does both of these things in the secular political sphere, the sphere itself much have space for –

even require – the institutionalization of collective responsibility and symbolic sacramental action.

I turn now to locate the apology in the context of debates about justice and dealing with the past, and in particular questions about conceptualizing and institutionalizing collective responsibility.

Chapter 2: Justice, Identity and dealing with the past

I. Deconstructing the peace/justice dichotomy: the problem of recognition.

Apologies emerged on the political stage as part of the more general trend of political communities “dealing with the past”, or more specially, dealing with serious public wrongs of the past.¹ This chapter explores how the apology illuminates the most significant questions about responsibility for past wrongs, what it means to ‘deal with’ them, and how the different imperatives of ‘dealing with’ gross violation stand in relation with each other.

The now voluminous transitional justice literature generally frames its analysis of the different institutions and approaches to dealing with past wrongs in terms of a conflict between the deontological imperative of (retributive) justice and the pragmatic demands of peace. Recently, theorists of transitional justice have suggested that one can resolve this tension by viewing the different approaches through the lens of a higher order conception of justice as a constructive process.² Even then, the conflict persists between those strategies oriented to particular acts of wrongdoing and individual wrongdoers and victims and those that attend to the broader social patterns that underpin systematic violations. This distinction often correlates with, but is not reducible to the justice/peace dichotomy.

¹ As indicated in chapter 1, this trend actually represents the thematic combinations of two somewhat different phenomena ‘transitional’ and ‘historical justice’.

Apology stands at the interface of these two fields. Apparently it attends (albeit insufficiently) to the specific wrongs committed by and against individuals and draws on what we tend to think of as an inter-individual discourse. Yet it also sweeps across individuals to account for the collective dimension of wrongdoing and victim-hood and to reconstruct the political collective. It seems to be at once a weak form of justice, in the sense that it involves the admission of wrongdoing, the assumption of responsibility and even a form of compensation, and at the same time a form of peace making or reconciliation, in the sense that it operates at the level of groups or identity based collectives.

This chapter takes the proliferation of apology as the opening to deconstruct the apparent dichotomy between ‘peace’ and ‘justice’ and collective and individual approaches. It does this by interpreting the specific acts of injustice as well as the ruptures in social peace or political integration in terms of the background political norms and specifically patterns of recognition or lack of recognition of groups in the polity. To fully understand the systematic mistreatment of a particular group, both extra-legally and through the law, one has to connect these wrongful acts to the background denigration of a collective identity.

Indeed, it is the failure to conceptualize this link between the specific wrongdoing and the individual who acted on the one hand and the political cultural norms of the political community which sustains them on the other that has made it so difficult for traditional

² Most notably Ruti Teitel, *Transitional Justice*, Oxford University Press, 2000.

liberal approaches to justice to write the collective into the story of responsibility and thus provide an adequate account of the necessary conditions for systematic wrongdoing. In turn, the political apology picks up this under-recognized dimension of justice through recognizing the legitimacy of the claims of the wronged and disrespected group, and acknowledging the role of the polity in perpetrating patterns of non-recognition.

Seen through the lens of identity, these two approaches also assume different conceptions of persons: on the one hand, as individual actors who choose to act in particular ways; on the other as members of a political and social group whose conceptions and actions are, at least in part patterned according to political cultural norms. I argue here that these two conceptions, so often thought of as mutually exclusive need to be held in creative tension in order to fully capture the production of systematic violations. Individual responsibility and collective responsibility do not form a zero sum game but co-constitute the necessary conditions for systematic violations.

Returning to actual situations of violation, in those cases where the wrongs are still acutely alive for members of the polity, the demands of individual justice will usually be so compelling that approaches that attend to the background conditions of wrongdoing will be experienced as little more than strategies for offsetting justice.³ And indeed, in many cases (for example the South African bargain) they are the outcome of pragmatic political agreements or attempts to avoid the harder forms of justice. Yet neither this phenomenology of injustice, nor the conflation of pragmatic and normative

³ In chapter 6 I will argue that this explains why apologies are more salient in historical justice

considerations should prevent us from seeing that these approaches point to and constitute an important, and frequently overlooked dimension of dealing with the conditions of wrongdoing.

II. Dealing with the past

1. Working through the past to the future

When people invoke the phrase, “dealing with the past”, they are making certain implicit claims about the power of action and interpretation in the present to alter the effect which events of the past have in the present and will have on the future.⁴ The psychoanalytic ring of the term is explicit in Adorno’s distinction between the faux “coming to terms with the past”, which would have us turn the page and wipe away memory, and an act of clear consciousness, a working through of the past which would free us to enter the future on different terms.⁵ Adorno’s metaphors are familiar and evocative - “breaking free of the past”, stepping out of the “shadow” of the past, “breaking the spell” of the past.

Writing forty years later in the context of the South African Truth and Reconciliation Commission, Cornel de Toit invoked similar spectral metaphors. He defined ‘dealing with the past’ as “an act of restoration and reinterpretation through which we redefine and

situations where the demands of individual justice are less acute.

⁴ I come back to questions of time and in particular Levinas’ treatment in chapter 4.

⁵ Theodor W. Adorno, “What does coming to terms with the past mean?” in Geoffrey Hartman (ed.) *Bitburg in Moral and Political Perspective*, Bloomington: Indiana University Press, 1986, from a lecture given by Adorno in 1959. Alex Boraine, formerly Vice Chairperson of the South African Truth and Reconciliation Commission adopted the same metaphor. See for example, Boraine, *A Country Unmasked*, Oxford: Oxford University Press, 2001.

reshape ourselves".⁶ Still in this latter context the rhetoric rings of individual psychology, but now it is applied to collective and institutional processes that are supposed to treat some remainder of the past so as to diminish or alter its ongoing effect on the future. Political institutions are now conceived of self-conscious interventions, designed to break the chain of effects that events in the polity's past would otherwise have had on its future constitution.⁷

In the recent years, the term has become a popular 'catch all' label, subsuming at once a range of mechanisms (truth commissions and reconciliation projects, international and domestic trials for human rights violations, reparations schemes, public memorials, lustration and apologies) and a range of wrongs (genocide, torture, disappearances, slavery, imperialism, race based medical experimentation, the removal of children and far beyond). This capacious classification does not annul the significant differences between these approaches, but thematizes them around this common construction of time – that is, working with the material of the past, but with an orientation to the future. This is true even in the case of justice in its apparently most deontological retributive form, as one sees in Kant's argument that the people who did not punish the guilty would bear the bloodguilt for the crime.⁸

⁶ Cornel du Toit, "Dealing with the past", in Botman HR and Petersen RM, Human and Rousseau (eds.), *To Remember and to Heal: Theological and Psychological Reflections on Truth and Reconciliation*, Cape Town, South Africa, 1996.

⁷ Note already the resonance with Hannah Arendt's conception of forgiveness as the sole means of bringing something new to an otherwise entirely determined history. Cf. Hannah Arendt, *The Human Condition*, New York, 1959.

⁸ This is frequently cited as the most purely deontological argument, because Kant is talking about a community about to disband, and thus whether or not the criminal is punished will not impact the

This familiar understanding of ‘dealing with the past’ no doubt resonates with the way we understand the range of strategies that now fall within its rubric, and the term is useful in so far as it allows us to view them through this lens of intertemporality. Yet as soon as one focuses more closely on the institutions - as diverse as apology and prosecution before an international criminal tribunal - and the wrongs - as diverse as slavery and colonization - the notion that they could be unproblematically subsumed under one general category seems absurd. Moreover, the implication is that they can be compared across a single dimension, and accordingly, that it is valid to ask the evaluative question: *how well do they deal with the past?* The singularity renders opaque the tensions between different, non-reducible objectives on which they are variously based. It also obscures background assumptions about the nature of persons, responsibility and identity at work in different conceptions of dealing with the past.

Very quickly, the political and legal debates about and conceptual analysis of institutional responses to past systematic violations focused in on the tensions between different approaches. Particularly in the early transitional justice debates and literature, the field was divided into approaches directed towards effecting ‘justice’ for past wrongdoing, and those directed to ensuring ‘peace’, rebuilding or consolidating political community.⁹ The

future community. It will nevertheless impact the individuals, who will, even on Kant’s argument, carry some damaging remainder unless they affect justice through punishment. Immanuel Kant, *The Metaphysics of Morals*, New York: Cambridge University Press, 1991, p. 163.

⁹ Interestingly, as I will trace here, the theoretical debate has moved in a spiral from the initial, undifferentiated thematization of the diverse approaches through identification and analysis of the conflicts and then to a higher integration within a more complex conception of transition as a reconstructive process.

former was characterized as a deontological moral imperative to do justice when injustice has occurred - to hold persons responsible for their actions principally by punishing wrongdoers, but also by compensating victims. The latter - 'peace' or 'reconciliation' – approach attended to the overall goals of social integrations and establishment of a functional polity. In its extreme form, this debate framed justice as pure Kantian deontological principle (*fiat justitia, et pereat mundus*)¹⁰, and peacemaking as pragmatics - a consequentialist compromise of justice in deference to the ultimate good of ensuring that the world not perish.¹¹ The more traditional forms of criminal justice – prosecution, punishment and victim compensation fell under the former; mechanisms such as amnesties, truth telling, apology, forgiveness and more symbolic forms of compensation fell under the latter.

This justice/peace dichotomy was also frequently conflated with the backward/forward looking distinction. However this alignment rapidly falls apart even within traditional theories of justice, which recognize that punishment (the most straight forward institution of justice) has both backwards and forward looking purposes. Moreover, the forward looking purposes are not just narrowly confined to individual and general deterrence, but include objectives that fit well into the peace side of the divide - ensuring that the community is cleansed of retributive (and thus destabilizing) impulses for example, and

¹⁰ "Let justice be done though the world perish". This was the motto of Ferdinand I, Holy Roman Emperor.

¹¹ Recall that for Kant, doing justice, punishing the wrong was a moral requirement, irrespective of the future state of the community. Even were the community to be on the verge of disbanding, according to Kant, murderers must still be punished.

reinforcing the rule of law by countering impunity.¹²

In this chapter I will provide the type of broad analysis of the necessary conditions for systematic wrongdoing that provides the most effective way of deconstructing this dichotomy. Before I move there, however, it is worth attending to the justifications and explanations offered by political actors and the early debate, which was framed in terms of this dichotomous structure. In these one can already discern the seepage across categories and locate where the tensions actually lie.

II. 2 The Justice/peace dichotomy.

The tension arose most conspicuously where states opted for transitional strategies involving general amnesties and so specifically ruling out prosecution of individual wrongdoers.¹³ In recent years there has been a strong push from international human rights agencies to protect local stakeholders from making deals that include amnesties.¹⁴

¹² Teitel points out that the justifications for punishment, and in particular the utilitarian or forward-looking argument is most apparent in the counterfactual case of impunity. Rather than asking what punishment or criminal trials achieve, one asks, what is the effect of impunity, and the projected answer is a failure to demonstrate the rule of law. Cf. Ruti Teitel, *Transitional Justice, op. cit.*, p. 28.

¹³ Peace negotiations constitute the other major class of case, not discussed here. For example, in the case of the former Yugoslavia parties to the negotiations were often persons otherwise classified as war criminals or perpetrators of genocide. Had they been indicted according to the strict demands of justice, the negotiations could not have proceeded. One might see these as a *de facto* amnesty. Of course, as we are seeing in the case of the former Yugoslavia, these players may be indicted, tried and punished at a later, more politically opportune time.

¹⁴ It was through the effects of the early amnesties and that the problem of legitimated impunity came onto the radar screen of the human rights community. Thus, for example, in 1999, when the Special Representative of the Secretary-General signed the Sierra Leone Peace Agreement he attached a disclaimer to the saying: "The United Nations interprets that the amnesty and pardon in article nine of this agreement shall not apply to international crimes of genocide, crimes against

However, all the transitions from military rule in Latin America in the 1980s involved virtual blanket amnesties, and the limited amnesty provisions in South Africa provided a mechanism for those guilty of the most horrific violations to avoid prosecution.¹⁵

Subsequent legal challenges to these laws well illustrate the choice they seemed to represent.

In the Biko case, for example, the family of ANC freedom fighter Steve Biko challenged the constitutionality of South Africa's amnesty law in terms of the imperatives of justice. They argued that by precluding the prosecution of the men who had violently tortured and murdered Biko, this law *prima facie* violated the imperatives of justice - imperatives which prosecution would presumably meet: "We all want reconciliation. But it must come with something. It must come with justice"¹⁶ as Biko's wife insisted. In its decision on this case, the South African Constitutional Court upheld the constitutionality of the amnesty provisions, but described the "agonizing balancing act between the need for justice to victims of past abuse and the need for reconciliation and rapid transition to a

humanity, war crimes, and other serious violations of international humanitarian law." The UN also commissioned a special Rapporteur to look at "The Question of the impunity of perpetrators of human rights violations (civil and political)" (See Report at E/CN.4/Sub.2/1997/20) and there have been a UN resolutions condemning political amnesties (cf. A/Res/44/162, Human Rights Committee General Comment 20 concerning article 7 and Human Rights Commission Resolutions 1999/32, o.p. 2 and 4 and 1999/34, paragraph 6).

¹⁵ Often cited as the ancient precursor of modern amnesties, a limited amnesty was declared in the transition in Athens following the defeat in the Peloponnesian War. Cf. Jon Elster, "A Case of transitional Justice; Athens in 411 and 403 B.C." Publication pending. The first prominent modern amnesty of this type followed the end of Franco's fascist regime in Spain. In recent years, a number of these amnesties, notably in Argentina and El Salvador, have been challenged not only before international tribunals, but also under domestic law, and their illegality has received some confirmation from the courts.

¹⁶ These were the words on Steve Biko's wife, reported in Tony Fremantle, "Crying for Justice,

new future.”¹⁷

Note how the court framed the balance: on one side is the goal of reconciliation or peace and the future, on the other the individual prosecution and justice for the past. The implicit assumption is that ‘peace’ was most effectively attained through a broad collective process outside the realm of criminal prosecution, and by extension that it required a sacrifice to ‘justice’.

At the more abstract level of analysis, in a widely read pair of articles published in the *Yale Law Journal* in 1991, international legal theorists Dianne Orentlicher and Carlos Nino line up their arguments behind these apparently competing objectives of justice and peace.¹⁸

These articles (and even the form of their publication as polemic) characterized the dichotomous framework taken for granted in the debates. Orentlicher, primarily invoking international law, puts the strongest case against amnesties as impermissible violations of the duty to prosecute gross violations of human rights. In response, Carlos Nino, both a legal theorist and former advisor on constitutional issues to Raul Alfonsin, President of

¹⁷ Searching for Truth”, *Houston Chronicle*, Nov. 18, 1996, p. A1.
Azanian Peoples’ Organisation and Others v The President of the Republic of South Africa, Case CCT 17/96, July 15, 1996, at 19.

¹⁸ Diane F. Orentlicher’s, “Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime”, 100 *Yale L.J.* 2537- 2615; Carlos Nino, “The Duty to Punish Past Abuses of Human Rights Put Into Context. The Case of Argentina”, 100 *Yale L. J.* 2619-40. Bruce Ackerman in his chapter “The mirage of corrective justice” in *The Future of the Liberal Revolution*, Yale University Press, 1981, also adopts this dichotomous forward looking/backward looking frame.

Argentina during the transition, insists that Orentlicher's deontological argument suffers for want of a real political context. Once the complex circumstances of political transition are taken into account, her absolute pronouncements in favor of pristine justice no longer hold. Sometimes the absolute of justice has to be sacrificed to the higher good of peace - a sacrifice which in fact, in the long run, creates the very conditions which will mitigate against the commission of more extensive injustices.

Certainly, as the amnesty example illustrates so poignantly, there were, from a policy perspective, real choices to be made.¹⁹ If one looks more closely however, the choices did not line up according to a clean conceptual opposition between justice and peace, backward and forward looking.

¹⁹ I leave to the side the fact that normative considerations are by no means the sole determinant of action. As Elster has pointed out, a range of independent variables concerning the political actors, the constraints on their decisions, their beliefs, their motivations and the mechanisms by which competing individual preferences are aggregated into a binding collective decision will be at work. See Jon Elster, "Coming to Terms with the Past", *European Journal of Sociolology*, (39) 1998, 7-48.

II. 3 Moves to mediate the justice/peace dichotomy

At the simplest level, the actual means towards achieving the apparently contradictory objectives did not always pull in opposite directions, but were in some cases complimentary. For example, mechanisms such as truth commissions seemed in the short term to replace or impede prosecution, but could in fact be considered a form of proto-justice. So, although they fell short of full-scale judicial proceedings, they did the important work of preserving evidence and producing authoritative narratives of wrongdoing that could form the foundations for full-scale criminal prosecutions once power had shifted sufficiently for this to be politically viable. This argument did not however actually mediate the tension, but only really showed how when practical impediments to prosecutorial justice were lifted (and normative considerations of justice trumped those of keeping the bargain), the products of the work undertaken to achieve the objective of reconciliation could be recycled for this new objective.

Pushing this line further, these apparently “peace building” or reconciliatory processes such as truth telling were re-framed as components of justice.²⁰ Specifically the exposure and shame which comes when perpetrators publicly admit their acts can be seen both as a type of punishment and as satisfaction for the victims whose unjust suffering is officially validated and who now get to see their former oppressors publicly humiliated.²¹ In the

²⁰ Teitel calls this the “limited sanction”, and argues: “Core retributive aims by the limited criminal processes are recognition and stigmatization of past wrongdoing... Wrongdoing that is publicly individuated, in and of itself isolates the perpetrator and liberates the collective in a measured process of transformation.” *op. cit.* p. 50.

²¹ In the South African case, for example, Archbishop Tutu suggests that public shaming acts as a form of punishment. Cf. Truth and Reconciliation Commission, *Final Report*, Cape Town, 29 October 1998, I, chapter 1, section 36.

Valasquez-Rodriguez decision, considered a legal landmark in remapping the relationship between amnesty and justice, the Inter-American Court held that the legal obligations arising from violations of the Inter-American Human Rights Convention could be satisfied through processes other than full-blown traditional forms of prosecution and punishment, including investigation of the crime and reparations.²² Similarly, the Chilean Truth and Reconciliation Report characterized truth as a form of “moral conviction”.

Besides this practical convergence, there were a number of signs that conceptually, the situation could not be mapped into a straightforward dichotomy. In making their case against amnesty for example, Biko’s family did not simply argue that a general forward-looking peace could not legitimately justify specific impunity for perpetrators of such gross injustice. They also claimed that peace built on such impunity (a failure in justice) was a flawed and unstable form of peace - one vulnerable to the negative effects of impunity such as unrequited retributive impulses and collective blame. With echoes of the Nuremberg justification that there could be no peace without justice, they argued that punishing perpetrators was not merely a way of satisfying retributive justice; it was also a condition for stabilizing the rule of law and thus of peace itself.

Part of the problem at this stage of the discussion was that the alternative to justice, the vague concept of peace, seemed to be little more than a pragmatic compromise – an unfortunate, albeit necessary absence of justice. While perhaps valid when applied to the

²² *Valásquez-Rodríguez Judgement*, Inter-American Court of Human Rights, Ser. C., No. 4 (1988).

amnesty laws taken in isolation, this characterization did not do justice to the positive good that the alternative mechanisms attached to amnesties (most notably truth commissions) were supposed to achieve through processes like truth telling and public memorializing.

The South African Truth and Reconciliation Commission provided an early elaboration of these objectives in its statements concerning the priority of peace and reconciliation. The Commission's final report described its purpose as transcending "the divisions and strife of the past, which generated gross violations of human rights, the transgression of humanitarian principles in violent conflicts and a legacy of hatred, fear, guilt and revenge."²³ The community that will have transcended the strife is envisioned as reconciled (but without making everyone the same - a 'rainbow coalition'), as politically stable, and as one in which the rights of all persons will be protected.

Similarly, in his advocacy for a national apology and reparations for the forced removal of indigenous children, the Australian Governor General evoked the idea of a healed nation: "Past oppression and injustice", he said, "remain part of the very fabric of our country.....[and] reach from the past to blight the present and to demand redress and reconciliation in the future" without which "we are and will remain diminished as a

²³ Volume 1, Chapter 1, Forward by the Chairperson, para 92. The language is self consciously reminiscent of the preambular paragraph of the Constitution of South Africa, which states that the goal of the constitution is to: "Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights". Note, the conflicts referred to are between groups, albeit manifest at the level of individuals.

nation.”²⁴ And recall, the words used by the Polish President in his apology for the Jedwabne massacre referred to the *shattering of the conscience* of Poles, as the German leader, expressing his deep remorse for the Holocaust, looked forward to the *intertwining* of German and Israeli lives.

The next move was a rhetorical one – reviving the term restorative justice to redescribe the institutions that seemed hostile to justice.²⁵ The concept of justice was reframed so as to move it away from the narrow association with punishment and retribution, and towards a broader range of approaches. The argument at work here is that if the goal of justice is to return the victim to her original condition or to the wholeness which existed before the injustice, we might call into question the notion that punishing perpetrators actually achieves this goal, or that it achieves it more surely than other strategies.²⁶

The important move at this point was to argue that broader reconciliatory strategies (and not only the more traditional institutions like victim compensation) could achieve this restorative objective. In fact, in situations where the violations and injustice pervaded the entire political space, they were required. Seen through this lens, measures which had been framed as antagonistic to justice (for example forgiveness) were redefined as

²⁴ Sir William Deane, 2001 Sydney Peace Prize Lecture, Delivered at the University of Sydney, 8 November, at <http://www.usyd.edu.au/publications/deane.html>

²⁵ Restorative justice can be linked back to Aristotle’s conception of rectificatory justice as a class of as discussed in Book V(4) of the *Nicomachean Ethics*.

²⁶ Similarly, it is this move that underpins the restorative criminologists’ advocacy for a shift from punishment to symbolic and material reparation. See for example, Braithwaite, John, “Restorative Justice and a Better future”, *Dalhousie Review* 76: 9-31, and Galaway, B. & Hudson, J (eds.), *Restorative Justice: International Perspectives*, Monsey, NY: Criminal Justice Press, 1996.

components of justice, for they too restored what the victim or the society more generally had lost. It was on the basis of this conception, for example, that Archbishop Tutu could state: “Justice, restorative justice, is being served when efforts are being made for healing, for forgiving and for reconciliation”,²⁷ although he framed his conception not in Aristotelian terms, but in terms of the indigenous South African conception of *ubuntu*, the concern for healing of breaches, the redressing of imbalances, the restoration of relationships.”²⁸

Not everyone saw this convergence as an expansion of justice. Robert Meister, for example insisted that the real work of justice was distributive justice and that this demanded comprehensive structural reform.²⁹ If anything, the moral work of truth telling and exposure only obscured the fact that the revolutionary goals that had motivated the original struggle had been dropped from the political agenda. The moral victory of having one’s story told replaced the structural victory of systemic change, and equality now took the benign form of casting both victims and perpetrators on a stage mapped by the moral parameters of the new order. This type of critique will emerge again in some of the responses to the apology movement in Australia.

Still staying with the justifications and explanations offered by political actors in

²⁷ Desmond Tutu, *No Future Without Forgiveness*, New York: Double Day, 1999, p. 55.

²⁸ Tutu, *ibid.* 54-5.

²⁹ See for example, Robert Meister, “Ways of Winning: The Costs of Moral Victory in *Transitional Regimes*.” 2000. The Marxist critique of ideology is in the background of this objection.

transitional situations themselves, one sees the extent to which this re-conceptualization of justice as restoration and the creation of wholeness pervaded the field. Notably, they were applied not only to defend the apparently soft strategies of reconciliation against charges of suspending justice, but also as justifications of justice in its most classical retributive forms.

Thus for example, the Rome Statute of the International Criminal Court sets out the justification for the court using language remarkably similar to imagery of shattering/breaking and healing so common in the reconciliation movement. The first paragraph of the preamble frames the need for the establishment of an international criminal court in these terms: "*Conscious that all peoples are united by common bonds, their cultures pieced together in a shared heritage, and concerned that this delicate mosaic may be shattered at any time*". In other words, those establishing this first international institution for prosecuting and punishing individual perpetrators of crimes against humanity conceive of this prosecutorial institution as a condition for protecting the delicate mosaic of the international community - a mosaic whose integrity is threatened by the commission of, and impunity for such universal crimes. One punishes the individual wrongdoer not only because they have done wrong (and punishment must follow as a matter of deontological moral logic), but also because their wrongdoing is part of and contributes to a fracturing in the social and political fabric of the international community.

Durkheim's notion of the expressive function of punishment was taken up more vigorously again in this new context by a number of legal theorists.³⁰ Moving away from the emphasis on punishment's retributive dimension, what was being highlighted here was work that prosecution and punishment do in forming or repairing a coherent social order, organized around a set of normative principles.³¹ As Mark Osiel pointed out, this dimension of punishment became particularly salient in situations where fundamental norms were damaged by their incessant and state sanctioned violation under the former regime.³²

One might go a step further and say that the crimes in question did not simply damage those norms, but were themselves a symptom of a more systematic breakdown in ascription to the values that would have provided the basis for judging them to be wrong in the first place. In those situations, punishment does not merely reconstruct or express, but constructs. This is all the more so when the judiciary itself had been complicit in legitimizing the normativity of the wrongdoing by failing to condemn, or even sanctioning it. To this end, a particular criminal prosecution provides the stage for the

³⁰ Durkheim characterizes punishment as the way in which members of a community "unite themselves to give mutual evidence of their communion . . . reinforce themselves by mutual assurances that they are always agreed" E. Durkheim, *The Division of Labor in Society*, trans. by G. Simpson, New York: The Free Press, 1964, 103 and is "a notation, a language, through which is expressed the feeling inspired by the disapproved behaviour" E. Durkheim, *Moral Education*, E. K. Wilson (ed.), trans. by E. K. Wilson and H. Schnurer, Glencoe: The Free Press, 1961, 176.

³¹ George Fletcher also takes up this notion, calling it positive deterrence to indicate that the primary point of motivation for rightful action is not the punishment of wrong, but rather the affirmation of right that is implicit to punishment. Cf. George Fletcher, *Basic Concepts of Criminal Law*, Oxford University Press, 1998.

³² Mark Osiel, *Mass Atrocity, Collective Memory and the Law*, New Brunswick and London: Transaction Publishers, 1997.

performance of the authority of the state and for it to explicitly assert its allegiance to certain values fundamental to a rightful social order, thereby both reinforcing or laying down those values for the future political community and writing them into its own identity.

So for example, writing about the prosecutions of generals responsible for human rights violations during the Argentine dictatorship, Owen Fiss argues that human rights are nourished by the legal proceedings that they motivate and regulate, and that they in turn function as social ideals which structure our social interactions.³³ More subtly, in so far as trials make social disagreement explicit, and allow for a genuine debate about the construction of social norms, they perform and re-institute both the democratic virtue of open and popular participation in decision making processes, and the liberal virtue of free expression and engagement of each member of the society as a rational agent evaluating social and institutional norms.³⁴

In embracing this dimension of punishment, one must certainly be alive to and cautions of the danger that the criminal process may degenerate into a 'show trial'. That said it is worth examining exactly what is wrong with a show trial, and separating that analytic question out from the more visceral horror that arises by virtue of our automatic associations with the show trials of Stalin, Mao or the Cold War US. Kirchheimer warns

³³ Owen Fiss, "Human Rights as Social Ideals" in Carla Hesse and Robert Post, *Human Rights in Political Transitions: Gettysburg to Bosnia*, New York: Zone Books, 1999.

³⁴ Leora Bilsky developed this argument in her work on political trials. See her book on political trials and the dilemmas of a democratic society (forthcoming, University of Michigan Press).

that political trials reduce courts to being for those in political power to achieve their political goals.³⁵ The problem with this analysis, drawing as it does on Schmitt's distinction between the political, the legal and the moral, is that it does not allow that in certain situations, the political and the legal need to converge to institutionalize certain normative principles. Certainly, one must be alive to the inter-play between these spheres, wary that the ultimate arbiter at work here is not merely political power, and scrutinize how that political power is itself constituted. But the fact that trials join in the work of consolidating a normatively (and democratically) grounded political power does not seem to me to be a problem. What is wrong about show trials is not that they demonstrate fundamental norms of the polity, but that they may do so at the expense of the individual who becomes the occasion for this broader performative moment.³⁶ As Osiel argues, there is no reason that the trial cannot perform and construct, while at the same time ensuring that the liberal principles of individual justice are respected.

Taken together, these moves certainly go a long way in destabilizing the justice/peace dichotomy. They expose the elements of each side necessarily contained or implied in the

³⁵ "The aim of political justice is to enlarge the area of political action by enlisting the services of courts in behalf of political goals. It is characterized by the submission to court scrutiny of group and individual action. Those instrumental in such submission seek to strengthen their own position and weaken that of their political foes." Kirchheimer, O. (1961). *Political justice*. Princeton, NJ: Princeton University Press. p. 419. To be fair, Kirchheimer certainly recognized that the mere fact that a court is working within the political framework of the successor regime does not disqualify it. To this end, he insisted that "When determining the credit rating given to a successor regime, one must take equal account of the method of examining and evaluating submitted facts, for it reflects the tribunal's amount of independence from momentary outside pressures." *Ibid.* p. 334.

³⁶ This is not to say that we might not condemn the norms themselves. But our views on the substantive content of norms are distinct from our views about how those are introduced into the polity.

other by either shifting the meaning of key terms or showing how mechanisms directed towards the achievement of one objective might also contribute towards the achievement of the other. Underlining this convergence across the field and speaking with a bird's-eye view of the apparently divergent approaches of prosecution and truth telling in Chile, Jose Zalaquett (former advisor to President Alwyn in post transition Chile and member of the Chilean Truth and Reconciliation Commission) stressed that lurking behind all other objectives was a comprehensive theory of moral reconstruction.³⁷ Such a comprehensive theory has been most thoroughly articulated in Teitel's *Transitional Justice*, an interpretive project which integrates the various specific objectives of the different mechanisms into a broad "constructivist" framework.³⁸ By insisting that the range of mechanisms developed to 'deal with the past' in transitional situations can only be properly understood by interpreting them in the light of their deployment during a transitional period, Teitel extracts the common thread.³⁹ Read in this way, one sees that the various forms of meting out justice (trying, exposing and punishing those who violate human rights), creating narratives of truth and history, memorializing and remembering, compensating, grieving, healing, feeling sorrow or shame, and forgiving all play a role in constituting or reconstituting the social and political conditions

³⁷ Naomi Roht-Arriaza, "The Need for Moral reconstruction in the wake of past human rights violations: An interview with Jose Zalaquett", in Hesse and Post, *op. cit.*

³⁸ Teitel, Ruti, *op. cit.* See also Elizabeth Kiss, "Moral Ambition Within and Beyond Political Constraints: Reflections on restorative Justice" in Robert Rotberg and Denis Thompson (eds.), *Truth v. Justice*, Princeton: Princeton University Press, 2000) and Jose Zalaquett in Alex Boraine and Janet Levy (eds.), *The Healing of a Nation?* Cape Town, 1995.

³⁹ Although Teitel's principal focus is transitional justice, one can slightly modify and extend the thesis so as to similarly frame the mechanisms deployed in historical justice situations as all playing a role in extending the reach of rights in existing democratic orders.

in which people will be better protected from human rights violations and from arbitrary interference.⁴⁰ This constructivist framework has both institutional and cultural dimensions, the former encompassing the institutions of democracy and the rule of law (an independent judiciary, a representative political system, non-discriminatory and just laws and accountable, socially just public institutions) and the latter a political culture or authoritative social norms which affirm equal respect for the rights of all members of the polity as the organizing ethic of all civic and political action.⁴¹

This constructivist framework certainly offers an appealing conceptual integration. It is particularly powerful as an analytic lens because it is sufficiently capacious to allow that the different mechanisms move towards this broad goal along different paths, tailored always in part to the social, political and historical circumstances in which construction or reconstruction is taking place. That said, it does not dissolve all the tensions that arise between them.⁴²

⁴⁰ I have collapsed in here both liberal and democratic justifications, which different commentators emphasize in their analyses of the constructive work of trials. Judith Shklar, for example, emphasizes “the liberal ends, where they promote legalistic values in such a way to contribute to constitutional politics and to a decent legal system.” Judith N. Shklar, *Legalism, Law, Morals and Political Trials*, Cambridge: Harvard University Press, 1964, p. 145. Leora Bilsky in her work on political trials emphasizes the democratic constructive work that trials do in so far as they promote public debate over key issues where there is reasonable disagreement. Cf. Bilsky, *op. cit.*

⁴¹ The term political culture has itself been subject to much analysis. I use the term here to indicate neither an aggregate pattern of psychological orientations towards political outcomes, nor as mere epiphenomena of the “real” objective social structure. Following approach of “interpretive” social scientists, I take political culture to be the symbolic dimension of all social situations. I take this up in detail below.

⁴² Nor do theorists providing this constructivist reading suggest that they do. Teitel’s project, for example, is to thematize the approaches, but not to unify them or dissolve all tensions.

II. 4 Apology and the persistent tension of individual/collective responsibility

The collective political apology makes some of these remaining tensions explicit.

Certainly, it can be integrated into this schematization, especially if it is interpreted as a form of performative re-covenanting, as I argue here. Leaning towards the cultural dimension, it contributes to the project of political and societal reconstruction by authorizing and highlighting the fundamental political norms that have in the past not been embraced with sufficient vigor to prevent abuse and which have in turn been rendered vulnerable through their systematic violation.

Even then, the collective apology seems to directly contravene two principles of justice as it is normally conceptualized and institutionalized in modern liberal political communities. First, it attributes responsibility or liability for the wrongdoing to a group, many members of which were not directly involved in the commission of wrong, and who in fact may not even have been alive at that time. Second, it seems to operate within the dynamic of mercy, as distinct from the dynamic of justice, where the former is in fact understood as a suspension of justice. One can hear echoes of this in the frequently raised objection that when people apologize, they are instrumentally appealing for forgiveness so that they can escape the moral (and legal) consequences of their wrongdoing.

These two sets of distinctions intersect in a complex way. Our first intuition is to ask, ‘if the collective cannot be held responsible, then how can it be pardoned?’ But, in fact, it is in this very disjuncture that one can intimate the unique dimension of justice that the collective apology picks up. That is, if we assume that apology ‘fits’ the type of

responsibility that adheres to the collective in a way that other institutions do not (principally punishment in this case), then we can reason back from the institution of apology to that particular form of responsibility. This will require a comprehensive examination of the apology that will take us past the entirely negative characterization that sees it, and the dynamic of mercy in which it operates as an absence of justice. This exploration of the institution and concept of apology will be the work of chapters 3, 4 and 5.

Here, I start at the other end, with the concept of responsibility, the limits of liberal individual conceptions of responsibility and conceptualizations of collective responsibility that do not contravene the principles of individual liberty and wrongful attribution that usually rule out holding collective responsible for wrongdoing.

What is so valuable about this exercise is not only that it answers the problem of collective responsibility per se, but also that it provides a way in through the back door to provide the key to deconstructing the peace/justice dichotomy itself. The resolution to the two sets of dichotomies – individual/collective responsibility and peace justice both lie in the normative plane of recognition.

The collective can be held responsible for systematic violation in so far as it is the subject which sustains and potentially alters the normative contexts out of which individual actors define right and wrong, make choices about how to act and act. Where the wrongs were systematically committed by one group against another, as is the case here, the

perpetrator group is responsible for its failure to recognize the other group as subject to the legal and political rights and the moral status they accord to themselves.

The institutional response to this dimension of injustice will thus have to do several things. It should force the political community to take responsibility for its role in sustaining or failing to correct the wrongful norms. It should offer an appropriate form of reparation to those who were the direct victims of the normative evils, or more accurately who were not recognized as full moral, legal or political subjects within the previous normative system. And it should repair or reconstruct the normative framework that was itself damaged by systematic wrongdoing and/or failed to prevent it.

Notably, the peace/reconciliation approach reflected a parallel set of concerns: to repair the normative ruptures in the political community; provide official recognition of and so legitimate the claims of those members of the political community whose status had been systematically denigrated; encourage mutual recognition between historically hostile groups (and in particular recognition of victim groups by perpetrator groups); and, equalize the baseline moral, legal and political status of all members of the political community.

Thus, the specific form of justice that comes through when attending to the collective as distinct from the individual draws on the same discourse as the work of peace or reconciliation: the discourse of recognition.

III. Conceptions of responsibility

In the peace/justice debate, the main objection leveled against ‘reconciliation’ approaches was that their ‘forward looking’ utilitarian justifications were not sufficient to override and so suspend the deontological demands of justice, where the latter usually denotes punishment of individual perpetrators and it may also include victim compensation.

The situation changes when the alternative institution itself seems to affect a form of justice at the level of the collective, as is the case with representative apologies.

Admittedly, the apology does not involve inflicting punishment on the perpetrator group, or even demand that it furnish material compensation, but it does attribute responsibility to and constitutes a form of moral compensation.

The prima facie liberal objection is that even this form of collective attribution violates important moral principles governing who can be held liable, and specifically the integrity of individuals who did not personally commit the wrongdoing. In fact, Arendt explicitly defines collective responsibility in terms of this absence of personal responsibility for the act and non-voluntary membership in the collective.⁴³ An equivalent, though inverse objection is raised from the other side – that an individualized model of justice is insufficiently broad in its moral scope, fails to institutionalize the whole picture of responsibility and so does not fully do justice. Addressing this ‘other side’ in the case of Nazism, Arendt argues “it is almost always overlooked that the true

⁴³ “Two conditions have to be present for collective responsibility: I must be held responsible for something I have not done, and the reason for my responsibility must be my membership in a group (a collective) which no voluntary act of mine can dissolve...”. Hannah Arendt, “Collective Responsibility”, in *Judgment and Responsibility*, Jerome Kohn (ed.), New York: Schocken Books, 2003, p. 249.

moral issue did not arise with the behavior of the Nazis, but with those who only “coordinated” themselves and did not act out of conviction.”⁴⁴

This section articulates the distinct and different conceptions of wrongdoing assumed by approaches that focus on individual justice on the one hand and, by those that build some form of collective liability into their approach to societal reconciliation on the other. It makes explicit implicit differences between the two approaches’ conceptualizations of the wrong, responsibility and persons (identity) to elucidate their distinct moral justifications for how a society should respond to wrongdoing, and explain why collective attribution is seen as illegitimate on one side, and legitimate on the other.

III. 1 Liberalism and the discourse of individual justice

The question of how to rightfully attribute guilt and punishment and the shift from collective to individual guilt and responsibility appears already as a major theme in the prophetic texts of the Hebrew Bible, and has been the subject of extensive historical, theological and anthropological analysis.⁴⁵ I will come back to this inter-play between individual and collective conceptions of responsibility in the religious sphere in chapters three and four. Here, I enter the debate significantly later by considering the moral

⁴⁴ Hannah Arendt, “Some Questions of Moral Philosophy”, in *Judgment and Responsibility*, *ibid.* p. 54.

⁴⁵ Cf. In particular Jeremiah chapter 31 and Ezekiel chapter 18. A key text, covering much of the territory is Paul Ricoer’s *The Symbolism of Evil*, Emerson Buchanan (trans.), Boston: Beacon Press, 1967.

individualism that characterizes modern liberal philosophy and politics - the insistence that individuals only be subject to the consequences of their own acts and choices.⁴⁶

A liberal interrogation of responsibility for wrongdoing begins with two questions, corresponding to the two conditions which must be met for responsibility to be legitimately attributed to a person: did the subject commit the act? (*actus reus*); and did they act as a full moral agent, were they aware of what they were doing, did they act rationally and willfully, and so on? (*mens rea*). It is these two conditions that explain the location and degree of wrongdoing and dictate the appropriate level of punishment. If one stops here, what is apparent is that this way of framing the exercise of interrogating responsibility already logically compels a very particular type of justice, a particular form of responsibility. Specifically, it precludes any attribution of responsibility beyond the person who actually committed the wrong, where the wrong is defined as a distinct act coupled with an intention. If one tries, for example, to say that others are also implicated, say because they tacitly supported racist violations, one will hit the wall at the point of trying to find an act they *caused* to happen (*actus reus*).

If there is going to be a place for a form of responsibility beyond direct causation of the

⁴⁶ In his essay on theoretical foundations of liberalism, Jeremy Waldron locates the foundation of a liberal conception of political arrangements as the “conception of freedom and of respect for the capacities and agency of individual men and women”, reinforcing this claim with a more general argument that “the relationship between liberal thought and the legacy of the Enlightenment cannot be stressed too strongly.” Cf. “Theoretical Foundations of Liberalism”, *The Philosophical Quarterly*, Vol. 7, No. 147, April 1987, 127-150, p.134. See also Hegel, *Philosophy of Rights*, T. M. Knox trans. Oxford University Press, 11967, in particular section 117.

act, it will be outside this framework. So we need to go back several steps to interrogate the assumptions already made when one interrogates *actus reus* and *mens rea*.

The first thing to note is that the liberal approach to justice tells the story of the injustice and wrong in a very particular way. According to this story what is wrongful is a particular action, and it is wrongful because it fails to comply with certain laws or moral standards that are held to be legitimate and binding on actors in a given social or political space.⁴⁷ Already one can discern an assumption that persons make judgments and act against a stable and defined background of right at work here. The 'wrong' is deviation from that background normative frame, and accordingly responsibility for this deviation belongs to the individual wrongdoer. Moreover, for this analysis to work smoothly, the normative frame (according to which one judges an act as right or wrong) should be institutionalized as positive law - domestic laws being the most obvious and clearly legitimate candidate to fulfill this role.

In the real world of law and politics, however, these conditions are not always met. In cases that become the subject of transitional and historical justice, they are certainly not met; indeed it is often the *law of the former regime itself* that is being condemned as wrong. How does the liberal form of interrogation and attributing responsibility respond to this disjuncture? What happens if there is not a perfect alignment between 'right' and law within a particular jurisdiction?

⁴⁷ Arguably, liberalism itself makes no distinction on the basis of political space, but speaks only to the rights of human beings in general. However, one can argue from within liberalism that given the ambiguous interpretation of rights and also the right to know which laws are binding, rights are

To illustrate, take the example of the removal of Aboriginal children from their families. The liberal approach tells the story of the injustice of removal in terms of particular wrongful actions or violations of particular rights - parents' right to take care of their children, for example, or the right to mount a legal challenge when one believes one's rights have been violated. If the practice is found to be in violation of any of these rights, the next stage is to locate particular responsibility for those violations, via the presence of action and intention.

Given this frame, locating responsibility for wrongdoing is most easily achieved where the actions contravene positive domestic law (they are 'illegal'). Here liability may legitimately be attributed to individuals who committed specific offences, for example physically removing children, or giving orders to do so, or preventing parental access, subject to their being found responsible for their wrongdoing. There is no problem because the moral condemnation of the act lines up with valid legislation. Correlatively, justice for those who suffered from the wrongs takes the form of compensation, to be assessed on the basis of the harms suffered/rights contravened.

Matters become more complicated where the acts in question were performed with the sanction of domestic legislation, as was the case in Australia. Here, the simple alignment between legality (binding on the individual) and rightfulness, as it is *now* defined has fallen away. Under these circumstances, the first move, still following the formula of looking for a conflict between the action and a binding law, is to look for a higher law

applicable within a particular jurisdiction.

which both trumps the lower law and is binding on the actor. The easiest case is where one can find a positive and domestic higher law, most likely an article of the state's Constitution or Bill of Rights.

Already at this point, however, one can see the difficulty that this presents for making an assessment of responsibility and placing blame within the liberal framework. If the state was both sanctioning the act, through the legislation that made it legal, and condemning it, through a constitutional principle, can the actor be held responsible and so liable for punishment? Or is it rather the state that is to be held responsible, in so far as it passed legislation that it had itself defined as illegitimate? And if the state is in some sense responsible, how do we then assess the individual's responsibility? I will come back to the issue of state responsibility in a moment, but for now want to stay with this interrogation of attributing responsibility to the particular person who committed the 'wrongful acts' in different legal contexts.

If there is no higher constitutional law (which is the case in Australia which has no Bill of Rights, and no equal treatment provision in the Constitution), one might look to the international legal system for a higher law.⁴⁸ Now there are two conflicts: one between what international law deems to be legal and what the actor did, and another between international and domestic law.

⁴⁸ The case of international law is complicated because most international human rights law is not considered positive law in the normal sense of being binding and backed by sanctions, with the possible exception of the European Convention on Human Rights. In this sense, it stands somewhere between law and morality.

Traditionally, international law bound only states, which means that only the second conflict (between international law and the state) could give rise to legitimate liability. The state would be liable for passing 'illegal' law. Let us put to the side this problem of state responsibility and remain a moment longer with the individual perpetrator.

Since Nuremberg and more recently in the development of international criminal jurisprudence, this traditional interpretation of the jurisdiction of international law has shifted so as to bring individual actors into the purview of international legal obligations, specifically in relation to crimes against humanity and genocide. The Nuremberg Principles opened the way for individuals to be criminally prosecuted for state crimes, breaking through the shield of immunity that their official roles provided.⁴⁹ The statutes establishing the International Tribunals for the former Yugoslavia and Rwanda and those Tribunals' jurisprudence as well as the Rome Statute for the International Criminal Court strengthened, elaborated and further institutionalized those principles.

Extra-legal morality provides a final sphere of appeal in the absence of constitutional or international law, although developments in international human rights law increasingly render recourse to morality unnecessary. The conflicts that arise here are still more complicated, because one is not simply dealing with a conflict between different levels of

⁴⁹ Specifically, Nuremberg principle III invalidates the Head of State and government official defenses, and principle IV invalidates the due obedience defense, both of which had previously impeded prosecution for state crimes. The wording of principle IV, drawing distinctions between legality, obedience and a general morality is particularly relevant here: "The fact that a person acted pursuant to an order of his Government or of a superior does not relieve him of his responsibility under international law, provided a moral choice was in fact possible to him." United Nations general Assembly, *International Law Commission: Report on the Principles of the Nuremberg Tribunal*, A/1316 (1950).

the law and the problem of which one is binding on an individual actor, but also a conflict between law and morality. This raises enormous problems, not only at the level of making the specific call (which standard do we use to assess the act?), but more generally because it would seem to contravene the fundamental principle *nulla poena sine lege* and so threaten the stability of the law per se.⁵⁰

Throughout these different levels of appeal, we look to the highest law, be it regular, constitutional, international or 'natural' law (morality) to find the most perfected, or least contaminated standard of right against which to judge the individual's actions.

Irrespective what the local law said we maintain that individuals who removed children or shot Jews are wrong and can be condemned because we hold that every rational human being has the moral sensibility to know that crimes against humanity are wrong.

So, for example, when Nuremberg Principle IV states that an individual who acted under superior orders can be condemned *provided a moral choice was in fact possible to him* we insist that a moral choice not to commit a crime against humanity is always possible (although it may be mitigated by duress). Normatively, this is consistent with liberal principles of individual freedom and responsibility because it recognizes that irrespective their role as state representatives and officials, individuals can always be held (at least partially) liable in so far as they retained a degree of freedom to commit or refrain from

⁵⁰ The full maxim is *Nullum crimen, nulla poena sine praevia lege poenali*, and is a basic maxim in continental European legal thinking, authored by von Feuerbach as part of the Bavarian Code in 1813: there can be no crime committed, and no punishment meted out, without a violation of penal law as it existed at the time. This basic legal principle is incorporated in a number of

committing actions which contravened a binding higher law. Institutionally, this move beyond the mantle of the domestic law marked an extremely important step forward in global human rights protection and is not one we should start to tamper with at the expense of individual accountability.

The advantage of this liberal approach is that it sets out clear guidelines for pinpointing and differentiating responsibility. It ensures that those who did commit the acts can be held accountable while protecting individuals who did not directly commit wrongful acts from the generalized collective punishment that results from blunt notions of collective responsibility. The Nuremberg principles are especially important in this regard. By pointing out that certain individuals remain responsible for their actions (at least to some extent) irrespective their official role and state sanction for their acts, the liberal conception of justice brought to light a dimension of responsibility rendered invisible by a doctrine of acts of state which allowed representatives to be entirely subsumed into the represented or the officer into the office. Recall a number of the apologies listed in chapter 1, for example the apology from the police union in France, framed the fault in terms of responsible actors having hidden behind an official role.

That said, there is something very important missing from this account: the complication of the ethical context in which individuals actually choose and act. And it is not simply complicated because the system is imperfect, but rather because the lower systems of law, the systems that most immediately inform individual choice are themselves *wrong*. And the moral compass that an individual uses to make the judgments that inform action

domestic constitutions as well as international criminal law.

is affected by the ethical context in which he is operating. This is most pertinent in cases of systematic abuse, where individuals were operating in a legal and ethical context that *was* 'contaminated' and *did* affirm their actions as *right*. The individual can be held responsible for the wrongful act, but not for the wrongful law. Some responsibility clearly lies beyond him. This exercise reveals the difficulties that arise when using the liberal approach to attribute responsibility when the normative standard against which actions should be assessed is fractured across different levels of the law, or across the spheres of law and morality.

A full picture must take this normative context into account and ask who is responsible for *it*? Perhaps we are wary to acknowledge the influence of context for fear that this automatically translates into mitigation and takes the edge off the Nuremberg achievement. But this need not be the case. The fact that the local context affirmed an action (or the norm motivating an action) as right does not mean that the individual did not freely act in choosing to do wrong, or in the terms of the Nuremberg principles that no moral choice was *possible* for the actor. The fact that the ethical context affirmed wrongful actions as right may provide some type of mitigation of responsibility or shift our institutional response, but this judgment will depend on a range of contextual factors such as the gravity of the norms violated and the availability of other normative standards. Attending to context should add to the conceptualization of responsibility not force a choice between the individual and the broader society.

Judgments about the individual are not however my concern here. The real cost of

omitting ethical context is on the other side – it prevents us from implicating that context into the story of responsibility.

III. 2. Liberal conceptions and institutions of collective responsibility

Where an individual commits a crime against humanity under the sanction of state law, liability falls both onto the individual because he acted in violation of a universal law binding on all individuals *and* on the state because it passed laws contrary to the universal standards that all nations are bound to respect in their own legal systems.⁵¹ How can the liberal framework make sense of and institutionalize this extra-individual responsibility?

In the first instance the liberal framework can conceptualize state responsibility in entirely institutional terms. There is no problem with asserting that the state passed a law and as such violated international norms or its own international obligations, either formally in terms of treaty law, or informally in terms of international customary law. However, from a practical point of view, attributing liability to the state may carry no implications for retrospective justice. The laws may be changed or the constitution rewritten, but these prospective adjustments do not address the role of state in the wrongs already committed. The only institution that encodes responsibility is victim compensation, which was widely used in the case of the Holocaust, but has been

⁵¹ This is evident in the language of human rights treaties, which set out standards and then require that states party institutionalize these standards within their own domestic system.

exceptional in the case of the majority of gross violations.⁵²

Even then, this formal and institutional level of explanation fails to capture the collective but nevertheless *human* dimension of gross and systematic violations. Conceptually, a link can be made between citizens and the institution of the state in so far as the state ‘represents’ them, or acts as their delegate.⁵³ Holding them responsible in this way is consistent with the liberal imperative that persons be held accountable only for their free actions to the extent that they freely established the government.⁵⁴ The model at work here is representation as delegated authority. The democratic government represents the people through institutional links, traceable through their role in establishing government and their capacity to displace it. Ultimate political and legal authority lies with the people, is lent to the government through a formal relationship of institutionalized trust, and as such responsibility for the actions of the government reverts back to the people - the represented.⁵⁵ It is possible to distribute responsibility across the officials *and* the

⁵² In the jurisprudence of committees and courts responsible for overseeing implementation of international human rights treaties such as the UN Human Rights Committee (*ICCPR*) or the Inter-American Commission and Court of Human Rights (*American Convention on Human Rights*), both compensation and legal/constitutional reform appear as basic remedies for violations of rights under the relevant treaty. See for example *Views of the Human Rights Committee under Article 5(4) of the Optional Protocol to the ICCPR*, Communication No. 16,1977 (petition from Daniel Monguya Mbenge against Zaire).

⁵³ Here one sees an inter-penetration of liberal and democracy theory. To preserve individual rights, as per liberal theory, the form of government must be a representative democracy.

⁵⁴ One implication is that this type of attribution will be morally justifiable only to the extent that the government can be shown to be genuinely representative. This can be assessed by looking at the institutional mechanisms for accountability. This raises significant problems when dealing with regimes that did not meet minimal conditions of democratic representation such as elections. Justifying citizens’ liability in these cases becomes more difficult. I will take this up later in looking at other justifications for citizens’ liability.

⁵⁵ Different conceptions of representation and their theoretical proponents are explored most

citizenry without a logical conflict because this model of representation is sufficiently capacious to allow that both authorizing citizens and officials retain a margin of free action and choice and so contribute to the wrongful outcome.⁵⁶

The problem is that this model of representation only clearly links citizens in with wrongful actions that were directly carrying out or were mandated by the law. Many of wrongful actions were not direct implementations of laws, but rather carried out under the mantle of a more generalized sanction. The citizenry may be held responsible for failing to authorize law that would prevent such wrongful action, but this failure to act falls short of the link we intuitively make between systematic abuse and their tacit assent or support.

As Durkheim pointed out, the formal institution of law sits on top of the soft network of norms that might be thought of as the collective conscience of the nation. It is this *phenomenological* dimension of law making and legal compliance that is omitted from the entirely institutional or even formal representational characterization. The omission is particularly glaring in the types of cases I am concerned with here, where the particular wrongs are more in the nature of a symptom of a more generalized and pervasive

comprehensively by Hanna Fenichel Pitkin in *The Concept of Representation*, Berkeley: University of California Press, 1967. This type of representation, taken up by a large number of theorists has roots in Hobbes' notion of representation as authorization and is clear in Weber, for whom in fact political representation provides a basis for ascribing responsibility to all members of the constituent group. So for example representation is where: "the action of certain members of a group is ascribed to the rest; or that the rest are supposed to, and do in fact, regard the action as "legitimate" for themselves and binding on them." Cf. Weber, *Wirtschaft*, I, 25, translated in Pitkin, pp. 19-20.

⁵⁶ This zero sum formula is required because both levels of responsibility are framed in terms of action. Pitkin calls this the mandate/independence controversy and discusses it in Pitkin, *op. cit.*, chapter 7.

denigration of a particular group than the beginning and end of the problem. In Australia, for example, removing Aboriginal children was not an aberrant act, but consistent with a range of other institutional inequalities and violations – all of which emerged from the background of the general view that Aboriginal people and communities were “less civilized”.

The institutional authorization model also fails to explain the attribution of collective responsibility across time. Most political apologies link citizens of the current polity with acts committed before many of them had any role in authorizing laws. Thus, for example, David Miller’s “co-operative practice” model, which he uses to link members of a collective with acts committed by particular individuals will only draw in those members who are actively part of a cooperative endeavor and will not persist across time.⁵⁷

The problem is that the liberal filter cannot make space for this link between the acts of an individual and the ‘collective conscience’ or normative framework. Either the individual acted and chose freely, or he acted under duress (as envisaged in Nuremberg principle IV) or he was not fully rational (in which case he did not have *mens rea* and so did not act in the full meaning of that term). One might try to build normative context into the concept of justification, but justification is a poor instrument to deal with something like ethical context or moral ambiguity. What is required is a conceptualization of the person and of action that builds context into choice and

⁵⁷ David Miller, “Holding Nations responsible”, *Ethics* 114 (January 2004), 240-268pp. 248-257.

judgment at a constitutional level rather than adding it on from the outside.⁵⁸

The insufficiency of this approach is even more pronounced in cases where the wrong itself has a collective dimension and is indicative of a more generalized normative pattern in the political community - and this is the situation in the overwhelming majority of wrongs that become the subject of transitional or historical justice. The case of the removal of Aboriginal children from their families is once again illustrative. As set out above, one can describe removal as the violation of a series of specific rights - the rights of parents to bring up their children, to a fair trial etc. - each of which then becomes the basis for prosecution or compensation. And while this would not be strictly inaccurate, this very process of breaking the wrong down into discrete parcels has the effect of obscuring the patterning of discrimination that is the essential problem. As will become even clearer when I look in more detail at the story of removal, the heart of the wrong and the reason it is such an important issue for Australians is that fundamental rights well recognized in the political community were violated *because the victims were Aboriginal*. Similarly the rights of Jews were violated because they were Jews, of black South Africans because they were black and of leftists because they were leftists in the contexts where these were the persecuted groups.

⁵⁸ Several writers who would stand firmly within the liberal tradition have accepted and argued in terms of this type of cultural/collective dimension of responsibility. David Miller for example in his recent article on collective responsibility of nations argues that collective responsibility can arise on the basis of what he calls "the like-minded group model", taking his inspiration from Joel Feinberg's argument that the atmosphere of racism in the South implicated all southerners in the specific violations of the rights of African Americans. The general frame is correct in both analyses, but what is lacking is a break down of how this 'single-mindedness' actually works, how it is transmitted and what it means. Cf. David Miller, *op. cit.*; Joel Feinberg, "Collective responsibility" in *Doing and Deserving: Essays in the Theory of Responsibility*, Princeton: Princeton University Press, 1970, pp. 222-251.

Admittedly, violation of the right to equality of treatment (non-discrimination) may be included in the inventory of wrongs insofar as there is a legal and judiciable right to equality of treatment.⁵⁹ Even then, however, *within the liberal framework* racial discrimination is still considered, and prosecuted as a violation committed by one individual against another. True, anti-discrimination laws play an expressive role, condemning discrimination in the name of the state. The actual mechanisms for prosecuting discrimination however - damages paid by the perpetrator to the victim – provide no institutional link between the specific acts and the background norms and social practices that provide the conditions for their occurrence.⁶⁰

Yet, when one looks at the removal of children or the genocide against Tutsis or the systematic violation of the social, political and economic rights of black South Africans, even as one sees the discrete acts of discrimination, what really stands out, and what motivates the call to ‘deal with the past’ at least as much as a horror at the individual violations is the pattern of violation and the moral framework which they manifest. What is most horrifying in the South African or Nazi or Australian systems, is not only that the white or non-Jewish German citizenry could be institutionally linked to the laws or

⁵⁹ I say *may* because at the time of commission, racial discrimination may not have been a punishable or compressible crime. This is the case in Australia, where there is no constitutional provision on non-discrimination, and anti-discrimination legislation was only introduced in 1975 (*Racial Discrimination Act (Cth.) 1975*).

⁶⁰ In fact, in the administration of anti-discrimination law in some jurisdictions, there are avenues for a more generalized intervention, precisely because a model of conciliation as distinct to judicial prosecution is used, at least in the initial stages. Thus for example, settlement of a complaint concerning racial discrimination in a certain workplace may involve the employer agreeing to more general anti-discrimination education programs in that workplace. I do not include these here, because these already indicate the movement into a different way of framing the problem.

policies (which is somehow too cold to capture their relationship with the wrongdoing) but that the practices were seen as acceptable in their eyes. What most strikes us as wrong is that white Australians thought of Aboriginal people as not deserving the minimal respect owing to fellow human beings and co-citizens and that they were willing to accept, albeit often passively, their being treated as less than human. As Karl Jaspers described it in his analysis of German guilt in the wake of World War II:

Moral failings cause the conditions out of which both crime and political guilt arise. The commission of countless little acts of negligence, of convenient adaptation of cheap vindication, and the imperceptible promotion of wrong; the participation in the creation of a public atmosphere that spreads confusion and thus makes evil possible – all that has consequences that partly condition the political guilt involved in the situation and the events.⁶¹

The individual justice which follows from the liberal conception of responsibility is not a fully adequate response to *this wrong* – a wrong which cannot be defined as a discrete act for which a responsible party might be found. Nor does it speak to the underlying theme that (*racial*) *identity was a condition for practical respect as citizen and as human being.*

This limit in the discourse and institution of justice follows from a core and non-negotiable principle of liberalism - the protection of the individual from consequences of

⁶¹ Karl Jaspers, *The Question of German Guilt*, E. B. Ashton (trans.), New York: Capricorn Books, 1961. p. 34.

actions or events for which he or she was not responsible, where responsibility is linked with a particular type of action and choice.⁶² Within this framework, responsibility can only be traced to members of a group who did not *personally* commit the wrong along formal institutional lines of authorization/delegation. Attributing any other type of liability would be an abuse of their individual rights. From the point of view of liberal justice, this limit is sacrosanct - indeed to violate it would be to commit a further injustice.

III. 3 Finding a framework for guilt beyond the individual - Jaspers and political guilt

In popular discourse, this intuition that the liberal approach is too narrow is often spoken about as the problem of the by-stander – the many who were not quite guilty, but surely not quite innocent. What is required is a conceptualization of collective responsibility that can write in the by-stander while respecting the liberal principle that individuals not be blamed for actions for which they are not responsible. “Reparative justice”, the term coined to describe the reconciliatory approaches promoting social wholeness will not suffice here. Even though it uses the term ‘justice’, it remains essentially a forward-looking justification. What is required is an alternative conception of justice that will allow for members of the political community to be legitimately written into the story of bringing the wrong about.

⁶² There is in fact a jurisprudential debate on the meaning of action, and specifically whether non-action can constitute an action, say in the case where someone stands before a bomb already activated and knowingly fails to de-activate it. This form of non-action still involves a type of direct participation with the singular event, which is not so in the cases I am analyzing. Cf. Fletcher, *op. cit.*

A very general statement like: ‘the conflict was between groups (whites and blacks, colonizers and indigenous, Nazis and Jews), and so the healing has to take place between groups’ has some intuitive appeal, but it does not suffice as full justification for holding a group responsible, or attributing blame to it, or requiring some compensatory response. The demand for a justification becomes even more onerous when the wrongdoing and the reparative response are separated by a significant time period, so that the concrete individuals who make up the contemporary group are not (in the main) the individuals who were alive at the time the wrong occurred.⁶³

Whereas liberalism is the obvious candidate for providing the underpinnings for individual models of justice, there is no equivalent theoretical frame obviously offering itself up when it comes to justifying collectivist approaches - or at least none that is likely to be acceptable in the modern context. When it comes to questions of guilt, liberal institutions of justice were conceived (in part) precisely to protect against the dangers of a collectivist ontology and its failure to shield individuals from collective blame.

I take this imperative to distinguish between the individual and collective in questions of responsibility as a non-negotiable prerequisite for any acceptable moral justification or theoretical frame. This means that attributing responsibility to the collective simply by collapsing the individual and the group will not suffice as a *moral* justification. What is

⁶³ Similar problems of identity arise where the individuals who comprise the group now were children at the time of the wrongdoing, or where they immigrated to the country after the period of wrongdoing. As I will discuss in chapter 5, some immigrant communities in Australia took an overt stand in the apology movement, arguing that their status as recent arrivals did not justify their not being implicated in the national responsibility for past wrongs.

required is an alternative mapping of the individual and broader cultural/national context which satisfies the prerequisite protection of individuals from a simplistic transfer of guilt, but goes beyond the constraints of liberal individualism set out above.⁶⁴

Political philosophers have long struggled with this challenge in slightly different forms. In contemporary political theory it arises in the form of a conflict between liberalism and communitarianism or identity politics. In earlier modern political theory it arose as the conflict between negative and positive liberty.⁶⁵

Writing several decades before the emergence of the late twentieth century trend, but in the context of attempts (both amongst Germans and internationally) to deal with the wrongs of Nazism, the philosopher Karl Jaspers confronted this conflict in precisely the way we do now in his attempt to make sense of German guilt in the wake of World War II.⁶⁶ Jaspers' strategy to broaden and sharpen the map of responsibility was to articulate a set of conceptual distinctions for types of guilt. While his schema suffers a number of conceptual problems and lacunae, Jaspers' unique approach is suggestive of the type of

⁶⁴ In a recent article on collective responsibility, David Miller offers an argument for attributing collective responsibility to nations, where he entertains some of the questions I am raising. Miller's analysis however is concerned with what he calls "outcome responsibility" as distinct from moral responsibility, where the former concerns responsibility for bearing the costs of an action or state of affairs, irrespective moral blame. He actually raises the question of political apologies and suggests that while they appear to imply moral responsibility they may in fact imply only outcome responsibility, an argument with which I disagree. Cf. David Miller, *op. cit.*

⁶⁵ The distinction was drawn by Benjamin Constant in his essay "The Liberty of the Ancients and the Liberty of the Moderns" in *Political Writings*, B. Fontana (ed.), Cambridge: Cambridge University Press, 1988, and then popularized in twentieth century political theory by Isaiah Berlin's famous essay, "Two Concepts of Liberty", in I. Berlin, *Four Essays on Liberty*, London: Oxford University Press. New ed. in Berlin 2002.

⁶⁶ Karl Jaspers, *The Question of German Guilt*, *op. cit.*

theoretical foundation one would need to develop a coherent grounding for a broader conception of responsibility beyond the individual perpetrator. Most importantly, Jaspers attempts to conceptualize political responsibility at the level of social meaning and public identity and in this sense moves the concept beyond the individual/institutional limits imposed by a liberal framework, while not falling into the trap of collectivist ontology. Jaspers approaches the task with the same two fundamental moral stipulations I have set out here: first, any conception of guilt must be framed in such a way as to shield individuals from primitive notions of collective blame; and second people genuinely implicated in massive wrongdoing should be held (appropriately) responsible, and not omitted from the inventory of guilt.

With respect to the first, Jaspers places himself squarely in the liberal traditions by reiterating the standard moral, political and philosophical objections to the notion of collective blame. In his view, collective blame is not only a confused concept and a false substantiation, but also one that debases individuals and has, in real politics “fostered hatred among nations and communities” - the very hatred which was the basis for the atrocities now being addressed.⁶⁷ At the same time, he was keenly aware that the focus on the individual guilty perpetrator was insufficient by way of explanation of the horrors of Nazism and did not provide a sufficiently broad base for the desperately needed

⁶⁷ Jaspers writes: “Morally one can judge the individual only, never a group. The mentality which considers, characterizes and judges people collectively is very widespread. Such characterizations...never fit generic conceptions under which the individual human beings might be classified, but are the type of conceptions to which they may more or less correspond. This confusion, of the generic with the typological conception, marks the thinking in collective groups -For centuries this mentality has fostered hatred among nations and communities.” Karl Jaspers, *op. cit.* pp. 40-41.

comprehensive response. In the cries of collective blame he heard an ill conceived expression of a correct intuition, and saw his task as carving this intuition out into a logically coherent, morally justified and politically responsible conceptual scheme

More precisely, the philosophical challenge was to carve out an analytic space for a type of guilt which is not trapped in the body of the person who, for example physically walked the child out of their parents' home or wielded the instruments of torture, but which is not conceived as the guilt of a reified collective - the individual subject writ large onto a collective body.

To this end, Jaspers distinguished between four types of guilt: criminal, political, moral and metaphysical. Put summarily, criminal guilt, the type generally assumed in liberal institutions of criminal justice applies where there has been a violation of a positive law, and is established by properly constituted courts. Political guilt is a state of liability attaching to a political community but arising from the actions of political leaders and fellow citizens. In Jaspers' words: *Es ist jedes Menschen Mitverantwortung wie er regiert wird.* ("Every person is co-responsible for the way he is governed").⁶⁸

Moral guilt is perhaps better conceptualized as the subjective sense of regret which one should feel when one does something which, in an absolute or ideal sense is wrong even if self-defense, duress or other circumstance may excuse or justify an act from the point

⁶⁸ Note, as will become apparent below, Jaspers does not intend here simply the responsibility through formal mechanisms of democracy. This is evident in the fact that he allows that political guilt also obtains in political systems other than liberal democracies.

of view of the criminal law, and so remove it from the purview of criminal guilt.⁶⁹

Finally, metaphysical guilt is a guilt based on our common identity as *human*. It is strongest where the wrong occurred “in our presence or with our knowledge”, but because, at base it arises through human solidarity, we bear this guilt for all wrongs inflicted by human beings - indeed to “free themselves from metaphysical guilt, they would be angels.”⁷⁰ For this reason, it lies beyond the reach of any human institution, or as Jaspers puts it: “jurisdiction lies with God alone.”⁷¹

Jaspers’ conceptualization of political guilt, the way he draws the distinction between political and criminal guilt, and the interaction between moral and political guilt are particularly useful in this attempt to map responsibility for systematic public wrongs of the past. His broad position is that “there can be no collective guilt of a people or a group within a people” under the categories of criminal, moral or metaphysical guilt, but that a people or sub-people group can be liable in the *political* sense.⁷² In the more nuanced

⁶⁹ The relationship between moral and criminal guilt was highly significant in post WWII debates about the grounds for prosecuting wrongs that were not illegal under Nazism, and continues to be important in the conflict between natural and positive lawyers concerning the validity of retrospective laws. For an early and comprehensive treatment, written at approximately the same time as the Jaspers piece, see the pair of papers representing the positivist and natural law positions: L. H. A. Hart, “Positivism and the Separation of Law and Morals”, *Harvard Law Review*, Volume 71, No. 4, February 1958, p.592, and Lon Fuller, “Positivism and Fidelity To Law - A Reply to Professor Hart”, *Harvard Law Review*, Volume 71, No. 4, February 1958, p.630. Jaspers’ was very clear that moral guilt is not the appropriate subject of criminal prosecution but rather goes before the tribunal of oneself and those “sharing a common fate”. Jaspers, *op. cit.* pp. 42-43.

⁷⁰ Jaspers, *op. cit.*, p. 33.

⁷¹ *Ibid.* p. 32.

⁷² “To pronounce a group criminally, morally or metaphysically guilty is an error akin to the laziness and arrogance of average, uncritical thinking.” *ibid.* p. 42.

sections of the text, he qualifies this outright rejection of a collective moral guilt by pointing out the Durkheimian connection between background morality and political conduct: “the conduct which made us liable rests on a sum of political conditions whose nature is moral.”⁷³ With this map, he seeks to articulate a notion of collective guilt in this moral/political space. It is the complex and difficult move he makes at this point which is most important for my purposes.

Jaspers does not want to reject the idea of the collective outright, but rather the conceptualization of the collective as a substantial entity on the same register as, and thereby ‘in competition’ with the individual (so that the individual and the collective form a zero sum game). He recognizes that implicit in our common conceptions of guilt and responsibilities are important but unacknowledged assumptions about the ontological status of the guilty subject. Specifically, if we understand guilt as an emotion or the consequence of an action, we inevitably conceptualize the subject of guilt as a cohesive intentional subject capable of action, self-consciousness and feeling. And this is precisely the ontological characterization of the collective that makes no sense – this is the mythic subject writ large. To avoid this problem, one has to develop a concept of guilt that does not assume or require a reified subject modeled on the individual. Using the grammatical analogy, one has to conceptualize a predicate (political guilt) that will not require the type of substantiation of the subject (the collective) inappropriate to a collective. To do this, Jaspers conceptualizes political guilt as a dimension of identity, as opposed to a consequence of action.

On the surface, this move in itself would hardly avoid the problems, because the term ‘identity’ implies a coherent subject, and so would seem to reintroduce the reification we were attempting to escape. This is not however what Jaspers has in mind when moves to the register of identity.

To clarify Jaspers’ conception of identity, one might think of it in terms of representation. Earlier, I used the authorization/delegation model of representation to link the collective with the wrongful acts of government officials.⁷⁴ According to that model, the representative and the represented are co-authors of the wrongful act. Although they are acting at different levels of the system, the logic that supports the attribution of responsibility is the same: an actor freely brings about an action that is wrongful/illegal according to a binding standard. In one case the subject authorizes the act, in the other they carry it out. The collective in this case can be broken down into an aggregate of freely acting individuals.⁷⁵

Jaspers assumes a second conceptualization of representation as identity (or being), rather than institutional delegation (or doing). Here, the government represents the identity of

⁷³ *Ibid.* p. 76.

⁷⁴ This second type is at work in the writings of advocates of “mirror” or “resemblance” representation in which the representatives resemble the represented in some salient way. Recent theorists such as Pitkin and Melissa Williams have justified identity representation in terms of action, that is by arguing the capacity of similar representatives to better understand and anticipate the interests of their constituents, and thus better exercise their delegated authority. Even then, however there is a notion at work here (often implicitly) that it is important that the representatives stand for the identity of the represented. In other words, the conception of representation here is not only about *doing*, but also about *being*, or perhaps more accurately, that the doing is not independent of the being. (cf. Melissa Williams, *Voice, Trust and Memory*, Princeton University Press, 1998) This is evident, for example, in the thought of Edmund Burke, when he locates “the virtue, spirit and essence” of a representative body “in its *being* the express image of the feelings of the nation.” Edmund Burke, “Thoughts on the Cause of the Present Discontents” (1770), in Hoffman R. And Levack, P. *Burke’s Politics*, NY, 1949, p. 28.

⁷⁵ Nevertheless, the act of authorizing the government can only be collective in the sense that an individual vote only has meaning in the context of the voting citizenry. One can distinguish here

people in the sense that it gives it form, in a manner somewhat analogous to a work of art - not a portrait, but one that portrays a quality or an ethos.⁷⁶ The relationship is not formed solely through a subject (the people) transferring something to another subject, whether that *something* is decision-making authority or the power to act. Rather the relationship is one of constructive correspondence. Here the people and the government are two dimensions that co-constitute the identity of the nation. The collective implied under this model of representation is also more robustly collective in the sense that it is not only institutional, but also in ontological.

In Jasper's terms, my political guilt for wrongs committed by my Government or co-nationals arises from the fact that the nation is the political realm in which *ich mein Dasein habe* - I have my being/place of being. It is in this sense of one's belonging in a thick communal space - a space in which political action emerges - that political guilt has a moral dimension.

To make sense of this, and to see how this move can help avoid the reification of the collective, one must understand that *Dasein* is understood in terms of its cultural as well as its physical dimensions, and moreover that it is at once part of identity of the individual and the source of the identity of the nation. *Dasein* is not a collective subject, bigger than but on the same register as the individual subject. So there is no question of an individual being subsumed in a larger subject, inheriting all its responsibilities in a one

between the moral individualism and the institutional collectivism.

⁷⁶

In this sense, the process of representation is not passive, but itself constitutes the nation which would not have existed in the same way absent the representative process.

to one correspondence. Jaspers is rather suggesting that political context is folded into the individual, providing them with the foundations of meaning from which their identity is formed. This picks up on the very problem I identified in my inventory of the liberal treatment of wrongdoing, where I discussed the dilemma of effecting justice for wrongs that were affirmed as right. At the same time, nationals form the context in which the institutions of the nation take shape, thereby giving them a form of responsibility. In his words:

By these political conditions....all of us Germans have been brought up for ages....and these conditions are part of us even if we oppose them. The way of life effects political events, and the resulting political conditions in turn place their imprint on the way of life. This is why there can be no radical separation of moral and political guilt.....

We are politically responsible for our regime, for the acts of the regime...and for the leaders we allowed to rise among us.....In addition there is our moral guilt. Although this always burdens only the individual who must get along with himself, there is still a sort of collective morality contained in the ways of life and feeling, which no individual can altogether escape and which has political significance as well.⁷⁷

Although Jaspers does not explicitly refer to the nation here, or engage with the debate in political theory about what the nation is, his move here anticipates, and is elucidated by later conceptualizations of the nation. In their attempts to define the nation, political theorists also recognized the constraints of the available conceptions which either reduced the nation to a composite of individuals, or reified it as a distinct entity.

Recognizing the inadequacy of either option, theorists such as Benedict Anderson argued

⁷⁷ *Ibid.* pp. 76-8. He elaborates: "In this view Napoleon was possible only because the French would have him; his greatness was the precision with which he understood what the mass of the people expected, what they wanted to hear, what illusions they wanted, what material realities they wanted." p. 77.

that the problem with available options was that they developed a definition within a “metaphysics of presence” which forces one to think of concepts as reified entities.⁷⁸ The alternative was to define the nation outside the metaphysics of presence, not as a ‘thing’ at all, but in terms of patterns of meaning or cultural and normative orientations.

Jaspers is making a similar move with his use of *Dasein*. In fact, the term *Dasein*, because of its verbal grammatical structure (Being there), makes it far easier to avoid the reification that the substantive noun *nation* inevitably implies. Nevertheless, the spatiality of *Dasein* (the *Da*) implies that there is a positive entity in space and time. The advantage of this is that it allows us to explain why it is this political community and not that one on the other side of the world or 2000 years ago that is implicated. The disadvantage is that it may bring back a metaphysics of presence that constrains our understanding of the collective. To avoid this one might use the analogy of a melody, which both organizes and is transformed by those who play the instruments.⁷⁹

By framing the relationship in terms of identity, rather than a more traditional notion of causality (via delegation), Jaspers is gesturing towards a re-conceptualization of responsibility and more broadly of the relationship between individuals and their political community. Political guilt for a given action does not arise because a person can be

⁷⁸ Benedict Anderson, *Imagined Communities*, London: Verso, 1983. For a discussion on the influence of the metaphysics of presence on international relations theory, but extending to theories of the nation more generally, see R. B. J walker *Inside/Outside: international relations as political theory*, Cambridge University Press, 1993.

⁷⁹ I came across this analogy in George Fletcher’s *Romantics at War: Glory and Guilt in the Age of Terrorism*, Princeton University Press, 2002.

located somewhere on the causal chain that led to that action (i.e. 'S' voted for the government and the government passed the law). Nor does it arise because an entity called the nation caused the action. Rather, the people of the nation, taken together, constitute a dimension of the nation, just as the institutions of government constitute a dimension of the nation, and it was the nation which provided the framework of meaning, or the context in which systematic wrongdoing came about.

This suggestion of an identity between the people and the state, or an ethos from which political action emerges certainly opens difficult territory and easily slips into precisely the type of reification of the collective which has to be avoided. Once again, the challenge in articulating this conception is to build a collective dimension into the map of the relationships, but without reifying it.

Even if it is possible to avoid reifying the collective way, one might nevertheless object that the identity model of representation bears a dangerous resemblance to the conservative undifferentiated form of social organization that Weber called the *solidarity* as distinct from *representation*. In the former the actions of any member may be the basis for benefits or blame falling on the rest, whereas in the latter clear, institutionalized lines set out who is authorized to act for the group. Weber, and the *Organschaft* theorists more generally argued that the former type of social system was not conducive to the individual freedom and rational decision making that a modern democratic polity should foster. With solidarity they associated exactly the type of collective behaviors that liberal polities shunned - blood feuds, vendettas and reprisals - practices representing a stage of

political development more “primitive” than formal representation.⁸⁰

These concerns are well placed and make it extremely important to be clear about the implications of Jaspers’ characterization of representation and distinguish those that will be helpful in articulating an acceptable form of collective responsibility from those that open this dangerous territory. In particular, were one to blur the two models of representation and subsequently collapse the types of responsibility that might flow from them, the category of political guilt would certainly fall prey to Weber’s critical observations about the implications of solidarity politics. In fact, at first glance, there is a striking and worrying similarity between political guilt as Jaspers characterizes it and Weber’s examples of how solidarity politics play out in relation to guilt and blame. That is, where ‘solidarity’ obtains, responsibility or guilt transfers not only between the designated government and the governed, but also between members of the political community - as is the case in Jaspers’ conceptualization.

Jaspers himself goes to great lengths to make it clear that the political guilt arising from a shared political identity does not give rise to these forms of attribution. Nevertheless, precisely because he wants to use this dimension of representation to support a responsibility across generations and beyond individual perpetrators, Weber’s warnings will be useful in setting clear limits. They do not render illegitimate any conception of responsibility that might arise, but they do heighten the importance of finding sharper

⁸⁰ See for example, Georg Jellinek, *Allgemeines Staatslehre* (Berlin 1905) and Hans J. Wolff, *Organschaft und juristische Person* (Berlin 1934). The critique developed of organic forms of social organization by this group of thinkers is discussed in Pitkin, *op. cit.*, p. 40ff.

conceptual tools to distinguish it.

Weber's normative distinctions will also be relevant when it comes to designing the institutions responding to the different dimensions of responsibility. First, such institutions must carefully observe the limits of this type of responsibility, recognizing that it by no means supports the types of direct and invasive responses that criminal guilt would. If they do not respect such constraints, they will be just what Weber warns against – vendettas and blood feuds.

Second, just as one needs to draw clear distinctions between normatively acceptable and unacceptable conceptualizations of collective responsibility, so too one will need to tailor institutional responses to ensure that they do not themselves construct the collective in a problematic way. Institutions of 'collective justice' will have to strike a careful balance between recognizing the complex involvement of the political community and refraining from themselves reifying a collective subject, thereby reinforcing misconceived and problematic understandings already current in the political community itself.⁸¹ Too often however, our heightened sensitivities to the threats to individual freedom have dulled us to the correlative danger of failing to respond to the truth that the individual does not act in a vacuum.

⁸¹ Were political guilt an effect of solidarity in the Weberian sense, that is, were it simply fallout of primitive conceptions of the collective, Jaspers would reject it as a basis for political action. That is, the mere fact that people perceive themselves this way certainly does not provide a moral justification for designing institutions based on this schema. On the contrary, if people persist in holding wrong-headed views of causality and responsibility, there is a moral responsibility to design institutions that discourage such conceptions.

While it provides a useful limit, one must also be wary of overreaching with Weber's argument and once again slamming the door that Jaspers is trying to prudently open. Jaspers', unlike Weber is writing descriptive, not normative theory. He is describing the thick organization of actual polities (or nations), not making a prescription of how they ought to be. Whatever liberal normative political theorists have to say about the ideal conditions of maximum individual freedom, cultural or national political cultures *do* exist and they *do* put a 'drag' on political or cultural change, forming a counter-weight to an absolute individual freedom. Thus, for Jaspers, it is not a matter of representation *or* solidarity - where collective and individual identity or collective and individual responsibility form zero sum games.⁸² Nor is the existence of this type of identity representation or trans-personal political identity incompatible with democratic representation. What he is trying to do by creating a multidimensional concept of responsibility is to recognize individual responsibility and representation along formal institutional lines but also build other forms of responsibility and association into them. Weber's binary distinction, mapped across a progressive history is too absolute to accommodate Jaspers' project.

Thus, what Jaspers provides is a skeletal map for a differentiated theory of responsibility

⁸² Jaspers is moving from his observation of the identity dimension of contemporary political communities to challenge the assumption that this is a sign that primitive or pre-modern conceptions of responsibility persist – ie that people still hang on to notions of a super-individual collective which are *incompatible* with the values of individual freedom which lie at the heart of the modern polity. He is inviting us to rethink the distinction between the individual and society or the nation that forces us to divide the field in this way. Rainer Forst takes up these tensions specifically in relation to the question of the type of solidarity compatible with liberal values of equal freedom in *Contexts of Justice*, J. M. M. Farrell (trans.), University of California Press, 2002.

as will be required to design and justify appropriately pitched institutions of collective justice. What is still lacking is an elaboration of the key concepts on which his map rests: political culture or Dasein and the politically located individual. Even more importantly, we still need to explain the relationships between them and specifically the way in which other members of the polity can be written into the necessary conditions for systematic wrongdoing.

The following sections draw on the work of a number of political and social theorists with a view to articulating a *technology of collective responsibility*.

III. 4 Hegel, the moral community and the logic of co-constitutionality

Hegel's profound attempts to mediate the space between communal ethos and individual freedom provide the template with and against which theorists seeking to build collective context into their accounts of individual action have since worked. Although his recourse to transcendental categories renders many of his particular formulations unappealing to contemporary thought, his work lays down the tracks for reconceptualizing the relationship between the individual member of a political community and the political community per se in a manner which neither privileges the detached individual nor reifies the community. The liberal objections to Hegel's own attempts to do this also flag the turning points where this theoretical endeavor starts to stray too far to one side.

Hegel did not begin with the specific question of responsibility for wrongdoing, but with

the broader conundrum of (individual) freedom and political community.⁸³ His starting point was a critical reading of modern conceptions of the constitution of political community as developed out of modern natural law theories, most notably in the work of Hobbes and Kant. Hegel identified their starting point - the primary fact of pre-social or pre-political individuals (ontological individualism) as the source of the problems such theories had in explaining how society or political organization can be constituted without impinging on the basic rights of individuals.⁸⁴ If one begins (as Hobbes did) with complete atomized subjects with ego-centered and separate desires or conceptions of how they should pursue their lives, it follows that any arrangement which combines them is already, by definition a form of constraint – particularly if freedom and political liberty are located with the ability to pursue one’s primary desires. At the same time, Hegel thought that Kant’s solution, which was to locate freedom in each person’s access to an abstract, albeit universal law (formal reason), stripped away too much, impoverishing freedom of the thick content sufficient to human experience.

Hegel’s preference by way of a starting point was the ancient conception of humans as politically or socially constituted *from the start*. In particular, he cites Aristotle with

⁸³ Although interestingly his early writings used the situation of the criminal as a model for examining the relationship between persons in community and as a vehicle for exposing the pre-existing social (legal) form on which their individual identity already rests. Cf. *System of Ethical Life* (1802/03) and *First Philosophy of Spirit* (Part III of the *System of Speculative Philosophy* 1803/04), ed. and trans. H. S. Harris and T. M. Knox, Albany, NY: SUNY Press, 1979.

⁸⁴ Hegel speaks of natural law theory’s assumption that the “being of the individual is the primary and supreme thing,” whereas social organization is a later stage, to be added “as if externally”. Cf. *Natural Law: The Scientific Ways of Treating Natural Law, its place in Moral Philosophy, and Its relation to the Positive Sciences of Law*, tr. T. M. Knox, Philadelphia, University of Penn. Press, 1975, pp. 64-70.

approval, for whom the political unit had ontological priority and human beings are always already located in this network of ethical relations.⁸⁵ In his idealized portrayal of the Greek city-states, the citizen's subjective sense of what he wants to express and what he sees as right for himself is entirely synchronous with the institutions and laws of the polis, thus unifying his freedom with the law.⁸⁶ At the same time, he was mindful of the eventual failure of the ancient rendering of the ideal to allow sufficient individual deviation from social norms, or in his terms, to adequately unify the universal with the particular.

Hegel explained this shortfall by mapping it historically in terms of the parallel developmental tracks of human subjectivity and society or political organization. That is, he imagines a development from the earlier, "natural" and one-sided (parochial) forms of ethical life, which allow for only limited expression of difference at the level of individual consciousness and action, to fully developed ethical life, in which the particularity and difference of individuals is fully consistent with a coherent and universal social frame. Through a series of confrontations between the natural, or pre-political

⁸⁵ Aristotle articulates the idea of the ontological priority of the collective perhaps most clearly: "The polis comes by nature before the individual. If the individual in isolation is not anything self sufficient he must be related to the whole polis in one unity, just as other parts are to the whole" Aristotle, *Politics* 1253a. 25-9 Interestingly, when Hegel cited the passage from Aristotle quoted above in *Natural Law*, he translated polis as Volk, the latter with its more organic resonance. Cf. *Ibid.*, 113.

⁸⁶ The parallel with Rousseau here should be evident (cf. *On the Social Contract*, Donald A Cress (ed. and trans.), Hackett Publishing Company, 1987, Book I, chapter VI). Rousseau similarly sought, in *le contrat social* the ideal of the unification of the freedom of the individual with the general will, although Hegel read Rousseau as reducing the general will to a summation of individual "arbitrary" wills or opinion, and thus missing the political or transcendental ground of this harmonizing will. Cf. *The Philosophy of Right*, section 258.

ethical community and individuals seeking recognition of their moral freedom, individuals and the unifying ethos together move towards the universal.⁸⁷ In other words, he envisioned a historical (progressive) movement in consciousness and political organization in which neither term is in any way sacrificed to the strengthening of the other, but on the contrary, their flourishing is mutually supportive.⁸⁸

Hegel's work on the concept of '*Sittlichkeit*' provides a key resource for thinking through the problem Jaspers was facing. *Sittlichkeit*, inadequately translated as ethical life is the background concept that Jaspers draws on in his claim that Dasein links individuals with their political community. As ethical frame, *Sittlichkeit* is neither the value system (morals) of discrete individuals, nor an abstract system of social values imposed on individuals, as if externally. Rather it is the normative grammar out of which individual morality emerges and which individuals in turn transmit or transform.

Axel Honneth explains *Sittlichkeit* by pointing to its etymological derivation *Sitte* (customs or mores), thus highlighting its organic quality as the ethos implicit in and carried by social institutions and inter-subjective action and understanding.⁸⁹ A more

⁸⁷ My classification of Hegel is markedly different to that given by Forst in his inventory of communitarian approaches to political integration. Forst classifies both Hegel and Aristotle as "substantialist" communitarians, meaning that they see the ethical substance that integrates the polis as pre-political. This clearly differs to Arendt's reading of Aristotle's conception of the polis as the space of political creation, and in my view does not do justice to Hegel's recognition of the movement through politics away from the pre-political identity. Cf. Forst, *op. cit.*, p. 100ff.

⁸⁸ Hegel refers to this as the "lively union of universal and individual freedom." *Natural Law, op. cit.*, p. 67.

⁸⁹ Axel Honneth, *The Struggle for Recognition*, Joel Anderson (trans.), Cambridge, Mass.: MIT Press, 1996, p. 13.

elucidating etymological source in my view is the deeper link between *ethics* and dwelling - a link which captures the sense of *Sittlichkeit* as the thick space in which people make their life and experience themselves at home. This resonance becomes even more pronounced if one extends the play of words through the metaphors of the etymological family - dwelling, habitat, habit, customary, custom.⁹⁰

The danger here is that in many of Hegel's formulations of the concept he seems to be positing a super-individual entity that subsumes the space in which difference and individual *choice* can arise, offending important principles of moral individualism and individual freedom necessary to ground the individual dimension of responsibility. There is certainly ample fodder for this fear, particularly in some of Hegel's linguistic formulations of the fully rational state, which is supposed to be endpoint of the dialectic development of parochial forms of *Sittlichkeit*. He refers for example to the "objective will of the state" and its having "supreme right against the individual".⁹¹ That his vision culminates in the notion that an ultimate unification of the objective and subjective will is possible is not necessarily problematic. It is however when he writes that individuals will "pass over of their own accord into the interest of the universal",⁹² and there attain their highest freedom.

⁹⁰ The Greek word *ethos* means habit, customs, character. The word *moral* originates from the Latin expression *mos moris* which means dwelling.

⁹¹ For example: "this substantial unity is an absolute unmoved end in itself, in which freedom comes into supreme right. On the other hand, this final end has supreme right against the individual, whose supreme duty is to be one with the state.", *Philosophy of Right*, section 258.

⁹² *Ibid.*

Clearly here Hegel's project errs too far on the side of the collective, introducing super-individual ethics in a manner that overwhelms individual morality and with it individual responsibility.

Elsewhere, however, Hegel makes it clear that the relationship between the individual and the social order cannot be framed according to the logic of means and ends (where either term is means or end), preferring the metaphor of a living organism in which both are "moments".⁹³ True, individuals are sustained and constituted as subjects (with intentional consciousness) in the inter-subjective space of the social order, but the social order is not an abstract entity held over individuals, rather itself comprising the expression of their constituted wills.

Other formulations of the fully rational State emphasize this co-constitutional quality; for example: "the universal does not prevail or achieve completion except along with particular interests and through the cooperation of particular knowing and willing; and individuals likewise do not live as private persons for their own ends alone but in the very act of willing these they will the universal and in the light of the universal....".⁹⁴

These formulations suggest a radical re-mapping of the relationship between individuals

⁹³ "The state is not there for the sake of citizens....this relation of ends and means is quite inappropriate here. For the state is not something abstract, standing over against the citizens; but rather they are moments as in organic life; where no member is ends and none means", Hegel, *The Philosophy of History*, 112.

⁹⁴ *Philosophy of Right, op. cit.* section 260.

and the social order that does not fall prey to the traditional criticisms. Just as one cannot explain the development of complex socio-political forms starting with a-social atomized individuals, so too an a-social natural world does not provide an adequate basis for the development of complex normative human consciousness. This type of moral consciousness, one that has ends and is able to pursue them, can only develop from the ground of a network of meaningful social relations. Morality, in other words, as the medium through which individuals make judgments is always situated. Language, the medium through which individual human subjects experience and express their world (in speech and privately in thought) is the most obvious example of the base material of social experience, but one can extend the analogy to the web of meaning and making sense of the world that underpins all human experience.

Putting aside Hegel's unfortunate formulations, the real question is whether one can separate out the *sources* of his problematic tendency to set *Sittlichkeit* over or against the individual, and then continue to pursue the different logical relationship that he is suggesting.⁹⁵

The source of the problem is the transcendental role he gives the State as the realization of *Geist* - the 'body' in which the cosmic subject finds form. This link between an abstract transcendental subject and the state leads not only to its having absolute

⁹⁵ Charles Taylor differentiates Hegel's thesis concerning the fully rational State into three propositions, the third of which alone includes this problematic link between the State and Geist, and similarly opens the questions of whether it is possible to further develop the conception of the State without this third proposition. Cf. Charles Taylor, *Hegel and Modern Society*, Cambridge University Press, 1979, pp. 93-5.

ontological priority, but to the more fundamental problem of its reification. As the expression of a subject, albeit a transcendental one, it operates on the same register as, and so in competition with the individual subject.⁹⁶

So to avoid the problem, one has to avoid making *Sittlichkeit*, *Dasien* or the collective the expression or manifestation of *anything*.

Conceptualizing collective norms as the expression of a transcendental subject also undermines the project of trying to build other members of the community into the story of wrongdoing. What the assertion that individual subjectivity (morality) is informed by super-individual norms does is provide the link between individual actions and the background political context. And Hegel's stronger version of this claim - that it makes no sense to abstract individual morality from the ethical context - provides the further basis for arguing that the existence of political cultural norms affirming that wrongful acts are right is a necessary condition for systematic wrongdoing.⁹⁷ It also links justice and the institutionalized system of justice (the right) in with ethics (the good). But none of this explains the link between *other members* of the political community with either the creation of norms or their assumption by particular judging and acting subjects.

⁹⁶ In fact, I think it is possible to read Hegel without seeing the ideal state as this type of entity at all. That is, if one understands *Geist* as the universal, then it is not a positive entity excluding other entities, but rather infinite. As such, its manifestation would not be a reified object at all. I take this up again in my discussion of the Jewish conception of God.

⁹⁷ Castoriadis, amongst others makes the point clearly: "[t]he psyche becomes individual *solely* to the extent that it undergoes a process of socialization (without which, moreover, neither the psyche nor the body it animates would be able to survive an instant)." Cornelius Castoriadis, "Individual, Society, Rationality, History", in *Philosophy, Politics Autonomy*, in *Philosophy, Politics, Autonomy, Essays in Political Philosophy*, David Ames Curtis (ed.), Oxford: Oxford University Press, 1991. p. 61.

The other half, still missing, will be to show that the citizenry in general is linked in with the normative background. Even more than that, to argue that the citizenry is *responsible* in any meaningful sense, one must explain how it actively contributed to the existence of that normative background or, correlatively to show that were it not for their contribution or participation, the normative background would not have existed in the form that it did. Without this step, one might object that the citizenry, like the individual is merely passive container for super-subjective norms and does no more than automatically reproduce the frame of meaning that gives it its own identity –an objection that seriously weakens any argument about responsibility.

To fill this explanatory gap, we need to go further in mapping the type of dynamic that organizes relationships between members of the political community and the normative framework. Without this step, the objection that on this model, people are merely automatically reproducing a frame of meaning which itself informs their consciousness would remain.

Already in his writings on the master-slave relationship and his subsequent elaboration of the dynamic of recognition and non-recognition, Hegel points the way to filling out this part of the map and linking members of the community (collectively) with the construction of the normative context. As it turns out, this turn to reciprocal relations also provides the way out of the subject centered conception of the collective or political culture that was the source of the major objections to his theory.

III. 5 Co-constitutionality; political culture and Castoriadis' 'social-historical'

In recent political theory, one finds the most direct and useful elaboration of Hegel's suggested re-mapping of the relations between individuals and the political community in the 'third way' literature on political culture. The practice or interpretive approach to political culture emerged as an attempt to go beyond the dichotomous framework adopted in previously dominant approaches, where political culture had been understood either in subjective/psychological terms, or in objective/structural terms. According to the former, political culture was the aggregation of the subjective views and understandings which exist in the heads of individuals: "the subjective feelings, attitudes, and consequent behaviors believed to characterize individual and collective political orientations - that is values - across a political system"⁹⁸, it "consolidated the underlying psychological forces believed to shape civic life and political behavior."⁹⁹ According to the latter, political culture was produced by the scientific operation of an underlying set of rules embodied variously in economic, political and social institutions.¹⁰⁰

⁹⁸ Rosenbaum, Walter, A., *Political Culture* New York: Praeger, 1975, p. 4.

⁹⁹ Somers, Margaret. "What's Political or cultural about Political Culture and the Public Sphere? Towards an Historical Sociology of Concept Formation", *Sociological Theory*, 13: 2, July 1995, 113-144, p. 119. This approach, building on Parson's privileging of culture as a legitimate part of sociology, is exemplified by the development of the concept of political culture in the work of Almond and Verbera, *The Civic Culture: Political Attitudes and Democracy in Five Nations*, Princeton: Princeton University press, 1963.

¹⁰⁰ For the purposes of this brief schema, I have collapsed a number of quite different approaches here. Levi-Strauss' structuralism, for example, differs significantly from the analysis of structural Marxism. The unifying quality to which I am pointing is the functionalism, the tendency to locate the base of political culture in objective structures, which may be quasi-grammatical rules, in the case of Levi Straus, or economic systems in the case of the structural Marxists. Cf. Sherry Ortner, "Theory in Anthropology since the Sixties", *Comparative Studies in Society and History*, Vol. 26, Number 1, January 1984, 126-166.

Recognizing the limitations of splitting the field in this way, and building the insights of each, political culture is conceived here as the system of meaning, or the grammar which patterns political action. It is not an abstract set of beliefs that organize institutions - "meaning is not an effect, a result, a product or a static quality, or something that can be coded out".¹⁰¹ Rather the patterning of the political culture exists and can be read in those institutions and at the same time it is patterned as the national identity of the population: "A practice approach has no need to break the system into artificial chunks like base and superstructure (and to argue which one determines which), since the analytic effort is not to explain one chunk of the system referring to another chunk, but rather to refer to the system as an integral whole."¹⁰²

Thus, posited neither as free floating first cause, nor as ideological reflection, evaluative schemes, actions, systems of belief and assumptions about rightful behavior are sites at which *actual people perpetuate or reform political culture*.¹⁰³ It is precisely at this point that Hegel's theory became so problematic, because he abstracted from the subjective experience of individuals or the form of social institutions to the idea of norms or values, reified these norms and linked them with a subject/source. This is the move that has to be avoided.

¹⁰¹ Denzin, Norman, K. "Reading Cultural Texts: Comment on Griswold", *American Journal of Sociology*, 1990, 95, 6, May, 1577-1580, 1579. Italics are mine.

¹⁰² Ortner, *op. cit.* P. 148.

¹⁰³ "All these routines and scenarios are predicated upon and embody within themselves, the fundamental notions of temporal, spatial and social ordering that underlie and organize the system as a whole. In enacting these routines, actors not only continue to be shaped by the underlying organizational principles involved, but continually re-endorse those principles in the world of public observation and discourse." Ortner, *op. cit.* p. 154.

Rather than making this move, the practice approach insists that norms only exist in so far as they organize actual institutional forms (including social relations) - but they are not identical to them. National culture and the nation on this model are not two distinct entities which stand in a causal relationship but two dimensions which mutually construct and constrain each other, and the concept of political culture emerges in this movement.¹⁰⁴ On the one hand, members of the political community are not inertly interpolated into a set of norms, simply the vessels for the expression of a political culture which exists irrespective their actions or their assuming it as their own subjectively held frame of meaning. On the other hand, they are not an independent source of such norms.

Castoriadis' descriptions of the relationship between social institutions, normative orientations and individuals clearly assume (and force) a similar reorientation in the way we think about each of these terms.¹⁰⁵ He too sees the individual/society dichotomy as fallacious, arguing that: "individuals are made by the *instituted society* at the same time as they make it and remake it"¹⁰⁶; and similarly "the social-historical object is co-

¹⁰⁴ This approach has generated a great deal of controversy, as Berezin puts it: "the fissures lie between scholars who privilege the possibility of explanation.....and those who privilege exegesis or interpretation." Berezin, Mabel, "Fissured terrain: Methodological Approaches and Research Styles in Culture and Politics", in Crane, Diana (ed.), *The Sociology of Culture: emerging Theoretical Perspectives*, Oxford, UK; Cambridge, Mass.: Blackwell Publishers, 1994, 91-116, p. 94.

¹⁰⁵ Castoriadis himself would not have identified with this school of thought, and was explicitly critical of systems theory and the notion of self-organization. See "Power, Politics, Autonomy", *op. cit.* p.145.

¹⁰⁶ And further : "Athenian society is, in a sense, nothing but the Athenians; without them it is only the remnants of a transformed landscape... worn out statues fished out some place in the Mediterranean. But Athenians are Athenians only by means of the *nomos* of the *polis*. In this relationship between instituted society – which infinitely transcends the totality of the individuals that 'compose" it, but which actually exist only by being 'realized" in the individuals it

constituted by the activities of individuals, which incarnate or concretely realize the society in which they live.”¹⁰⁷

What makes Castoriadis’ approach particularly useful is that he explains and elaborates what has, up to this point, been little more than the assertion that the citizenry participates in perpetuating (and potentially reforming) the institutionalized frame of meaning.

The key to understanding how Castoriadis does this is recognizing that for him “everything that is presented to us in the social-historical world is inextricably tied to the symbolic”¹⁰⁸, and as such, *meaning* becomes the central organizing concept. Thus, for example, in place of *Sittlichkeit* or political culture or society, he posits *the social-historical* - a unique form of *organized meaning* which is itself not abstract, but instituted - in (inter alia) language, law, work, politics and the reproduction of the individual psyche. In this sense, the symbol and meaning are at the heart of the explanation of what society is, or what institutions are, or what history is – it is not form added on after substance is already there.

manufactures – on the one hand – and these individuals, on the other, we witness an original, unprecedented type of relationship which cannot be thought under the categories of the whole and the parts, the set and its elements, the universal and the particular. Cornelius Castoriadis, “Power, Politics and Autonomy” in *Philosophy, Politics, Autonomy*; *op. cit.* p. 145.

¹⁰⁷ Cornelius Castoriadis, “Individual, Society, Rationality, History”, in *Philosophy, Politics Autonomy*, *op. cit.* p. 60. Here, Castoriadis draws an important distinction between ontological individualism, which insists on placing the individual first in the order of being (thus causing society) and methodological individualism which insists that one can in fact only understand the behavior of actual persons. This distinction helps to establish why it makes sense to reject the linear causal model which ontological individualism requires, while still insisting that what is accessible to our analysis is the behavior or world of meaning of individuals.

¹⁰⁸ *The Imaginary Institution of Society*, (Kathleen Blamey, trans.) Cambridge Mass.: MIT Press, 1998, p. 117.

By placing meaning at the center of his explanatory system in this way, he builds in a necessary and active place for human subjects in two ways. First, although he insists that meaning is not a product of singular psyches, or even individual psyches acting cooperatively, it is only *for* persons that meaning exists.

Second, although he asserts that the meaning of “acts of individuals, collective phenomena, artifacts, or institutions.....is already constituted as such by the *immanent actuality of meaning* – or of *signification*”¹⁰⁹, the particular meaning which any act, phenomena or institution has in the actual world will not be complete until people have engaged as its *interpreters*. And this interpretative step *intrinsically* introduces indeterminacy into the system. As he puts it: “Symbolism can be neither neutral nor totally adequate.”¹¹⁰ Symbols, by their nature are incomplete prior to the act of interpretation – there has to be a subject who relates the symbol to the signified.

Meaning is most indeterminate at the first level of what Castoriadis call the “pre-social” or “raw” world. He concedes that the ‘world in itself’ has some minimal degree of organization or stability, because without some intrinsic patterning social coordination would become completely impossible. Beyond this necessary minimum however, he insists that it this raw world is “sufficiently lacuna and incomplete to bear an indefinite

¹⁰⁹ Castoriadis insists that meaning is not meaning for an individual, rather “Individual, Society, Rationality, History”, *op. cit.*, p. 60.

¹¹⁰ *Ibid* p. 121.

number of socio-historical creations of signification.”¹¹¹

Nor is this indeterminacy in meaning confined to the pre-social or closed off once socio-historical institutions are formed in history. True, historical institutions are organized around, constitute and reproduce a particular (sanctioned) symbolic network (rules of interpretation), but even then the symbol is not and cannot be closed over entirely and so no singular meaning can be transmitted as an entirely closed system.¹¹² Even though the instituted imaginary has a definitive form in any particular instance - this form is not without breaks, without ambiguities, without space for alternative elaborations. Signs themselves are always multivalent, there is always a space between the sign and the interpreter of that sign, and the sign is always being interpreted in a novel context. That is, the combination of factors that influence interpretation (who is interpreting, where they are, who they are with, what else is happening) is constantly shifting. These qualities – that are as characteristic of socio-historical institution as is the reasonably stable form, undermine the possibility of a total system, a total ethical interpolation that would leave no space for dissent or disruption.

By holding the tension between stability and alterity Castoriadis also avoids slipping off either end of the co-constitutional model: complete indeterminacy or the impossibility of

¹¹¹ “The world in itself in itself signifies nothing, [but] is always there as an inexhaustible provision of alterity”. *Ibid.* p. 152. One can see the influence of Lacan’s categories of the real, the imaginary and the symbolic in Castoriadis’ thinking here. The Real, for Lacan is equivalent to the world in itself – the world before meaning.

¹¹² Cf *ibid.* pp. 117ff.

ethical change.¹¹³ By insisting that both stability and alterity are necessary components of institutionalized meaning, he can account for social stability (or cultural/institutional drag) *and* change, dissent and history. On the one hand the reproductive effect of the sanctioned symbolic systems permits the certainty necessary for social coordination, as well as constraining the interpretive freedom of people in any group. On the other, the impossibility of a totally closure of meaning keeps open the possibility of dissent and thus change in systems of meaning and ethics.

Most importantly, it is in these spaces where meaning is made that one can locate the active engagement of the people who are part of this social historical formation. They are given neither a raw ‘natural’ world awaiting their open interpretation, nor a world endowed with a closed meaning. Rather they engage a world endowed with potential meaning, which will only be complete once they have endowed it with meaning *for them*. Prior to their actively engaging it as subjects, there is no meaningful world and no socio-historical institution. This requirement of subjective engagement builds them into the story of constituting the normative frame or political culture and thus into the inventory of responsibility.

This very distinctive form of responsibility cannot however be mapped onto the linear causal relationship that underpinned the two types of responsibility discussed so far –

¹¹³ One sees this problem in Hegel’s claim that in ethical life members of a community are bringing into being what already is. His apparent conflation of what should be and what is (Sollen and Sein) presents problems in explaining how members of a community could take a critical ethical stance on the existing norms, and in locating the engine for ethical progress or for that matter history *per se*. I take this up below.

individual (criminal) responsibility and collective (institutional/authorization) responsibility. People, along with a range of institutions are the source *and* the site of the political culture within which it is possible for the wrongful actions to occur. As one of the faces of this web, the ongoing speakers of the social grammar cannot be abstracted and ‘blamed’ as independent agents; but nor are they merely passive recipients of norms.¹¹⁴ Rather, it is through their consciousness and their meaning laden actions that political culture is perpetuated, sustained and potentially transformed.

Moreover, because meaning is formed through this interplay of social-historical institutions, it is necessarily a collective project. Individuals actively engage as interpreters, but social meaning is uniquely the work of the groups of people who belong to that society. Correlatively, only together (and with difficulty) can they shift that meaning. Hence his notion that “society and individuals alter themselves together”.¹¹⁵ This distinction between the discrete moment of individual interpretation and the collective project of constituting social meanings and norms explains Jaspers’ claim that even those individuals who disagreed with the dominant norms of a rights violating regime can, in some sense, be held responsible.

III. 6 The political community and the inter-subjective transmission of norms

The next stage in articulating this technology of collective responsibility concerns the actual fabric of the transmission of norms. Hegel already identified inter-subjective

¹¹⁴ I referred to this earlier as the identity dimension of political representation.

¹¹⁵ “Power, Politics, Autonomy”, *op. cit.* p. 146.

recognition as the engine of social change, providing the starting point for later theoretical elaborations. In his early *Jena* writings in particular, but also in his later writings (for example on the master-slave relationship), Hegel analyzed the development of normative consciousness (at the individual level) and the process whereby subjective and more generalized and institutionalized social norms come to be aligned in terms of a series of struggles (ideal but also historical). For Hegel, it was via these struggles that both the individual and the social form progress from their own one-sidedness towards greater freedom and universality.

Once again, his metaphysical assumptions and his vision of the ultimate unification and harmonization to which this process would inevitably lead made Hegel's rendering of this idea problematic. But one can pursue this line of thinking, leaving out both the problematic metaphysics and the teleology. Axel Honneth does this, for example, by drawing on social psychologist George Mead's more naturalistic theory of mutual recognition.

Mead suggested that a subject acquires its sense of self as a certain kind of person through its practical and cognitive relations with others.¹¹⁶ Initially through concrete interactions with particular others the subject comes to general normative patterns of identity and value, which then form the basis of its evaluations, expectations and actions in relation to, self and other. Again, the idea that the self is a dialogical product is not

¹¹⁶ Cf. In particular G. H. Mead, *Mind, Self and Society From the Standpoint of a Social Behaviorist*, Charles W. Morris (ed.), Chicago: University of Chicago Press, 1932.

unique to Mead, but his rendering (like Hegel's) emphasizes two particularly important aspects of the process - first that it has a normative dimension, and second that it is inter-subjective.¹¹⁷

By normative, I mean that the sense of self being generated is not merely descriptive or cognitive (how do I understand myself), but is endowed with ethical values and is action-oriented (what do I think that I/others can or should do or have done to me/them?).¹¹⁸ By inter-subjective, I mean that the process is not one in which an unformed psyche takes form by reflecting a fixed image (parents and then the generalized other of society), but is, in Mead's and Hegel's terms, a process of mutual recognition: "It is that self which is able to maintain itself in community in so far as it recognizes the others."¹¹⁹

The idea that subjectivity and in particular *normative* subjectivity emerges from pre-existing patterned social relations provides the crucial link needed to explain how it is that the community in general enters into the judgments of individual actors.

¹¹⁷ There is a substantial body of psychoanalytic literature, and psychoanalytically oriented feminist analysis looking in detail at the mechanisms of the development of the individual psyche in terms of the broader social norms and pre-existing categories of identity. See for example, Juliet Mitchell, *Psychoanalysis and Feminism*, Basic Books, 1974.

¹¹⁸ In fact, as feminist readings of Freud have brought out, one already sees this argument in Freud's tracking of the development of boys and girls through the Oedipal process. That is, they do not simply learn about themselves and their differences in terms of a narrowly understood sexuality, but more generally as differently placed with respect to questions of power and social role. See for example Gallop, Jane. *The Daughter's Seduction: Feminism & Psychoanalysis*. Ithaca: Cornell UP, 1982.

¹¹⁹ Mead, *op. cit.* p. 196.

Mead uses the metaphor of the movement between play and games to explain the process. In play the child organizes her activity according to the behavior of the concrete other with whom she is playing; in the game, she orients her actions according to a generalized set of rules which she understands orient the actions and expectations of the other players in the game. This movement links her sense of herself, what is expected of her and what she can do to a more abstract set of norms which need not be actualized in any one interaction, but which organize the social field. These norms do not flow from or belong to a particular other, but are the normative orientations of what Mead calls the generalized Other.¹²⁰ One might also think of them as Durkheim's concept of the collective conscience - the soft web of meaning and subjective orientation out of which hard legal and political structures are formed.

Castoriadis similarly recognizes that the interaction with the particular other is the medium for the transmission of the normative ordering of the social world. Influenced by structural linguistics, he supplements this naturalistic psychological model with the metaphor of social meaning as an interlinked grammatical pattern of meaning. Within this extended pattern of meaning any one fragment becomes the entry point to "the interminable reciprocal referrals that link, magmatically, each fragment of this social world to the rest of it."¹²¹ Thus he writes:

¹²⁰ To avoid the move that derailed Hegel at this point, one must be careful not to conceptualize the Other as a subject, but rather the abstract site of a general pattern. Different theorists in the phenomenological and psychoanalytic tradition use the terms other and Other in slightly different ways. Lacan, for example, for, the capital 'O' Other is associated with the Law. The relationship between the generalized Other and the Law is a key question which shall be raised again in chapter 7.

¹²¹ "Power, Politics, Autonomy", *op. cit.* p. 149.

Not only are these individuals always already themselves socialized, but what they “transmit” goes far beyond them...they provide the means and modes of access to the whole of the social world as it is instituted in each instance, this whole being a totality which they in no way need to possess in actuality.

Moreover, there are not only individuals: language *as such* is an “instrument” of socialization...whose effects go immeasurably beyond what the mother who teaches it to her child could intend.¹²²

By invoking the world of meaning beyond individuals, Castoriadis is pointing out that even as inter-subjective networks are the occasion for the transmission of norms in the social-historical, inter-subjectivity is not sufficient to create or sustain a social-historical formation.¹²³ The process requires both the active participation of concrete persons, and the weight of institutionalized meanings.

The advantage of Mead’s inter-subjective schema, read in combination with Castoriadis’ grammatical model is that it mediates the two tendencies that tend to polarize explanations of how meaning is transmitted. That is, in the process of trying to avoid an overly functionalist description of the social formation of consciousness that squeezes out any role for actual subjects, theories often end up at the other end of the spectrum with an

¹²² Castoriadis, “Individual, Society, Rationality, History”, *op. cit.* p. 62.

¹²³ He writes that the term inter-subjectivity “is the fig leaf used to conceal the nudity of inherited thought and its inability to confront the question of the social-historical”, “Power, Politics, Autonomy”, *op. cit.* p. 144. Elsewhere: “The *social-historical* is neither the unending addition of inter-subjective networks (although it is this *too*), nor of course is it their simple ‘product’”. *The*

entirely local and personalized transmission - in its grossest form, a description of how the mother is the source of a child's sense of right and wrong.¹²⁴ The normative dimension of human subjectivity and the normative quality of the social order are folded into each other through patterned inter-subjective relations.

Finally, a key aspect of Mead's approach, and one that marks it from other theories of the social formation on individual consciousness is its emphasis on *inter*-subjectivity. The self is an active participant, not inert material that is shaped passively by a fixed set of norms or values. Subjectivity arises as much because I recognize the other as it does through the other recognizing me. The inter-subjectivity of the process has two important implications.

First, it explains how one can argue that consciousness is both formed through social interactions and is at the same time free; or, in the language of responsibility, why one can say that the background ethical context informs individual normative judgments and that the individual is responsible for the judgments she makes. A genuinely inter-subjective explanation not only allows, but also requires both dimensions, because even as the generalized norms inform individual consciousness, they only do so by virtue of this consciousness actively grasping and recognizing them as its norms.

Imaginary Institution of Society, *ibid* p. 108.

¹²⁴ This is precisely what Castoriadis was seeking to avoid where he rejected the notion that the transmission of the social-historical could be inter-subjective. Thus, he writes about the interaction between the child and concrete others in its life as the moment for the introjection of "vast fragments" of the social-historical. Cf. "Power, Politics, Autonomy", *op. cit.* p. 148ff.

Second, it brings out the analogy between the structure of normative subjectivity and the structure of legal relations and rights. Both the formation of subjectivity and legal relations are always reciprocal, in the sense that they involve more than one party recognizing the subjectivity or rights of the other. Just as it makes no sense to speak of a subject with a normative sense of self and other abstracted from others' normative sense of self and other, so too it makes no sense to think of rights without reference to a community in which one expects to have ones rights honored *and* is expected to honor the rights of others.

This common structure of reciprocity does not however entail equality. One subject in the interaction may be recognized as having far more rights than the other – as in Hegel's master slave relationship. Reciprocity can involve very different types of equilibrium.

This suggests that the structure of legal relations mimics the structure of the relations of normative recognition, or to put it the other way round that the particular organization of reciprocal recognition in a given social political space forms the bedrock of legal relations. Differences in how subjects are recognized underpin different forms of political/legal relations. The ideal liberal democratic form of political organization for example, is distinguished by the fact that all subjects have equal rights, and that they accord those rights to each other. For this ideal form of organization to be possible, the soft network of recognition underpinning the legal structure will have to be one where the reciprocal recognition is similarly egalitarian. Similarly, political forms characterized by systematic violation, including legally sanctioned violation sit on the bedrock of deeply

inegalitarian forms of recognition.

From the point of view of trying to understand the basis for rights' violations and repairing societies where they have been systematically perpetuated, this is a very important claim. It draws our attention back from the external legal structure - the set of regulatory laws imposed on subjects, to the 'internal legal structure' – the constitution of selves who experience themselves and others as deserving (or not deserving) to have their rights respected. Systematic, identity based inequalities in the law can similarly be traced back to systematic disparities in the recognition of different group identities.

III. 7 Differentiating inter-subjective recognition; norms, identity and the injuries of non-recognition

The theoretical frame I have laid out so far provides the general schema for mapping the relationship between the political community, political culture or the orienting norms, the constitution of persons as subjects of rights and the actions committed by members of that community. This co-constitutional framework provides a theoretical counterpoint to liberalism's focus on the particular action and actor.

As it turns out, this schema is particularly well suited to explaining the link between generalized norms and the types of violations that become subject to transitional and historical justice - violations that themselves have a collective or identity based dimension. In such cases, the link between patterns of social recognition embedded in the political community and the normative judgments of individuals who commit the specific

wrongful acts are very clear. Honneth's schema differentiating levels of recognition provides the basis for more clearly articulating the link between collective norms, collective identities, individuals' subjective sense of themselves and others as rights-bearers and identity-based violations.

Building on Mead's general schema of inter-subjective recognition and the development of the normative self, Honneth differentiates three levels of recognition, each entailing a dimension of identity. Correlatively, he explains the basic types of injury to the self through the lens of failures to provide appropriate recognition at each level.

Of these the second and third, which involve the normative sense of self, are most relevant to this inquiry. The first, which I mention here only briefly to fill in the map deals with the practical relation with self – the recognition required for a person to experience themselves as a physical and emotional being capable of autonomous control of their own body.¹²⁵ Where this “inter-subjective balance between fusion and demarcation.” is lacking, or where the person suffers forms of abuse that violate their boundaries and deprive them of the ability to protect their physical integrity, they will lack a basic confidence in themselves.¹²⁶

The second form of recognition moves from the physical/emotional to the normative, and

¹²⁵ Part of the injury which victims of systematic human rights violations suffer is of course to this practical relation to self. This is apparent, for example, in the levels of alcoholism and self abuse amongst victims of child removal in Australia. Here I focus on the normative dimensions, but will come back to tie in this more basic level when I discuss the Australian case.

¹²⁶ Cf. Axel Honneth, *The Struggle for Recognition*, *op. cit.*, p. 133 ff. and , “Integrity and Disrespect”, *Political Theory*, Vol. 20, No. 2, May 1992, p.190ff.

more specifically to the sense of self as a person having socially valid rights claims as an equal member of a rights community. Where a person is systematically denied recognition of their rights, that is, where they are systematically excluded from the community of persons who can legitimately expect to have generally recognized claims met, they cannot develop a sense of self as ‘a legally equal interaction partner’. Accordingly they are deprived of their sense of self as a morally accountable fully fledged legal member of the political community.

The logical correlate of this process of self-formation is the formation of a sense of the normative worth of other people. Just as a person develops a sense of himself or herself as having legitimate rights claims, so too her experience of others includes codes about their status in the community of rights-bearers. Recall, the particular process through which a single subject is ‘informed’ is embedded in a far more comprehensive and extensive grammar of norms. Thus, as I enter into this normative system, it is not only my sense of where *I* fit in that is formed, but also my sense of where others fit in – what they can legitimately claim. In fact, both structurally and empirically the affirmation of the rights of certain members (including a subject’s sense of *their* rights) is often co-extensive with the denial of the right of others to enjoy similar rights.

The third level involves the positive affirmation of the social value of the person’s life style or identity, or social solidarity with the person, against a horizon of values and goals. Where the second was the basis for one’s sense of self as a legal equal, this third level involves one’s sense of self as a member of the ethical community. Honneth’s

concern here is for the effect that denigration of particular individual or collective 'ways of life' has on a person's self esteem. Clearly, however, in most cases this individual analysis has a collective dimension: in almost all instances an individual's 'way of life' is usually denigrated because it is an instance of a more general category that is socially denigrated – he is gay or suffers some disability or belongs to an unpopular minority group.

While Honneth differentiates the second and third, and associates them with rights and solidarity respectively, the two are in fact inter-dependent. Full solidarity must include being accorded equal rights, or more precisely being accorded equal rights to make rights claims. Their combination links the recognition of persons as equal rights bearing subjects with recognition of the person as a legitimate member of the ethical community in a way which accurately maps familiar patterns of rights recognition.

To understand the full import of this theoretical frame, one must keep in mind that although Honneth describes the forms of recognition and respect as if they take place in discrete scenarios, each concerned with the sole individual, his schema works as a more general description of the normative patterns in the political community, or the structure of norms and the corresponding distribution of rights. Whether or not a particular individual is recognized as an equal legal partner and a member in the ethical community is not a singular event, but emerges against the background of, and is encoded in the generalized norms of that political community, or its political culture. This also means that at the same time as one is acquiring one's subjective sense of self, one is also

acquiring a normative sense of others and the general abstract rules regulating the distribution of rights, including rules linking rights and membership with identity.

In ideal liberal democratic theory, there would be no place for identity in this schema of the distribution of rights and political membership - that is beyond formal rules of citizenship. Membership in the political community should be the only criteria for equal legal recognition and solidarity, and the criteria for equal inclusion should be as formal as possible, thinned out so as eliminate any thick identity based criteria. But actual historical political communities diverge significantly from this ideal picture.¹²⁷ In fact, inclusion and legal rights are not distributed equally, but are patterned around thick identity criteria. Nor are the connections between identity and the structures of inclusion and exclusion, equality and inequality random (some individuals are included, others excluded). Rather they track identity distinctions salient to the particular political community - gender or race or religion or ethnicity. These distinctions are in turn naturalized as the justification for the distinction. This means that identity distinctions are not added onto but encoded in the normative orientations that inform individuals' sense of themselves and others. Or to put it another way, the fundamental rules about who has a legitimate claim to what are organized around thick identity distinctions.

If a particular identity marker, say race, is a criterion for full inclusion (solidarity and rights), then one's experience of oneself *and also* of others as deserving or not deserving

¹²⁷ One might even make the stronger analytic claim that structurally the concept and institutionalization of rights and rights-bearing subjects entails correlative categories of subjects denied similar rights. According to this analysis, which grows out structural anthropology and deconstruction theory, the presence of the excluded other is not a fault in the system of the distribution of rights, but is its very condition. At this stage, I only mention this structural

respect, rights and solidarity will be mediated through the lens of race. If whiteness is a criterion for legal equality and inclusion in this political community (the political 'we'), then my interaction with non-white others will always also be the occasion for transmitting and perpetuating this norm – I will neither regard nor treat them as fully fledged legal members of my community.¹²⁸ This may or may not result in my violating a particular right.

The idea that identity distinctions are built into the patterns of recognition that generate the distribution rules for legal and political rights significantly extends the sense in which one can say that members of the political community are implicated in systematic violations of the rights of certain groups. So far, I had argued that members of the political community can be held responsible for perpetuating the political culture or norms which then underpin *particular* violations, still equating the wrongdoing which justice should address with these particular acts. Here, the claim is that the wrongdoing itself should be understood more broadly. The injury is not limited to the moment where a particular violation occurs, but is the more pervasive failure to accord recognition, or more positively, the active disrespect which members of the political community convey in their interactions with persons whose identities are denigrated within that community's normative horizon.

argument, but come back to it in chapter 5.

¹²⁸ This also helps explain why members of the denigrated group may themselves see members of their own groups as less than co-equals in the political community even as they eschew this norm.

Relating this back to my initial discussion of the liberal model of responsibility and liability, one sees how this pervasive experience of disrespect and exclusion resists being encoded into the language of rights' violation, and so simply slips out of the picture of justice. Recall, in the liberal story of wrongdoing and justice, liability was distributed by assessing responsibility for particular wrongs, defined as violations of particular positive rights. Institutionally, anti-discrimination law cannot be triggered until there is a particular act that corresponds with a violation of a specified right (to equal pay, to the provision of services etc.).¹²⁹

There are certainly good reasons for delimiting the attribution of responsibility and institutionalized liability in this way. One can well imagine how dangerous it would be if the mere claim that a person 'felt' excluded because of their color or gender were sufficient to punish another person. The requirement that evidence be public and that violations be clearly and operationally defined are necessary for the fair and objective administration of the law and assessment of the degree of liability. Nevertheless, practical concerns about unverifiable and subjective evidence or un-measurable wrong should not be conflated with the idea that discrimination and exclusion are always packaged in public events that conform with legally recognized categories of discrimination. As soon as we confuse the requirements of the system with the reality of the phenomena, we blind ourselves to the very real experience to which members of denigrated groups can well attest. When people describe their experiences of racial discrimination, they point less to the particular incidents than to their pervasive experience of being looked down upon or

¹²⁹ This more generalized denigration of persons on the basis of identity will often be conveyed in speech, and the right to free speech – itself considered central in liberal political philosophy – complicates this problem in so far as speech that has a discriminatory intent is excluded from the

not being treated as fully fledged equals – experience which the structural requirements of the law necessarily marginalize.

If these phenomena are both real, and constitute an important form of injury, yet cannot be encoded into the existing system of justice, what is the appropriate institutional response? How can the responsibility legitimately attributable to members of the political community be properly recognized in institutions of justice or dealing with the past?

Before answering this question, one further step is required – to go back and systematize the type of responsibility that is being claimed here and to deal with the problem of freedom and responsibility which this approach raises.

IV. Responsibility and freedom

The significant achievement of this conception of collective responsibility is that it neither implies nor requires that members of the polity actually committed discrete rights' violations, but locates their responsibility at another level, or on a different dimension of the analysis of wrongdoing. There is no contention that they *caused* the wrongful act, as this is normally evaluated in terms of *mens rea* and *actus reus*. They are posited as co-constituting the normative framework against which the act occurred, or correlatively, without which it would not have occurred. It is through what Arendt calls their “matter-of-course” collaboration, even their non-committed coordination that they made the

purview of the law.

discrete and identifiable acts of abuse possible.¹³⁰ Their own actions, expectations and sense of themselves and other members of the political community form part of the necessary conditions for the occurrence of systematic violations. More specifically, there is a hierarchy of collective identity (white/not-white, gentile/Jewish, settler/indigenous) and the dominant social group is recognized as deserving rights which are denied the excluded or degraded group.

This framing allows one to avoid contravening the moral principle of holding individuals responsible only for their own actions, as well as providing the conceptual foundations for a type of responsibility which legitimately obtains in a political community across time, adhering not only to the concrete individuals alive at the time when specific wrongful acts were committed.

Moreover, while this account is certainly different from the individual (liberal) account of justice and responsibility, telling a very different story about how wrong occurs, it is not necessarily incompatible with the liberal account. Nor will institutions which one develops to pick up this form of responsibility necessarily be incompatible with liberal institutions. Individuals who committed violations are still responsible and can be held liable, even if they were acting in a context that affirmed the rightfulness of their acts.

In achieving this compatibility, however, the role of the political community looks very different to anything one would normally call responsibility, and the objection might be

¹³⁰ Arendt, "Some Questions of Moral Responsibility", *op. cit.* p. 53.

raised that it lacks some of the features which are considered necessary to *any* conceptualization of responsibility. Underpinning this objection is the background claim that only subjects who are free can be held responsible, and then only for actions freely performed. This requisite link between freedom and responsibility is putatively missing in the conception developed here.

In fleshing out and responding to this objection, the concept of ‘freedom’ (with its own troubled history and competing interpretations) is better avoided and replaced by less ambiguous descriptions of what is apparently required for a viable conception of responsibility. The general claim can be broken down into two components: first, claims about the type of subject capable of responsibility; and second the type of relationship that must exist between the subject and the state of affairs under investigation. Different theories of responsibility make different demands of the subject and the relationship, but they share certain baseline requirements concerning the distinct capacity of the actor and the contingency of the event or state of affairs.

The minimal claim regarding the subject itself is that only a subject that can affirm or contribute to a state of affairs is a candidate for responsibility. No party could be held responsible if they were themselves *fully* determined, contributing nothing from themselves. Thus, for example, it would make no sense to hold a robot responsible for breaking the foot of a passing pedestrian if the robot was set to automatically drop a weight on the sidewalk at 4.00pm (where the person happened to be walking). The robot does not have the subjectivity or capacity required to make it the type of subject that can

be responsible. This failure becomes clear if one thinks about how absurd it would be to punish a robot.

In traditional theories of responsibility, this claim has caused serious problems in making sense of human responsibility against the background of a putatively deterministic universe. If a person's acts can be apparently fully explained by recourse to prior causes, it would seem that they would be precluded from being held responsible. For the purposes of this discussion, I bracket these broader debates and assume at least the compatibilist argument that holds that even if determinism holds (at one level of explanation) persons can nevertheless be responsible in so far as they are also conscious subjects.¹³¹ Nevertheless, the fact that the actions of human beings are not fully free, but also determined by factors which are considered to be acting 'on them' complicates the attribution of responsibility.

There is also a more demanding version of this claim - that responsibility can only adhere to subjects that can intervene in a chain of events so as to bring about a state of affairs *other* than the one which occurred. Here, one has to be the type of subject capable of generating alternative possibilities – sometimes called the principle of alternative possibilities or phrased as the demand that they “could have done otherwise.”¹³²

¹³¹ For a discussion of compatibilist arguments see J. V. Canfield “The Compatibility of Free Will and Determinism”, *Philosophical Review*, 1962 and Peter Van Inwagen, “The Incompatibility of Free Will and Determinism”, *Philosophical Studies* 27, 1975, p. 185-99.

¹³² Harry Frankfurt calls this the “principle of alternative possibilities”. Within analytic philosophy in particular the link between freedom and responsibility is subject to extensive debate and Frankfurt for one rejects the validity of this formulation. Cf. for example Harry G Frankfurt, “Alternative Possibilities and Moral Responsibility” in, *The Importance of What We Care About* Cambridge

Again, even in traditional accounts, this demand raises problems in justifying holding persons responsible where they seem to be acting on the basis of some characteristic or attribute which is putatively essential to them, or where something seems to be acting 'on' or 'through' them (for example an addiction). In the jurisprudence of responsibility, this is dealt with by drawing a distinction between those characteristics for which the subject is deemed not responsible, and the presence of which mitigate responsibility (for example being a child or having a mental illness) and those which, even if essential to the person and on one account outside their 'control', nevertheless count as that subject and so do not annul his responsibility (something like their 'bad character' or lack of moral concern).¹³³ At work here is the association between the capacity to be held responsible, and the capacity to make choices.

Traditional criminal law theories bypass the problematic distinctions between different attributes of persons (mental illness versus moral weakness for example) by focusing on people's *actions* rather than their attributes. So a person is held responsible for what they do, not for who they *are*. Who they are, or their attributes may be drawn in so as to argue that responsibility for the wrongdoing is mitigated (he cannot be held fully responsible for doing wrong because he is a minor), but they are still always related to some action, and are not assessed *in themselves*. In those cases where the person is 'driven' by some un-chosen or compelled attribute (insanity for example), one says that they are not acting

University Press, 1988. In the jurisprudence of responsibility however, this formulation is generally accepted as a working principle. Cf. George Fletcher, *op. cit.*

¹³³ It is in these borderline cases that one can see the instability of the basic distinctions between what can be attributed to a subject, and what was 'caused' in the subject. When these are pushed, one

at all, because action requires something like their rational affirmation of the act. The attribute is thereby assumed to work in much the same as an external source of compulsion.

This raises the second dimension of the link between freedom and responsibility – the relationship between the responsible subject and the event or state of affairs in question. For it to make sense to say that a party is responsible, there has to be some gap between the responsible subject and the wrongdoing (and equally a rightful act) or wrongful state of affairs. If this space is not there, if the subject and the state of affairs are already collapsed, it would be impossible for the person not to be responsible, and the concept of responsibility would be drained of all meaning.

This distance is achieved most clearly and simply when one is looking at a person and the actions that they *cause* - person A caused act X to happen. It is more difficult to explain this distance when thinking about the relationship between the subject and their attributes or states, or when trying to include a person's attributes or states in the story of how an action comes about. So for example, if one wants to argue that a person (A) is responsible for an act (X) and also acknowledge that their addiction was part of what caused them to do X, one might argue that A caused or chose their own addiction and so can still be located on this causal chain.¹³⁴

can see an apparent arbitrariness in where the distinctions are drawn.

¹³⁴ This is sometimes known as a second order desire.

Again, there is a slightly more demanding version of this claim, which holds that because there is a space between the actor and the act or state of affairs, they could have moved in a different direction in that space – doing right versus wrong (or vice versa). The difficult cases here are those where it is difficult to imagine how the person could have done otherwise, given who they are or their attributes. To deal with these, liberal jurisprudence has to count these attributes as part of the acting subject or argue that they are something that the person actively affirms (in their second order desires).

If one pushes this conception of responsibility, it soon becomes evident that there are various types of borderline cases where it is difficult to fully meet these requirements - that only a fully choosing subject can be held responsible, and then only for what they bring about. Indeed, if we go back to my earlier inventory of responsibility, it was on account of these very demands that the liberal account itself ran into problems attributing responsibility to individuals in cases where their act was affirmed as right both legally and morally by the state and society in which they were located. It was precisely at this point and because of this breakdown in the unicity of a moral/legal framework that I argued one had to move outside the liberal account of responsibility and locate responsibility at the level of the social context, and thus the political community.

Still, in those cases, one would still say that the individual is responsible for the *act*. What they are not responsible for is the *wrongdoing*.¹³⁵ Call this the distinction between responsibility and *blame*. No one is arguing here that the society compelling the person to

¹³⁵ In his analysis of collective responsibility, Miller distinguishes these as “outcome responsibility”

act, depriving them of the ability to act as a subject ('setting' the individual to use the robot analogy). Rather, the political community enters the story in so far as it set the moral parameters in such a way that one cannot expect the person to have judged the act as *wrongful*, or more minimally that they affirmed the rightfulness of an act that according to other (say international standards) would be deemed wrong. This distinction between the subject's responsibility for the *act* and their responsibility for understanding the moral rightfulness of the act is key in understanding how this move to the political community works.

Then the two part question arises - corresponding to the two dimensions of responsibility discussed here: First, is the political community the type of subject which one can hold responsible, being careful to underline that it is not being held responsible for the act, but only for the normative framework; And then, is the relationship between a subject and something like a normative framework (as distinct from an attribute or state or an act) one which is amenable to the concept of responsibility?

Regarding the first, one might argue that the political community, as conceptualized here is not the type of subject that can be held responsible. Indeed, I have explicitly rejected any notion of the political community as a subject modeled on the independently acting individual who acts or affirms so that one might separate the subject and the action or attribute out into two ontologically distinct entities. It is certainly not a conscious subject.

and "moral responsibility". Miller, *op. cit.* p. 244ff.

Regarding the second, the community certainly does not stand in a causal relationship with its norms. Rather norms are a dimension of the political community's identity one might even say that a political community is constituted as that political community by virtue of its fundamental norms, particularly given that identity markers are coded into the norms. On the basis of this conceptualization, one might argue that the political community and its norms are too close for it to make sense to say that the political community is 'responsible' for them. Moreover, if its role here is *reproducing* itself (as a particular type of political culture), continuing to perpetuate and sustain the norms which underpin the wrongdoings *and already order it*, there seems to be an inevitability which would preclude responsibility.

This problem becomes even more pronounced if one moves to the higher 'could have done otherwise' demand: If the political community is fully interpolated in a set of normative orientations, how could it have had other normative orientations? This proximity is a particular problem here, given that the norms underpinning systematic violations against particular groups are those most deeply entrenched in the political culture, least open to revision and most tightly wound into the community's core identity. In fact, as will become apparent in the Australian case study, the denial of the rights of certain groups is often structurally linked with the construction of the political community's own identity and political constitution. Thus, if one follows the demand that responsibility lies where the party could have done otherwise, one ends up with the contradictory conclusion that the political community is *least responsible* for the most damaging norms, because it is these which are most deeply entrenched and so trenchant

against revision.

These objections might seem to gut the account I have given of the basic requisites of an account of responsibility, thus undermining the whole enterprise. In my view, however, a better conclusion to draw is that this analysis of the link between standard conceptions of responsibility and action, choice and causal explanations elucidates the profound structural differences between them and the conception of responsibility developed here.

This account told the story very differently to the liberal story of individual responsibility. It was not an explanation based on causally linked elements, going back until one locates a primary cause where responsibility can be located. It rejected the very idea that the events, states of affairs and subjects can be logically separated out. In fact, it was the problematic results of the ontological individualism of the liberal account which set this inquiry into motion, and the rejection of transferring the ontological abstraction to the 'collective' which led to a conception of norms as an organizing grammar rather than a product or a cause.

On this account the political community does not 'cause' norms; nor is the normative orientation of the political community caused by structural factors and then taken on (passively) by the political community. Norms are neither invented by the free-floating interventions of 'the community' (or for that matter independent autonomous actors), nor are persons' normative orientations simply the effects of institutional causes –

automatons set by social construction.¹³⁶ As Ortner puts it, “.... the analytic effort is not to explain one chunk of the system referring to another chunk, but rather to refer to the system as an integral whole.”¹³⁷

But then, one might ask, if the system is explained only as an integral whole, how can one think of any part of that system as ‘responsible’?

To answer this, one must be willing to undergo the type of ontological and methodological conversion that Castoriadis urges. To say that the different dimensions of the political community (identity, norms, actions, institutions) cannot be differentiated into discrete bits, or even that they form an integral whole is not the same as saying that they are indistinguishable or that this whole is monochrome. Through this lens it makes no sense to think of the dimensions of this whole in terms of means and ends or causes and effects, because the logic of discrete causal sequences is totally inappropriate to this type of explanation. It is possible to ascribe a distinct and engaged, but non-causal role to the political community, as one sees in Castoriadis’ alternative formulation - that the members who comprise a political community are the necessary subject dimension of organized meaning. Without concrete persons who collectively interpret and act in meaningful ways, there can be no social meaning. It is only when we insist that a causal logic underpin any statement about responsibility that we are forced to conclude that

¹³⁶ Thus Castoriadis in one of his many attacks on the insistence of analyzing the social historical in terms of a causal model writes: “Society is self-creation deployed in history. To recognize this and stop asking meaningless questions about “subjects” and “substance” or “causes’ requires, to be sure, a radical ontological conversion.” *World in Fragments* (David Ames Curtis, ed. and trans.) Stanford University Press, 1997, p.13ff.

responsibility is inconceivable on this account.

One reason that it is so difficult to map this explanation of the relationship between the political community and the normative framework is that neither the ‘political community’ nor the relationship between the community and norms can adequately be described according to any of the categories articulated in the traditional mode: fully rational and responsible actor, irrational actor, justified actor, compelled actor, automaton etc. on the one hand or attribute, state or act on the other. What we need to find are novel categories for ‘political community’, ‘normative orientation’ and for the type of relationship between a political community and its normative orientation.

This need for a different type of relationship or different conceptual framework for speaking about a political community and its normative orientation recalls the comment I made in the initial discussion of Jaspers’ conceptualization of political guilt, where I noted that this guilt was conceived not in terms of action, but rather identity. Already there I noted the inadequacy of this alternative, and the need to find a way of thinking about norms that neither collapsed them into the subject, nor placed them entirely outside it. Identity implies too little differentiation – action too much.

The distinction I drew earlier between responsibility and blameworthiness elucidates what is going on here. At the first, very minimal level, to say that the political community is responsible, is no more than to say that it is *this* political community, or the normative

¹³⁷ Ortner, *op. cit.* P. 148.

orientation of *this* political community which provides the conditions for the wrongdoing, in the sense that it is this community and not another. Here, normative orientation is a dimension of identity. This attribution of responsibility can in no way imply that one thinks that the political community should have had a different normative orientation, because this orientation is part of what it is. To demand that it was otherwise would be to demand that it was a different political community.

This is different from the more demanding attribution of *blame* which would involve the claim not only that this political community is the locus of the normative framework, but that it *should have* and thus *could have* had a different normative framework.

To focus on the last part of this claim, to say that the political community *should have* had a different normative orientation implies first that there is, objectively (or at least from the point of view of the one making the claim) a morally superior normative framework against which the existing one can be judged (and thus an objective scale of assessment). It also implies that it would have been possible for the political community to have adopted this alternative normative orientation.

Yet, trying to find a way of explaining something like ‘the political community could have had a different normative orientation’ presents logical problems if one is to remain faithful to this non-reified conception of the collective. When one says that a subject could have had a different attribute or performed a different action, one usually thinks of this in terms of the subject having the capacity to make a different choice, or act differently. Yet again, these relationships of choice and action are inappropriate to this

framework, where the political community does not have the ontological status of an independently acting agent. Nor is the political community appropriately conceptualized as a collection of individuals who could act or will or cause something to happen.¹³⁸ This precludes our placing the political community in a syntactical structure where it is the subject of an active verb – choosing, willing, changing.

To see how difficult it is to make sense of this ‘could have been otherwise’, one need only go back to the way in which the theorists discussed here tried to explain how dissent and ethical criticism (and therefore ethical historical progress) can emerge when members of a political community are formed within existing conditions. Hegel only manages to break through the perpetual reproduction of one-sided ethical life by building into his argument the transcendental (Kantian) idea that individuals retain (through individual rational will) access to universal reason- reason that transcends the parochialism of their situated ethical consciousness. Mead’s solution is also to add something onto the individual self, in his case by drawing a distinction between the socially formed *me* (which is formed in inter-subjective relations) and the spontaneous critical *I* which exists outside this process.

In either case, the possibility of critical distance, dissent and social/historical change lies in this bifurcation of the individual self, and the assumption that individuals always retain a psychic reservoir (reason for Hegel, unformed energy for Mead) which is not fully

¹³⁸ Here, I would recall Jasper’s claim that even those who were critical of Nazism still bear political guilt. This guilt, or responsibility is precisely *not* attached to a choosing individual.

subsumed in the process of socialization. Thus, even while Hegel insists that *Moralität* can only become a motor for real social change when an individual does not withdraw (into alienation, individualism or idealist religion), but reinvests in their concrete community so as to broaden its determinate ethical frame, the source remains individual, not collective and comes from outside the social formation (or *Sittlichkeit*).¹³⁹

Castoriadis' approach is more promising, because he locates the possibility of dissent, and thus the space I am trying to find at the level of the social-historical institution itself and at the level of subjects (in so far as they are part of this institution). Recall that for Castoriadis, one must always insist that meaning itself is not a product of singular psyches, or even individual psyches acting cooperatively.¹⁴⁰ Rather, he locates the generation (and potential change) of meaning simultaneously at a number of sites - first at the abstract level of the "social-imaginary significations", then more accessibly in the social-historical institutions which organize social relations and human action (language and a full range of social and political institutions) and then also with the engagement of concrete persons. This means that he builds the seeds of change into the social-historical formation itself, rather than having to locate the source of change at the site of a challenge coming from the outside (including here the putative 'un-socialized' part of the individual).

¹³⁹ While the access is individual; reason, Hegel's ultimate claim is of course that the source of this absolute reason is *Geist*.

¹⁴⁰ "... whether it is a matter of acts of individuals, collective phenomena, artifacts, or institutions, I am always dealing with something that is already constituted as such by the *immanent actuality of*

In making this move, he is by no means rejecting the idea that it is concrete persons who bring about shifts in normative orientations. It is certainly only the individuals who comprise a society who can ask questions about, and change their organization of existing norms, the way in which people are categorized, what constitutes a right and the associations between different categories of people and rights. What he does reject is the idea that this autonomous action, this bringing in something new occurs *in* the individuals in a manner which can be abstracted from the broader existing institutional context and institutionalized patterns of meaning.¹⁴¹ Hence his observation that autonomous individuals are found in and supported by autonomous social institutions (forms of government, educational systems, systems of explanation) which in turn foster autonomy at the level of the individual.

Thus, when Castoriadis speaks of ‘the capacity for self alteration’ one must be very wary of interpreting this as the capacity of the abstracted collective to act *on* the institutional framework or *on* meaning so as to alter them.¹⁴² His conceptual framework allows for the possibility of normative change, and links the political community in as one of the components in effecting this change, but without making ‘the political community’ the active subject *doing* something, or identifying it as the subject which *should have done*

meaning – or of *signification*” “Individual, Society, Rationality, History”, *op. cit.*, p. 60.

¹⁴¹ Castoriadis’ distinction to which I drew attention earlier between ontological individualism, which insists on placing the individual first in the order of being (thus causing society) and methodological individualism which insists that one can in fact only understand the behavior of actual persons is again relevant here. Cornelius Castoriadis, “Individual, Society, Rationality, History”, in *Philosophy, Politics Autonomy*, *op. cit.* p. 60.

¹⁴² He writes: “society and individuals alter themselves together, those alterations entailing each other... “Power, Politics, Autonomy”, *op. cit.* p. 146.

something. In this sense, it remains very difficult to elaborate the ‘capacity for self alternation’ in positive terms, because the political community cannot be abstracted out as the subject into a syntactical description – “A does/makes/causes/wills B”. In place of the phrase ‘could have done otherwise’, one might nevertheless say that there is a degree of open access in the relationship between the political community and alternative norms.¹⁴³ This difference between the logical possibility of change, and the possibility of a subject (the political community) *affecting* change is crucial in understanding the different conceptions of responsibility at work here. It will also be important in thinking through legitimate responses to responsibility and effective ways of affecting the desired normative shifts.

Let us call this property ‘accessibility’. Such accessibility allows one to sensibly speak about change, but does not yet provide sufficient basis for ‘blaming’ the political community for a failure to act in the way implied by the term *blame* in the traditional liberal framework. It is not sufficient to sensibly speak about *blame* or to hold political communities responsible for their *wrongful* normative orientations. This further comparative move demands more content. That is, at issue here is not merely an abstract

¹⁴³ This portrayal is complicated because one of the ways societies can ‘alter themselves’ is, ironically, by *increasing* the degree of closure and diminishing their own capacity for self alteration. One might track this, for example, in the legal/normative shifts which took place from around 1933 onwards in Germany as the ideology and institutions of Nazism, with their explanation of right and their classifications of persons occupied more and more space and correlatively the space for dissent became narrower and narrower. If one enters history in say 1942, one will have a different picture of the relative autonomy of Nazi Germany and the capacity for self alteration, than one would entering the scene in 1933. In 1942, the effective possibility for putting the social institutions of Nazism into question was greatly diminished, and yet one might well argue that this diminution was itself the effect of an earlier exercise of the capacity for self alteration.

capacity for self alteration, but a more substantive possibility of altering the normative frame in a very particular way: one is looking for the capacity of the collective to shift from a normative frame which is now considered wrongful to one now deemed to be rightful - from racism to egalitarianism, from failing to recognize indigenous people or Jews or blacks as legitimately having a claim on rights and inclusion, to recognition and inclusion. It is not enough to speak about the abstract multi-valence of the instituted imaginary (accessibility). The substantive norms which would condemn violations must also be available. Let us call this second property “availability”.

Availability requires that those alternative normative orientations be on the horizon of the political community. This might take several forms. The norms condemning the violation may already take a positive form ‘outside’ the political community, but still in a moral jurisdiction to which the community putatively belongs – for example in international norms or international law. The continuation of apartheid in South Africa through the 1980s in the context of international condemnation of racial discrimination (including international law) is an example of this ‘external availability’ of alternative norms.

The alternative norms may also be embedded as one of the interpretations of more general normative principles that orient and are affirmed by the community itself. So for example, the idea of the rights of persons and respect for others may be current in the political community, but the existing interpretation of this principle may define certain groups out of the category of persons and thus beyond the reach of its practical

application. These alternative interpretations, while not actively supported by the political community (or reflected in its laws and institutions) may nevertheless be current as minority opinion, or they may have been interpretations which the community affirmed in the past but has turned away from, or they may exist in its ideal principles. So for example, one of the critiques leveled at contemporary Israel, often by Jews themselves is that in failing to recognize the rights of Palestinians Israel is failing to respect basic principles of Judaism concerning respect for the stranger or love of the neighbor, and that is why Israel can be blamed from a moral point of view.

This claim that blame requires the availability of alternative norms matches our intuitions. The more 'aberrant' a society is vis a vis other societies and legal orders to which it is exposed, and the more aberrant the particular norm vis a vis its own other norms, the more we hold it responsible or blame it for continuing to embrace the wrongful norm. By contrast, where the entire context is more monochrome – where there is no alternative pattern of seeing the world, it is harder to look at this group and condemn it for failing to do otherwise. One can hold it responsible in the sense that it is the political community where this norm is affirmed, but without also blaming it in the same way for so doing, or so being.

The problematic distinction one sees at work here between the responsibility which is associated with identity itself (what a political community *is*) and responsibility for what it *does* also helps to explain the paradox I pointed to earlier concerning responsibility for violations which are condoned by norms closest to the core identity of the political

community.

Here one sees clearly the structural difference between this conception of responsibility and the conception that takes as its subject the autonomous choosing subject. Whereas the conception of responsibility which starts with the choosing subject demands that responsibility be linked with greater freedom to shift, this is not the case here. In the traditional individual account, one should (logically) hold the subject most responsible for those actions over which he has the most control. Or to put it otherwise, responsibility should be proportionate with the possibility of generating alternatives (the degree of ‘could have done otherwise’).¹⁴⁴

In the case of systematic violations that become the subject of transitional and historical justice however, just the opposite may be the case. The norms that affirm the legitimacy or rightfulness of the actions now judged to be wrong (and the norms most subject to transitional and historical justice processes) may in fact be those norms which are most tightly bound into identity and system of meaning of the political community, and thus those most trenchant and resistant to change.¹⁴⁵ In this sense, here one is dealing with orientations which are closest to the identity of the political community, the most part of

¹⁴⁴ In fact, this is also not the case in the individual account when it comes to the moral orientation of the individual. It seems that our condemnation is greatest where a person is unambiguously attached to the values which affirm the rightness of their wrongdoing (‘bad moral character’) – yet it is in this case which it would seem least possible for them to act otherwise than in a morally bad way.

¹⁴⁵ I will explore this in greater detail in the case analysis of the apology to Indigenous people in Australia, but the general claim I am making follows from my earlier discussion of the connection between the thick identity of the political community and the constitution and exclusion of the ‘non-member’.

what *it is*, and thus those with respect to which the possibility of ‘doing (being) otherwise’ is most inaccessible. Because, however, I have now established that choice is not the relevant link when one is looking at collective political responsibility, this absence of choice does not undercut the attribution of responsibility.

These structural differences brought out by the problem of freedom help to clarify why it is so difficult to conceptualize the responsibility of the political community. Properly understood, it resists classification in the traditional categories of being (identity) or doing (action), and yet one tends always to come back to these two basic classifications, especially in the jurisprudence of responsibility.

It is this apparently inevitable tendency to think of responsibility in terms of doing or being which makes this conception so unstable, and explains why it is so unappealing to contemporary politics – even as one can provide a conceptual foundation for it.

V. Institutionalizing ‘just responses’ to collective responsibility

The final question with which I close this exploration of the theoretical underpinnings of a collective approach to responsibility is: ‘what institutions would logically follow from, or can be justified by this conceptual framework?’

At this stage, I seek only to answer this in very general terms, highlighting in the main what cannot be justified and pointing to the type of institutions that may appropriately follow.

As the final discussion on the structural differences between a collective form of

responsibility and standard (liberal individual) conceptions highlighted, this form of responsibility does not follow from freely chosen actions on the part of autonomous individuals. This absence of autonomous individual action in the account of responsibility then has implications for the type of institutions that justifiably follow from it.

Specifically, it cannot justify the same type of subsequent demands as are made by, for example, punishment or individual liability. Because these institutions of justice directly impinge on the liberty of the individual (especially punishment), they require and imply a threshold active involvement in the perpetration of a wrong which is not met in the scenario portrayed here. To *do* something to the individual requires that this individual has himself *done* whatever it was that contravened justice.

To find the correct level or register of the responding institution (of justice or whatever else one might call it), one needs to look at the register or level on which the responsible party is being tied to the wrong. The accusation in a collective analysis is not leveled against individuals qua individuals, nor even at persons in their capacity as actors. Rather, the analysis focuses on the political culture or norms that orient action, and it draws in concrete persons in so far as they perpetuate those norms and bring them into actual practice. As such, one should be thinking of institutions that work at this same level of the creation or perpetuation of constitutive norms. If punishment or compensation seeks to right the individual who corrected wrong, or restore the correct balance between wrongdoer and victim, here one is looking to institutions which will correct the problematic norm or reorient the political culture – and moreover do so in a manner which actively draws in the persons who comprise the political community.

This presents quite a challenge. How does one correct something that does not have an independent substantive existence, but is woven through the practices and psyches of a political community? More abstractly, how does one locate an institutional intervention to alter a phenomenon that has been defined outside a metaphysics of presence?

One might well argue that the very idea of an intervention to effect something as diffuse and woven into the identity of a political community as its orienting norms is absurd: One cannot ‘remake’ a political community or act on it in such a way as to alter its identity – this is a process that happens over time and as a result of enormously complex shifts.

Jaspers treats this question very briefly in a section in *The Question of German Guilt* that asks what follows from the four types of guilt which he sets out. His suggestions are fascinating given the emergence of the apology. Only criminal guilt, he argues, can justify punishment. Political guilt forms the basis for liability and hence reparations. But what follows from moral guilt are *penance and renewal*, and from metaphysical guilt *a transformation of human self-consciousness before God*.

In the case of these latter two, neither atonement nor reparation are sufficient, although both are necessary. Rather, the individual or community bearing such guilt must either bear it all their lives or undergo a transformation: “There is no other way to realize truth for the German”, he argues, “than purification out of the depth of consciousness of guilt.”¹⁴⁶ It is through the confrontation with guilt that the possibility of a new form of life emerges.

¹⁴⁶ *Ibid.* p. 118.

For Jaspers, this confrontation is not a merely cognitive or even an emotional event, but has strongly religious overtones. It requires a level of engagement that cannot be framed in terms of the legal person or the citizen, but rather calls on a more fundamental level of being – in his words, the soul. How this might translate into public policy is a more difficult question – yet his suggestion that the work must take place at the level where religious ritual is located provides us with a direction to pursue.

The Jewish and Christian institutions and conceptual debates about repentance pursue this very question – how to reform the value orientation of the community. I turn now to those two traditions.

Chapter 3: Collective and ‘political’ apology and repentance in Judaism

“Sin is the breaking off of a personal relationship with God. It presupposes the experience of a vis-a-vis whose holiness has been discovered in a retrospective act of reflection and repentancethe idea of sin is the obverse of the idea of God.”¹

I. *Teshuvah* and the public constitution of community in Judaism

Chapter 2 deconstructed the peace/justice dichotomy by articulating a form of responsibility for wrongdoing arising from the failure within the political culture to recognize particular groups as full and equal rights holders. In this chapter, I explore the practices and conceptualizations of collective repentance in Judaism so as to flesh out this collective trope and deepen our understanding of this distinct form of repentant action. This detailed analysis of apology and repentance in Judaism establishes the collective public apology as a *sui generis* category of social or political action. It thus provides an argument against the overwhelming tendency in the literature to categorize it as a problematic projection of an essentially individual/personal process onto the political sphere.

The advantage of looking at Jewish practice is that one finds in them precisely this type of transformative ritual in very clear and self-conscious terms. The tradition both recognizes the constructive role of symbolic action and speech and provides highly ritualized and formalized processes that work through its collective transgressions towards renewal of the orienting norms (the covenant). Moreover, I argue that formally these processes can be detached from the *content* of the constitutional principles. That is,

while there are undeniable differences in the way in which religious and political communities represent their fundamental commitments and identities, the mechanisms for realizing (and I will argue shifting) fundamental principles of right and identity are transferable from the sphere of religious community, to the sphere of secular community.

This chapter also addresses the objection that one cannot transfer meaning from the ancient/religious to the modern/secular setting. At the first and most straightforward level, I argue that Jewish practices provide forms of intervention or processes of societal transformation that can be detached from their content and taken up in the secular setting. At a more complex level, the chapter critiques and deconstructs the dichotomies that putatively divide the two spheres. It does so primarily by showing the inadequacy of the one sided classification of these religious practices as external and crudely collective. This in turn lays the conceptual foundation for challenging the view that ritual and collective repentance cannot be integrated into the modern secular political setting.

More specifically, it establishes a link between apology and the political processes required both to constitute political communities and establish or shift their normative orientations. In this sense, it draws a direct connection between the work of creating or altering collective normative frames (political identities) and instantiating those frames for members of a political community. The public apology thus constitutes one mechanism for achieving the collective task of shifting political cultures – the work which was identified in chapter 2.

¹ Albert Gelin, "Sin in the Old Testament" in Charles Schaldenbrand (ed.), *Sin in the Bible*, Desclee Company, New York, 1964, p. 39f.

Teshuvah, repentance or return lies at the heart of Jewish theology and practice, and apology - the verbal expression of regret - is a necessary condition of doing ‘*teshuvah*’.² *Teshuvah* is not simply one concept or practice amongst others, designed to achieve particular and discretely defined ends. Rather, it orients religious and social action and identity, constituting one of the building blocks of the religious experience and even of the people, law or “Knesset” Israel” as a distinct corporate entity.³ In fact, the tradition holds that *teshuvah* existed before the creation of the universe.⁴

Two features of the Jewish concept and practice of *teshuvah* make it particularly germane to this exploration of the contemporary political apology: its essentially corporate or collective character and the centrality of publicity and public speech. The collective quality of the practices and theological understandings of *teshuvah* cannot, without gross distortion be reformulated in terms of the individual ‘psychoanalytic/confessional’ model which dominates evaluations of the contemporary political practice. As I argued in chapter 1, it is the assumption that this individual model is the essential form of apology that leads to collective apology being seen as deviant or as a category mistake. In this sense, *teshuvah* provides a *sui generis* form of collective and even representative apology far more consistent with the contemporary practice.

² Although usually translated as repentance, a more faithful translation of *teshuvah* would better reflect the dynamic notion of return - *shuv* - which constitutes its etymological root. In parts of the scripture this translation is made explicit. For example Hosea (14:2): “Return, O Israel”; Ezek. 33:11: “Turn ye, turn ye from your evil ways”.

³ Understood as the people of the law, not contemporary state or the land it occupies. The question of whether “Israel”, or any other collective entity is a metaphysical, sociological or political entity is what is necessarily unsettled.

⁴ Talmud tractates Pesachim 54a; Nedarim 39b, Midrash, Genesis Rabbah 1. Also before the creation of the universe existed *Torah* (the five books of Moses), *Gan Eden* (Garden of Eden), *Gehinnom*

Certainly, there are practices in Judaism directed towards individual redemption and thus a place for a more individual form of repentance. However, even in the contemporary setting, these exist alongside, or within the context of the collective and collective repentance. In this sense, Judaism has not followed the supposedly progressive path, discarding primitive collectivism and adopting practices more consistent with modern individualism. Within Jewish ritual and self-understanding, *teshuvah* continues to be practiced and recognized as a process whereby the community per se fulfills *its* religious mandate.

To fully grasp the sense in which *teshuvah* is necessarily collective, one must see how it forms part of the formation and reformation of Israel as a covenantal community. The collective entity Israel came into being by acceding to a covenant that was both a set of laws about how to live and an agreement with another party God. In this sense, the existence of Israel is defined through a set of normative principles and a relationship with the putative source of those principles. This means that *teshuvah* is never merely an act discretely concerned with norms and laws, as if these are extrinsic to the nation. Rather, just as the covenant gave birth to Israel, it is through *teshuvah* that Israel continues to commit to and constitute itself as this covenantal entity.

Thus, *teshuvah* is not simply the repudiation of wrongful behavior, nor even affirmation of the rightfulness of laws that have been contravened, but is return to the covenant itself, and with that to the covenantal relationship. Because *teshuvah* is grounded in the

(Hell), *Kisse Hakavoth* (the Throne of Glory), *Beith Hamikdash* (the Temple; lit., "House of the Sanctuary"), and *Shem Hamashiach* (the Name of the Messiah).

covenant, it provides the performative means whereby the community re-covenants afresh with the very principles that provide it with its identity and its existence as a particular community, as distinct from an association of individuals. *Teshuvah* is not simply something that the community does to achieve an extrinsic end, but is intrinsic to its very self-perpetuation. Seen in this light, it is not only a religious, but also a political act.

Second, the centrality of collective and representative apology (public speech) in the work of *teshuvah* makes the Jewish case an even richer site for thinking through the contemporary political apology. Historically, and still today the actual performance of the apology, the public speaking of the words, is an essential part of the process, not simply a reflection of the ‘real’ work which is taking place either internally (through inner contrition) or materially (through for example monetary compensation). As ritual speech, the apology is integrated into the process of *teshuvah* – effecting its own part of the reorientation and reconstitution, but only in concert with *teshuvah*’s other components – the subjective experience of regret, material restitution and a commitment to rightful action. In this way, the Jewish practice and understanding of apology challenges the conceptual scheme which would relegate the verbal dimension of repentance to ‘mere representation’, and locate the real motor of change elsewhere.

In this chapter I set out and explore the collective/constitutional dimension of *teshuvah* by looking at a number of foundational and interpretive texts, ritual forms and etymology. I also delve into the treatment of ‘performance’ in Jewish practice and

thinking, using this as a site which provides an alternative way of structuring the relationship between what is said, what is done, what is felt and ‘dealing with the past’ so as to reorient towards the future. Judaic practice and theorizing puts flesh on the category of the performative that I introduced in abstract terms in chapter 1.

What is particularly striking about this conceptualization of apology and *teshuvah* is its consistency with the understanding of collective responsibility I built through the arguments in chapter 2. Repentance in Judaism is a form of collective action that does not annul the integrity of the individual, but rather properly recognizes the sense in which individual wrongdoing (or for that matter rightful action) is always grounded in a set of principles and orientations that belong to and are the responsibility of the community.

II. From religious to political communities: general issues of transfer

1. The basic objection: protecting principles of secular modern politics

Before exploring the practices themselves, I want to return to the objection that the modes indigenous or suited to the sphere of religion are irrelevant, if not positively inappropriate in the sphere of modern politics. The contention here is that even if there is a structural resemblance between apology in the religious and the political setting, one cannot validly transfer interpretations from one to the other because the two spheres are organized around fundamentally different principles.

Importantly, this is not merely a methodological objection, but a normative one: the apology appropriate to the sphere of religion contravenes core normative principles of

political liberalism and so should be rejected by modern political communities. One might go even further and say that modern secular political principles developed in self-conscious contradistinction to these earlier forms of social organization where politics and thick religious identity were still enmeshed.

This is not a version of Rolph-Trouillot's objection, that collective apologies do not make sense because apology requires a self-reflecting subject with an internal soul. The problem here is not that the apology is essentially individual, private and *unpolitical*, but rather that the collective model of repentance developed in the religious setting *is* 'political', but in the wrong way. The ritualized processes of Judaism, including apology were public and collective and *did* play a legal and political role, because 'Israel' or Judaism did not simply represent a religious identity or sphere of activity circumscribed by public political life. It was itself a corporate political body regulated according to a set of laws, established through a covenant and sustained, in part through rituals like *teshuvah*. The objection is to binging the form of law and social organization associated with the religiously based polity into the modern space of liberalism.

This objection draws on two sets of distinctions or apparent dichotomies: first, between the secular and the religious forms of political organization and principles; and second between the pre-modern worldview or form of subjectivity within which Old Testament theology and practice were articulated and modern norms and subjectivity.

One of the main objectives of this chapter is to critique the assumption that the two spheres can be neatly distributed across a series of dichotomies: the internal and the external, the intentional and the performative, the magical and the mechanistic, the collective and the individual. It is this dichotomous conceptual grammar that prevents our seeing how the ritual form of repentance could speak to modern sensibilities and the demands of the modern political organization. More broadly, it impoverishes our understanding of the modern polity and the forms of intervention required to mediate injustice and systematic violation.

II. 2. The ancient religious versus the modern secular political form

Four differences between religiously constituted and modern secular political community drive the first distinction. I present each as a stark opposition, as framed in the objection.

First, the identity of religious communities (here specifically the “Knesset Israel”) is grounded in and oriented towards a transcendent Absolute – God. Modern political communities, by contrast may be oriented towards a set of abstract values, but one of the fundamental commitments of political modernism is to detach political identity and political norms from the absolute.⁵ According to this reading, the ultimate goal of *teshuvah* is to turn the concrete humans who comprise historical Israel into the ideal Israel in complete unity with the Absolute, and indeed the unification of all being. By contrast, even though processes for dealing with the past in modern political communities

⁵ In her discussion of the nature of law and its relationship with the absolute in *On Revolution*, for example, Arendt argues that on the Hebrew model, laws are understood as commandments to which men owe their obedience, “regardless of their consent and mutual agreement”. *On Revolution*, Penguin Books, 1990, p. 189. I take this up again in chapter 6.

seek to close the gap between the way in which a political community acts and its ideal norms (or laws), these laws are understood as an expression of its will or even of natural law, but not an expression of the Absolute transcendent.⁶

Second, religious communities are characterized by their thick particularistic identities and ascription to a concrete set of non-negotiable moral principles. By contrast, a core objective of modern liberal-democratic political organization is precisely to exclude thick or non-negotiable moral commitments. Democratic institutions are designed to thin out identity and substantive commitments as much as possible, to ensure that all normative commitments are freely embraced by those to be bound by them and to keep unifying or constituting principles open to ongoing revision by those who are bound by them. The only permissible non-negotiable principles are those necessary to ensure the ongoing possibility of full and free participation in the democratic process by all members and to protect their dignity and integrity.

So, for example, contravening fixed principles (thick laws about right and wrong set down for eternity in the scriptures) would mechanically trigger the call to repentance in the religious community, whereas in modern secular communities the very definition of right and wrong is a matter for ongoing political deliberation.⁷ Or, in temporal terms, in religion wrongdoing is defined according to a set of laws established in the past, whereas

⁶ This is reminiscent of the criticism I raised in my treatment of Hegel's ultimate subsumption of history and political development to the reconciliation of all being into Spirit or the Absolute.

⁷ This last claim is of course contentious, and there is significant debate within political theory itself about the need for or rightfulness of fixed rights in a modern political community. My point here is to draw a broad contrast, not to take a position within this finer debate. For an entry point into the debate see Stephen Holmes, *Passions and Constraint*, Chicago and London, University of Chicago Press, 1995.

in liberal political communities those definitions change and ideally develop progressively.

Finally, the appropriate modalities of religion's and politics' treatments of wrongdoing are qualitatively different. Politics operates through law and a range of public institutions (economic, educational etc.), which work by substantively, and objectively restructuring social organization. Religion by contrast operates either through the inner work of the soul or the outer work of public sacramental ritual ('the symbolic'). Further, in the case of modern secular political forms in particular, the 'performative magic', which was still a character of monarchical rule, has been largely replaced by the 'disenchanted' politics of law and economics.⁸ The garb of ceremonial power no longer convinces 'us moderns'.

II. 3. Ancient versus modern worldviews and subjectivity

This last (putative) difference feeds into the second distinction, between the modern forms of subjectivity for which modern secular political organization caters and the pre-modern worldview, which provided the context for public ritual, practices. The methodological objection here is that, because sacrifice and ritual offerings belong to an era where human beings held radically different conceptions of the world and their own existential status, they cannot be used as a template for interpreting apology in the modern context. The normative objection is that if apologies as practiced in the modern context do indeed draw their meaning from these pre-modern practices, they have no place in the modern secular political sphere. Two differences are emphasized here: the

collectivist versus individualist ontology and the performative/external versus the internal/intentional.

Ritual practices are said to belong to a world where the group and not the individual had ontological, sociological and political precedence. Responsibility, guilt and forgiveness adhered to the collective thus spreading indiscriminately across individuals. The pre-modern religious community, thus characterized provides the normative counterpoint against which modern political communities developed their institutions, ensuring both that the individual was shielded from the effects of collective attribution and carving space for the individual to flourish. In pre-modern communities, the collective can apologize precisely because protecting individual rights and carving a space for the moral individual had not yet emerged as moral or political imperatives.

The second putative difference is that ritual apology belongs to a realm of performative practice and lacks the inwardness or engagement of consciousness that, for moderns is the sine qua non of authenticity. In the words of the ancient prophets and modern critics respectively, ritual apology is 'empty' or 'mere words'.

Pre-moderns, so the argument goes (in a very crude form) had a primitive grasp of causality and largely attributed the causes of events in their own lives to the interventions of entirely external (transcendent) forces. Accordingly they believed that the best way to influence events was through magical and external practices, which lacked an internal,

⁸ On the historical changes in performance in politics see Jurgen Habermas, *The Structural Transformation of the Public Sphere*, Thomas Burger (trans.), Mass.: MIT Press, 1991.

intentional dimension. By way of evidence for this claim, critics point to the prophets' denunciations of ancient Hebrew rituals as formalistic and 'empty', in contrast to later repentance of the heart brought by the new Covenant and Jesus.⁹ When applied to the apology, this turns into the oft-heard criticism that an apology is meaningless, because as 'mere' words it is neither guarantees 'real' (read internal, intentional) change in the individual, nor does it effect 'real' change in political and legal institutions.

II. 4. Critiquing the dichotomies

By breaking down the objection to moving from the religious to the modern secular in this way one can see very clearly the extent to which the two spheres are characterized according to a set of mutually exclusive categories. In turn, our judgments about what properly belongs in the modern secular political sphere are given by these dichotomies.

When it comes to the collective political apology, this framework leaves us with a choice. Either the apology that appears on the contemporary political stage *is* consistent with modernism' priority for individuality and the internal, in which case it is in no way continuous with the collective apology of the religious sphere. Or, if it is continuous with that sphere and draws significance from religious practices that attribute responsibility to the collective and work as a form of performative ritual, then it has no place in modern

⁹ The tendency to use the prophets to indict the empty formalism and crude collectivism of Judaism is apparent in some Christian commentary. Redlich for example writes: "[O]ut of the ruins of nationality, in the destruction of the Holy City and the Temple, rose the concept of individual religion." E. Basil Redlich, *The Forgiveness of Sins*, Edinburgh: T & T Clark, 1937, p. 45. By oversimplifying Hebrew ritual and the Hebrew theology in this way, Christian commentators create a foil for Christianity's difference and progress.

secular politics. If it is the former, the Rolph Trouillot's objection holds; if the latter then apologies lie on the 'wrong side of the tracks'.

In this chapter, I approach this dilemma indirectly, by unsettling the dichotomies and the categories that constitute them on the religious side. In this exploration of rituals and conceptions of sacrifice, repentance and apology in Judaism I critically examine the presumptions about religious community and organization that allow them to represent 'the other' to modern secular polities - adhering to thick non-negotiable principles of right, crude collectivism and sacramental magic. By showing that these processes of public religious repentance defy clean categorization within one side of each of the dichotomies, the boundary that would 'exclude' them from the sphere of proper action in modern secular politics begins to dissolve.

Jewish practices and self understandings around repentance and apology are particularly fertile in this regard because they challenge the very dichotomies in question: between human autonomy and divine heteronomy, between the existence of an absolute ground for political or normative order and the ongoing development of political form and norms, between collective and individual responsibility and between the internal/subjective and the external/performative. Throughout this chapter, as I come to each of these distinctions, I will explore how practice in the religious context itself escapes the side of the dichotomy it is supposed to represent. Two dichotomies stand out as particularly important for the apology, heteronomy versus individual autonomy and intention versus ritual and external performance.

The other side of the work will be to re-examine the practice in the contemporary secular setting, suspending the strong assumption that it must conform with the modern side and the dichotomies and assessing whether some aspects of the collective ontology and ritualistic and performative modality can be reintegrated into our self understanding.

III. Collective apology in Judaism: practices

1. Contemporary forms of collective apology: The Yom Kippur liturgy

In contradistinction to the ‘confessional’ trope of apology so often assumed to be apology’s basic form, it is in fact the public and collective forms of apology that predominates Jewish theology and practice. This is true not only in the case of ancient, pre-modern practices, but remains the case in contemporary ritual.

This is very clear in the ritual services of Yom Kippur (the Day of Atonement) – the annual focal point of apology and repentance in the Jewish calendar.¹⁰ Repentance, and more specifically apology lie at the heart of the Yom Kippur ritual, when the entire community gathers and communally repents its wrongs. They do not simply gather as a

¹⁰ In his collection of commentaries on Torah written between the 6th and 8th centuries Rab Kahana recalls a discussion amongst the rabbis about when one can do *teshuvah*. “As the sea is always open to all, so the gates of repentance are always open to all. Prayer [in the congregation] however, is likened to a ritual bath. As a ritual bath is open at some times and barred at other times, so the gates of prayer are open at some times and barred at other times.” (William G. Braude, trans. and ed. *Pesika de Rab Kahana Piska*, Philadelphia: Jewish Publication Society, 1975, 24: 2, p. 366.) Maimonides then write, “Repentance and calling out [God] are particularly desirable during the ten days between Rosh Hashanah (the Day of Remembrance) and Yom Kippur (the Day of Atonement)” *Mishnah Torah: Hilchot Teshuvah: The Laws of Repentance*, Trans. Rabbi Eliayhu Touger, Jerusalem: Moznaim Publishing Corporation, 1990; Rosh Ha-shana 18a, Yeshayahu 55:6.

collection of individuals each apologizing for their own wrongs, but as a community repenting qua community - as the corporate body, *Knesset Israel*.¹¹

This corporate form is apparent in the *Selichot* or penitential prayers, which dominate the Yom Kippur liturgy.¹² The various prayers are articulated in three basic ways: aloud by the rabbi on behalf of the community, aloud by all members of the congregation on behalf of all members of the congregation and privately and silently by each person. In the second instance, where each member of the congregation individually, but in unison confesses a common list of sins, the voice of the prayers is first person plural: “we have sinned against you...”. During the service, one experiences the voices of the pray-ers coming together to make a single sound. Each person literally, but also as part of the common voice, speaks their responsibility and regret for every sin, whether or not they have individually committed it. It is only when it comes to the private silent prayer that individuals are invited to add those sins that they personally wish to repent.

The collective ownership of repentance is also explicit in the content of the liturgy. One Yom Kippur prayer says, for example:

¹¹ Once again, it is of course the status of this corporate entity and its relationship with individual members that is at issue here. As used here, however, Israel does not refer to the modern state or land.

¹² Over the first eight centuries of the common era, specific *Viduy* developed which form the core communal confessional forms used during the period of repentance. The earlier, more simple and general *Ashammu*, dating from the 1st century C.E. is pure confession, expressing an awareness of sin and the pain of remorse, but making no move towards supplication. The longer, more specific and later *Al Het* developed gradually in post-Talmudic times, somewhere between the 5th and 8th centuries and includes both an inventory of sins and a call for forgiveness. See Joseph Marcus,

As on this day we examine our individual lives, so do we look at the life of the society around us... as we would share in the rewards of righteousness, so must we confess a measure of responsibility for the world's evils.¹³

How can one make sense of this collective form of repentance? What is going on when the community, as a single voice apologizes for past wrongs? To answer this question, I pursue several paths. First, I will look at the sacrificial practices that are understood, within the tradition itself, as the predecessors of contemporary Yom Kippur rituals, and from here more broadly at the meaning of sacrifice in the ancient world. Second, I look at the stories that Jews tell about the origin of Yom Kippur as windows into its significance. Third, I look at the etymology of some of the key terms. Finally, I look at interpretive writings within the tradition itself on collective responsibility and ritual practices bearing on it.

III. 2. Ancient rituals of repentance: The Temple era Yom Kippur ritual

While Jewish self-understanding recognizes a definite break between temple era Judaism and the Rabbinical Judaism that developed after the destruction of the 2nd temple (75 AD.), the ancient texts, rituals and interpretations continue to provide the primary sites of meaning. Thus, the collective form of repentant *tefilah* (prayer) and spoken repentance that continue into modern Jewish practice are understood as practices that substituted

"Confession" in Landman, Isaac, B., *The Universal Jewish Encyclopedia*, New York: Universal Jewish Encyclopedia Co., c1939-1944, Vol. 3, p. 328.

¹³ cf. Chaim Stern, ed., *Shaarei Teshuvah: Gates of Repentance: The New Union Prayer book for the Days of Awe*, New York: Central conference of American Rabbis, 1978, p. 401.

ancient sacrifice and purification rituals. Along with the other dimensions of *teshuvah* and *tzedakah* (charity), repentant speech took up part of the role that sacrificial rituals of the ancient Yom Kippur ritual had played.¹⁴

Accordingly, the significance of the earlier rituals will provide a key to interpreting the later practice of spoken apology. At the same time, because apology was only one strand of the rich set of practices that substituted temple era rituals, it will only take over part of their work or meaning. Methodologically, this implies that one needs to find a hermeneutic for reading which part of the earlier rituals was taken up in apology.

Conceptually and practically, it implies that one cannot look to apology to play all roles and should not evaluate it in terms of work for which it is not tailored.¹⁵ This latter point is particularly important for assessment of the apology in contemporary politics where apology is often assessed in terms of how well it compensates or even as a substitute for punishment. As I argued in chapter 1, whether these are the roles of apology at all is rarely evaluated.

The description of the original temple-era ritual, which Jews take to be authoritative (and now read aloud as the morning Torah portion of the contemporary Yom Kippur service)

¹⁴ The Yom Kippur liturgy repeatedly states that *teshuvah* (repentance), *tefilah* (prayer) and (*tzedakah*) charity are equally efficacious (referring to the now defunct sacrificial ritual). Cf also the Pesikta de Rab Kehana, "Shemini 'Atzeret'" (Buber, 191a, Mandelbaum 425).

¹⁵ In chapter 5 I will set out the dimensions of reparation specified in the authoritative United Nations Study on Reparation for Human Rights Violations. What one sees here is that apology is understood as *one* component of reparatory action.

is set out in Leviticus 16.¹⁶ This portion is set within the book of Leviticus, which, as a whole, constitutes that section of the foundational five books of the Torah in which the rituals and laws that the Israelites were to observe are set down. The Yom Kippur portion comes at the end of part IV on defilement and purification, and more generally as part of an extended tract prescribing and describing standard sacrificial practices brought down from older, pre-Mosaic cultic practices.¹⁷ The Yom Kippur rituals fall into the broader categories of guilt (or restitution) and sin (or purification) offerings.¹⁸

The early ritual is striking as an example of collective and representative repentance. Dramatically, the entire performance centers on the High Priest (predecessor to the rabbi) as the representative actor of the community. It is the Priest who will make expiation for all the people of the congregation.¹⁹ That the congregation is also expected to “afflict yourself”, or practice self denial (fasting), and abstain from work is mentioned only at the

¹⁶ The fact of reading this portion on sacrifice reinforces my argument about the continuity between ancient and modern practice. There is a midrash which addresses this very point. It elaborates on an incident in Genesis chapter 15 where Abraham asks God how he can be sure that God will not cut off the people of Israel when they sin in the future, as God did in the time of Noah. When God points to the ongoing practice of sacrifice as a sign that this contract, this relationship is permanent, Abraham argues that this is fine in the time of the temple, but what about when the temple no longer exists. God replies: “I have already fixed for them the order of sacrifices. Whenever they will *read* the order of the sacrifices I will reckon it as if they are *bringing* me an offering, and *forgive* all their iniquities.” [Meg. 31b].

¹⁷ Leviticus 1-7, 14, 17, 27. References to the ritual also appear in Numbers 18 and 29. For a treatment of the age of such sacrificial practices, see A Lods, *Revue d'histoire et de philosophie religieuses*, 1928, pp. 399ff. Gerhard Von Rad *Old Testament Theology*, Vol. 1, D.M.G. Stalker, (trans), San Francisco: Harper, 1967, pp. 258-9.

¹⁸ Milgrom, in his translation and commentary of Leviticus provides these alternative names. In particular, and importantly for this work, he argues that the term ‘sin offering’ is both an inaccurate translation and poorly represents what was actually going on, and suggests the alternative ‘purification’ offering. Accordingly, I use both terms in this text. See Jacob Milgrom, *Leviticus 1-16, A New Translation with Introduction and Commentary*, The Anchor Bible, New York: Doubleday, 253ff.

¹⁹ Leviticus 16: 30, 32, 33, 34. This mimics Moses in the original story.

very end of the portion when the text announces that this shall be the law for all time, “to make atonement for the Israelites and for their sins once a year.”²⁰

The rituals set out include animal sacrifice, burning incense and ritual cleansing of the alter and the High Priest. The most captivating aspect of this annual drama, or certainly the one which continues to engage contemporary imaginations, is the ritual of the two goats.²¹ The text describes how the priest brings two ‘he goats’ to the entrance of the holy tent - one of which will be marked “as a sin (purification) offering to the Lord”, the other – the scape goat - which will bear the sins of the entire community.

Before he sends away the living scapegoat, the priest lays both his hands upon its head, and confesses over it all the iniquities and transgressions of the Israelites, “putting them on the head of the goat. And it shall be sent off to the wilderness through a designated man. Thus the goat shall carry on it all their iniquities to Azazel”. *Azazel* is commonly translated as an inaccessible region, the *other* place, outside the boundary, removed and disconnected from the divinely constituted community.²²

²⁰ In fact, in his analysis of the text, Milgrom argues that this last section was an appendix to the primary text. Milgrom, *op. cit.* p. 1054.

²¹ Leviticus, 16: 21-22. This rite almost certainly dates back to very early stages of the development of Judaism and the idea that the goat could carry contamination away from human beings was present in earlier and contemporary pagan practice. For example, during plagues the Hittites sent a goat into enemy territory so that it would carry the plague there, and an Akkadian magical inscription from the city of Assur points to a belief that sickness was transferred from humans to goats. See Ahmuel Ahituv, “Azazel”, *Encyclopedia Judaica*, Cecil Roth (ed.) Vol. 3, The MacMillan Co., New York, 1971, p.1001.

²² There has been a great deal of midrashic discussion about what Azazel refers to. The most authoritative interpretation is that it is a demonic being residing in the desert, but to avoid what would seem to be an acknowledgment of an independent evil power inconsistent with monotheism, many commentators interpreted and translated it as a place, rough ground (Rashi), a

The text of Leviticus itself is very thin on interpretation or elaboration of the meanings of the offerings, indicating only that the purposes of Sin (or purification) and Guilt Offerings were, respectively to expiate sins between man and God and transgressions between man and his fellow. Without elaboration however, these terms themselves tell us very little and lend themselves to anachronistic readings.

Modern commentators have offered a gamut of interpretations of ancient sacrifice, but three stand out: sacrifice as a form of compensation, sacrifice as a form of substitution for retributive justice and sacrifice as a form of purification.²³ Apology, I argue correlates most closely with the third.

III. 3. The significance of sacrifice

According to the first, sacrifice was a literal act of compensatory renunciation. The agent making the sacrifice was “giving up” something of value to them, in a way one might see as continuous with the modern legal form of compensation, including also punitive damages.²⁴ In the case of sacrifice however, the wronged party is not only or even

mountain near Sinai (Ibn Ezra) or dismissal (the old Greek translation). See *The Torah; A Modern Commentary*, W. Gunther Plaut (ed.), Union of American Hebrew Congregations, New York, 1981, Commentary on Yom Kippur, p. 859, and note 4, p. 1735.

²³ As Milgrom argues, “no single theory can encompass the sacrificial system of any society”. Milgrom, *Leviticus, op. cit.* p. 442. In fact, within the literature there are many interpretations of sacrifice. Evans-Pritchard for example identifies 14 different motivations: “communion, gift, apotropaic rite, bargain, exchange, ransom, elimination, purification, expiation, appropriation, substitution, abnegation, homage”. p. 281. For a fuller exposition of sacrifice, see Joseph Dan, “Sacrifice”, *Encyclopedia Judaica, Vol. 14*, The Macmillan Company, New York, 1971, p. 599 and Milgrom, *ibid.* 440ff.

²⁴ In practice, domestic animals as opposed to wild animals were sacrificed because wild animals did not belong to anyone. Similarly, offerings of food normally took the form of flour or meal, because these required substantial work to prepare “I cannot sacrifice to the Lord my God burnt offerings that have cost me nothing” (2 Sam 24:24). In the Levitic description of the guilt

primarily another person against whom wrongs have been directly committed, but God, whose will or law the wrongful act failed to respect.²⁵ This dimension of the work of sacrifice picks up the argument I developed in chapter 2 that repair is also required for the damage which specific acts of wrongdoing do to the law itself and the normative frame which orients action.²⁶

Second is sacrifice as substitution, where the sacrificial material substitutes for the person making the sacrifice. What should, according to strict requirements of retributive justice be done to the person, is done metaphorically to the sacrificial material. The substitution takes place both at the level of object for the person, and in terms of the shift from justice to mercy.²⁷ One can discern this strand of meaning in the later (post temple) *Yom Kippur* custom known as *Kapporot* (from the Hebrew for atone, the root of *Kippur*). In the traditional form of the ritual, a person swung a chicken over their head (a rooster for a

offering the quantity of the offering is measured in terms of the gravity of the sin. The value of the offering is supposed to be equivalent to the value of the transgression, plus one fifth to be added, presumably by way of punitive damages.

²⁵ As I noted earlier *tzedakah* and *teshuvah* along with *tefilah* substituted sacrifice in post-temple practice, and it is *tzedakah* - which also involves a form of giving up – that would seem more clearly to pick up this dimension of sacrificial practice.

²⁶ Society or the state occupies a similar place in relation to the criminal law. Applebaum writes for example: “Criminal law is generally considered to be that field of jurisprudence which is concerned with wrongs against society. Such a wrong might arise by reason of an act directed against an isolated individual, but it is the tort against the social structure, resulting from such an act, which is punishable. . . . The purposes of criminal law are rather to punish the wrongdoer for his offense against the mores of society. . . .” J. Applebaum, *Military tribunals and International Crimes 9* (1954).

²⁷ In the Torah, God is named in many different ways, according to the attribute being evoked. Whenever the subject of sacrifice is addressed in the Torah, the name of God used is the four-letter name indicating God's mercy. Rab Kehana recalls a teaching that during the blowing of the shofar there is a moment when God is about to sit on the throne of judgement, but hearing Israel blow the note of redemption on the shofar, ‘takes His seat on the throne of mercy’. *Peskita De-Rab Kahana, op. cit., Piska 23:3, p. 354.*

man and a hen for a woman), and recited the prayer: “This is my substitute, this is my pardon, this is my atonement, this rooster goes to death and I shall enter a long, happy and peaceful life.” In contemporary the *tzedakah* (charity) takes the form a gift of money, tied in a handkerchief, substituting the chicken, but still swung over the head while reciting the prayer.

In these two strands, the sacrificial act is a form of exchange or substitution - an offering made by way of giving up something that stands in for the “gain” affected by the wrongful act. One might think of them as belonging to the economic trope that Tavuchis referred to when he suggested that the apology “constitutes both the medium of exchange and the symbolic quid pro quo for, as it were, ‘compensation’.”²⁸

Tzedakah (charity) and the components of teshuvah more expressly concerned with material compensation are more clearly continuous with this strand of meaning than apology itself. At the same time, there is a sense in which apology picks up this trope, both in the religious and the secular political context. One thinks, for example of the apology as something that one offers up to God or the other person. Similarly, in the contemporary context, recent jurisprudence allows that telling the truth about past wrongs and public shaming constitute forms of restitution and punishment.²⁹ That said, one needs to be careful to distinguish exactly what it is that apology compensates and to recognize that apology is not directed towards compensation *simpler*, or compensation in every

²⁸ Tavuchis, *Mea Culpa*, *op. cit.* p. 33f.

²⁹ See for example *Valasquez Rodriguez Case*, Inter-Am Ct. H. R. (ser. C), 1988.

sense. I will return to this *sui generis* compensatory role of apology in discussing contemporary human rights principles concerning the different components of compensation for gross violations in chapter 5.

It is the third conception of these rituals as a form of purification that most powerfully elucidates apology. However, to make this link between purification and contemporary apology, one needs to critique the anachronistic interpretation that characterizes ancient conceptions of purification. If, as is usually the case, one reads the purity/impurity trope in terms of external contamination and (external) magical intervention, it is difficult to square this with modern conceptions of the autonomous role of human beings in both causing and responding to wrongdoing. To make this link, one has to critique the understanding of purification as an objective, heteronymous intervention in an undifferentiated community and beyond that the dichotomies between the objective and subjective and internal and external on which it is based. The reading I suggest here, does not locate the source of purification outside the actors, nor in a pure abstract (ideal) intention, but grounds it in their performative ascription to norms and a covenantal relationship.

Most modern commentary contends that the ancients understood impurity as “a physical substance, and aerial miasma that possessed magnetic attraction for the realm of the sacred”³⁰. Sin, correlatively had a quasi-material quality - equivalent to a type of contamination, which, if left unchecked, could spread through the community. Sacrifice

³⁰ Milgrom, *op. cit.* p. 257.

then becomes a ritual means for expelling the evil, purifying the communal space and thus safeguarding the entire community from its harmful effects. If sin and guilt cleaved to the wrongdoer and the community like an infection that would then spread and cause further disease, sacrifice served the remedial or medicinal function of restoring purity.³¹

In the background to these readings is a particular way of characterizing the ancient worldview and pre-prophetic religious practice.³² Specifically, sacrificial practices are said to belong in a world where humans were still lacking a proper understanding of the causes of advantageous or disadvantageous events in their own lives (sickness, shifts in the weather, crop failure) and of the mechanics or structure of causality more generally. They interpreted the success or failure of their endeavors as the independent movement of external forces - transcendent beings (gods and demons) whom they endowed with all power over the events in their own lives. In political theoretic terms, this worldview represents an extreme of heteronomy, that is, the power of influence is located radically outside the people themselves.

Accordingly, they believed that the only way to influence such events was by magically entreating divine intervention or manipulating the movements of the gods through rituals that would reverse the negative consequences of contamination.³³ According to this

³¹ See for example Moore, George, Foot, "Man, Sin and Atonement", *Judaism*, vol. 1, Cambridge 1958, p. 497.

³² This conceptual scheme has been well rehearsed in anthropological and historical literature. For a connection between this world view and practices concerning sin, see Paul Ricoeur, *Symbolism of Evil*, Emerson Buchanan (trans.), Boston: Beacon Press, 1967.

³³ "The impression is gained that everyday religion was dominated by fear of evil powers and black magic rather than a positive worship of the gods...the world was conceived to be full of evil

conceptual scheme, these ritual practices were entirely ‘external’, where this term signifies an absence of intention or inner process (regret) on the part of those partaking.

Moreover, seen through this interpretive lens, the rituals were organized around a social and political system that did not recognize the individual as a distinct (let alone the primary) moral unit, but still took as its basic unit the organic community. Thus, just as sin infected the corporate entity and contamination could spread indiscriminately between organically connected members of the community, so too could the purification effected by the ritual cleanse the entire body.

It is easy to see how the ritual described in Leviticus 16, particularly the striking drama of the two goats, lends itself to this reading. Cleansing, purging the individual, the community or the holy place of the stain of sin are certainly dramatically vivid in this scene. The defilement and contamination of the sin of the entire community are literally transferred onto the goat and exiled. Similarly, the text commands the Kohen (High Priest) to sprinkle blood on the alter, so as to “hallow” and cleanse it of the uncleanness of the people of Israel.

If one accepts this reading, and that post-temple era practices including collective apology took over from temple era rituals, then contemporary Jews continuing the practice would still seem to be ascribing to this ‘pre-modern’ ontology and system of

demons who might cause trouble in any sphere of life. If they attacked, the right ritual should effect the cure.....Humans, as well as devils, might work evil against a person by the black arts, and here too the appropriate ritual was required.” Lambert, W. G..1959, *Three Literary Prophets of the Babylonians: Prayer to Marduk*, No. 1. AfO 19, 1959-60, 55-60.

magic, at least in the sphere of religion. Their individual identity would be subsumed into an undifferentiated collective where responsibility fell onto the corporate as a whole. And the performance of apology, the prayers they speak, would be forms of magical intervention – entreaties seeking to appease or appeal to a God with absolute power to purify them of the stain of impurity or release them from the consequences of their wrongdoing. This seems especially true because the tradition teaches that partaking in the Yom Kippur prayers is itself sufficient to atone for certain sins.³⁴ Of course, they might not actually experience themselves as bound in with any corporate entity or engaged with the ritual in a meaningful way at all, but perform the ritual for the sake of form or tradition.

Irrespective, if this is indeed the template for later forms of collective repentance, one can see why it is so incompatible with the tenets of liberal democratic political organization. The undifferentiated and horizontal contagion of guilt evokes the form of social organization that Weber called *solidarity* – that earlier, undifferentiated form replaced by the normatively superior *representation*, where responsibility adheres to individuals or across clear institutional lines.³⁵ And in the externalization of responsibility, it deprives individuals (and even the community) of any autonomous role in influencing their own fate. As I argued in chapter 2, modern political communities rightly reject such crude collectivism and empty externality.

³⁴ A teaching in the Mishnah (albeit not uncontested) is that Yom Kippur automatically provides atonement for sins committed against God, not against other people. Yoma 85a.

³⁵ As I discussed in chapter 2, in the former, responsibility is indiscriminately transferred through all members of an organic group, whereas in the latter it follows democratically authorized lines.

III. 4. Re-thinking purification

There are good evidentiary and conceptual grounds for questioning this reading of the purification trope, or at least for suggesting that there are other more sophisticated readings that do not cast the practices in this anti-modern, anti-liberal light.

To start with, there are three ‘evidentiary’ problems with this interpretation of the ancient rituals themselves. First, amongst the major pieces of evidence brought to prove that the ancient rituals of the Hebrews were formalistic and ‘empty’ are the prophets’ denunciations, but one cannot deduce from their condemnation of how Israel was practicing its rituals that they were *essentially* empty.³⁶ True enough, the prophets complained that ritual had become meaningless, but one could well hear their words as invective designed to highlight the degeneration of practices and inspire the people to reinvest themselves into their rituals.³⁷ Read this way, they would then be testament to the abuse of the practices, not proof of their inherent limit.

Second, the absence of any textual reference to the subjective dimension of the practices is brought as further evidence for its absence in fact. As Von Rad observes: “[T]he reader looks in vain for firm holds to enable him to rise into the spiritual realm by way of the

³⁶ The tendency to use the prophets to indict the empty formalism and crude collectivism of Judaism is apparent in some Christian commentary. Redlich for example writes: “[O]ut of the ruins of nationality, in the destruction of the Holy City and the Temple, rose the concept of individual religion.” E. Basil Redlich, *The Forgiveness of Sins*, Edinburgh: T & T Clark, 1937, p. 45.

³⁷ Cf. For example Hosea: “For I desire mercy and not sacrifice, and the knowledge of God rather than burnt offerings.” (6:6), also Amos: “I hate, I despise your feasts...though you offer me burnt offerings... I will not accept them. But let Justice well up as waters, and righteousness as a mighty stream” (5:21-24), also Jeremiah 7:22.

sacrificial concepts lying behind the sacrificial practices.”³⁸ But we should be cautious about equating a textual gap with a gap in the processes themselves – that the Priestly Code is crudely materialistic does not mean that the practice was. A more sophisticated knowledge of the way these texts were constructed tells us that the priestly code was not the place where this type of elaboration was recorded, and that it almost certainly appeared in texts that have not survived.³⁹

Approaching this question from a more conceptual perspective, Von Rad argues that if the text contains little indication of “rising into the spiritual realm”, this is not an indication that the practice was crudely materialistic, nor even simply a shortfall in the text, but rather a signal that we are dealing with an understanding in which “spiritual faith” and “cultic practice” did not belong to two spheres. God is not posited as the abstract object of belief, but is immediately experienced through the cultic practice.⁴⁰ Milgrom similarly argues that the ancients did not distinguish between emotional and physical suffering, as one can see in the impossibility of distinguishing between pangs of

³⁸ Von Rad, *op. cit.* p. 260.

³⁹ cf. A. Buchler, *Studies in Sin and Atonement in the Rabbinic Literature of the 1st Century*, London: Oxford University Press, 1928, p. 263. As Auerbach pointed out in his classic paper, *Mimesis*, the Old Testament books did not fill in this type of detail but adopted a suggestive, skeletal style. We would be wrong, for example, to move from the observation that the story of the sacrifice of Isaac makes no reference to Abraham’s internal state to the conclusion that he had no feelings about this, cf. *Mimesis: The Representation of Reality in Western Literature*. Trans. Willard R. Princeton: Princeton UP, 1953.

⁴⁰ In this context, James Hillman draws a distinction between the abstract belief of monotheistic religions and the direct experience of the divine in myth. In the former, God is transcendent and posited as the object of abstract belief. In the latter, gods are experienced as immediate. James Hillman, *The Terrible Love of War*, Penguin, 2004.

conscience and physical pain in the language of the primary biblical texts.⁴¹ One did not do something in order to attain a spiritual experience, nor is God reduced to material terms. The faith of ancient Israel cannot be divided in this way. Rather, it was through the sacrificial cult that relationship with God was maintained and experienced.⁴²

Third, and importantly to this consideration of *apology*, these early practices already included a verbal dimension – a fact difficult to square with the putative ‘externality’ and the claim that they involved no intention on the part of the subjects or no engagement with their subjective experience. The Levitic prescriptions themselves indicate that speech was a necessary part of the sacrificial ritual: “He shall confess that he hath sinned in that thing”, and “And confess over him all the inequities of the children of Israel”.⁴³ They also indicate that the prescribed actions had to be accompanied by a verbal pronouncement concerning the meaning of the actions (known as “declaratory formula”), for example “it is not acceptable” or “it is unclean meat”, “it is a burnt offering”, “it is most holy” and so on.⁴⁴ Without the spoken words, the ritual was believed to be ineffective. According to Von Rad, “only the addition of the Divine word made the material observance what it was meant to be, a real saving event between Jahweh and his

⁴¹ For this linguistic fusion see for example, Jer: 17:14, Pss 38:2-11, 18-19, 102: 4-11; 149:3. Jacob Milgrom, *Cult and Conscience; The Asham and the Prisetly Doctrine of repentance*; Leiden: E J Brill, 1976, p. 8. Milgrom links this fusion with the fusion between guilt and punishment, which I will raise in the etymology section below.

⁴² *ibid.* p. 260.

⁴³ Lev. 5.5 and 16.21 the scripture itself is silent on the content of the confession, but it is recorded in the *Mishnah* as: “O Lord, your people, the House of Israel, have committed iniquity, transgressed and sinned before you. O, by the Lord grant atonement, I pray for the inequities and transgressions and sins....*Yoma* 6:2.

⁴⁴ Leviticus 19:7, 22:23, 25.

people. Only by virtue of the declaratory word of the priest did the sacral event become a gracious act of God.”⁴⁵

At a more conceptual level, there is a logical problem with squaring this conception of purification with monotheistic covenantal Judaism. In the polytheistic context, where people saw independent transcendent beings (demons) as the source of impurity and understood their rituals as means of protecting their Gods from contamination, the analogy between sin and impurity was very straightforward. Once monotheism became the basis for religious practice however (as was the case for the Hebrews) there were only two categories: the one God and human beings themselves, acting freely and in particular ways. There were no other transcendent beings that could fill this role as the source of contamination and correlatively the object to be exorcised. In the absence of these ‘external’ sources of impurity, it becomes difficult to see how sin can be analogized to contamination and correlatively how purification can be understood as something that *happens to* people. If impurity is no longer attached to another transcendent entity but inheres in human actions and is a function of people’s adherence to God’s law, then the process of purification cannot but implicate human action and consciousness.

⁴⁵ Von Rad, *op. cit.* pp. 261-2.

III. 5 Purification, sacrifice and the covenant

Recognizing this logical problem in his commentaries on Leviticus Milgrom argues that logically, the sacrificial system must have encoded the recognition that absent a third independent party, the only remaining determinant of Israel's fate is the way in which *it* takes up its side of the covenant. Human beings endowed with free will and the capacity to live according to or in defiance of God's laws were *themselves* the sole source of impurity. But if this is the case, one has to think differently about the whole purity/impurity distinction.

Milgrom suggests re-reading the trope of impurity in terms of the fidelity to the Covenant. Rather than impurity entering through external corruption, it is the direct effect of human's failing to take up their side of the covenantal agreement to uphold a certain way of living. Effectively, the wrongdoing of human beings became the force that would "drive God out of his sanctuary" and "out of their lives".⁴⁶ When the wrongdoing of the people has reached a sufficient level, read, when the people transgressed the covenant to a sufficient degree, the 'impurity' would drive God away – read, sever the relationship.⁴⁷

In the materiality that characterized ancient practice, this was understood literally as penetration into the sanctuary of the temple – recall Von Rad's argument that God was not posited as an abstract object of belief but experienced through practice.⁴⁸ Purification

⁴⁶ Milgrom, *op. cit.* p. 43.

⁴⁷ The book of Lamentations is testament to this theology: "The Lord has abandoned his alter, rejected his sanctuary. He has handed over to the foe the walls of its citadels." (2:7).

⁴⁸ Milgrom provides a fascinating analysis of the correlation between the severity of the sin and the degree to which the impurity penetrates the sanctuary. Quite literally, the more severe sins move

rituals were then means for bringing God back, and with this the foundation of Israel itself. Yet of course, it was the organized community of Israel that was being brought back. In this sense, purity and impurity were not ‘external’ phenomena, but woven into the actions and values of the community and its constitution.

This reading is consistent with the under-recognized conception of sacrifice as a means of approaching or gaining access to and fellowship with God, or Holiness.⁴⁹ The Old Testament theologian, Von Rad for example argues that in the sacrificial ritual, “Israel is granted fellowship with him.....above all here Israel could be reached by his will for forgiveness.”⁵⁰ Indeed if one returns to the original Hebrew, this meaning persists in the language of the text itself. Although usually known in English as *Leviticus* (from the Greek, of the Levites), the Hebrew name for the book setting out the sacrificial rites is *Wayyikra*, drawn from the first words of the book: “He is called.”⁵¹ Moreover, the Hebrew word for sacrifice is *Qorban*, which derives from the root ברק (Qôwph-Rêysh-Bêyth), meaning close or near. Sacrifice in Hebrew means to approach, to bring near or to come near (to the alter, literally and then to God). This sense has not been altogether lost in the English word, derived from the Latin, to make holy.

more deeply into the heart of the sanctuary to where God is said to reside. Milgrom, *Leviticus, op. cit.* pp. 257-8.

⁴⁹ *Kadosh*, (Holy) is the most frequently repeated word in Leviticus.

⁵⁰ Von Rad, *op. Cit.* p. 260.

⁵¹ The reference is to God calling Moses from the tabernacle.

Understood against this theological end of obtaining or retaining proximity with God and recreating a space in which God can be present (literally the sanctuary), purification starts to make sense in a way that does not require recourse to crude collectivism and empty externality. What is being purified is not the community understood as an undifferentiated organism, but commitment to a certain normative frame, grounded in the commitment to the covenantal partner. Indeed, this reading destabilizes the dichotomies I discussed earlier. Purification is not external, where ‘external’ excludes the people’s own involvement in making meaning, but nor is it internal as if meaning making is an abstract event inside each person. It is not collective, where collective annuls the engagement of each person as a subject holding certain norms, but nor is it individual, where normative ascription is a personal decision. In fact, it resonates strongly with the conception of political culture and *Sittlichkeit* that I developed in chapter 2 – but specifically concerned here with constituting political culture or constituting the polity through its ascription to norms.⁵²

Indeed Milgrom develops the argument in precisely this direction, using this interpretation to link the collective character of the ritual to the nation in a manner consistent with the argument I have been developing here and in chapter 2. Using the analogy of *The Portrait of Dorian Gray*, he argues that “while the sin may not scar the face of the sinner, it does scar the face of the sanctuary”, where the sanctuary is the seat

⁵² Again, one must be careful here not to fall into the trap of posting an existing community into onto which norms can be inscribed and thus losing the inter-penetration of normative and ontological constitution of the polity.

of God and as such the source of Israel's identity as the people of this God.⁵³ What in the priestly scheme is represented as the sanctuary being corrupted, he reads as society being corrupted. What is represented as God being driven out of the sanctuary is the nation being destroyed. Again, this makes sense because what created Israel as a political community was its acceptance of the covenant. Correlatively, driving God out is equivalent to the death of Israel.

This also establishes how the collective's relationship with God is the key determinant of purity or impurity. Infidelity to the covenant, failing to uphold its norms brings impurity (and grounds systematic violation); return to the covenant purifies (and re-grounds or re-sanctions respect). Thus, Milgrom argues that the collective is responsible for driving God away not because sin is transmitted like a contagion within the organic community, but rather because those who 'allowed the wicked to flourish' did not pay sufficient attention to protecting what was, in symbolic terms, the sanctuary, or in more abstract terms the principles of Israel. This claim is reminiscent of Jaspers' reference to the "moral failings", the "countless little acts of negligence, of convenient adaptation of cheap vindication, and the imperceptible promotion of wrong" which make evil possible and "cause the conditions out of which both crime and political guilt arise."⁵⁴

If one understands the early practice as a ritualized form of renewing and re-enlivening the foundational covenant, and moreover a form which also implicates members as

⁵³ *Ibid.* p. 51ff.

⁵⁴ Karl Jaspers, *The Question of German Guilt*, E. B. Ashton (trans.), New York: Capricorn Books, 1961. p. 34.

subjects, one can start to allow and make sense of the transfer both to the modern and to the political setting. Indeed, note just how close this characterization of the ritual practices of the ancient religious setting is to the character of the modern political. Here too, norms are not abstract objects of belief, but the grammars that organize practice and institution. These political norms always have a transcendent or symbolic *and* an action oriented dimension. They are articulated in laws or written codes, but encoded as the community's norms through its active ascription to them. Here too, in the secular political, the internal/external and the collective individual dichotomies break down. As I argued in detail in chapter 2, individuals are only able to experience or recognize themselves and others as subjects of rights and make subjective judgments about right and wrong because they are interpolated into the grammar of norms of the political community. The individual experiences their political normative judgments as *their own*, but they could not have created them without the collective in which they became subjects and through the rituals of action where those norms were performed.

This means that it is not only methodologically valid to interpret the collective apology as practiced on the secular political stage in terms of the religious ritual, but that the normative evaluation of modern secular politics that insists that collective norms or responsibility and ritualized action be excluded cannot be sustained. I will come back to these issues of transfer and the characterization of the secular in chapters 5 and 6.

IV. Collective apology in Judaism: Stories of the origin of Yom Kippur

The midrashic stories of the origin of Yom Kippur and the story that provides the context to the ritual set out in Leviticus 16 reinforce the interpretive frame I have suggested.⁵⁵

IV. 1. The genealogical story of Yom Kippur: the covenant and revelation

Like all Jewish Holy-days, Yom Kippur is said to mark and recall an event or story that is constitutive of the principles of Jewish belief and practice and *b'nei Israel* (the people of Israel). According to the Midrash, the first Yom Kippur took place as part of the drama of Moses receiving the Torah, (the law or the way of living) and accepting the Covenant with God.⁵⁶ When Moses first climbed Mount Sinai to make a Covenant with God, he commanded the people to wait for him, and not turn to any other God in his absence. When he returned with the tablets containing the Ten Commandments which he had received on Sinai, he found that the people had given up waiting and, contrary to his orders, had made and were now worshipping a golden calf, an act of idolatry signifying their loss of faith in the one God of their new religious faith and identity. Moses pleaded with God for forgiveness on behalf of the people and on the first day of the month of Elul, he again ascended the mountain for a second set of tablets.⁵⁷ This time, in his absence, the nation fasted from sunrise to sunset.

⁵⁵ Midrash is the general term for the stories that the sages and rabbis told to elaborate the thin descriptions contained in the actual written Torah. According to some interpretations, the Torah given at Sinai contained not only a set of laws and prescriptions, but all future commentary. Whether called Torah or commentary on Torah, the body of Jewish thought comprises a series of interpretive layers and conversations.

⁵⁶ See Ta'anit 30b, Rashi, cf. Rav Yair Kahn, "Revelation and Repentance". *Yeshivat Har Etzion, The Virtual Beit Midrash*, The Yom Kippur Journal, http://www.vbm_torah.org/yk.htm.

⁵⁷ Judaism follows its own calendar. The months of Elul and Tishri (approximately August and September, depending on the year) are the months of the phase of repentance.

Upon returning, on the tenth day of the month of Tishri Moses found the nation truly repentant and announced that God had forgiven them. He then decreed that this day would remain a day of atonement for all generations. The forty day period between his return from the first and second ascents marks the forty days of repentance in the Judaic calendar, and the tenth of Tishri, the day of his return and bringing the law to the waiting people, is *Yom Kippur*.

What this story does is locate Yom Kippur within a narrative about the primary Covenant which brought the Jewish people into being as a distinct people, whose identity and civil order was organized around a set of laws and principles of association and civic behaviour.

If we ask, “what does Yom Kippur recall or memorialize?”, this first story of origin does not give the answer we might expect. It does not simply recall the moment of repentance and correlative forgiveness, narrowly understood as direct responses to particular wrongful actions. It represents the people’s return to faith after a period of faithlessness, their turn back from infidelity to the principle of God – in this case a turning back which is also the first moment of constitutive relationship. Certainly, there is an event of repentance and forgiveness, but these are not singular acts or processes, but embedded in the broader drama of the covenant. In fact, in the narrative of this story, *repentance and forgiveness comprise the process whereby the covenant was forged*. The initial agreement to covenant with God slips away very quickly in the absence of sustaining proof and it is only the retrospective recognition of the loss, achieved through facing the consequences of their turning away which brings them to the point of being able to enter the covenant.

The period of repentance and the subsequent declaration of forgiveness coincides with the delivery of the Ten Commandments, with God's and the people's accession to the Covenant. Already in this first narrative of origin, the moment of repentance and the moment of covenanting coincide.

More specifically, if one looks at Moses' actual communication with God (the communication that the contemporary representative 'apology' is said to recall), what one sees is that he was not asking for 'forgiveness', but for the Covenant. Or perhaps, forgiveness and the covenant were inseparable. And what he got by way of forgiveness was the Covenant, both in the form of the law (the tablets) and a set of revelatory words, setting out the attributes of God. When Israel recites these words, it brings itself back to the covenantal relationship. Its repentance is its affirmation of God's norms, or its own.

One might ask, from a narrative point of view what the text achieves by telling the story in this way. Surely an omnipotent and omniscient God would have no need or desire to allow the people to make a mistake. What is served by locating the covenantal moment after the people's 'sin' and recognition of their sin? The answer lies in the particular nature of this relationship and of what political covenanting means. On one side there are orienting laws and norms – norms that are not purely subjective. On the other however there has to be a community that actively takes on those norms – not as external laws but as its own, those that it affirms, even those that it desires. Only the experience of loss, the experience of God's absence or the absence of a normatively constituted community can

create this experienced sense of desire and embrace and attachment. Repentance, in this sense does not logically follow ascription to norms, but always precedes it.

IV. 2. God's revelation as forgiveness: story and contemporary liturgy

Within this same story there is a further event where forgiveness and revelation come together – an event now recalled in the recitation of the *Shelosh Esre Middot* (thirteen divine attributes), inserted at various points into Yom Kippur liturgy and understood as central in the entreaty for God's forgiveness.⁵⁸

Following the incident of the Golden Calf, Moses asked God to reveal God's self, seeking reassurance that God would fulfill the Covenant despite the recent cataclysm. God answered Moses saying, "I will pass all My goodness before your face and I will proclaim the name (Hashem)⁵⁹ in your presence and I will be gracious with whom I shall be gracious and I will show mercy with whom I will show mercy. You cannot see My countenance for man cannot see Me and live....and you shall see my back but My face shall not be revealed."⁶⁰

⁵⁸ This prayer is recited several times on *Yom Kippur* itself and upon waking during the forty days preceding it, marking the period from the first time Moses ascended mount Sinai to his final return and the making of the covenant. There is some discrepancy in practice here, with Sephardic Jews reciting the Thirteen Divine Attributes every day for the entire month of Elul and Ashkenazim only beginning the week preceding Rosh-Hashana.

⁵⁹ In Judaism there is one name of God which, like God is itself inaccessible to human conception and as such cannot be written or pronounced, but is denoted יהוה (Yud-Heh-Vav-Heh). This name is sometimes written and pronounced as hshem – meaning simply 'the name'.

⁶⁰ Shemot (Exodus) 33: 18-23.

Then, on Mount Sinai God covered Moses' face, passed before him and pronounced the four-letter Name as part of what we now call the *Shelosh Esre Middot* -- the 13 Attributes of God. (*Adonai, Adonai El Rahum v' Hanun...*).⁶¹ Moses then pleaded with God on behalf of the people, and asked forgiveness for their sins. Talmudic commentary on this passage explicitly affirms the essential connection between repentance, forgiveness and the covenant in this event:

“He [God] said to him [Moshe]: Whenever Israel sins, let them carry out this service before Me and I shall forgive them. “HaShem HaShem” - I am He before man sins, I am He after man sins and repents....Rav Yehuda said: A covenant is made over the thirteen attributes, that they are never ineffectual, as is written: “Behold I am making a covenant”.⁶²

The recitation of the thirteen divine attributes, which says nothing about sin or repentance but rather speaks the qualities of God is itself sufficient to forgiveness. The act which we would call repentance in this instance makes no mention of sin at all, of the failure to God or the covenant, but only of the presence of and connection with God: “Whenever Israel sins, let them carry out this service before Me, and *I will forgive them.*”

⁶¹ Shemot 34: 4-8. “Hashem, Hashem, a God compassionate and gracious, slow to anger, abounding in kindness and faithfulness, extending kindness to the thousandth generation, forgiving iniquity, transgression and sin; yet He does not remit all punishment but visits the iniquity of fathers upon children and children’s children, upon the third and fourth generation.”

⁶² Rosh-Hahana 17b.

What we have then is Moshe's request for Divine revelation - the search to come into contact with God, God's answer in the form of the recitation of the *middot ha-rachamim*, presented both as revelation and as the covenant, and the subsequent teaching that the recitation of the *middot ha-rachamim* will result in forgiveness.

What can forgiveness and correlatively repentance mean here? If one stays with this story, rather than immediately reading it according to a preconceived answer to this question, what comes through is a broad covenantal definition. Ritual repentance is not narrowly concerned with speaking one's sins and seeking to remove their stain from the record of the soul. It is a search for contact with God, or the foundation of the covenant. And forgiveness is not wiping away the sins, but affirming that the covenant still holds: In theological terms, God is compassionate.

Taken as a whole, the repentance/forgiveness drama is a performative reaffirmation of the principle of God and of the covenantal relationship, a reaffirmation that occurs by *our* speaking them ourselves.

This last point is particularly important in thinking through the apology as a particular type of practice. According to this story, the recitation is not a means of obtaining the revelation but is a form of revelation itself. As the contemporary commentator Rav Yair Kahn puts it: "[T]he recitation of the *middot*....is neither incantation nor prayer in the classic sense. Rather, it is an experience of Divine revelation. In some way, it is a re-

enactment of Moshe Rabbeinu's experience."⁶³ Thus, far from the performance standing in for the authentic process of dealing with the past, it is itself the process of dealing with the past. It is the affirmation which re-covenants the instantiated (as distinct from the abstract or historical) community. Repentance, encounter and the covenant are not distinct spheres, but are one and the same moment.

This analysis is also consistent with the movement from demonic to human sources of sin, which Milgrom linked, with the development of monotheism. If human beings are the source of sin, and sin arises from a movement away from relationship with God, then overcoming sin is the same as moving back into relationship with God. Moreover, this is a relationship which is forged both through actions and through words – hence the need for both rightful action and apology in the act of *teshuvah*.

The coincidence between repentance and the covenant is in fact evident in the form and content of the (post-temple era) Yom Kippur liturgy, which integrates repentance and recognition or praise of God. In the Yom Kippur liturgy the plainly penitential prayers (those confessing sin and seeking forgiveness) are interspersed with prayers affirming the Greatness and Mercy of God, the Divine attributes, giving thanks and confirming the close, covenantal relationship between God and God's people.⁶⁴ Over and over again throughout the day of Yom Kippur itself and during the approaching month, the community recites the *Avinu Malkenu* ("Our Father our King.."), a prayer which affirms

⁶³ Rav Yair Kahn, "Revelation and Repentance", *op. cit.*

⁶⁴ I refer here, *inter alia* to the recitation of the modified *tefillah*, the recitation of Psalm 27 as well as the Thirteen Divine Attributes. The integration of praise and repentance is complex throughout the liturgy. For example, during the month leading up to Yom Kippur, and in the Yom Kippur liturgy itself, a number of insertions and modifications explicitly referring to mercy and God's remembering his people are made to the daily *tefillah*.

the unique status and capacity of God to receive this repentant community and calls or recalls various dimensions of God's being and the covenantal relationship.⁶⁵

This sense of confession as profession is in fact probably closer to the original meaning of the term in the Leviticus texts and accompanying sacrificial practices. The original scriptural descriptions of the practices refer to 'confession', but in these early forms, that term marked something broader than self-exposure and is more like profession, naming or witnessing – thus foreshadowing the conflation of affirmation and remorseful expression evident in the contemporary prayer.

IV. 3 The narrative context of the Yom Kippur ritual: approaching God

The context for the Yom Kippur ritual as it is told and retold in Leviticus 16 similarly does not begin by talking about repentance or forgiveness at all, but rather with a story about approaching God.⁶⁶ It opens with a reference to tragic death of Nadab and Abihu - the two sons of Aaron (who was the High Priest and Moses' brother).⁶⁷ Their dramatic death had occurred when they had attempted to enter the inner most sanctuary, the Holy

⁶⁵ See Abraham Milgrim, *Jewish Worship*, Philadelphia: The Jewish Publication Society of America, 1971, p. 226

⁶⁶ There is significant concern in the Leviticus text with the correct way to approach God, expressed materially as keeping the sanctity of the sanctuary. Strict rules apply concerning who can enter, how they must be purified and attired, when they are permitted to enter and what they may do there.

⁶⁷ This telling of the event takes up from chapter 10. The intervening chapters (11-15) detail the ways in which the sanctuary can be polluted.

of Holies, the place where God was believed to be literally present, or present to a special degree without taking proper precautions, and had been consumed by fire.⁶⁸

Immediately after reporting this event, the text goes on to prescribe and describe, in great detail, the ritual whereby the High Priest, alone, on only this one day of the year and with elaborate precautions, is permitted to enter the inner most sanctuary, the Holy of Holies.⁶⁹

The ritual that Leviticus sets out is in fact a set of instructions of how a representative human being (the high Priest) can enter the Holy of Holies, or approach the Divine without being destroyed. This process of entering and approach is *simultaneously* the ritual whereby the High Priest makes expiation for himself, his household and the whole congregation of Israel for all their sins.⁷⁰

As normally read, the rituals described, consistent with the traditional understanding of purification I described above, are directed towards cleansing the community of the impurity/guilt of particular sins. If however, we re-embed the process into their narrative context, the purification and sacrificial processes are the practices for correctly establishing proximity to the Divine.

⁶⁸ Leviticus 16: 1; “The sons of Aaron, Nadab and Abihu, each took his fire pan, they put fire in them and placed incense upon it; and they brought before HaShem and alien fire that He had not commanded them. A fire came forth from before HaShem and consumed them, and they died before HaShem.” (Leviticus 10:1-2) this fate was already preempted in Exodus 33:20 “Man may not see Me and live”.

⁶⁹ Leviticus 16 and 17 describes the elaborate precautions taken by the Priest to enter the Holy of Holies. Tradition holds that a rope was to be tied to his leg, so that if he dies within the Holy Shrine his body can be removed, as no one else could enter.

⁷⁰ Leviticus 16: 34.

Thus, reversing our habitual understanding, it is not the case that one achieves ‘purification’ through approaching God, but rather that humans re-approach God through the work of purification (repentance), the expression of sorrow for our infidelity to the principles of the Covenant. And again, recalling Milgrom’s point, it is not only human beings, singularly or as a collective who are ‘purified’, but the sanctuary, the place where God can reside and the seat of the community’s life. The performance makes literal what it means to approach God: one removes the defilement so as to make possible the encounter with the God, otherwise understood as the foundational relationship and the possibility of the polity itself. In Milgrom’s terms, through repentance we are acting directly to restore the portrait which has been damaged through sin, and thus connect ourselves with the foundational vision for ethical action.

V. Etymology

The last source I mine for the significance is the etymology of key terms. In Hebrew, and in particular in the Hebrew of these ancient prescriptive texts, a word’s etymology and metaphoric resonance constitute a rich resource of meaning. Two methods are employed in elucidating the meaning of Hebrew words: looking to the *shoresh* or root, and tracking the concrete contexts in which it is used, looking to its metaphoric context and “the atmosphere of the story or poem” in which it occurs.⁷¹ In this brief survey, I look to the

⁷¹ Albert Gelin, “Sin in the Old Testament” in *Sin in the Bible*, Charles Schaldenbrand (ed.), Desclee Company, New York, 1964, p. 18. As Levinas comments in his Talmudic readings, “ideas are never separated from the example that both suggests and delimits them.” Levinas, “Towards the Other” in *Nine Talmudic Readings*, Annette Aronowicz, trans. and ed., Bloomington and Indianapolis: Indiana University Press, 1994, p. 21.

roots and their variations, and at some of the key contexts in which Hebrew words translated as repentance and sin appear in the Hebrew Bible.⁷²

As I already noted, the key term for all treatment of ‘repentance’ and apology in Judaism, *teshuvah* comes from the root שׁוּב (shin-vav-bet), *shuv*, meaning to turn, to turn back, to return. The metaphor of turning comes through strongly in the elaboration of the concept. The rabbinical understanding for example holds that the “turning” of *teshuvah* has three dimensions, towards God, towards the community and other people, and towards one’s self. Rabbinical commentary emphasizes the idea that what we are doing during the period of the days of Awe, known as *chesbon hanefesh* or accounting for the soul is returning to the principles of correct relationship with God, with other people, and with ourselves as ethical beings.⁷³

Almost without exception, the word is constructed only in its verbal form, emphasizing the notion of *teshuvah* as a process.⁷⁴ This linguistic emphasis conveys the idea that *teshuvah* is not “a quality which man could possess as his own; there are no converted men in the Old Testament but only men who are forever being converted”.⁷⁵

⁷² The English translation is often quite far from the literal meaning, so one cannot look for the uses in English and then go to the Hebrew.

⁷³ See Chaim Stern, *op. cit.* p. ix.

⁷⁴ It appears as a noun only in Is. 30:15. Gelin also points out that the word is constructed with a preposition which accentuates the movement of rupture and return. Gelin, *op. cit.* p. 33.

⁷⁵ E. Jacob, *Theology of the Old Testament* New York: Harper, 1958, p. 289. n. 2. In chapter 6, I will similarly argue that there is no action that is truly universal or morally pure, but that moral purity is always approached through recognizing moral impurity.

The dynamic quality of the word stands in contrast with the English words repentance and penitence. The English term has its roots in the Medieval Latin *poenitentia*, an alteration of Latin *paenitentia*, meaning to regret, or the Latin *paene* or Greek *poenere* (to suffer, to feel pain). Interestingly, “*poena*” originally referred to a payment of money to get rid of pollution connected with manslaughter; it is cognate with or derived from Greek “*poine*”-- “blood-money.” (Also a goddess of vengeance.)

When the Hebrew was translated into Greek, *teshuvah* was rendered *metanoia*, from the two terms *meta*- beyond, and *nous*, mind. This translation carried with it two significant conceptual shifts. First, the action orientation of the Hebrew was replaced by an inner transformation – a state of mind.⁷⁶ Second, the sense of a backward or spiraling movement was replaced by a movement forward or beyond.

If one looks at the scriptural contexts in which *teshuvah* is invoked, the point to which one is called to return is not an event in the past, but God, or God’s law or God’s way. One sees this for example in Hosea “unto the Lord”,⁷⁷ or even in Jesus’ prescription: “Repent and return to the Gospel”.⁷⁸ This implies that the movement is not purely backward looking, but also involves a progression towards a yet to be fulfilled ideal.

⁷⁶ Ismar Schorsch, chancellor of the Jewish Theological Seminary, argues this point, and supports it with Maimonides’ insistence that full *teshuvah* only occurs when the same person does not act the same way when placed in an identical situation of temptation (Mishnah Torah, *Hilkhot Teshuvah* 2:1). See Ismar Schorsch, commentary on parashah Va-Yiggash 576, Genesis 44:18 - 47:27, January 6, 2001 11 Tevet 5761.

⁷⁷ Hosea, 14: 1, 2.

⁷⁸ Mark (1:15)

In fact, the problem of how anything one did could alter events in the past was already a dilemma for the Rabbinic, just as it is for modern critics who wonder how apology can alter an event which has already taken place. I return to this problem of time in the section below looking at Jewish conceptions of time and the notions of rupture and redemptive time.

In English usage, the word sin refers to the act (or thought) for which repentance is due - it is the other half of the equation - sin/repentance. With its religious connotations, sin is understood as a breach of a sacred as distinct from positive secular law, but nevertheless the notion of a fixed law is central to its assumed meaning in contemporary thought.

There are a number of Hebrew words used in the Torah and foundational texts and translated as sin, the three most common being *chet* חטא, (chet-tet-aleph), *avon*, עון (ayin-vav-nun), and *psha* פשע (pe-shin-ayin).

In its literal usage, *chet* means ‘missing’, or missing the mark, goal or way or failing or failing someone. For example, slingers from the tribe of Benjamin are described as being so good with their weapons that they can “aim at a hair and not *chet* (miss).”⁷⁹ Similarly, as used in the phrase in Proverbs usually translated as “he that hasteth with his feet sins”, means more literally, he who stumbles or falls or misses the way.⁸⁰ In Kings, when King David is on his death bed his wife, Bathsheba, comes to him and says, “If Solomon does

⁷⁹ Book of Judges, 20:16.

⁸⁰ Proverbs, 19:2. Cf. Also Pr.8.36 “The one missing me is one wronging himself”.

not become king after you then Solomon and I will be *chataim*.”⁸¹ The usual translation is that they will be counted as sinners or offenders, but also means that Solomon and Bathsheba will not reach their potential, will not make the grade, will not measure up.

Used metaphorically as missing the right path, going wrong and hence sinning, the term appears almost always in the context of sins against God, but is used occasionally for sins against other people.⁸² The sense of missing, used as missing oneself, also becomes being bewildered or besides oneself.⁸³

Interestingly, *chet* is used to refer both to the sin itself and to its consequence - incurring guilt or a penalty or forfeiting something as a consequence of sin, as in: “I shall incur the blame (*chet*) of sinning against thee all my days”,⁸⁴ and bearing the loss: “I bear the loss (*chet*) of it”.⁸⁵ Similarly, when Moses says: “But if you are disobedient you will have sinned (חטאת) and you will meet with your חטאת”⁸⁶ The latter word is translated “punishment”, but is in fact the same as the word translated sin.

To the modern reader, for whom sin/guilt and punishment are distinct moments, in fact moments that stand in a causal relation, this confluence seems odd. Yet, this linguistic

⁸¹ 1, Kings 1:21.

⁸² Used with respect to God it appears in the Torah more than 500 times, cf. Lev. 4.3, Lev. 5.1,11,17,21,23; but only 36 times with respect to man, cf. Ex. 5.16; 1S.26.21.

⁸³ Jb. 41.25. The verse is translated as the mighty are afraid.

⁸⁴ Gn. 43.9

⁸⁵ Gn. 31.39

fusion lends further support to the interpretation of sin as a breach in relations and organizing principles. Understood this way, it makes perfect sense that the wrongful act and the consequences are designated by the same word, because the breach is both the act and the problem. If we understand the covenant as a living bond, sustained only by active observance, then every infidelity is damage to the covenant, not merely the cause of damage to the covenant. As Von Rad puts it in his Old Testament theology: “the “recompense” which catches up with evil is certainly no forensic event which the sin evokes in a completely different sphere - that is with God. It is the radiation of evil which now continues on; only so does the evil which the sin called out reach equilibrium.”⁸⁷

The second root, *avon* is usually rendered *iniquity* in English. It literally means to be distorted, to go astray, to act perversely, as expressed in Isaiah’s entreaty: “Woe to those who call evil good and good evil, who put darkness for light and light for darkness.”⁸⁸ In its more common nounal form it means a trespass, and always involves the guilty party’s consciousness. ָוִן has its roots in the evil disposition, and indicates that the act is intentional, a willful, knowing transgression of God’s law where one’s desires get the upper hand.

⁸⁶ Num. 32:23

⁸⁷ Von Rad, Gerhard *Old Testament Theology*, D. M. G. Stalker (trans.), New York, Harper, 1962, Vol. 1, p. 256. Like Ricoeur, Von Rad connects this linguistic fusion with what he calls the synthetic view of life in which people do not yet understand their actions and the consequences of their actions as two separate events, or at least events standing in a loose relationship with each other.

⁸⁸ Isaiah, 5:20.

As we saw in the case of *chet*, while *avon* is usually rendered iniquity or sin, it is in fact linguistically ambivalent, standing for sin or guilt, and the consequences of sin, which we might call penalty. Cain, for example, when found out and cursed by God, says, “My *avon* is greater than I can bear”. *Avon* is translated almost always as “punishment”, although the phrase might also be taken to mean that he cannot bear his sin.⁸⁹

There are a number of other terms translated as sin whose literal meaning is also to err or to deviate including:

- *‘avlah*, literally deviation from the right way, as in “They build up Zion with blood, Jerusalem with *‘avlah*”;
- *‘abar*, literally to pass over, usually rendered transgress as in “They have transgressed my Covenant” or “transgressed the laws”;⁹⁰
- *shagag*, and *shagah* used literally for straying sheep and a meandering drunkard,⁹¹ or in a moral sense: “I have sinned...I have played the fool and have erred exceedingly”;⁹²
- *ta’ah*, literally “to wander away”, used for example in “Forty long years was I grieved to this generation and said, It is a people that do err, in their heart, and they have not known my ways.”⁹³

⁸⁹ Gen. 4:13

⁹⁰ Hos. 8: 1 and Is. 24:5.

⁹¹ Ez. 34:6 and Is. 28:7.

⁹² 1 Samuel, 26:21.

⁹³ Ps. 95:10, cf. also Psalm 58:4.

The third term *pasha* פֶּשָׁה is usually rendered transgression, but the root means rebel, and the term belonged to the realm of politics, signifying enmity, revolt or rebellion.

Pesha, refers to a willful transgression, normally against God, as for example: “All their rebellions wherein they have rebelled against thee”.⁹⁴

Again, a number of associated terms carry this sense of rebellion:

- *Marah*, and *marad* usually rendered rebel or refractoriness, as in “If ye are refractory”, and “Nations.....which have been refractory against me”;⁹⁵

- *Sarar*, denoting stubbornness, as in “A stubborn and rebellious generation”;⁹⁶

- *Ma'al* usually rendered trespass, denoting treachery against God, as in “The children of Israel committed treachery in the devoted thing”;⁹⁷

- *chanaph*, literally “to lean away from”, rendered renegade, Godless or hypocrite, as in “the hypocrite’s hope shall perish”.⁹⁸

Finally, there are a number of terms used as descriptors of sin, each of which is in fact the opposite of one of the various descriptors of the qualities of God (holiness, purity, wisdom and glory), which are to be emulated by human beings. Particularly interesting here is *rasha'* (wickedness), standing in opposition to God’s righteousness and describing

⁹⁴ 1 K 8:50.

⁹⁵ 1 S. 12:15 Ez. 2:3

⁹⁶ Ps. 78:8.

⁹⁷ Jos. 7:1

⁹⁸ Job. 8:13.

a man who wrongs God or man. *Rasha* is used as the collective of the adversaries of God.⁹⁹ To holiness is *chalel*, rendered profanity, but from the root meaning to loose or let loose, and hence being let loose from the holy place into the profane.

These etymological metaphors and plays, particularly those in which sin conveys the idea of missing or breaking relationship are consistent with the argument of Old Testament theologians that “sinning” always signified the breach of the sacral order, and further a direct insult to God and his sovereign rights.¹⁰⁰ Gelin writes, for example: “Sin is the breaking off of a personal relationship with God. It presupposes the experience of a vis-a-vis whose holiness has been discovered in a retrospective act of reflection and repentancethe idea of sin is the obverse of the idea of God.”¹⁰¹

Particularly when placed together, the etymologies of *teshuvah* and the three terms for sin are consistent with the interpretation I derived from my analysis of ritual and stories. The idea of sin and repentance as economic relations to a law, where sin marks a deficit, and repentance a balancing of accounts is far less prominent than the idea of sin and repentance as movements in relationship. Wrongdoing and repentance come through as our movements away from or towards the place from which the sense of right and wrong

⁹⁹ Ps. 3:7, see also Ps. 1 where the righteous and the wicked are set against each other.

¹⁰⁰ This understanding of sin resonates with the Jewish, as opposed to the Pauline or Augustinian understanding of the significance of the Fall in the narrative of the garden of evil. The original sin is understood not as the violation of a law, but rather as a departure from the primal harmony between human beings and God, an act of separation, or infidelity. See Samuel S. Cohon “Original Sin”, *Hebrew Union College Annual, Vol. 21*, Cincinnati, 1948, pp.275-330.

¹⁰¹ Albert Gelin, “Sin in the Old Testament” *op. cit.*, p. 39f. Similarly, Ryder says: “It is everywhere assumed and often asserted that sin is disobedience to God.”, *op. cit.* p 67.

emerge. The return of repentance effects a reconnection with this place of orientation from which the person is capable to ethical action.

VI. Jewish self-understanding of collective responsibility

In the forgoing sections, I have derived an interpretation of collective repentance from the forms of ritual that express it, the stories of its origin or derivation and the language which carries it. Jewish commentary and legal principles also explicitly speak to this question. They do so both philosophically, that is in terms of the conception of the law and existential status of *B'nei Israel* and more practically, in terms of the structure of legal arrangements.

VI. 1 Jewish philosophy on the collective and individual

At a very general level, the rule known as *Kol Yisrael Arevin Ze Bazeh*, that the Jewish people is collectively, not just individually responsible before God, is one of the foundational principles of Judaism.¹⁰² It is supported through various passages of the Torah,¹⁰³ explained metaphorically by the sages,¹⁰⁴ and provides the basis for various *halakhic* (legal) principles, which allow for one person to fulfill another's obligations.¹⁰⁵

¹⁰² This understanding is spelled out in a number of Talmudic laws, for example, "All Jews are responsible for one another. They are like one body and like a guarantor who repays the debt of a friend." Ritva, *Babylonian Talmud*, Rosh Hashanah 29a.

¹⁰³ One could select myriad passages here. One example, central in Jewish practice forms the second paragraph of the Shema, recited three times a day: "If you are careful to heed my commandments . . . I will give the rain for your land in its season . . . and you will eat and be satisfied . . . Be careful that your heart not be tempted to go astray . . . The land will not give forth its crops, and you will rapidly vanish from the good land that God is giving you." Deuteronomy, (Devarim) Chapter 11 Verses 13-17.

¹⁰⁴ It is the way of the world that if a person takes a bundle [agudah] of reeds and tries to break them together he cannot. If, however, the sticks are taken one by one, even a child can break them. So

At an even more fundamental level, the entire story of the formation of the Jewish people is told and retold in collective terms. Israel and with it Judaism were born through a covenant between God and Israel, where Israel is understood to include every Jew righteous or not, present at Sinai or not, including every Jew into the future.¹⁰⁶ The individual Jew assumes obligations both to the law and to other people *as a member of the covenantal community*.

As I noted above, read through the lens of Christian theology, the relationship between the God of the Old Testament and Israel has most often been portrayed as crudely collective and empty of subjective engagement. The lens of this reading, however, was a theology distinguishing itself from its Jewish roots and establishing its credentials as the original and authoritative representatives of individual spirituality and morality. Jewish theology became *Old Testament* theology, a foil to the new, the old to be transcended by a religion that recognized the moral and spiritual claims of the individual.

If however one removes this projective lens and reads the theology of the Jews through the entire tradition, including the body of commentary, a far more complex picture of the relationship between the collective and the individual and ritual and intention emerges.

Certainly, the texts are replete with stories of a vengeful God inflicting collective

too with Israel: they are redeemed only when they form one band [agudah achat]. Mechilta d'Rabbi Shimon Bar Yochai, Chapter 19, verse 6.

¹⁰⁵ For example, one person can recite a commandment blessing of behalf of another even though he has already fulfilled the mitzvah. (Chidushei Ha-Ritva Rosh Hashanah 39a).

¹⁰⁶ "I make this covenant, with its sanctions, not with you alone, but with both those who are standing here with us this day before the Lord our God and with those who are not here with us this day." Deuteronomy 19:13-14.

punishment on Israel and the other nations. This is however also a religion that requires individual ascription and a God with whom Abraham argues about the balance between individuals and community.¹⁰⁷

I have already argued that recognizing the intrinsic link between the constitution of the people (as a collective), the covenant and the norms that orient individual judgment destabilizes the individual/collective dichotomy. By seeing that the Jewish focus on the collective enters at this constitutional level, different spaces can be carved for the collective and individual dimensions of identity and morality.

Suzanne Stone addresses the status of the corporate body in this vein, asserting that the ground for the Jewish community is a set of collective positive commandments:

In contrast to Christianity.....social solidarity [in Judaism] is not grounded in human nature. Instead, it is a product of a congerie of positive commandments mandating some associations and forbidding others. The legal principles regulating associational life are thus part and parcel of the larger purpose of the law: In biblical terminology, to mold a holy nation; in the philosophic language of

¹⁰⁷

There are various points in the Old Testament story where God is portrayed as punishing the collective without regard to the fate of individuals (cf. Exod. 11:4, 112:12-13, 12:23, 29), providing a basis for the rabbi's dictum: "Once leave has been granted to *mashit* to do injury, it no longer discriminates between the righteous and the wicked." Levine, B. A. *In the Presence of the Lord*. Leiden: Brill 1974, p. 86. Interestingly, already in the early part of Genesis, a human being (Abraham, the first Jew) argues against this position, pleading against the collective punishment God threatens to inflict upon all of Sodom: "That be far from thee to do this after this manner, to slay the righteous with the wicked: and that the righteous should be as the wicked, that be far from thee. Shall not the Judge of this earth do right?" (Gen. 18:25).

Maimonides, to provide for the objective human well-being or happiness of the community.¹⁰⁸

The people - *b'nei Israel* - is not *naturally* one, that is by virtue of some pre-political, 'genetic' characteristic which pre-dates their accession to the covenant. This would be the case if, for example the claim was Jewish identity was grounded in an essential pre-social characteristic like race.¹⁰⁹ Rather, they came to be one through their accession to the covenant – an act with legal and political as well as religious dimensions. Moreover, Judaism understands the giving of the Torah, of the law and guideline for the nation's orientation as an ongoing process, not a singular event which occurred at a point in history, forming a corporate body which then exists independent human action.¹¹⁰ The giving and accepting of Torah as the constitution of *b'nei Israel* is something which has to happen continually, with the active participation of the living people identified as Jews.

Teshuvah is then an essential aspect of this process of the ongoing renewal of the covenantal relationship and covenantal basis of the people's existence. As we all know from our own lives, we often only find out what we ought to do, or what our ethical commitments are through the process of being confronted with ourselves acting in a

¹⁰⁸ Susan Stone, "The Jewish Tradition and Civil Society", in Simone Chambers and Will Kymlicka (eds), *Alternative Conceptions of civil Society*, Princeton University Press, 2001.

¹⁰⁹ I am not claiming that race is essential, but rather referring to identity claims which themselves assume that it is.

¹¹⁰ So for example the blessing recited when the torah is read in synagogue is in the present: "Blessed is God who gives us Torah."

manner that we can retrospectively identify as something we do not want to do or as someone we do not want to be. It is through recognizing that one has strayed that one can identify or redefine the path. In this case of the corporate body, it is through the process of being faced with, identifying and accepting its own transgression or failure to live up to the terms of the covenant that Israel is effectively identifying and thus *practically* recommitting to it.

This means that it is logically impossible to think of someone as a Jew or of their obligations to Jewish laws or their relationship with God entirely outside the corporate body Israel. Because law logically requires plurality, no single abstract person could abide by the laws outside the fact of the body of Israel. If one insists on starting with the individual at this level, there would be no law. The sages expressed this conception metaphorically: “It can be compared to people on a boat. One took out an awl and began boring a hole in the boat beneath his seat. The others said to him, ‘What are you doing?’ He replied, ‘Is that any concern of yours? [I am not boring a hole beneath your seat] but only under mine.’ They said: ‘But you will sink the whole ship, and we will all drown.’¹¹¹

This does not prevent one from evaluating substantive laws in terms of their effect on individual rights or judging them for repressing the expression of individual personality or aspiration. But the law, *qua* law, as an authoritative organizing system logically precedes specific laws. And at this level the law, like the grammatical structure of a language, or the notion of property, only exists if it is held up at a number of locations. At

¹¹¹ Attributed to Rabbi Shimon bar Yochai, *Vayikra Rabbah (Margalioth)* 4.

the point of origin and thereafter, law and parameters of right are a collective endeavor. Absent general respect, the law cannot work as a meaningful and authoritative mechanism for regulating social relations, and so cannot work for any single individual. Without this structural starting point only anarchy, not autonomy is possible.¹¹²

If *teshuvah* is understood as part of the process of sustaining this foundational covenant, its collective dimension is not necessarily opposed to, but may in fact be one of the conditions for individual rights. Of course the degree to which this is in fact the case will then depend on the substantive content of the law and the processes whereby law is defined and redefined. Again, however, the structural foundation is logically prior to the substantive content.

In his commentary on the category of sin, Von Rad similarly draws attention to the social aspect of sin in its Old Testament usage. He argues that in Old Testament theology any offense against the sacral order implicated all members of the community, not simply because of the deep ties of blood and inter-connection, but more importantly because the offense threatened the order itself, the possibility of cultic activity and the set of relationships which organized the community and its social function.¹¹³ Sin, understood in this latter sense is not attached to a number of individuals by virtue of their proximity

¹¹² This notion was beautifully expressed by the literary character of Sir Thomas Moore in *A Man for All Seasons*: “And when the last law was down, and the Devil turned round on you, where would you hide...the laws all being flat? This country’s planted thick with laws from coast to coast.....and if you cut them down...d’you really think you could stand upright in the winds that would blow then?” Robert Bolt, *A Man for All Seasons* New York: Vintage Books, 1960, p. 66.

¹¹³ Von Rad, *op. Cit.*, pp. 263ff.

to the wrongful action, but rather rests at the level of the set of relationships and organizing principles in which they, *qua* collective, are located - that is, in the covenant.

VI. 2. Wrongs against the victim and wrongs against God – the triangular structure of apology

This analysis also provides a way of making sense of the fact that in Judaism wrongs committed against other people are also wrongs against God, and require that *teshuvah* be done both with the directly wronged (human) other and with God. The division between the two types of sins seems obvious enough at first glance: the former concern the transgression of prohibitions and ritual commandments, the latter material, moral and verbal transgressions against other people. The modern Jewish philosopher Emmanuel Levinas suggest however, that the requirement to seek divine forgiveness for sins between persons destabilizes the distinction in a very interesting way.

Levinas has entered deeply into this question of the interdependence of what he calls the vertical and horizontal dimensions, where the vertical is between human and God and the horizontal between one human and another. Repentance to God for sins against God belongs to what he calls ‘the moral realm’, that is the order of things on an absolute plain. When a human being commits a ritual transgression they “undermine[d] the moral conscience as moral conscience”.¹¹⁴ The *teshuvah* they undertake directly with God to address this transgression represents the simplest case of the process I have been

¹¹⁴ Levinas, “Toward the Other”, in *Nine Talmudic Readings*, *op. cit.*, p. 17.

articulating here: repairing the order itself, or in symbolic and ritual terms purifying the sanctuary.

This form of ritual transgression, however, only covers a relatively small part of all possible violations against the universal (absolute) order, the order that in religious terms is called God's law and in political terms the abstract constitutional orienting norms. This order is also damaged through violations committed against other people and cannot be repaired except by moving through these horizontal relations. It is not possible to repair the absolute moral plane exclusively through a vertical relationship with the transcendent. Levinas argues that this praxis of teshuvah points to the background truth that the universal dimension is to a large extent inaccessible to humans unless it passes through concrete relations. The transcendent cannot be abstracted out and conceived, removed, and "decontaminated" of its trappings in human relationship.¹¹⁵ It is rather in the particular trappings that it has being-in-the-world, and through the particular trappings that it is reached. That is why, Levinas argues, divine forgiveness is also required for sins against other people. Or to put it in more positive terms, that is why the process of confronting particular wrongs committed against concrete others provides a way into renegotiating our relationship with general orienting norms.

¹¹⁵ Levinas goes even further in his analysis, in a manner resonant of some of the scholastic discussions of grace and the order of forgiveness. It is not quite correct to say that God forgives a person because that person has attained forgiveness from others. Rather one's forgiveness of others presupposes that one has God's forgiveness. Forgiveness of others is both a manifestation and an outcome of this implicit divine forgiveness.

What this practice manifests conceptually, according to Levinas, is not simply a shift from a concern about God to a concern about relations between persons, but rather a conceptual scheme which brings together the plane of universal moral values and the plane of particular, local infractions against other people, yet without collapsing them. Judaism, he argues, rises up against “the overly virile proposition.....which puts the universal order above the inter-individual order”, and insists that God’s forgiveness, or the forgiveness of history cannot be given unless and until the relationship between persons has been honored.¹¹⁶ Yet, in retaining the idea of the absolute (of God) it resists the tendency to fall in the other direction, reducing the transcendent to the interpersonal or allowing that abstract norms can be reached only by attending to a closed personal morality.

This re-mapping of the abstract and the particular, the transcendent and the immanent is reminiscent of the reconceptualization of the collective and individual I developed in chapter 2. In particular it recalls Castoriadis’ insistence that societal norms can neither be reduced to inter-subjectivity, nor do they have a manifest existence anywhere other than through inter-subjective interactions.¹¹⁷ Rather, there is a dynamic movement between the

¹¹⁶ He writes: “God is perhaps nothing but this permanent refusal of a history which would come to terms with our private tears.”, *op. cit.*, p. 20.

¹¹⁷ Recall for example the passage quoted in chapter 2: “Athenian society is, in a sense, nothing but the Athenians; without them it is only the remnants of a transformed landscape... worn out statues fished out some place in the Mediterranean. But Athenians are Athenians only by means of the *nomos* of the *polis*. In this relationship between instituted society – which infinitely transcends the totality of the individuals that ‘compose’ it, but which actually exist only by being ‘realized’ in the individuals it manufactures – on the one hand – and these individuals, on the other, we witness an original, unprecedented type of relationship which cannot be thought under the categories of the whole and the parts, the set and its elements, the universal and the particular. Cornelius Castoriadis, “Power, Politics and Autonomy” in *Philosophy, Politics, Autonomy*, *op. cit.* p. 145.

social imaginary (the abstract/symbolic or *nomos*), social-historical institutions and the subjective and practical experience of the human beings who comprise any living society.

For both Levinas and Castoriadis, normative orientations and commitments which subjects experience as *their* perspective or their identity are drawn from a pre-existing set of ‘imaginary’ significations. And yet these significations are only perpetuated (and potentially transformed) through their being lived by concrete subjects. Importantly, the fact that there is a necessary space between these sites – the abstract norm and the concrete instance – makes it possible to explain both variation and norm development or change. The abstract exists only at a very general level, and does not spell out how this norm is to be embodied in all instances or for all time. Far from the abstract norm dictating the substantive instance, it is the particular formation and reformation at the level of concrete action and institution which fills out the abstract norm.

The remapping also corresponds with the relationship between the abstract principles of universal justice known as *jus cogens* or customary international law and the concrete forms of action at the level of social and political institutions. Unlike treaty based human rights law that derives its authority from positive legal articulation, customary international law seems to exist in a vague, abstract way. It may be, but need not be articulated human rights instruments. Rather, something becomes customary international law when enough states have begun to behave as if it is law.¹¹⁸ It becomes “law by use.”

¹¹⁸ This does not mean that it is respected. A state may behave as if something is law even while people violate the standard. However, that state will have to act in certain ways, for example by enacting and actually enforcing positive laws proscribing the behavior or it will cease to be acting as if it is law.

In other words, we name the laws in the abstract, but this abstract existence rests on the concrete practice. This means that it can only be damaged or strengthened through actual persons or institutions (including positive laws) violating or respecting it. This also explains how a range of different state practices can be consistent with an abstract universal norm.

Thus, just as in the religious sphere apologies addressing infractions against other people provide the route for approaching the otherwise inaccessible principles of God, so too political apologies against particular others are also the means for reaffirming the principles of a more universal justice. At one level, apologies are formally addressed to the wronged party and framed around a concrete wrong or set of wrongs (a historical genocide, or complicity in violation against a particular group). At another, they speak to more general moral principles. Using Levinas' categories, the apologizing subject does not address the plane of the universal, speaking in abstract terms about respect for the integrity of others, or the wrong of genocide or discrimination. It rather approaches the general principle through confronting a failure to uphold that principle in a concrete historical instance.

In this sense, the international community is also, albeit implicitly, the addressee of the apology. It occupies the place of God as the site, source or guarantor of abstract, universal principles. Importantly, this triangular structure is very different to the binary relationship that Tavuchis assumed was the fundamental structure of the apology. The third, be it God, the international community or any other figure representing the ideal

norms that organize the horizontal relationship and provide reasons for the parties to respect them is always and necessarily present.

Working with this schema, one can then see how individuals can be implicated in collective apologies without implying that they *personally* committed particular infractions. And one can see how apologies for particular infractions engage the people apologizing in broader ethical or political projects – projects concerned with the more general and abstract set of norms which define the particular infraction as an infraction.

That the apology works through this dynamic interplay of the particular violation and the abstract principle helps to make sense of the fact that in many actual cases the identity of the addressee is somewhat amorphous. Recall, one of the criticisms leveled against political apologies is that they lack integrity because it is often not clear exactly *to whom* the apology is addressed. Even though they have a formal rhetorical addressee (Indigenous Australians, Jews, Rwandans), in fact this group is poorly defined. I also raised this problem in the context of the idea of uptake in speech act theory and the difficulties that arise if one expects forgiveness to be what completes the apologetic act.

This is, however, only a problem if one insists that the primary concern of the apology is the actual relationship between apologizing subject and the *formal* addressee. If one accepts that apology's concern reaches beyond, or works through the concrete instance, but has a more far reaching object (the abstract principle), then the need for a closed definition of the addressee becomes less important. In so far as it speaks to a particular

instance it requires a particular addressee, but it does not insofar as it speaks to a principle or the community ascribing to that principle - the national community, the international community. This means that the identity requirements for the formal addressee are far less stringent.

VI. 3. Legal principles concerning the responsibility of the collective

Chapter 4 of the book of Leviticus sets out the sacrificial procedures which should be followed in cases where common individuals, the priest himself, the political ruler or the whole congregation sin. The different ritual obligations flowing from these various sites of wrongdoing provide an early map of the relationship between individual wrongdoing and collective responsibility. In the post temple era, the Rabbinic sages worked with this text to elaborate a fuller scheme of legal responsibilities, now taking into account the existence of a formal court which was charged with interpreting Torah, or more concretely drawing from the background frame of Torah to articulate specific rulings about what was and was not permissible for a concrete community. Their conclusions are set out in *Mishnah Horayot*.¹¹⁹

The argumentation in this *Mishnah* is of particular interest in thinking through political apologies because it considers situations analogous to those that become the subject of transitional and historical justice - violations committed with the sanction of the state. Or, in more general terms, the contemporary measures seek to deal with situations where

¹¹⁹ Mishnah, Tractate Horayot chapter 1, published in Albeck, Hanokh. *Shisha sidrei mishna*. Jerusalem: Bialik and Tel Aviv: Devir, 1952-59. Translations of this Mishna used here are by Natan Margalit, published in his doctoral dissertation, *Life Containing Texts: The Mishnah's*

members of a political community have systematically acted in a manner deemed wrong according to some absolute standard (international law, universal moral norms) but with the sanction of the authority charged with giving those absolute standards positive form (positive domestic law). This *Mishnah* similarly deals with the situation where the actions take place contrary to the Torah, but in accord with the rulings of the contemporary court. Moreover, it does not only ask who can be held responsible in such cases, but is concerned with the business of institutionalizing responsibility – who has to make sacrifices.

Already the first line of this text makes it clear that the norms exist at two levels and that they can be in conflict (“If the court ruled to transgress any one of the commandments of the Torah”). It then establishes which has precedence. The first level, the law as given by the court (*Horah*), is accessible but fallible. The second, the absolute (*Torah*), does not provide individuals with direct access to a fully articulated code of behavior and is inaccessible but infallible. Where the two come into conflict, it is the absolute (Torah here, or to recall my discussion in chapter 1, constitutional law, international law or putatively universal moral standards) that provides polities with the compass to assess the law as articulated by the contemporary authority.

It would be inaccurate however to characterize the relationship between these two levels of law as ideal and actual, or template and exemplar. Certainly, the implication is that they have an *intrinsic* connection. The immanent authority draws its norms, albeit

Discourse of Gender, A Literary/Anthropological Analysis, University of California, Berkeley, 2001.

partially and imperfectly from the absolute. In Hebrew this internal connection is even conveyed etymologically. *Horah*, the word for ‘Court’ shares its root with *Torah*. It is derived from but not equivalent to *Torah*, and can deviate so as to violate *Torah*. At the same time, *Torah* does not exist as a complete fully articulated object but requires human interpretation. Were *Torah* or absolute law itself fully accessible, the court’s function would be limited to enforcement and sanction. There would be no need for it to act as a creative jurisprudential body.

The most important general principle set out by this *Mishnah* concerns the seat of responsibility in cases where the court sanctions an act that is in fact contrary to the *Torah*. When this occurs and the congregation acts in accordance with the court’s ruling, both the court and the congregation must bring offerings. Moreover, the congregation must bring an additional offering on behalf of the court.¹²⁰

Notably, the *Mishnah* separates out the case where individuals sin (contrary to the *Torah* but in accordance with court rulings) from those where ‘the entire congregation’ (or a majority of them) does so, thus marking a distinction between the association of individuals and the congregation *qua* corporate body. In fact, the *Mishnah* is explicit that even where only seven of the twelve tribes sin, the others are also responsible for bringing offerings, i.e. they too bear responsibility for repairing the sin. The entire congregation is implicated even where not every member has committed the wrongful action.

¹²⁰ *Mishnah* 5.

One of the things this *Mishnah* is trying to do is to make sense of the concept of ‘the entire congregation’, referred to, but not operationalized in the original text in Leviticus. The *Mishnah* effectively equates the court with the whole congregation by asserting that it is the court that “speaks words of Torah on behalf of the people”.¹²¹ At the same time, the entire congregation is also the actual persons whose actions are informed by the court. If the court were not held to be legitimate in the eyes of the people, its rulings would not represent the congregation. Thus, it is this combination of the court and the people that forms the corporate body that carries responsibility for the normative framework informing individual action. As per the conception of collective responsibility I developed in chapter 2, this conceptual framework allows one to sensibly speak about this body – as a corporate entity – taking responsibility for the wrongdoing of individual members of the community without also having to say that each individual in the corporate body is responsible for the wrongdoing of each other individual.

The second principle of interest to me in this text concerns the case where the court rules against a commandment (of the Torah) *entirely*. *Mishnah* 3 begins with the situation where “the court ruled to uproot the whole body of a particular commandment, saying, “there is no *nidah* (commandment concerning restrictions on menstruating women), or there is no (commandment of) Shabbat in the Torah, (or) there is no (commandment concerning) idol worship in the Torah.”

In this situation, the court is exempt from bringing an offering. The *Mishnah* continues by asking what is required where the court rules to cancel part and affirm part of a

¹²¹ Natan Margalit, *op. cit.* p. 101.

commandment. Its apparently paradoxical ruling is that in this case, the court *is* required to bring an offering. Why, if the court has ruled incorrectly in an extreme way would it not have to make an offering, especially given that it is obligated to do so when it merely deviates from Torah?

The key to this discrepancy can be found in the language used to describe the first case. The misruling has, in the words of the mishnaic text literally uprooted *the whole body* – both the body of the commandment and the body of the community constituted through its observance of the commandments. The reason that no offering is required in the first case is not that the wrongdoing or misruling is mitigated, but rather that it is so severe, so grave as to have removed the court from the system of the law altogether. In other words, the ruling was not simply a mistake – an unacceptable deviation in interpretation, but moved the court outside the grammar of Torah altogether – so much so in fact that it is not possible to use the Torah’s own mechanisms of repair (sacrifice) to address the breach. The *Horah* has lost all connection with Torah.

This case revisits the question of the relationship between the temporal rulings of the legitimate authority for a community and the absolute norms. Now what we see is that for a return to Torah to be possible, or even for it to be possible to access Torah’s mechanisms for repair, there has to be some intrinsic relation between the norms embraced by the community and the norms towards which it is reorienting itself – however tentative that connection. *Horah* and *Torah* have to retain an intrinsic

connection. If the tree is uprooted entirely, so too is the reference point against which actions can be judged.

This claim recalls my discussion in chapter 2 about how a political community can alter its normative frame and whether apology always refers back to an existing set of norms. There I was addressing the problem of how (from a logical point of view) one could argue that the normative orientations of a political community inform and are informed by the subjective norms of members while simultaneously arguing that normative frames can change. I argued that for this shift to be possible, the alternative frame has to “somewhere on the normative horizon” of that community. That might be in terms of other internally held (ideal) norms or an external set of norms to which it at least nominally ascribes (international law). If these alternative norm are nowhere on *its* normative horizon, if they are totally alien from *its* political culture, then it cannot move towards embracing them – or at least not without becoming a different political community.¹²² As soon as one understands that political identity cannot be reduced to geographic or blood continuity, but also lies in ascription to constitutional norms, this connection between normative change and continuity becomes tremendously important.¹²³

¹²² This latter claim raises the question of how to differentiate between a political community changing its ethical frame across time, and still in some sense having a continuous identity, and a political community ceasing to be *that* community. I do not enter fully into this troubling dilemma of identity here. Rather, I propose a working concept of an ethical system that can change, but only through grammatical links.

¹²³ One saw that for example, in the French example where the France of Vichy was not considered continuous with La France, and in the initial apology by the Croatian President that distinguished between the collaborationist regime and Croatia.

Similarly here, if the norms which the polity actually embodies, those that in fact orient actions, lose all connection with the ideal normative frame which would condemn them, then the ideal normative frame can no longer resource that community to move beyond its embodied norms. A Jewish community may deviate from the proper observance of Torah in many ways and still be part of *B'nei* Israel. But if its connection with Torah is severed altogether, it ceases being part of Israel at all, and cannot deploy Torah's own tools of *teshuvah* in order to bring itself back.

At work in both the religious and the secular political case is the same principle. If a polity is to reorient itself from a normative point of view, it must be able to find a trace of these ideal norms in its own normative frame – even if they are radically contradicted in many aspects of its actual normative orientation and manifest action. Were the ideal point entirely *external*, the movement would be impossible. This principle applies both in cases where the ideal point is understood as a pre-existing set of thick laws (as Torah is usually represented) and where it is more open ended and subject to ongoing revision.

From here, one can also develop a more open interpretation of the notion of return. The values to which the individual or community is “returning” need not be values set down in stone – as one tends to think of Torah – but can rather be any set of more universal, less one-sided values. In fact, they may not be values which ‘existed’ in any determinate manner before, but may (as Hegel suggested) be those which are brought into being through confrontation with the consequences of one-sided values, or more accurately,

confrontation with the subject voices of the people whose humanity was degraded through those parochial values.¹²⁴

This exploration of the relationship between the *Horah* and the Torah – the positive law articulated by concrete human beings and the ideal law points to two important philosophical problems that the practice of repentance raises not only here but more generally. First, is the idea of repentance coherent in the absence of a set of pre-existing orienting standards? Does it even make sense to think about repentance if one did not have a firm set of background norms against which to judge wrongful acts? For example, “I should have done X (kept the Sabbath, not eaten proscribed food), but I did Y (which contravened X). I am sorry, and I commit myself to doing X in the future.”

In the modern political context, a lot is at stake in this question. If repentance only works against the background of thick substantive and fixed norms, it may be an inappropriate tool to be employed in political communities committed to thinning out their ethical commitments or ensuring that these principles are always open to ongoing and democratic revision.

The second problem concerns the conception of time and repentance. The idea of repentance seems to rest on a reversal of our normal conception of time moving

¹²⁴ My argument clearly assumes that the notion of ethical progress not only makes sense but that it comprises a movement from ethical values that draw hierarchical distinctions between categories of persons to those where all people have an equal right to recognition. My preference however would be to modify this Kantian claim (all moral norms by universalizable) to a more Habermasian one, where normative progress is achieved through a more inclusive debate including the perspectives of all actors.

inexorably from the past to the present and into the future. How can an act in the present affect something that already happened in the past?

Both also receive extensive and thoughtful treatment within Jewish thought. In the following section I will briefly mine some of the Jewish thinking on these two problems with a view to gathering analytic resources for a more general reflection.

VII. Jewish conceptions of law, God and time

What types of background norms are required for the concept of repentance to be coherent? Does the very idea of repentance necessarily rest on there being a fixed set of laws in relation to which one repents?

The notion of *return* as transmitted in the term *teshuvah* suggests that one is returning to a fixed point, be that God or God's laws. Similarly, the most common image of (monotheistic) religion is that adherents are prompted to repent because God judges and condemns deviations from a set of fixed standards – standards that are themselves absolute and not open to revision. In fact, one of the defining characteristics of religion in general (and Judaism in particular) is that it is founded on a set of thick pre-established norms (Thou shalt not A, B and C.....). If it is this model that is transposed onto the modern political setting, then a polity's apology must similarly imply the existence of some fixed absolute and non-revisable standards. As I discussed earlier, this is normatively problematic in terms of the general democratic commitment to revisable norms. It also would seem to place constraints on ethical progress, given that states may

need to move well beyond their prior normative frame, especially where that frame, even in its ideal form involved identity based inequalities.¹²⁵

Alternatively, one might argue that repentance remains a coherent concept even without such fixed standards, that it can function in relation to more open ended, revisable norms.¹²⁶ The existence of these sorts of norms, affirmed by the political community itself, is consistent with liberal democratic principles, but seems remote from the religious model I have used as my template. Again, one sees here the type of dichotomization I set out to deconstruct earlier in this chapter with a view to blurring the thick line between religious and secular communities.

Despite the more common conception of Torah as a set of commandments, there is, as I already indicated, a conception of Torah as an ongoing project that requires the open-ended participation of historical subjects. According to this conception, Jews are not oriented according to a complete set of hard, heteronomous God given laws. Nor are they totally free to act according to the whim of the moment. Rather, the ideal normative frame, which one might call Torah, is co-constituted by an ongoing inter-penetration of human ethical exploration and background orienting norms. This conceptual framework

¹²⁵ As I will discuss in chapter 5, this is particularly true in the case of post-colonial states, which are founded on the annihilation of the prior rights of the indigenous peoples and their sovereignty.

¹²⁶ Certainly, repentance logically requires there to be *some* normative standards. Without this repentance would raise the same moral problems as retrospective (*post hoc*) legislation which allows people to be prosecuted for contravening laws which did not exist at the time when they acted. In both cases, one might question the legitimacy as well as the coherence of judging actions as wrong in cases where the standard that so defines them did not exist as an authoritative, legitimately binding standard at the time.

challenges the dichotomy between autonomy and heteronomy so often used to draw a thick line between secular liberal democracies and thick religious communities.

In the background to and underpinning this reconceptualization of moral precepts and the autonomy/heteronomy dichotomy is an alternative conception of God. According to the commonly held view of religious ethics and God within religious doctrine, God is the absolute sovereign, the transcendent otherworldly source and site of moral laws that human beings must learn to honor and obey.¹²⁷ God has the absolute power to define moral good and correct action (norms and laws) and the normative orientation of the religious community (here Israel) is given by a set of fixed and fully articulated positive commandments. A life faithful to religion involves submission to these given laws – obedience without question. Sin arises when human beings deviate by acting on their own initiative - Adam and Eve's rebellious actions in the Garden of Eden providing the archetype of sin arising from human self-assertion.

This is not the only authoritative position within Judaism. In fact, the question of how open or closed Torah is, is itself a subject of internal dispute.

There is a famous discussion amongst the Sages in the Talmud between about precisely what was given at Sinai.¹²⁸ One sage holds that God revealed the entire Torah on Sinai:

¹²⁷ Again, as discussed in note 5 above, this is Arendt's characterization of the Hebrew model of God and thus the basis of her arguing that it provides a problematic basis for modern law, even given the need for an absolute grounding.

¹²⁸ The Torah teaches that God gave Moses the law at Sinai.

every letter, word and prescription was the literally revealed text from God. Living according to the precepts of Judaism then permits for no deviation from a set of fixed laws, no progressive interpretation and no human involvement in shaping Jewish faith or norms, only acceptance and obedience.

A second Sage argues that it was only the Ten Commandments that were given on Sinai, but these comprise an absolute normative/legal frame. Already here, one might argue that the existence of such laws is not inconsistent with, but may even be a condition for political freedom or autonomous political organization, in much the same way as some liberal democratic theorists argue that certain basic constitutional laws provide the necessary conditions for a functioning democratic community rather than being anathema to political freedom.

The third sage holds that only the first two of the Ten Commandments were given at Sinai—"I am the Lord Your God", and "You shall have no other Gods before me". Still another Sage declared that only the first Commandment was given: I am the Lord your God. According to this reading, what was given was not a law at all, but a point of orientation, a talisman of where loyalty should reside.

Yet another proclaimed that it was only the first word of the first commandment that was spoken at Sinai: Anochi - I— not even orienting us to a thick conception of God but to another subject point outside our own immanent human location. As one moves through

these progressive stages, paring down the Sinai transmission, not only the law, but also the conception of God becomes less substantial.

The position of the final sage is attributed to the Galician Hasidic master Menahem Mendel of Rymanov, who held that all God actually said was the first letter of the first word: Aleph.¹²⁹ Aleph actually makes no sound at all, but is the proto-sound, the necessary precedent to any sound a person utters. Aleph is the potential from which all actuality, and all actual speech, conversation and moral debate emerges.

This latter position implies that what was given was not the substantial laws themselves, but the capacity to make laws - constructive autonomy. If what was given at Eden was being – ontology, and at the expulsion morality, at Sinai was given the capacity to create law and a new form of social organizations oriented around law and moral principles – social morality and politics.

This interpretation recalls my earlier argument that any system of law, even the most democratic, requires a grounding or justification outside the particular individuals who will adhere to it and even give it substantive content. One can see in this last position precisely an attempt to recognize this logical requirement by conceptualizing a universal ground, or the point outside the particular, which nevertheless allows as much space as possible for human freedom. As Leclau puts it, “[T]he impossibility of a universal ground

¹²⁹ As reported by his student Naphtali Zevi Ropshitzer, *Zera Kodesh*, on Shavuot.

does not eliminate the need for it: it just transforms the ground into an empty place which can be filled in a variety of ways.”¹³⁰

This is no doubt a delicate task. The less content one ascribes to this universal ground, the more easily one can fall off the other end of the scale, abandoning the idea of a continuous normative framework altogether and opening the door to “anarchy, letting individual caprice replace community needs, personal desire replace loyalty to God.”¹³¹ Yet this is certainly not what the original sage, nor those who draw on his authority had in mind. Rather they are gesturing towards an idea which allows for open-ended creativity with respect to norms, yet preserves an orientation to some other point – here called God. In this sense, they do not simply present an alternative position, but are suggesting a more profound structural challenge to the autonomy/heteronomy dichotomy. As one contemporary exponent puts it:

“Because we believe that God spoke that Aleph on Sinai, we now have the potential to create, to invent, to think, to advance Judaism far, farther into the future than a mere slavish adherence to ritual practice would admit. It is precisely this interpretation of Judaism which allows for growth, for a vigorous and vital Jewish future.”¹³²

¹³⁰ Ernesto Leclau, *Emancipation(s)* W. W. Norton and Co. Inc., 1996, p. 59.

¹³¹ Rabbi Eric Silver, *Annual Report 1997-1998* to Temple Beth David, available at <http://www.uahc.org/ct/tbd/tbdlead.html#Report>.

¹³² *Ibid.*

There is a famous story in the Talmud in which a number of Rabbis are arguing on a certain point of Torah interpretation.¹³³ Rabbi Eliezer, who stands alone in his position against all the other Rabbis calls out: “If the Law agrees with me, let the carob tree prove that I am right.” The carob tree is uprooted and flies 150 (or 600) feet into the air. He then calls out: “If I am right, let this stream of water prove that I am right” and the stream begins to run uphill. Similarly, when he looks to the schoolhouse for a sign, the walls lean inwards and when he speaks to heaven, a *bat kol* (heavenly voice) calls out that the Law always agrees with him.

Still the others do not change their minds. Rather one of them (Rebbe Joshua) argues that the laws given at Sinai now belong in the human domain, that human reason trumps the heavenly mandate. He even quotes a passage from Deuteronomy to authorize his claim: “The commandment that I command you is not hidden from you, nor is it far. It is not in heaven that you should say: ‘Who will go up to heaven and bring it to us that we can hear it and do it?’But the word is very near you, in your mouth and in your heart that you may do it.”¹³⁴ When the sages vote, they voted with Joshua, despite the “signs” of God’s position. The Talmudic story does not finish there, but goes on to report that after the scene, God laughed and said, with obvious pleasure, “My children have defeated me.”

This alternative conception of the normative framework of Israel or Judaism by no means renders *teshuvah* incoherent, but on the contrary gives it a far more active and

¹³³ *Baba Metzia* 59b.

¹³⁴ Deuteronomy 30:11-14.

constructive role. Now *teshuvah* does not simply respond to a fixed point of normative definition, but itself forms part of the process of defining and redefining normative precepts. This constructive work differs from the case of retrospective legislation, because a person who does *teshuvah* is not being punished or penalized for something they did in the past (which would itself contravene important normative principles). Nothing is being done *to* them. Rather, the person is themselves taking up the past, and their own identity and actions in the past and deploying them as a way of altering the normative frame that informs their actions in the present and future.¹³⁵ When this happens collectively and publicly, when a political community declares *now* that what it did *then* was wrong, a certain form of action and normative orientation come to be defined as wrong – and meaningfully so - for this community.

In fact, ethical progress is itself dependent on history. On the one hand, the interpenetration of the abstract and the concrete is what allows the parochial and one-sided historical understanding of right to expand. On the other, it is history that gives form and thus reality to the abstract norm. More substantively, what drives this ethical progress is the recognition of the claim of the other, the one whose perspective has been omitted. Norms are universalized when they are forced to go beyond the limits of their application – when, for example women and then black and indigenous peoples are also considered citizens.

¹³⁵ This dynamic closely resembles Castoriadis description of the inter-dependency and co-constitution of abstract meaning and the human subjects who make meaning in an embodied world.

This is the heart of the message conveyed in another famous story about Torah. “A heathen once came to Shammai and said: “I will become a proselyte on the condition that you teach me the entire Torah while I stand on one foot.” Shammai chased him away with a builder’s measuring stick. When he appeared before Hillel with the same request, Hillel said, “Whatever is hateful to you, do not do to your neighbor. That is the entire Torah, the rest is commentary; go and learn it.”¹³⁶

This analysis also points to an important distinction between repentance and other types of responses to the past, punishment or material compensation for example. Repentance, one might say works at the level of meaning and not at the level of positive being. Nothing can alter the actual event as it occurred. What can be altered is its meaning and it is at this hermeneutic level that the apology does its work.

This shift from the level of positive being to that of meaning also provides Jewish thinkers with a way of resolving the paradox of time in apology. That paradox is that repentance apparently assumes that what a person does at one point of time (t_2) can alter what occurred at an earlier point of time (t_1). This would seem to involve a reversal of the normal order of time. This applies to the mechanism of repentance in a way that it does not apply to say prosecutorial models, because in the former the whole point seems to be to affect some type of healing of the injury.

¹³⁶ *Shabbat* 31a. Shammai and Hillel represent the two great schools of interpretation.

The modern commentator Rabbi Soloveitchik suggests that Judaism makes sense of this apparent paradox by elaborating its understanding of time.¹³⁷ He writes:

*“Man lives in the shadow of the past, future and present simultaneously.....the future determines the direction and indicates the way.....There exists a phenomenon whose beginning is sin and whose end is mitzvot and good deeds, and vice versa. The future transforms the trends and tendencies of the past.”*¹³⁸

The Jewish philosopher Emanuel Levinas engages directly with this perspective, universalizing it by stripping it of the religious terminology and using more analytic and secular language. He locates the cause of the paradox of apology in a particular and on his view limited, conception of human subjects and time. He argues that the paradox is based on a restricted understanding of humans as quasi-mechanical objects who operate according to physical laws of cause and effect. If, he argues, we recognize human beings’ unique status as what he calls “fecund beings”, beings who create something *new* because they create meaning, the paradox disappears.¹³⁹

¹³⁷ Although I will not here explore the deeper spiritual resonances of this passage, I would simply note that in the Jewish mystical tradition teshuvah involves accessing the Y-H-V-H name of God, which stands outside of time. It is here that the workings of linear time are rectified and transformational teshuvah is a possibility. See Estelle Frankel, “Repentance, Psychotherapy, and Healing Through a Jewish Lens”, *American Behavioral Scientist*, Vol 41, No. 6, March 1998, 814-833.

¹³⁸ Rabbi Joseph B. Soloveitchik, “Ish Halakhah” (Halakhic Man) in *In Aloneness In Togetherness, A Selection of Hebrew Writings*, ed. Pinchas Peli, Orot, Jerusalem, 1976, p. 163.

¹³⁹ Levinas’ own elaboration of this description is so deeply embedded in his complex critique of ontological philosophy that any passing reference to it will only cause confusion. Accordingly, I do not pursue it.

Interestingly, he does not explain the difference between these two dimensions of persons in terms of being (by, for example exploring the psychological attributes of persons), but rather in terms of a differentiated understanding of time. It is only “time that gives a meaning to the notion of finite freedom.”¹⁴⁰ For Levinas, the paradox of apology arises if we assume a particular conception of time as “mechanical time”. If we adopt an alternative conception, “redemptive” or “ethical” time we are not forced into the same paradox. These terms require some clarification.

The first and more common conception of time is quantitative time, flowing according to the mechanical laws of causation, where the moments of the past flow directly and mathematically into the present and then the future. Each is an irreducible, indivisible “bit” of time, just as we used to think of each atom as an irreducible indivisible “bit” of space. This time is a passage moving irrevocably forward from a past which “is no longer” (and so “is not”) towards a future which is “not yet”; passing time means that each moment ceases to exist when it is serially replaced by the next - “a mobile image of immobile eternity”.¹⁴¹

Levinas well recognizes that it cannot be at this level that repentance does its work, and indeed writes: “The pardoned being is not an innocent being”.¹⁴² In this time, we are condemned to the “impossibility of retreat”. There is space only for forgetting or fate, but

¹⁴⁰ *Totality and Infinity*, Alphonso Lingis, (trans.) Pittsburgh, Duquesne Press, 1969, p. 224.

¹⁴¹ See Bergson, Henri, *Time and Free Will*, (F. L. Pogson, trans.) London: Mac Millan, 1950, pp. 183-198.

¹⁴² *Totality and Infinity*, *op. cit.* p. 283.

none for pardon. Were repentance concerned with annulling what *was* it would be senseless. “One cannot feel remorse” he writes, “about a past which is already dead and has sunk into the abyss of oblivion.”¹⁴³ At best, apology effects a superficial re-alignment of the niceties between persons.

Levinas develops his critique of this mechanical conception of time initially drawing on Henri Bergson’s thesis that mechanical time is insufficient to contain the breadth of human experience and his insistence that we need a conception of time which “adds something new to being”.¹⁴⁴ Unlike Bergson, however, he does not see time as a seamless flow, “one instant does not come out of another without interruption, by an ecstasy”; rather, “there must be a rupture in continuity, and a continuation across rupture.”¹⁴⁵ Time, understood as “the discontinuous time of fecundity”, he writes, “makes possible an absolute youth and recommencement, while leaving the recommencement a relation with the recommenced past in a free return to that past.”¹⁴⁶

Importantly, what interrupts the apparently determinate flow of time is human interaction, and in particular interaction which forces human beings to alter their understanding of the events of the past and their identity as products of those events.

¹⁴³ Rabbi Soloveitchik quoted in Pinchas H. Peli, *On Repentance; the thought and Oral discourses of Rabbi Joseph Dov Soloveitchik*, Northvale, NJ: Jason Aronson Inc., 1996, p. 30.

¹⁴⁴ See for example *Totality and Infinity*, *op. cit.* pp. 283-4 and *Time and the Other*, *op. cit.* pp. 80-81.

¹⁴⁵ *ibid.* p. 284.

¹⁴⁶ *ibid.* p 282

Between the events of the past and the present there is only one path - already marked out and incorruptible, but between the present and the future are many paths. It is freedom at this place, looking forward, which leaves the possibility of another type of recommencement of the present, and therefore of the past.¹⁴⁷ Here the “the destiny of an actually lived life recommences at each instant, receiving a new sense starting from the inimitable novelty of the present which opens upon the unforeseeable future.”¹⁴⁸ Full consciousness of what is, for Levinas, does not comprise a relationship with a present fully accomplished - but with a present “only constituted in the *future* of a recollected being”.¹⁴⁹ Thus, what allows for something new to be added is the work of recollection – which Levinas clearly sees as an active creative process and not simply an act of mechanical retrieval.

Although she is not writing within the Jewish tradition, Arendt’s writings on forgiveness are remarkably close to, and elucidate this conception. For her also, forgiveness opens the possibility of breaking the absolute determinism of the past and past events. She writes: “Forgiving is.....the only reaction which does not merely re-act but acts anew and unexpectedly, unconditioned by the act which provoked it and therefore freeing it from its consequences both to the one who forgives and the one who is forgiven.”¹⁵⁰

Forgiveness as used by Arendt, and pardon for Levinas, mark this possibility of human beings adding something new to the quasi Newtonian mechanical chain of events - cause

¹⁴⁷ Levinas writes that this rupture, achieved through pardon, is “the very work of time”. *Totality and Infinity, op cit.* p. 282.

¹⁴⁸ *ibid.* p. 130

¹⁴⁹ *ibid.* p 166.

¹⁵⁰ Hannah Arendt, *The Human Condition, op. cit.* p. 241.

effect -effect-effect..... “I” and what I experience need not simply be the product of fate, the passive outcome of the passage of moments following upon each other mechanically and inexorably producing each other. Pardon or forgiveness interrupt or corrupt this path, opening the space for what Levinas calls fecundity - the creation of something new.

Crucially, both for Levinas and Arendt and within Jewish philosophy more generally, this freedom with respect to the past is not located inside the individual consciousness. What makes it possible to bring in something new is not an attribute of the sole human person - it is not that “I” have a distance to myself, as if able to determine myself in some regards but not others. If the future is still indeterminate, open before us as the possibility of calling up the past as memory and giving it new meaning, this is only by virtue of the presence of another point of view. It is the *relational* dimension of repentance which makes possible this freedom or fecundity.

The infinity of the future that allows for the recommencement of the past cannot be my work alone. Notably, this model is importantly different to the one Mead used to explain ethical change or the break from the self constructed through pre-existing social relations and norms. For Mead, the source of difference was within a closed off self. Here, on the contrary the other must accompany me in my re-visitation of the past, and only in this space between one and the other can the continuous flow be broken. What Levinas seems to have in mind here is the way in which a relationship with another person, with another seat of subjectivity can break the single narrative of my isolated consciousness- albeit a consciousness once formed in social relations. Similarly Arendt locates this possibility in

the narrative which subjects create together, the stories they will tell together and to each other about the events in the past. It is the inter-subjective quality of language that makes the break possible. The linguistic dimension of the work – carried uniquely in the apology, far from being peripheral, represents a unique site of transformation. Once again, it provides the means for making ethical progress because it is the site where one-sided perspectives can be challenged and the ethics they would demand broadened to take the other into account.

The words spoken between subjects, or more exactly in the case of apology, the words one subject speaks to another are not mere names for a process that is taking place elsewhere – in some imagined realm of consciousness where true change occurs. Rather, it is the passing of the words which itself effects the transformation.

This need for an external point, a point outside a closed consciousness, explains why one needs to address the apology to God, why it is not sufficient for me to tell myself a different story about the meaning of the past. Without the external point, without another perspective the space necessary for language to do its creative work collapses. At the same time, what has occurred does have irreversible consequences.

Thus time is neither definitive, nor infinitely open. The former would preserve the idea that time is being in motion, and the latter would deprive the past of its weight and foreclose the possibility of personal identity per se. The freedom pardon implies does not signify the capacity to rule over history and thereby change the “event in itself”.

Understanding time as continuous disruption means casting our understanding in a conceptual map which itself does not close the past from the future. For both Levinas and Arendt, what is distinct about human life is its movement between two poles, two absolutely non-synthesizable points of view. Levinas holds life in the movement between the “incorruptibility of the past” and fecundity of the future, between the historical narrative of my life, with all the fixity and finitude this implies, and the moral creation of the I, whose “horizons [are] more vast than history.”¹⁵¹ Arendt, using a slightly different map holds it between promise and forgiveness, the former providing the continuity necessary for identity and the latter the possibility of its transformation. The pole of pardon or forgiveness does not annul the pole of determinism, but promises do not bind meaning.

This creative tension between these two poles also resembles conception of Torah as the product of human creativity into the open future, yet always tied back to a point of origin. Linking this back to the thinking of *Mishna Horayot*, Torah is the anchoring point, but it is Horah, the voice of the living community that gives content to and has the capacity to breathe life into the ethics for actual lived situations.

This conception of repentance as a constructive process and not only one which responds to a pre-existing set of thick given norms bridges the putative gap between religion as the sphere of heteronomous law and democratic politics as the sphere of human autonomy. It also provides analytic resources for understanding the level at which repentance, as the

¹⁵¹ *Totality and Infinity, op. cit.* p. 246. See generally pp. 246-7 for a discussion of these two points of view.

work of language and meaning operates, as distinct from parallel processes for dealing with the past such as compensation and punishment.

VIII. The significance of speech; externality and internality

Finally, I come back to the question of authenticity and performance, which speaks to one of the main objections raised against the contemporary apology: ‘apologies are nothing but words’, where words *in themselves* are presumably worth nothing. Authenticity requires that the words point to something beyond them, because it is *there* either at the site of (internal) consciousness or in the realm of (external) action that the truth – ‘deep truth’ and ‘practical truth’ respectively - lie. This authenticity requirement was, recall, one of Austin’s conditions of success for an apology, and inauthenticity a form of abuse.

I will come back to his question more generally in chapter 6, but here address the question by again critiquing external/internal dichotomy that organizes conceptions of religious and secular political practice.

As I noted in my discussion of sacrifice, for the ancient Hebrews the spoken word was intrinsic to the ritual. Absent the priest speaking the words the ritual was ineffective. The words, like the action into which they were woven were, *sacramental*, the embodiment of repentance rather than its proxies. Commentators on the use of language in the ancient context have sought to convey the special weight carried by words. Redlich, for example writes:

“[w]hen they used a word, they saw in it its results as well as its immediate meaning. Hence to remember included action as well as recalling to memory, to love included the consequences of the sentiment, to save meant actual deliverance, to cover a sin meant reconciliation following the covering. So also abstract ideas were embodied in narrative.”¹⁵²

This weightiness of words has certainly not been lost in contemporary Jewish practice. On the contrary the significance of the ring of language itself continues in contemporary Judaism, where the spoken word form the heart of ritual and study. Action and intention are not sufficient – one must speak words and speak them aloud, both in the form of prayer, and in the form of spoken apologies to the other party. Certainly, the actual performance of the word differs in the two historical contexts, but the passage represents an example of what Victor Turner called the movement “from the concrete to the increasingly abstract,” not a loss of the performative.¹⁵³

Still in its modern form, *teshuvah* defies this dichotomous break, comprising both inward and outward dimensions. In the last chapter of the first book of the *Mishnah Torah*, the *Sefer ha-Madda* or book of knowledge, Maimonides systematized the teachings on the

¹⁵² E. Basil Redlich, *The Forgiveness of Sins*, Edinburgh: T & T Clark, 1937, p. 8. cf. Also Van Rad: “the word has a different and much more primitive way of acting: on solemn occasions it can release meanings and establish mental affinities which lie at the deeper level of its magical matrix and which apparently have little or nothing to do with its obvious and every day meaning.”, *op. cit.* pp. 82-3.

¹⁵³ Turner, V. W., *The Forest of Symbols*. Ithaca, NY: Cornell University Press, 1967, pp. 53-4, cited in Milgrom, Jacob. *Leviticus 1-16. op. cit.* p. 1083.

necessary conditions for, or components of teshuvah.¹⁵⁴ In answer to his question, “What is complete repentance?” he listed six necessary components: (1) abandonment of sin; (2) removal of the sin from thoughts; (3) resolution; (4) regret; (5) expression of sincerity before God; and (6) oral confession.

Throughout these teachings, *teshuvah* is understood simultaneously as attitude, action and most importantly here, speech. Following the of rabbinic teachings, Maimonides emphasizes that even if all the other conditions necessary to achieve *teshuvah* are fulfilled, they will not be sufficient, save the spoken words of apology: the sinner must “confess in words, with his lips and give voice to those matters he has resolved in his heart”.¹⁵⁵ The *sine qua non* of teshuvah is verbal confession - words offered to the other. One must address oneself to the other and with spoken words identify oneself as a wrongdoer, confess the specific sin, expose one’s shame and promise not to repeat the sinful act.¹⁵⁶ This emphasis on the spoken word is remarkable when compared with the common conception that apology is a mere representation – the signifier not the signified.

¹⁵⁴ He begins his exposition with the statement: “The laws of repentance are contained in one positive commandment, namely that the sinner shall repent of his sin before the Lord and make confession. The exposition of this precept and of the principles connected with it, and which exist for its sake, are discussed in these chapters.”, Maimonides, *Mishnah Torah*, The Hilchot Teshuva (Treatise Concerning Repentance), Book 1, V, chapter I.

¹⁵⁵ *ibid.* chapter 2. Also “Even though a man pays (the offended person) he is not forgiven until he has asked pardon” Mishnah Baba Kamma 8,7.

¹⁵⁶ “How is the verbal confession made? The sinner says thus: “*I beseech Thee, O great Name! I have sinned; I have been obstinate; I have committed profanity against Thee. Particularly in doing such and such. Now behold! I have repented and am ashamed of my actions; forever will I not relapse into this thing again.*” Maimonides, *Mishnah Torah*, Treatise Concerning Repentance , Book 1, V, Chapter 1.1. Maimonides refers back to several tracts quoted in the section on *tefilah*.

Levinas takes this up in his observation that in Jewish thought the material form of expression is not arbitrary, a trapping which might be shed so as to get to the essence which it contains, but is rather itself a site of significance. Speech has real weight.¹⁵⁷

More specifically, Levinas sees in Judaic teachings on repentance an implicit understanding of the interdependence of inside and outside. He too places himself in the line of Maimonides, this time arguing that “all that is said of God in Judaism signifies through human *praxis*.”¹⁵⁸ Repentance cannot be correctly understood as essentially disembodied, and then “named” - it is in the naming that it exists.¹⁵⁹

The philosophy which Levinas attributes to Judaism is a particularly valuable tool in our endeavor to make sense of the apologetic act because it does not simply champion the value of the performative, but presents a more profound challenge to the modernist dichotomy and hierarchization of inside/outside.¹⁶⁰

¹⁵⁷ Ideas do not become fixed by a process of conceptualization which would extinguish many of the sparks dancing beneath the gaze riveted upon the real. I have already had occasion here to speak of another process which consists in respecting these possibilities. . . . Ideas are never separated from the example which both suggests and delimits them.” “Towards the Other”, in *Nine Talmudic Readings op cit.* p. 21.

¹⁵⁸ *ibid.*, p. 14.

¹⁵⁹ Levinas goes even further in seeing apology not simply as an example of the interdependence of inside and outside, but rather as the heart of what he calls the conversational relationship between two persons, thereby making it the fulcrum of the *religious* bond itself. By religion, Levinas intends the realm in which self and other come into relationship but are not collapsed into a “totality”. Cf. *Totality and Infinity, op. cit.*, p. 40.

¹⁶⁰ Again, the traditional modernist response has been to relegate such practices to the other side of a definitive historical divide between the materialism of pre-moderns and the abstract thinking of moderns – a divide which I argued does not hold up to scrutiny. Even Nietzsche, in his scathing critique of the assumed distinction between surface and depth bought into the assumption that the imposition of the distinction had been the mark of modernism. “The ‘apparent’ world is the only one. The ‘real’ world has only been lyingly added.” *Twilight of the Idols*.

He argues that ritual, the mitzvot, and specifically those brought down in the tradition for seeking forgiveness do not stand outside a sealed consciousness which might then repent. Rather, “[O]riginating communally, in collective law and commandment, ritual is not at all external to conscience. It conditions it and permits it to enter into itself and stay awake. It preserves it, prepares it for healing.”¹⁶¹

Not that healing is the end of the process: the “healed” consciousness is only the one that is continually open to responsibilities towards other persons and in the world. Healing is this process of opening, not an end.¹⁶² When the damaged consciousness reconquers its integrity, this is at once the work of social morality, and the basis for a living - embodied moral sociality. If the concept of the healed or repentant consciousness makes sense at all, it is only as the one that acts with respect for the law and the concrete other. By emphasizing the process and the practical meaning of ‘healing’, Levinas challenges the notion that religious healing is something that takes place at an ethereal ideal level and only then informs social action.

Continuing this line of thought, Levinas argues that the multidimensional quality of *teshuvah* should be understood neither as a composition of distinct and independent parts, nor as a dialectic which will ultimately resolve itself into a higher order common term. It is rather an irreducible movement against which interior and exterior (and for that matter, individual and collective, vertical and horizontal) are static points - points which the

¹⁶¹ *Totality and Infinity, ibid.*, p. 17

¹⁶² This is reminiscent of the observation I made earlier concerning the absence of the nounal form *teshuvah* but rather only the verbal form *shuv* (turning) in the Pentateuch.

observer constructs for the purpose of naming them, but which do not exist as such in the dynamic itself.¹⁶³ Performance, according to this reading, does not belong to the realm of “external action”, as if there is a hidden internal behind it.¹⁶⁴ Performative action is meaningful action, even more so when that action is speech, which by its very nature cuts across the divides between internal and external, self and other.

Going back to the key Talmudic passage dealing with apology, *Yoma 85a-b*, Levinas notes the ubiquity and importance of speech through the discussion of *teshuvah*. The Talmudic discussion elaborates a piece of Torah, which is precisely about the binding power of words: “Thou are snared with the words of thy mouth; thou art taken with the words of thy mouth”.¹⁶⁵

Note in this passage that words are central both at the point of healing and at the point of injury. On the one hand, as we already know, *teshuvah* requires that the apology be spoken – even at the edge of the grave if the injured party has died. But speech, or verbal injury is also used in this text as the paradigmatic form of injury for which *teshuvah* is required.¹⁶⁶ Moreover, the Talmud takes as its example not just any act of speech, but one

¹⁶³ This analysis is resonant of Derrida’s deconstructive method in general, and Nietzsche’s critique of the distinction between depth and surface in particular: “The ‘apparent’ world is the only one. The ‘real’ world has only been lyingly added.” *Twilight of the Idols*.

¹⁶⁴ At the same time, Levinas’ analysis is alive to the instrumental dimension of human relations and to the ever-present possibility that the words we speak to each other will not be words of respect and recognition, but attempts to preserve and promote our own positions of power.

¹⁶⁵ *Proverbs*, 6:2.

¹⁶⁶ “Rabbi Isaac has said: Whoever has hurt his neighbor, even through words, must appease him (to be forgiven). For it has been said [Proverbs 6: 1-3]: My son, if you have vouched for your neighbor, if you have pledged your word on behalf of a stranger, you are trapped by your

in which a person has made a promise. And this promise is made not on his own behalf, but as a guarantor for a third party – where the person has pledged his word on behalf of a stranger. The speech for which one needs to do *teshuvah* is not a dyadic act –involving one person who speaks and another to whom the words are spoken, but a triadic act.¹⁶⁷

On the basis of this discussion, Levinas argues that speech in general, and the apology in particular is not only the quintessential relational act, but the quintessentially social act.¹⁶⁸

Not only do the words I speak bind me to the person to whom those words are directly addressed, but they also bind me into the social:

“Speech, in its original essence, is a commitment to a third party on behalf of our neighbour: the act *par excellence*, the institution of society. The original function of speech consists not in designating an object in order to communicate with the other in a game of no consequences but in assuming towards someone a responsibility on behalf of someone else. To speak is to engage the interests of men. Responsibility would be the essence of language.”¹⁶⁹

promises, you have become the prisoner of your word. Do the following then, my son, to regain your freedom, since you have fallen in the other’s power: go insist energetically, and mount an assault upon your neighbor.” *Tractate Yoma* 85a-b.

¹⁶⁷ Recall, as I discussed in chapter 1, that Tavuchis argued initially that the apology had a dyadic structure and then, when dealing with the collective and public apology suggested that one needed to move to a triadic structure.

¹⁶⁸ This forms part of his larger argument to which I alluded earlier, namely that the third is the condition of responsibility, speech and justice.

¹⁶⁹ *Ibid.*

By defining the apology as a social act, and moreover an act which constructs and does not simply reflect social relations, Levinas forces the analysis to move beyond the depth and surface paradigm. Certainly social relations are structured by what people do, as reflected in the requirement that one alter one's behavior. But they are also structured and organized by what people say and importantly here can be reorganized by what people say about what they did and said in the past.

The applicability of this analysis of the religious case to the political sphere, where the public use of language is central is striking. Laws would cease to effectively bind people's actions if they were not ultimately backed by some form of sanction, but the existence of sanctions is not the only reason that people feel obligated and act in accordance with the word of the law. Even in his often-misquoted definition of a state, Weber emphasized the *claim* to the legitimate use of force, not to the actual ability to use force.¹⁷⁰ When it comes to the public speech of representative leaders, the social, binding power of words is crucial both in relation to the substance of what they are saying and their legitimacy as political representatives. Perhaps now, in the age of mass media more than ever, political rhetoric forms the most important bridge between the representative and the represented.

¹⁷⁰ "Today, however, we have to say that a state is a human community that (successfully) claims the *monopoly of the legitimate use of physical force* within a given territory.", Max Weber, "Politics as Vocation" in From H.H. Gerth and C. Wright Mills (Translated and edited), *From Max Weber: Essays in Sociology*, pp. 77-128, New York: Oxford University Press, 1946.

IX. The Link back to the political

This chapter has laid the foundation for my first thesis, that the contemporary political apology is best understood as ritualized collective recovenancing not as a deviant mutation of the individual/internal apology. The obvious question this raises is, if this public, collective, ‘covenantal’ trope has been part of the historical repertoire of the apology, why is it that people continue to interpret the apology according to the individual trope? Irrespective how strong or even how politically apt the collective trope is to the contemporary political scene, undoubtedly, in popular imagination, it has largely been displaced by the conception that apology marks an essentially individual and internal shift. How did this displacement occur? What was at stake in individualizing the process of apology in this way?

Interestingly, the primary site of the individual/internal trope is also religion, this time the confessional model of Christian repentance. The next chapter explores the development of conceptions and practices of repentance in Christianity, focusing specifically how the public collective form was marginalized and, in the case of the Roman Catholic Church doctrinally replaced by a private, inner and individual one. This history reveals not only that there was shift from the public/collective to the private/individual but also that this shift involved a highly charged struggle over the ‘right way to apologize’ or the use of apology.

Indeed, it was only during the twentieth century that the earlier history and the earlier practices were exposed and people began to recognize that they had been part of their

own institutional and faith tradition. Rediscovering these forms of practice, Roman Catholic scholars argued that their displacement had been part of a broader process of obscuring the collective dimensions of wrongdoing and identifying the individual as the sole source of 'sin'. Recognizing their social significance, movements within the church successfully argued for their re-introduction into contemporary practice, seeing this as a means for reestablishing in practice the recognition that wrongdoing has a collective dimension.

The second step required to complete this thesis is to show that this trope does in fact provide an accurate interpretive lens for understanding apologies in the contemporary political sphere. This will be the work of chapter 5.

The analysis of this chapter has also laid the foundation for my second thesis, that dichotomous thinking constrains our understanding of the sphere the political, and specifically the norms and institutions of liberal democracy. It did this primarily by showing that the ancient religious form of political organization is not in fact the 'other' (purely external, crudely collective), and pointing out the similarity between processes and conceptualizations articulated in religious practices and those involved in constructing and sustaining a modern liberal democracy.

The corresponding part of the work is to re-imagine the character, principles and appropriate modalities of secular politics, no longer insisting that they be defined through these dichotomies: the individual over the collective, the provisional/autonomous over

the Absolute/heteronymous, the material over the symbolic. This work already began in chapter 2 where I showed that the constitution and identity of political communities *always* involves (and requires) ascription to abstract foundational principles that are neither reducible to contingent human action (fully immanent), nor derived from an order outside history and human participation (transcendent).¹⁷¹ As in religious communities, these principles essentially belong to the corporate body, albeit providing the orientation for individual action.

Chapter 6 will complete this work by arguing for a more radical reconceptualization of the political and integration of institutional processes and modes generally considered inappropriate if not hostile to the political.

¹⁷¹ This was most strongly argued by Castoriadis who argued that meaning and socio-historical form can never be reduced to inter-subjective phenomena, while insisting that they do not simply come from an 'elsewhere' radically detached from humans as makers of meaning. Cf. "Power, Politics, Autonomy", *op. cit.*

Chapter 4: The privatization of Repentance in Christianity

I. Shifting tropes of repentance

“The focus.....shifted from the well being of the community and the reintegration of penitent sinners to enabling sinners to make satisfaction for their sins and experience forgiveness. The ministry was less and less perceived as community ministry - the ministry of the community to penitent sinners with the goal of restoring the integrity of the community - and instead regarded as an individual ministry of the priest or spiritual expert for the sinner who sought healing.”¹

In line with the commonly held image of Christianity as a religion emphasizing the individual's relationship with God, one usually thinks of the Christian model of repentance as essentially individual and private. The communal and collective dimensions that remained central in Jewish understanding and practice seem conceptually alien and practically absent. Arnedt, for example, sets her attempt to conceptualize collective responsibility in relief against what she assumes to be the essentially individualistic lens that is part and parcel of the Hebrew Christian heritage. “With the rise of Christianity”, she argues, “the emphasis shifted entirely from care for the world and the duties associated with it, to care for the soul and its salvation.”²

In fact, however, the corporate dimension of repentance has been, and in some Christian churches remains a central dimension of religious practice and understanding. Its absence from our notion of Christian repentance is largely due to the dominance of the image of

¹ James Dallen, *The Reconciling Community; the Rites of Penance*, the Liturgical Press, Collegeville, Minnesota, 1986, p. 101.

² Hannah Arendt, “Collective Responsibility”, in *Responsibility and Judgment*, Jerome Kohn (ed.), New York: Schocken Books, 2003, pp. 151-2.

individual sacramental confession in the Roman Catholic Church. This image of the individual, privately murmuring their sins in the darkness of the confessional obscures both the public, communal practice that was once the principal form of repentance in the early Church, and the practice of general confession that is still central in some Protestant Churches.

In the first centuries after Christ, the church's penitential practices were in fact highly public and involved the entire community. But from the Council of Trent (mid 16th century) until Vatican II in the 1960s, the sole sanctioned rite of penance in the Catholic Church comprised an individual, private ritual. In the darkness of the Confessional, the single penitent confessed his or her sins to the priest in exchange for forgiveness and absolution. Until the early 1970s, the Roman Catholic concept of repentance and this form of practice were considered synonymous, and there was no recognition of the fact that there had been, nor the possibility that there could be other forms or conceptualizations.

The trajectory of the Protestant Churches was quite different. They did not continue to recognize the sacrament of penance, largely because of the abuse of mediation that had sullied the church. One way to deal with this degeneration in the church's role was to make the relationship with God entirely personal and private, getting rid of mediation altogether. The other was to make the mediation entirely transparent and public by getting rid of the private dimension altogether and putting in its place a public general confession.

In the case of Roman Catholicism, the singular focus on private individual confession after Trent was expanded, institutionally, by the call Vatican II made to develop new rites of penance that would better embody the communal and reconciliatory dimensions of repentance. Subsequently, in 1973, three new rites of penance, now (significantly) named *Rites of Reconciliation*, were promulgated and entered official church practice. One of these remained exclusively individual and private, one combined private penance with a public and collective ritual, and the third eliminated the private part of the rite altogether.

What makes this shift particularly fascinating in the context of this project is that it occurred shortly before the emergence of the public political apology. This temporal proximity is not sufficient ground to argue that the two stood in a causal relation, but it does suggest a more general shift in conceptualization and practice, which is manifest in each of these spheres.³ My claim is that the shifts in both the religious and political spheres evidence a growing recognition and acceptance of the communal or social dimensions of wrongdoing and the consequent pressure to accommodate this alongside the dominant individualistic conception of responsibility.

This chapter looks initially at the early forms of penitential practice in the early centuries of the church's existence, then at the development of private penance in the Celtic church and its subsequent export and ascent. My main focus will then be on the trajectory from

³ Nevertheless, the fact that doctrinal and institutional change occurred and was experienced in the Catholic church in the years immediately preceding the emergence of the political practice supports my weaker thesis that religious practices of repentance provide the alphabet or the grammar with which political actors then work. Moreover, the institutionalization of this form of collective repentance in the Church at this critical juncture provided a concrete experience which could then support its development in a new sphere.

early Christianity through the dogma and practice of the Roman Catholic Church.⁴ In particular, I concentrate on the two turning points, first the dogmatic declaration of private confession as the sole valid form of practice to the exclusion of all others and second at the historical background that gave rise to Roman Catholic Church's reintroduction of collective repentance.

The aspect of this history and conceptualization to which I draw particular attention is the Roman Catholic Church's positive concealment and repression of the early practices and the alternative, public conception of repentance that they embodied. The shift in practice and the move towards privatization and individuation signified and perpetuated important re-conceptualizations in the nature and concerns of religion as a distinct sphere of life, of individual and communal responsibility, and of the work of repentance in respect to each of these. In the words of one contemporary Catholic theologian: "the form of the administration of the sacrament is not harmless; it favors one aspect of reconciliation. The private form favors reconciliation with oneself in the interior of one's own conscience, sole seat of authentic relationship with God. Other human realities, and notably economic and political relationships, escape all interference from Christianity".⁵ On the other side, as the idea of collective or corporate responsibility for national wrongs of the past became more compelling in the late twentieth century, the collective form of repentance once again became salient.

⁴ Other than looking at early forms of practice, this chapter will not discuss the eastern or Orthodox churches at all.

⁵ Christian Duquoc "Real reconciliation and Sacramental Reconciliation" in Edward Schillebeeckx, (ed.) *Concilium Religion in the Seventies Volume 61: Sacramental Reconciliation*, New York, Herder and Hrder, 1971, p. 36.

The chapter also looks briefly at the continuous practice of general, public confessional forms in the Protestant Church, taking as an example the rituals of the Anglican Church. Here, the prose, rhythms and voice of collective repentance have remained at the center of religious ritual, etching a template for the collective apology.

II. Early conceptions and forms of penitential practice

The forms and understandings of repentance during the first centuries of the church have now been the subject of extensive study and documentation.⁶ The following “highlights” provide a map of this early period of development.

II. 1 New Testament representations of sin and repentance

The call to repentance lay at the heart of Jesus’ teaching and formed a major key in the Gospels, beginning with the invitation to “repent and believe in the Gospel” (Mk. 1:15) and concluding with the command “in his name repentance and forgiveness of sins is to be proclaimed” (Lk. 24:47).⁷ The stories and parables told about repentance provide the richest elucidation of what this actually signified. The predominant note which comes through in these was not repentance as a specific legalistic response to particular

⁶ See in particular Bernhard Poschmann, *Penance and the Anointing of the Sick*, NY: Herder, 1964; James Dallen, *The Reconciling Community*, New York: Pueblo Publishing Company, 1986; Edward Schillebeeckx (ed.), *Sacramental Reconciliation, op. cit.* and for a collection of primary texts, Oscar D. Watkins, *A History of Penance*, 2 vols., London: Longmans Green and Co., 1920.

⁷ There is a plethora of references to forgiveness and repentance in the Gospels, cf. For example: “Penance and the remission of sins should be preached in his name and to all nations” (Lk. 24:47); “If you forgive men their trespasses, your heavenly Father will also forgive you.” (Mt. 6:14); “For those whose sins you forgive, they are forgiven; for those whose sins you retain, they are retained.” (Jn 20:22); cf. Also Mt. 12:32, 16:18-19, 1 Jn. 5:14-17; Mk. 3:29, 2 Cor. 5:18-20.

transgressions, but as was the case with the Jewish *teshuvah*, repentance as return, as commitment to a relationship with God and the holy community.⁸ In the background to the many parables on repentance was also Christ's preoccupation with dealing with sinners and demonstrating that redemption was now available to all people, irrespective of their status, by turning to Christ.

Amongst the parables about sin and repentance, the prodigal younger son poignantly illustrates the most important New Testament themes.⁹ In this story, the younger of two sons asks for his inheritance and travels away from home and from his father. He squanders this inheritance and discovers himself in a humiliating and distressing situation. Desolate and without support, he ends up working as a swineherd, a deeply humiliating situation for a Jew, for whom pork is considered unclean and forbidden. It is only at this point, standing in this place far away that he contacts his sense of deep alienation and meaninglessness.

Only from here does he experience the impulse of connection to his father that moves him to choose to return home.¹⁰ His father welcomes him compassionately, accepts him unconditionally and indeed calls for the finest robes in which to adorn him and the fattest

⁸ This is hardly surprising given that Jesus was himself a Jew and the early Christian community emerged directly out of Judaism. That said, the relationship between Christianity and the Judaism from which it was seeking to distinguish itself was complex. As James Dallen puts it; "Early Christians were reluctant to borrow from rabbinic Judaism while competing with it." Dallen, *op. cit.*, p. 10.

⁹ Lk 15: 11-32. Other key parables on repentance are the publican, the Pharisee, Lk. 18:9-14, the lost sheep Lk. 15:1-7 and the wicked servant, Mt. 18:23-35.

¹⁰ As noted in chapter 3, one of the meanings of the Hebrew root *chet*, חטת (chet-tet-aleph), is to be beside oneself.

calf to celebrate his return. In this elevated status of the prodigal son, one hears echoes of the Jewish teaching that the one who sins and repents stands where not even the righteous (who never sinned) stands, for the latter lacks the penitent's intense yearning.¹¹

Importantly, as with the initial failure of the Hebrews to remain faithful to their promise to wait for Moses when he ascended the mountain to God, the younger son in this story can only value the connection with his father after he has lost it. Only the experience of loss and of his own infidelity to a certain way of being transforms that way of being into something that he positively embraces *as a subject*, as distinct from an unconscious being for whom it is 'natural'.

In this story sin and repentance are not breaches of a law on the one hand and subsequent actions to make good on the other. This is a story about going away from a relationship that grounds (or could ground) the person in a certain way of being and returning to that place of relationship and self. Sin and repentance are not responses to a law - the former transgression, the latter reparation of the transgression. They are movements in relationship and commitment.

The expulsion of Adam and Eve from the Garden of Eden, originally told in Genesis 1, is retold by Paul in Romans 5 to illustrate how just as sin came into the world through one man, so too one man, Christ has now brought the possibility of redemption.

¹¹ Berachot, 34b. As set out in *Yoma* 86 repentance out of love transforms sins into mitzvot, because they have the same effect of bringing the sinner closer to God. In the story of the prodigal son, this is brought out when the older brother, who never left asks why his wayward brother is honored with the fattest calf.

The event which has come to represent the original sin is Adam and Eve eating the fruit of the Tree of Knowledge of good and evil - the sole fruit which God had forbidden them to eat in this garden which was otherwise completely open to them. They ate the fruit after the serpent goaded the woman, telling her that if she did, not only would she not die, as God had warned, but on the contrary, her eyes would be opened – the fruit would make them “as the Gods”, knowing (and hence able to discern between) good and evil.¹² As a result of their decision and subsequent act, Adam and Eve recognize their own nakedness (shame, self-consciousness) and are expelled by God from the place of undifferentiated harmony.

This story is commonly assumed to be a moral commentary on sin, understood as breaking God’s law, and the punishment that follows from transgression or disobedience, exile from a life of untrammelled bliss. Like the story of the prodigal son however it can also be read as a commentary on the attempt to gain independence at the expense of symbiotic connection and naive reverence. Read this way it is a story about the origin of the constitution of human beings as creatures who do not simply have free will (which they did to start with), but also have the capacity to reflect morally on the consequences of their exercising that will.¹³ Their choice is the occasion for their being able to experience themselves as individuals (hence seeing their nakedness and feeling shame)

¹² This is both the promise that the serpent makes to them, “For God doth know that in the day ye eat thereof, then your eyes shall be opened, and ye shall be as gods, knowing good and evil.” (Genesis 3:5), and the observation which God makes subsequently: “Behold, man is become as one of us, to know good and evil.” in Genesis 3:22.

¹³ Although perhaps one does not truly have free will until one is confronted with the consequences of exercising it.

and correlatively for their being able to have a positive, as distinct from an assumed or unconscious experience of moral commitment.

It is only in the face of the consequences of their exercising their free will contrary to God's word that they can even discern the moral consequences of their choice – and even more fundamentally experience themselves as choosers. Again, it is from this place that the moral choice of return and commitment becomes possible – manifest in repentance. Of course, the return cannot reconstruct the situation *ex ante* - the untrammelled innocence of the original state has gone. But the recognition of alienation can form the base of a positively chosen reconciliation, reentry into relationship and subjectively experienced commitment to being 'good'. In Paul's retelling, Christ represents the opportunity to make this return.

Within this story is another with the same structure - the story of the serpent or Satan. The name Satan is derived from a root meaning "to oppose" or "to be or to act as an adversary" and extra-biblical commentary fills out the identity of the serpent as the angel who fell from God as a consequence of his bold assertion of independence.¹⁴ Like Adam and Eve, it was his desire to be out of the original form of relationship with God that was the core of sin, and the cause of his expulsion.

¹⁴ There are a number of sources explaining the identity of the serpent and Satan. Isaiah 14 explains that Lucifer was sent down from heaven because he wanted to be higher than the stars of God (Is. 14:14); In Rabbinic writings, he is identified as one of the fallen angels, (Babylonian Talmud, Baba Bathra, 16a; In the *Life of Adam and Eve*, and early Jewish Apocryphal text, Satan falls because he refuses Michael's command to worship Adam who was made in God's image. See *Vita Adae et Evae* in R.H. Charles, *The Apocrypha and Pseudepigrapha of the Old Testament*, Oxford: Clarendon Press, 1913.

Interpreting the implications of these key stories in the context of New Testament theology, the contemporary theologian Monika Hellwig gives a reading strikingly close to the one I offered in the previous chapter:

....Sin can never be reduced to the breaking of rules and commandments. It cannot even be reduced to a collectivity of specific, discrete destructive deeds. Sin is deliberate or unrecognized detachment from God, orientation of human striving away from God. It is the placing of ultimate trust in anything other than God, even placing of trust in moral behaviour or good conduct according to the law of God.¹⁵

In this last phrase, Hellwig is making a distinction between trust in God and trust in the law of God, and through this distinction pointing to a type of commitment to normative orientations that is distinct from, and indeed more fundamental than the one which is grounded in obedience to the law. These stories narrate the process whereby human beings make that commitment. They do not do so ‘naturally’, but only acquire this subjective commitment to the right through a retrospective recognition attained through loss, or (to recall the Hebrew root of sin, *chet*), straying from the path. The call to repentance in the New Testament is a call to come back into rightful relationship with God, and by extension with the *ecclesia* - the holy community, which is God on earth. It was this conception that was taken up in the early formation of Christian communities.

¹⁵ Monika Hellwig, *Sign of Conversion and Reconciliation; The Sacrament of Penance for Our Times*; Wilmington, Del.: Michael Glazier, 1984, p. 21.

II. 2 Practices and conceptions of repentance in the patristic church

The very early Christian communities that formed in the first century after the death of Christ were fervent, small and tightly knit. Because they believed that the second coming and hence ultimate Judgment were imminent, and because most members had been baptized as adults and so had already been through a profound and exacting process of conversion, there was little attention to post-baptismal penance. Ideally, the urgency of the imperative to be close to God and on the right side of redemption rendered additional intervention to counter sin superfluous.

In fact, post-baptismal sin was an unavoidable reality, and New Testament and early documents provide evidence of the types of penitential rituals developed at this stage to deal with it.¹⁶ In the very early period these processes of repentance were not formalized, but there appear to have been two main ways of dealing with sin. The first was through a combination of fraternal correction, the prayer of the community and a form of public verbal confession of sins to the community.¹⁷ Second, and in the case of especially serious and public sins, the person in question was separated from the community, corrected so as to move him to conversion, and then reintegrated into the social and

¹⁶ See J. Murphy-O'Connor, "Pêche et communauté dans le Nouveau Testament" in *Rev. Bib.*, 74 (1967) pp. 161-93. Important testimony concerning the practices during the first century is found in the letters written to the church of Corinth by the Roman bishop Clement and in a Syrian document from the late first or early second century, the *Didache*. *The Epistles of St Clement of Rome and St Ignatius of Antioch*, James A. Kleist, trans.; *Ancient Christian writers*, Vol. 1, New York: Newman Press, 1946. Other important testaments on this period are from Ignatius of Antioch' *Epistle to the Philadelphians to the Smyrnaeans and to the Ephesians*.

¹⁷ "Confess your faults one to another, and pray one for another, that ye may be healed.", James 5: 16; 1st Epistle of John, 1: 9: "If we confess our sins he is faithful and just to forgive us our sins, and to cleans us from all unrighteousness." Cf. Also Mt. 18: 15-17, 19-20; Gal. 6. 1-2; 1 John 5.16.

cultural life of the community.¹⁸ Communal prayer and mutual correction were common practice, understood within the context of a strong sense of the corporate body and the social character of sin. In both cases, repentance was not a solitary process, but rather one in which the entire community was directly involved.¹⁹

As I already argued in the previous chapter, there are conceptual problems in analyzing these early forms of practice in terms of the distinction between the individual and the community as understood in the modern context. Nevertheless, one can characterize these forms as integrating individual and collective dimensions. The framework was individualistic insofar as individuals and not communities were seen as the unit of sin or righteousness, but the call to repentance was a corporate enterprise. Moreover, this corporate quality of repentance did not simply reflect a sense of mutual concern or responsibility. It flowed rather from the conception of the church as the embodiment of God (Christ) on earth, and following from this, from the conception of sin as directly affecting the community *per se*.²⁰

Preserving the righteousness of the Church (the gathering of Christians) was a particular imperative because Christians saw it as the witness or performance of the reality of God's being in front of Jewish and Pagan communities. As such, the reintegration of the individual through penitential processes was not merely a service to the individual, but

¹⁸ 2 Thess. 3. 6-15; 1 Tim. 1. 20.

¹⁹ "If any man see his brother sin, a *sin* which is not unto death, he shall ask, and he shall give him life for them that sin not unto death." 1st Epistle of John, 5: 16.

²⁰ "Know ye not that a little leaven leaveneth the whole lump? Purge out therefore the old leaven, that ye may be a new lump, as ye are unleavened." 1. Cor. 5:6; cf. Also Rom 14:7-8, 2 Cor. 2:5.

also effected as a means of once again making whole and holy the church as the living proof of God.²¹ Repentance was, in other words, an integral part of constituting the Christian community – a community whose identity was founded on certain normative orientations.

The collective dimension of repentance also grows from the early Christian emphasis on horizontal relations between members of the Christian community. The Gospels, the Acts of the Apostles and the writings of St Paul and John the Evangelist indicate that love of or proximity to God were equivalent to love of one's neighbour. Early Christian communities inherited this notion that being without sin meant being in relationship with God, and this in turn meant living as a holy community which embodied the reality of God's being in this world (and not only the world to come). The return to God, through conversion or repentance was a community enterprise not by virtue of the support or solidarity this offered, nor even because acting well to others was the means for achieving a return to God, but because creating and sustaining this normative community was what it meant to return to God.²²

²¹ This is evident, for example, in Ignatius of Antioch's letter to Polycarp, which insists that the sinner be reclaimed "so that you may preserve the whole of your community intact." (11.4), in *The Epistles of St Clement of Rome and St Ignatius of Antioch*, James A. Kleist, trans.; *Ancient Christian writers*, Vol. 1, New York: Newman Press, 1946.

²² "It is return to vulnerable degrees of empathy and identification with others, transparent or total presence to others, making unreserved common cause with others, sharing of all resources without reserve or qualification." Hellwig, *op. cit.*, p. 90. Using the same reasoning, Hellwig places the Eucharist at the center of early Christian life and connects it with the early understanding of repentance: "for in it they do not live, but Christ lives in them in as much as they are dying to themselves but alive to him, to others, to the community in a continuing experiment of mutual reconciliation mediating the reconciliation with God." p. 91.

The two central terms designating repentance in these early documents are *exomologesis* and *metanoia*. *Exomologesis*, is usually translated as confession, but in this usage (as in the case of the early Hebrews discussed in the previous chapter) it signified praise of God as well as admission of wrongdoing and appeal for forgiveness.²³ *Exomologesis* was one necessary, but insufficient element of a holistic penitential practice that effected *metanoia*, the general term for conversion. Importantly, *metanoia* was understood as a process, a shift in the person and their relationship with the community, and not an institution.²⁴ Most critical in this process was conversion of faith and re-alliance to God enacted and evidenced through word and deed.

More concretely, the word and deed of *metanoia* included self-abasement, confessional prayer, fasting, alms deeds and the humble acceptance of ecclesial punishment.²⁵

Expiation proportionate to the wrongful act and active reconciliation between people were also required.²⁶ Penance, through these practices, was thought to achieve healing, purification and forgiveness of sins and life or salvation (where sin brings death).

²³ “In church confess your sins and do not come to your prayer with a guilty conscience.”, *Didache* 4: 14. Cf. Clement, Letter to the Corinthians 26:2, 48:2, 51:3, 52:1-2, 61:3. For a broader discussion of *exomologesis* see G. W. H. Lampe (ed.) *A Patristic Greek Lexicon*, London: Oxford University Press, 1961, 1: 499-500.

²⁴ Cf. Dallen, *op. cit.* p. 22f.

²⁵ One early document, the *Shepard of Hermas*, an apocalyptic Roman work dating from the later 1st and early 2nd centuries witnesses the contemporary practices of repentance. Hermas is recognized as the first writer to make post-baptismal penance the object of a special study. Cf. *Visio I*, 3:2; *Visio II*, 4:3; *Visio III* 1:5, 9:4-6, 9:10, 10:6; *Mandatum VIII*, 10; *Similitudo VI & IX*, discussed in Poschmann, *op. cit.*, pp. 26ff.

²⁶ “On the Lord’s own day, assemble in common to break bread and offer thanks; but first confess your sins so that your sacrifice might be pure. However, no one quarreling with his brother may join your meeting until they are reconciled; your sacrifice must not be defiled.” *Didache* 14:1-2.

The emphasis on orientation as opposed to legal compliance comes through strongly in early views about forgiveness. The question of the conditions for forgiveness was already a major concern for early writers, but whereas in later doctrine this question was answered by classifying the sins themselves as remissible or irremissible, in these early teachings the possibility of forgiveness could only be assessed by attending to the orientation of the sinner themselves. If there were limits on the possibility of forgiveness, this was not because of some objective rule or quality of the sin, nor because the sin itself carried an objective level of punishment under God's legal system.²⁷ The sin was only relevant to this assessment in so far as it provided an indication of the person's willingness or ability to undergo the conversion which effected forgiveness and realignment.

The informality that characterized practices in the very early church quickly became untenable under its changing circumstances. The small, intimate communities moved from being a sect to a distinct institution and as increasing numbers of members were baptized at birth, the overall membership lost the fervor of the first Christians. As these demographic shifts combined with the influence of Roman legalism, the formality of repentance as an institution started to harden.²⁸ Already in the early 2nd century there is evidence of the incipient formalization and ritualization of what had been loose processes

²⁷ The classification of sins is evident by the writings of Tertullian.

²⁸ The literature on this period points to a number of controversies which were the focus of many writers, but which are not of direct concern here, most notably the question of whether repentance was repeatable (after baptism that is), or a once only process and the distinction between remissible and irremissible sins. Here the debate between the Montanists, who were rigorous in practice and doctrine and Catholics who rejected their rigid line. Cf. Dallen *op. cit.* p. 30ff.

of repentance, and of appeals against such hardening, stressing the processural rather than institutional nature of *metanoia*.

By the beginning of the 3rd century penitential practices very similar to those that were to become the formalized order of the penitents were already widely known in the Latin speaking North African church.²⁹ These processes are variously called restoration, reincorporation into the church, peace, return to the Church's camp and reception into communion. The practice started with a public *exomologesis* or *confessio* - public speech in which the penitent spoke of their sinfulness and acknowledged God's mercy and their desire to return. The performance of repentance that followed was highly public and implicated the whole community.³⁰ The person donned sackcloth and ashes, fasted to facilitate prayer, abstained from delicacies and comfort, groaned and wept in public, and prostrated before the priests and knelt before the congregation of the faithful to beseech their prayers.³¹

Importantly, this latter role of the body of the church was at the core of the penitential process, and not simply an incidental prop. The *ecclesia* embodied a dimension of God,

²⁹ The most important witness here is Tertullian, born in North Africa in around 155. His key works are *De Paenitentia*, written while he was still a Catholic in 203 or 204 and *De pudicitia* (On Purity) a polemic against Catholicism, written when he had become a Montanist.

³⁰ As well as praying and undertaking the penitential performance, one had to make peace with those one had wronged to make peace with God: "When we pray we must compose whatever strife or wrong we have concocted with our brethren. For what kind of deed is it to approach God without peace, the forgiveness of debts while you retain them?" Tertullian, *De Paenitentia*, c. 11.

³¹ "*Exomologesis* requires that you prostrate yourself at the feet of the Priests and kneel before the beloved of God, making all the brethren commissioned ambassadors of your prayer for pardon", Tertullian, *De Paenitentia*, 9). See original documents in Watkins, *op. cit.* pp. 82-83 and interpretation pp. 116-7.

in this case its prayer effecting forgiveness because it was understood as the prayer of Christ.³² Hermas' 5 visions setting out the process of repentance (late 1st or early 2nd century) poignantly represented the central role of the church. They begin with Hermas sinning and learning from an old woman (who represents the church) that he can gain forgiveness by repentance. In the third vision a great tower built upon water appears, representing the water of baptism, surrounded by stones at differing distances, representing persons further or closer to repentance. Those professing faith are warned that unless they do so while the tower is in the process of being built they will be cast away. The most distant - those with no connection with the church - are falling from the water into the fire. In the fourth vision the aged woman, seeing that her warning has been heeded becomes a bride, and in the last she departs and sends the shepherd, the angel of repentance, in her place.³³

This strong ecclesial understanding comes through more formally in the writings of Cyprian, Tertullian's successor as the Bishop of Carthage (249-258).³⁴ Cyprian teaches that penitential works achieve divine forgiveness, but only through reconciliation with the Church. Driving out evil meant adjusting one's priorities to make fidelity to God paramount. This was done through penitential acts that achieved and witnessed

³² *De Paenitentia, op. cit.* c. 10:6.

³³ A translation of the Shepherd by J.B. Lighfoot in 1891 is available at <http://www.gnosis.org/library/hermas.htm>.

³⁴ St. Cyprian's letters to and from Rome provide important historical witness to the shifts in penitential practice in the face of the many apostasies under the persecutions of Christians under Decius. This situation forced the church to reconsider its harsh line on the readmission of sinners. See Poschmann *op. cit.* pp. 53ff.

conversion, and in turn involved reintegration into the corporate body of the church. This also comes though in his exegesis about the practice of laying on of hands, which formed both the beginning and end of the ritual. At the front end of the process it exorcises the evil spirit from the penitent, and at the other infuses her with the spirit of the holy community. The important point here is that this infusion is not with an abstract metaphysical entity, but is also the embodied holy community - *pax cum Ecclesia*.

To properly understand this form of ritual and the conceptualization it embodied, the modern reader has to accurately capture the complex structural connection between the idea of God, the holy community of the church, and the individual as sinner or penitent. The relationship does not, as we tend to think, move vertically from the individual to a transcendent God, nor even from the sinner to God via the necessary mediation of the Church as God's proxy. Rather, as with the social conception of sin, relationship with God is grounded in the constitution of the Church as the community of God and God's order.

Understood in this context, repentance was not simply about bringing the individual back into a community, but reconstituting the community itself, because the community only existed as God's body by virtue of the fidelity of individuals who composed and affirmed it. God and the Holy community are not distributed across the categories of abstract and concrete, but inter-penetrate one another.

Moreover, as was the case in Judaism, the existence of the community and its normative orientation are not two separate moments – norms coming after the constitution of the community, but are similarly inter-dependent. The church was constituted as a distinct community through ethical orientation, an ethical orientation that only has its being as the ethical orientation of actual people.³⁵

II. 3. The Eastern Church and the shift to inwardness

In the Eastern Church, contemporary testimony indicates similar forms of public penance to those practiced in the west, though somewhat less rigorous, and with the additional distinct emphasis on private counsel and spiritual direction.³⁶ Although not a substitute for public penance, ministers in the Eastern Church played a distinct role as healers and spiritual guides, mostly at the beginning of the process of public penance. This more personal form of repentance and healing was also practiced in the case of lesser sins that would not require the full penitential journey. These guides, who were not required to be church officials but rather holy persons, would provide spiritual counsel concerning how to return to a holy life through repentance. They are referred to as physicians, helpers of

³⁵ It is interesting in this context to reflect back on the Pope's apologies and his care to distinguish between the sins of the sons and daughters of the church and the church itself. He was clearly asserting the ongoing existence of the church as a corporate entity faithful to its ethical orientation. One might wonder at what point the loss of this ethical orientation in the actual practice of members of the historical church would constitute its demise and not simply its deviation.

³⁶ Key documents here are the testimonies of Clement of Alexandria (d. 215) and Origen (d. 254), and the *Didaskalia*, a North Syrian document from the early 3rd century.

Christ the supreme physician. Following this metaphor, sins were thought of as the wounds that must be shown to God and to God's Priest.³⁷

In this encounter the core purpose of confession was the manifestation of conscience, as distinct from the public revelation of sinfulness. Inwardness, the transformation of the soul was paramount here and the emphasis was on what confession effected in the individual person who sinned (purgation) rather than on the public display and relationship. This medicinal or therapeutic dimension of repentance was to become the mark of the Greek church, and later the dominant tone of the church *per se*.³⁸

Although this distinct line of practice was not the same as the private form of confession that became the sanctioned sacrament of penance, it can certainly be seen as an early antecedent of the monastic penance that developed into the later sacramental form. The resemblance lies not only in its formal privacy, but also in the emphasis on internal moral striving and conscience. Importantly however, the emphasis on internality and conscience in this context did not go along with a detachment from the ecclesial aspect of repentance. The constitution of the holy community was still intrinsic to repentance.

³⁷ Origen, *In Jo. 37 hom. 1,1*. "Remission of sins through repentance during which the sinner bathes his bed in tears become his bread by day and night, and during which he is not ashamed to show his sin to the Priest of the Lord and ask for the remedy".

³⁸ Care must be taken however to distinguish between this early eastern practice and the later Monastic and Celtic developments. While there are similarities, and some writers have seen this early practice as the original source of modern private penance, the differences are marked. Cf. Dallen, *op. cit.* p. 104f.

Public penance was also part of the practice in the Eastern Church, and writings of this period provide a vivid picture of the topography of the penitential process. Gregory the Wonderworker, a student of Origen writes of five grades of penitents, each located literally further or closer to the heart of the holy community and communion.³⁹ The “mourners” were located outside the church altogether, seeking the prayers of the faithful and readmission; the “hearers” were allowed to stand just inside the entrance hall, but only during the early part of the service; the “fallers” or “prostrators” were permitted inside the nave, but in a position of self-abasement, and again only for the first part of the service; the “bystanders” were present for the entire liturgy, but were excluded from communion; and the faithful were fully admitted to communion.⁴⁰

In this very graphic and literal way, the relationship of the members of the church to God, or holiness, or the ideal of the church as the holy community was mapped in the grammar of repentance. The space between the reality of the lives of the church membership and ideal of the church as the holy community could be measured through the grades of repentance - and in turn the process of repentance provided the vehicle for closing the gap.

³⁹ This topography and literal representation of proximity to God is reminiscent of the visions set out by Hermas and discussed above. This distribution of the sinners is reminiscent of the temple era conception of levels of sin penetrating the Holy sanctuary to different degrees as set out by Milgrom and discussed in the previous chapter.

⁴⁰ See Watkins, *op cit.* p. 246.

III. Canonical penance from the fourth to sixth centuries

The Peace at Constantine at the beginning of the fourth century transformed the church from a persecuted 'community apart' to a politically tolerated religion with legal status. This political legitimation in turn influenced the development of practices within the church, including the penitential system. So long as the church had been defined as a "community of saints", and the contours of Christian identity had been given by the mandate to distinguish the Christian from Jew and heathen, sin had primarily been defined as public offense against, or infidelity to this holy community. Once this strictly oppositional identity fell away, structure had to come from within.

The "mainstreaming" of Christianity and its assimilation into civil models of administration had two types of effect. First, as the church adopted secular (Roman) models, legal formalism replaced the informality and spontaneity that had characterized its early life. This legalization altered the character and understanding of sin and repentance. Whereas sin had been an experiential category, and responses to sin had been developed in the context of closely knit communities of people who knew and responded to one another, sins and the appropriate responses now became legally defined and impersonally regulated. This movement towards formalization had already been occurring - but it now took on a legal character.

In Rome during the 4th century, bishops acquired the right to act as judges in civil suits and their judgments had legal force. The structure of the role carried over - as judges they acted in the name of the Emperor, as bishops they acted in the name of God. Their role in

the church became that of legislators and arbiters, promulgating rules and adjudicating compliance. Obedience and penalty in turn became more important than bringing individuals back to, and strengthening the corporate body of the church. Sin, which had been regarded as a break in the relationship of love and trust between members of the community, and a breach of the covenantal relation between the community and God, was increasingly conceived in legal terms, as a violation of a divine or ecclesial law. Correspondingly, repentance, which had been understood as the change of heart required to reenter the holy relationship, was now regarded as the penalty imposed for violating the law. In turn, the notion that penance was satisfaction to expiate or pay for the offense started to be abstracted from its other various roles, and this significance became predominant.

This reflected a deeper theological shift. The early fathers had conceived of repentance as the means by which sin was eliminated in the sinner and forgiven by God, just as sin was itself the estrangement and not cause of estrangement as a separate event. In this later period, penance becomes the prelude to a forgiveness, which occurs as the final act of reconciliation. Repentance/reconciliation, which had originally comprised an integrated process, now became a linear succession of detached acts - repentance/ penance/ forgiveness. Separating the moments into discrete events meant that the penance could be measured so as to assess whether it would be a sufficient causal agent.⁴¹

⁴¹ This resonates with the linguistic ambivalence of the term *chet* used to signify both sin and guilt in Hebrew scripture.

The tension between these two conceptions is evident in the writings of Augustine, who provided the most comprehensive picture of the penitential system during this period.⁴²

He still held that sinfulness, in principle, was a matter of conscience, and as such the classification of sins should have been dependent on the attitude of the sinner. In practice, however, since no one can look into another's heart and assess the degree of sorrow, the gravity of sins was judged according to objective norms.⁴³

Of course, this change did not happen in a single historical moment, but built on the incipient formalism already noted. Nevertheless, it was during this period that a series of conciliar decisions, papal decretals, private counsels and directives and the "penitential letters" became the basis for rigid legal forms - canons that strictly regulated the practice, hence the term "canonical penance". The mechanization and legalization that is evident at this period was only to become more pronounced right up to the council of Trent in the mid sixteenth century.⁴⁴ It marks one of the most important shifts in the conceptualization and practice of repentance and apology.

⁴² I complement them here with other contemporary writings, including testament found in Ambrose and Pacian's vindications of the capacity of the church to forgive, written in the face of extreme Novatianism.

⁴³ *Enchiridion*, 17, 65. I will take this up again in chapter 6 when I look at Arendt's argument that this opacity of the heart requires that politics be quarantined from matters of the heart.

⁴⁴ "The process initiated by the *Didache* will be taken up by the Church Orders, the Councils of successive centuries, the rescripts of the "servant of God", the Penitential Books....By progressive codification Christianity is becoming 'mechanized' as though it were a modern army; the church is all but completely assimilated to the model of secular society." Kenneth E. Kirk, *The vision of God, the Christian doctrine of the summum bonum. The Bampton lectures for 1928*, London, New York: Longmans, Green and co., 1941, Lecture iii, pp. 130-137.

The other effect came as a counter-reaction to the demographic and legal shifts. In the face of assimilation and in an attempt to preserve the distinct character of the church, responses to sin became more extreme. The influx of converts and the new toleration opened the space for the church to thrive and grow, but also posed a threat to its identity as an exceptional holy community. The strictures of canonical penance can in part be understood as responses to this threat - hardenings against the tide of change and relaxation of the eschatological mission.

Augustine notes three categories of penance: pre-baptismal penance, penance for sins of daily occurrence and penance for grave sins - *paenitentia maior*.⁴⁵ The former was the initial process of conversion, which brought the person to accept Christianity. Thereafter, in daily practice, baptized Christians were to follow the path of everyday penance, which meant constant conversion towards a more holy life. The primary mechanism for attaining pardon for daily sin was the recitation of the Lord's Prayer, as well as fasting, almsgiving and forgiving the sins of others. The connection between professing fidelity to God and confession that one sees in the Jewish penitential prayers is also evident here. The third was canonical penance - the prominent ecclesial public ritual. Notably, there was no category of private ecclesial penance.⁴⁶

⁴⁵ At this later time there were conflicting opinions regarding which sins required public penance. Some, like Pacian confined it to the same three as Tertullian - idolatry, murder and adultery, but Augustine insisted that tradition required that sins against the whole decalogue required public penance. Cf. Poschmann, *op. cit.* p. 84.

⁴⁶ This question has been the subject of controversy in Church history, with some contention that in addition to canonical penance, there was a form of "private penance." Poschmann addresses and dismisses this contention as a misinterpretation of the material. He points out that the first evidence of what can be called private penance is found in the eleventh canon of the Synod of Toledo (589), which branded it an abuse which had crept into practice in some Spanish churches. Cf. Poschmann, *op. cit.* p. 86 and pp. 116ff.

The public penitential procedure was essentially the same as that set out already by Tertullian, Cyprian and Origen in the preceding century. It was initiated by the request to do penance, which included acknowledgment of the sin and verbal confession. This was followed by the laying on of hands and formal admission to the “Order of the Penitents”. Entering this order entailed becoming part of a special body with inferior legal standing and literally occupying a distinct physical location within the church.⁴⁷ Penitents were excluded from the Eucharist, but were allowed to be present during the service, and there was a special rite of blessing of the penitents, which included the laying on of hands before the congregation.

Once in the order, penitents were to wear ignominious clothing, crop their hair and neglect their personal care.⁴⁸ A series of rigors and restrictions characterized the life of the penitent - fasting, almsgiving, prayer, renunciation of the pleasures of body and mind, curtailment of sleep, sexual abstinence and the abandonment of the struggle for worldly honors.⁴⁹ The period of penance for ordinary sins of the flesh was probably reasonably brief, about 40 days, but for more serious sins, there is evidence that lifelong penance, or periods of ten, twenty and thirty years were imposed.

⁴⁷ Probably at the back of the church. Augustine refers to this as the *locus paenitentium*, *Serm.* 232, 7-8.

⁴⁸ Cf. Ambrose, *De Paenitentia* 1,8,37; Jerome *Ep.* 77,2. In some areas special and prescribed penitential garb developed, for example in Spain the 1st Synod of Toledo in 401 prescribed the *cicilium*, goatskin. This was not universal and is not mentioned by Augustine.

⁴⁹ Cf. Ambrose, *De Paenitentia* 2, 10, 96-7.

Reconciliation at the end of the period of penance was again a public, dramatic, ecclesial rite. On a raised platform sits the bishop, below him the penitents prostrate and in tears, around them the congregants, bowing in prayer, weeping in compassion and joining in the reconciliation. Though it is the penitents who are being brought back in, the whole body of the church is involved in the act of making whole. This strong corporate ecclesial dimension is graphically portrayed in Jerome's description of the bishop's ministry:

The priest offers oblation for the layperson; he imposes hands on the one subject to it; he prays for the return of the holy spirit, and thus by the other public prayer he reconciles the people to the one who had been handed over to Satan for the destruction of the flesh so that the Spirit might save. And no sooner is *one member restored to health than all members come together as a whole*. The father finds it easy to pardon his son when the mother begs on behalf of her flesh and blood.⁵⁰

Three related aspects of this passage are particularly important. First, notice the powerful metaphor of the family. The father represents the transcendent God; the mother represents the Church or God's immanence; and the son represents the human individual or community. The Church is the partner of God and the human child is their flesh and blood, partaking in both and inconceivable out of this relationship.

Second, it highlights the way in which the publicity and community of the act are not incidental, or helpful, as they will soon come to be portrayed, but essential. The public penitential procedure is shaped around the corporate conception of sin and reconciliation - the whole process is about the corporate body and not the individual. Third, it elucidates the particular understanding of the representative role of the bishop. The bishop is a

⁵⁰ *Contra luciferianos* 5 quoted by Dallen, *op. cit.* p. 72. Italics are mine.

representative actor, but not of a transcendent singular God who acts on the individual through the representative figure; he is fully steeped in the body of the community.⁵¹

These observations point again to the theological question about the relationship between God, the church and the individual and more specifically the relative places occupied by God and the Church and the effective site of forgiveness. Dallen's summary sets out the core terms of the theological problem:

The assembled church in its diversity of orders, functions, and responsibilities, received the penitents and then celebrated the Eucharist as the ultimate sign that the penitents were reconciled to God, in the Body and the Blood of Christ. The laying on of hands seems not so much to give the spirit directly as to restore access to the Eucharist through which the penitent once more filled with the Spirit. It is this *ius communicationis*, the right to share, which is primary: solidarity with the spirit filled community, expressed particularly in its Eucharist.⁵²

The key point here is that the church, as an active community, occupies a direct and not an incidental role in the work of repentance and forgiveness. Although it is the individual who repents for their sins, within this theological framework, it would make no sense to see repentance as an exclusively individual, internal or private process. The moments, or dimensions of God as the source of forgiveness and the church as the body within which reconciliation occurs may be distinguished analytically, but are not separate.⁵³ From a

⁵¹ Jerome's gendering is notable here - the Church, represented as the mother is the body, the ground of being, while the father stands above, the inspiration.

⁵² Dallen *op. cit.* p. 73.

⁵³ Hippolytus (d. 235) who was the first to theorize on the efficacy of reconciliation invokes the story of Lazarus raised from the dead to elucidate the relative roles of God and the Church. It was God who awakened Lazarus, but the reawakened man is brought back through reincorporation in the church. See Poschmann, *op. cit.* P. 103, and for a discussion of the relative parts of God and the Church in this context Dallen *op. cit.* pp. 71-73.

theological and not simply a practical point of view, repentance is necessarily about the body or the constitution of the Church as a community oriented to a certain way of being.

It is in the context of this theological understanding that repentance and reconciliation as public communal processes make sense. Correlatively, as sin and repentance came to be seen in individualized, internal and legal terms, the publicity and collectivity of the institution became relatively superfluous. The quote at the beginning of this chapter is Dallen's commentary of the shift during this period - "The focus had now almost totally shifted from the well being of the community and the reintegration of penitent sinners to enabling sinners to make satisfaction for their sins and experience forgiveness."⁵⁴ The role of the community becomes one step removed - standing beside the process rather than being its primary subject.

This is evident in the incipient shift in the descriptions of the role of the community and congregational prayer. The prayer of the community moves to the role as helpful support for the individual in their journey.⁵⁵ No longer were communally based repentance and reconciliation moments of a process grounded in the body of the church. Rather confession and penitential works come to be seen as the cause of forgiveness.

Reconciliation becomes the public declaration of forgiveness that had been obtained.⁵⁶

⁵⁴ James Dallen, *op. cit.*, p. 101.

⁵⁵ Caesarius of Arles (501) writes that while satisfaction for certain sins can be made alone and secretly, the prayers of others are helpful. (Sermo 261).

⁵⁶ Cf. Dallen *op. Cit.* p. 100ff and references in Eloi of Noyon, hom. 4, hom. 11; Gregory of Tours, hom. 26. This shift can be traced further back, in, for example changes in the use of the term *exomolgesis* from Tertullian to Cyprian. Whereas for Tertullian the term encompassed the whole procedure, Cyprian uses it in the more restricted sense to designate the final act of liturgical

This loss of connection between the practice of public penance and the experience of sin and repentance provides the internal reason for the demise of the practice. Deprived of a compelling and connected meaning, it lost its hold. More practically, its extreme rigor made it unsustainable in a Christian community, which was no longer comprised only staunch devotees. Particularly abhorrent were the life long restrictions that were imposed on penitents even after they had been reconciled, including exclusion from the clergy and public office and abstention from marital intercourse - all of which amounted to renunciation of life in the world.⁵⁷ To avoid the constrictions, most people put canonical penance off until the last days of their lives, and it lost its role as a vital practice in the constitution of the holy community. By the 6th and 7th century, the end of Christian antiquity, canonical penance had fallen into disuse.⁵⁸

IV. The privatization of penance through the Middle Ages

The modern penitential system, centered on the act of private confession has its roots in practices developed in the Celtic Church from around the 6th century.⁵⁹ Initially developed as Monastic practice and as a form of spiritual guidance or counseling,

penance undertaken before reconciliation. Already here there is a shrinking back or isolation of confession to a specific moment in the process. This differentiation of sin, repentance and forgiveness into different moments also resonates with the discussion in the previous chapter of the relevance of the linguistic collapsing of sin and guilt in the Hebrew words *chet* and *avon*.

⁵⁷ According to Poschmann, it was this inferior legal status of the reconciled penitent and the excessive demands which it entailed which "more than anything else were the shoals on which the system of canonical penance would inevitably be wrecked. How could the average Christian be expected to renounce not only sin, but life in the world, in itself permissible, in exchange for a monastic life?" *op. cit.* p. 106.

⁵⁸ Poschmann p. 123; Dallen pp. 100-101.

⁵⁹ Watkins provides a Welsh document as the first indication of this form of penance, cf. Watkins, *op. cit.* pp. 603-4.

confession became the first instance of a private and individual form of penance that spread through the Celtic and Anglo-Saxon churches in the 6th and 7th centuries.⁶⁰

Irish missionaries took the new private form of practice to the continent from about the end of the 6th century, where it quickly took hold, but also met with significant resistance on the part of the church hierarchy. The Carolingian reform councils of the 9th century condemned it as contempt of ancient law, and attempted, without success, to ban the penitential books.⁶¹ In the face of the expansion of the practice through the continent Church officials attempted compromise solutions - first by offering private penance as an option for sins not subject to canonical discipline (which was still required in the case of all other sins),⁶² and later by another kind of division of labor - public canonical penance for public sins, and private penance based on the Celtic model for private sins.⁶³

Through these doctrinal debates and the interaction of practices, the private form underwent a number of profound changes before it was crystallized as the sacramental rite sanctioned by the Church at the council of Trent in the mid 16th century.

⁶⁰ Private confession and spiritual counseling had long been part of the Eastern monastic tradition, and the roots of private penance are often traced back here. For a detailed discussion of the links and differences between the 2 traditions see Dallen *op. cit.* pp. 103ff and Poschmann *op. cit.* pp. 122ff.

⁶¹ Notably the councils at Tours 9813), Reims (813), Paris (829) and Mainz (847).

⁶² This was Theodulf's solution, put forward in his *Capitulare*, II, and accepted at the Synod of Chalon-sur-Saône in 813.

⁶³ Canon 26 of Arles; Canon 31 at Reims.

From its early Celtic inception, private penance, like the public canonical form, began with confession. Confession had of course been an integral part of the earlier public process, but this was quite different. Confession here comprised private confession by the individual to the priest (or in early Monastic practice, to the spiritual counselor), not a public act before the church community. Second, whereas in its older usage and the one assumed in the canonical system *confessio* had been an inclusive utterance, comprising praise for the merciful God and admission of wrongdoing, now it was narrowed to an inventory of sinful acts for which penance was to be done.

Following the confession, the priest assigned penance or satisfaction, which was then performed by the penitent. Notably, the community had little or no role in the process. The confessor regulated entry into the process, the performance of penance and provided reconciliation, the latter signifying readmission to communion, not to community. This being the case, the very term *reconciliation* now seems inappropriate, or at least to have changed its meaning, the earlier corporate significance having fallen away.

In early practice the reconciliation still came only after the performance of penance, but even then, in contrast to the canonical form of public penance, there was no formal ritual of excommunication following confession. The penitent was excluded from receiving communion, not from the community, and the end of the process brought the lifting of legal restrictions imposed against the individual, not re-integration and reformation of the community. By around the year 1000 confession and reconciliation had collapsed into one scene - a change which generated troubling questions about the role of satisfaction

(acts of penance) in forgiveness - given that forgiveness was granted before any satisfaction was actually performed.⁶⁴

In the Celtic context, and then in its spread through the continent, an inventory of the correct penitential satisfaction required for any particular sin was set out in penitential books that proliferated from around the 6th century.⁶⁵ The most commonly prescribed penance was fasting joined with fervent prayer, but it might also entail abstinence from marital intercourse, renunciation of weapons and even, for more serious crimes, exile. Again, as time progressed, the amount of penance assigned and performed decreased. As Dallen describes it: “the shame, humiliation, and self-punishment that were seen as freeing a person from sin’s consequences were being transferred from the penance to the confession.”⁶⁶ As I raised in chapter 2, one sees this sense of confession itself as a form of punishment or compensation through shame again in the contemporary scene as the act of publicly telling the truth of one’s crimes itself becomes a form of moral compensation.

In this, one can see the two distinct types of roles which the confession played: first, an instrumental, legalistic role, providing information or evidence on the basis of which the priest could properly prescribe penance; and second a medicinal role in itself, a means of

⁶⁴ Both Dallen and Poschmann present this as, in part, a pragmatic response to the difficulties posed in getting people to return for reconciliation after the initial confessional encounter. I will take up the theoretical questions it generated below.

⁶⁵ There were a number of these books, the earliest being the *Penitential of Finnian* (6th century) and the best known of which was the *Penitential of Theodore* dating from around the middle of the 8th century. The latter was the first to note the difference between this penitential system and that of Rome: “*Reconciliato in hac provincia publice statuta non est, quia et publica paenitentia non est.*” (I, c. 12).

⁶⁶ *Op. cit* p. 117.

cleansing through admitting sinfulness. In the ancient eastern monastic tradition confession had primarily served as a means of healing and purification – a trope that became increasingly central as penitential work all but dropped out of the process altogether. In the meantime this evidentiary role came into play for the first time.⁶⁷

Clearly, the passage from the work of sacrifice discussed in the previous chapter to this conception of the work of repentance involved a significant narrowing of meaning. Recall, the repentance which emerged from the early sacrificial system served variously as a form of compensatory justice, substitute for retributive justice, purification, approach to God and recommitment to the holy principles which gave form to, and oriented the community. Here, the work of confession is cut off from the broader communal context and has become very much focused on purifying the individual, where purification means exorcising some stain of sin, as distinct from restoring a connection with God. It also works as a type of punitive compensation, where the individual pays with their shame for their sinfulness. This represents is a new type of combination of the economic model of compensation and the medicinal model of purification: repentance as a type of compensation for the damage to the soul.

The contextual reasons for the development of this private confessional form elucidate the nature of the shift, the formal differences between the two systems and the implications of those differences. James Dallen's analysis, for example, locates the shift

⁶⁷ This difference between the medicinal quality of the Eastern monastic tradition and the legalism of the Celtic experience is discussed by Hellwig *op. cit.* pp. 66-7. For a discussion of the medicinal or punitive character of penance in the Celtic system, see John T. McNeill, "Medicine for Sin as Prescribed in the Penitentials", *Church History* 1 (1932) 14-26.

in the Celtic Pagan context. First, he argues that the practice developed to meet the specific pastoral demands of a pagan community, which was both highly fearful of the supernatural, and already possessed indigenous practices that dealt with such fears and beliefs. To successfully convert these people the church had to provide tangible reassurance of protection and purification.⁶⁸ Canonical penance, with its focus on the community, was not sufficient to meet this pastoral need, which was far better met by direct pastoral counseling and a tangible formula for protection or forgiveness. This makes very clear the difference between the significance of forgiveness in the two contexts; in one it is understood as return to God and the holy community, in the other as guarantee against (divine/supernatural) punishment. Oddly, the magical quality that moderns so often attribute to ancient practices is far more present here.

Second, he argues that the indigenous (Celtic) secular legal system provided the formal model for this type of penance. According to Celtic tribal law, *Wergeld*, taxes, fines and lesser substitute penalties had to be made as expiation for crimes. By analogy, the relationship with God came to be seen in similar commercial terms. Penance represented the satisfaction to be paid for the sin. In this sense, repentance as penalty for a crime replaced repentance as medicine for the illness of sin as the metaphoric frame. Now operating within this frame, sin and penance had a positive quantifiable value and could be measured against each other so as to ensure economic parity. A shorter more severe and intensive penance (for example a complete fast of three days) could substitute a

⁶⁸ I detail here what I consider the two most pertinent contextual factors that he points to. He also argues that the large numbers of pagans to be converted, the particular organization of the church, and the strong individualism of Celtic culture were influential factors. Dallen *op. cit.* pp. 103ff.

longer, less severe penance (a partial fast of a year), provided they both entailed the same “amount” of self-denial. Located within this context, confessing a list of sins became a way of giving the evidence, which then provided the priest with the information he required to allocate satisfaction. The act of confession in itself had become radically detached from the work of reconciliation, or reintegration.

Dallen’s explanation highlights those features of this practice which distinguish it most sharply, and which place it in a different metaphoric world to the earlier one of public penance with its emphasis on community and the assembly of the church as the site of holiness and reconciliation. The idea that repentance frees one of the burdens of sin and purifies the sinner threads through both types of practice. It is, however only in this newer private form that the motif of repentance as commercial exchange comes to the fore - repentance for sin, affecting a clean slate. Thus, even where the two forms were outwardly similar, they were quite different in terms of significance. Both for example regularly entailed fasting, but whereas in the former this was understood as the process through which the penitent *lived* conversion, in the latter it was “punishment as the price for having sinned.”⁶⁹

This shift in meaning infiltrated even those more public forms which survived past the demise of canonical penance, namely crusades, flagellation (which was mostly a monastic, but also a lay practice) and *paenitentia Solemnis* (a yearly ritual of the Lenten season, which originated in the mid to late 8th century and eventually became standard

⁶⁹ Dallen, *op. cit.* p. 109. He continues: “There was a parallel with the canonical system, but there was also a significant reinterpretation...”

practice for all Christians).⁷⁰ Although these practices were still ‘public’ and retained an outwardly collective dimension, they had now become little more than individual practice in the public domain, rather than practices implicating the public domain per se. The significance of publicity shifted from its being a necessary aspect of a process which was integrally communal, to its being a means of intensifying the punishment.⁷¹

The transformations that confession itself underwent during this period are particularly rich. Specifically, it is here that confession, understood in a very particular way, becomes the central act of the repentant process.

There was a narrowing in the meaning of *confessio* - from profession of faith, to inventory of wrongs and expression of regret for the wrongdoing. At the same time, confession increasingly moved to the center of the whole process. As noted above, at the early stages of the development of this form, it had still been seen as a prelude to the penitential work which was the effective cause of forgiveness, and served mainly by way of allowing the priest to set the correct satisfaction. Over the next three to four centuries, however, confession itself becomes the effective cause of forgiveness (insofar as the

⁷⁰ Beginning the Wednesday which marked the beginning of Lent, penitents were clothed in the hairshirt (standard penitential garb), prayed over, and remanded to a special place in the church until they were reconciled on Holy (Maundy) Thursday. (The practice of giving them ashes, which became central in the 10th century, is the origin of the term ash Wednesday.) During this period, they undertook similar restrictive practices to those operating in ancient canonical practice, although fasting became the principle expression of penance.

⁷¹ Assessing the significance of these practices, Dallen insists on a shifting interpretation. Fasting, for example, “became less the external expression of interior conversion and more the means of purifying oneself and repaying God for one’s sins” - and in this sense more on a continuum with the fasts of private penance than those of the ancient practice. He argues in a similar vein that the symbolic gestures performed as part of the reconciliation of penitents in *paenitentia Solemnis* became “indicative..... of an abstract emotional state rather than relationship with community.” Dallen *op. cit.* pp. 124 -5.

penitent contributes to this)⁷², effecting its work through the humiliation it brought: “Shame covered him wholly like the fine glowing ashes falling continually. To say it in words! His soul, stifling and helpless would cease to be.”⁷³ By the 12th century, it was observed that “oral confession is the essence of expiation”.⁷⁴ Correspondingly, from around the 8th century, the term *confessio*, which had originally referred to the initial speech act, came to designate the entire ecclesial penance.⁷⁵

Again, this movement tracked an overall shift in the understanding of repentance. Conversion moved from being a way of living in community, a process for reestablishing the wholeness of the community qua holy community, to individual repentance and private rite. The orientation shifted from reconciliation to forgiveness. Interior contrition, now abstracted out and defined as the essence of the process, was emphasized over the external penitential works. The focus or the goal of the process narrowed in on the guilty individual anxious for salvation, and forgiveness was the resolution to guilt.

⁷² I am referring here to the Scholastic debate about the relative contribution to forgiveness of the confessant, the Church and God. No amount of repentance on the part of the sinner would be sufficient to forgiveness in the absence of Divine grace.

⁷³ Saint Bonaventure, fc. “Confession: Du Concile de Latran au Concil do trente” cited in *Dictionnaire de Théologie Catholique*, Paris: Letonzey et Ané, 1911. S.v. Confession: du Concile de Latran au Concile de Trente, 3: 920.

⁷⁴ The quote comes from Peter the Chanter (d. 1197), quoted by Dallen, *op. cit.* p. 133, N. 36. Poschmann quotes from a number of contemporary sources affirming the effectiveness of confession, including *De vera et false paenitentia*, an 11th century tract attributed to Augustine (and for that reason highly authoritative) until the 15th century.

⁷⁵ Poschmann, *op. cit.* p. 138, taking Boniface, Pirmic, Chrodegang, Theodulf and Aleuin as the source documents.

One can see evidence of this abstraction from community in the Scholastics' struggle to explain the role of the priest in the process of repentance/forgiveness through private auricular confession. Explaining the role of the priest became a problem *now* because repentance and forgiveness were understood as processes that took place inside the individual, albeit in relationship with God. The fact that this even became a question, let alone such a central one, is indicative of how far the understanding and practice of repentance had come from their origins as reconciliation with the living God - the Church as a community of the faithful. Theologians were left to find a necessary link between the priest (the church) and the transformative process towards contrition - whereas earlier it would have made no sense at all to abstract the transformation from the ecclesial context - a way of being in community. Now that the inwardness of the soul and the outwardness of the church seemed to belong to different orders of being, it became necessary to explain their relationship.⁷⁶

What one sees here is precisely the dichotomization of the inside and outside that I discussed in relation to the modern conceptualization of ancient sacrificial and purification practices. Recall, I argued that the major problem with the traditional (modern) conceptualization was not that it missed the 'internal' dimension of the ancient practice, but rather it failed to recognize that its very conceptual categories were distinct and different from those of the ancients. It is only the assumption that intention and

⁷⁶ Given its complexity I omit any discussion here of the important theological debate about the *claves ecclesiae*, the keys of the church, and the relationship between attrition, contrition, grace and the church. For a useful treatment of the developments and in particular the Thomistic solution cf. Poschmann, *op. cit.* pp. 145-194 and Jose Martos, *Doors to the Sacred*, New York: Doubleday, 1981.

practice (ritual) belong to two different and hierarchically organized registers, that makes possible the judgment that the ancient rituals lacked intention and were thus somehow inferior to the modern, individual sacraments of the heart.

What comes through in the debates and writings of the Scholastics is that it was precisely during this time in history, the late Mediaeval and dawning modern period, that these categories were undergoing important transformations and being consciously rethought and re-articulated. In their attempts to articulate the operation of the sacraments and to formulate the categories within which they could be understood, for example, one sees how practice and intention drift apart.

The 11th century founder of scholasticism Peter Abelard, for example, emphasized *contritio* (sorrow) as the decisive agent in the process of repentance and attaining forgiveness. On first reading, his claim may seem no different from those offered by Augustine, or for that matter Maimonides - both of whom placed “repentance of the heart” at the center of the process. Now however, this is a sorrow that can be abstracted from the “outward” work through which conversion is effected and experienced - an abstraction which only became possible when internality was constituted as a separate category.⁷⁷

⁷⁷

Monika Hellwig's analysis of the shifting understanding of grace - grace as the 'condition for', as distinct from the 'reward of' repentance can be seen within this frame of the development of the split: "That the grace of God is not so much a reward for this effort as the original condition of its possibility in the first place seems more or less taken for granted in most of the Church Fathers..." Hellwig, *op. cit* pp. 93-4.

Before the early Scholastic period “sorrow had been taken for granted as present in all sincere penance, and hardly received any special treatment independently of satisfaction (*paenitentia*)”.⁷⁸ The notion that sorrow, as such, might be an effective agent would have been nonsensical within this framing. Now, penitential work becomes the evidence of the sorrow, not the external dimension of a movement, where sorrow is the internal dimension. Internal sorrow had become a functionally independent category - and so detachable from penitential work which would, in time virtually drop out of the picture altogether. It is this detachment that makes possible the critique of apology as “mere words” and the accusation of insincerity or partiality - accusations which continues to haunt our assessment of apology as a response to wrongdoing.⁷⁹

Along with this shift comes a sharp split in the understanding of forgiveness. At this stage, one can clearly see the contours of the distinction between forgiveness as the remission of debts or punishment on the one hand, and a more abstract forgiveness of the soul on the other. This is explicit in Abelard’s teaching that sincere contrition out of the love of God will automatically annul sin and eliminate the cause of eternal damnation, but that temporal punishment must be expiated by satisfaction - or if not then in purgatory.⁸⁰ Forgiveness now has two distinct meanings - one abstract, the forgiveness one “feels” towards the person and one concrete, the forgiveness of debts.

⁷⁸ Poschmann, *op. cit.*, p. 157.

⁷⁹ Hence Hellwig, “Yet there remained now the obvious problem that it is one thing to say “I am sorry”, and mean it, but a far more laborious and demanding matter really to put right what one regrets, really to make sorrow for sin actual and operative in one’s life.” *op. cit.* p. 96.

⁸⁰ *Serm.* 14. As Poschmann points out, the notion that eternal punishment can be converted into temporal punishment thus making sin pardonable is not new. Cf. Poschmann *op. cit.* p. 158 and note 3.

The Scholastics tried to explain how the process of repentance resulted in forgiveness by combining the different parts of the repentant process (confession, contrition, satisfaction, absolution) with the different levels of forgiveness (internal/external, temporal/in the after-life). The idea was that if the right match could be made, the combined contributions of the different components would be fully sufficient to complete forgiveness. My concern here is not with the permutations which the different scholastic writers proposed, but rather to point to how they are beginning to draw distinctions which still inform our understandings of what it is that repentance, as opposed to say punishment or material compensation, is supposed to do.

Recall in the discussion of the Hebrew words translated as sin - *avon* and *chet*, I noted that there was an indeterminacy in their meaning - a fluidity of movement between sin, guilt and punishment. Here, in the writings of the early scholastics the distinction between guilt - *culpa* and punishment - *poena*, is introduced into theology. Through this lens, and within this grammar it becomes possible to be absolved of guilt through a penitential process, as if guilt is something like a color of the soul, and still be liable for temporal punishment.

Within this split frame, the former branch, the 'inner' came to be defined as the proper sphere of religion. Religious practice accordingly intensified its focus on guilt as a condition of the soul, as distinct from a guilt that encompassed both the state of the soul and the person as an actor in the world. As repentance became more and more strongly

associated with this branch, and institutionalized in the private form of confession, it became 'natural' to think that this was its essential sphere of application, distinct from the business of changing action or making concrete adjustments, both of which belong in a different sphere - politics or the law.

V. The Sacramental rite of Penance to Vatican II in the Roman Catholic Church

From around the year 1000, private auricular confession had become virtually the sole and universal form of penitential practice in the church, with other forms gradually slipping out of usage. The legal status of this form had been hardened through a number of canonical decrees - most significantly those of the fourth Lateran Council (1215) requiring that all Christians (of age) undertake annual private and secret confession to a priest.⁸¹ As part of this process, the priest was instructed to interrogate the penitent so as to tease out all sins, and the failure to confess entailed refusal of a funeral, a Christian burial and threatened hell.

The private form of penance was definitively sealed as the sole authoritative form of the sacrament in the Roman Catholic Church at the Council of Trent (1551). The Council was itself set up to establish and declare Church Doctrine in the face of reformers, whose teachings it deemed to be heresy, and in particular the reformers' anti-ecclesial stance.⁸²

⁸¹ Chapter 21 of the decrees of Lateran IV (DS 812) "Of age" was probably the age of marriage, that is 14. On this see M. Gy, "Les bases de la pénitence moderne," *Maison Dieu* 117 (1974) 79; more generally on this development see M. Gy, "La précepte de la confession annuelle et la nécessité de la confession", *Revue des Sciences Philosophiques et Théologiques* 63 (1974) 529-547.

⁸² This also meant that the Council did *not* expand on some settled aspects of Catholic doctrine, and did not settle some internal questions. Its intention was primarily to answer those it deemed to be heretical critics. One looks in vain then to Trent for clarification on many of the points of scholastic debate.

Because Luther's and Calvin's critique of penance was so closely connected to the heart of their overall critique of Church doctrine and practice, the rite of penance was one of the more important subjects of Trentine pronouncement.⁸³ It was also a place where the split in the church led to very different practices.

The key doctrines concerning penance set out at Trent were designed to deal with the reformers' two major critiques of contrition, the first concerning the role of the penitent, the second the ecclesial power and its role in absolution.⁸⁴ Specifically, Luther had claimed that by giving contrition (the penitent's personal merit) and the church causal roles, the church was undermining the work of Christ as the effective cause of salvation. In response, Trent firmly asserted the judicial power of the church in the work of absolution, directly countering the reformers' denial of the priestly power of the keys.

Trent explicitly defined absolution as a judicial act.⁸⁵ This judicial power, "the power of the keys", derived its authority from the Gospels, which were seen as vesting power to grant absolution in the church, a power transmitted to priests through ordination.⁸⁶ The Trent doctrine also recognized that satisfaction had educative and medicinal roles, but it

⁸³ Neither rejected the process of confession outright. In his earlier and less polemic work Luther recommended it, and Calvin recognized it as a useful institution, though rejecting its divine origin. Both explicitly rejected obligatory confession, Calvin calling it mental torture (*Instit. Rel. christ.* III c. 4)."

⁸⁴ These were by no means the only criticisms. Reformers also took issue with more practical matters such as the abuse of church practices through indulgences. I am concerned here however more with doctrinal matters than their misapplication.

⁸⁵ Chapter 6 canons 9 and 10.

⁸⁶ Mt. 18:18 and Jn.. 20:23

clearly established its primary identity as retribution and judgment. This is both in keeping with the trend I have been tracking to this point, and establishes this as the metaphoric frame for the next four hundred years of church practice and doctrine.

As well as its doctrinal pronouncements, at its final session in 1563 the Council entrusted the Pope with the task of liturgical reform. This work culminated in the *Rituale Romanum* promulgated on June 17, 1614, which became the basis for the rite of penance throughout the western church and essentially remained the standard penitential practice in the Catholic church right up to the time of Vatican II, more than four hundred years later.

To grasp the extent of the journey which repentance had traveled to get to this point, one might recall to mind the images of penance in the early church described above, and juxtapose these with the penitential scene in the late mediaeval period as solidified at Trent. Recall the spectacle of the different orders of penitents - distributed, as in Hermas' vision of the tower, with human souls swimming or drowning around it, at varying distances from the altar, and gradually moving back into communion and community as they underwent the process of conversion. The repentance one envisions there is a fully and necessarily corporate process, taking place literally in the body of the ecclesia.

The rite sanctioned by Trent looks very different.⁸⁷ In this scene, there are only two actors, the penitent and the priest. The latter's role is distinctly defined, primarily as

⁸⁷ The details given here track the 25 regulations of the *Rituale Romanum*.

judge but also as physician.⁸⁸ The single penitent enters the church, kneels and makes the sign of the cross. He sits in a confessional in an open place in the church, separated from the priest by a screen.⁸⁹ The verbal exchange that constitutes the process then takes place. The priest inquires about the penitent's status, his last confession and whether he has examined his conscience.⁹⁰ The penitent then gives a general confession (the *confiteor*), followed by a more specific enumeration of his own sins. At this point the priest may ask the penitent to be more explicit about the number, type and circumstances of the sins (although the *Rituale* instructs him to ask no unnecessary questions).

The priest then offers some verbal counsel and support for contrition and amendment, and imposes penance (satisfaction) to assist the penitent in renewal, remedy his weakness and punish his sins. In theory, satisfaction may have included almsgiving and fasting as well as prayer. In practice, however, the pragmatic concern that if left until a later time penitential acts would not be performed at all led to satisfaction increasingly comprising only work that could be performed before the penitent even left the church - prayer alone.

⁸⁸ That the priest's role is primarily judicial, and the spiritual, doctrinal and canonical knowledge he requires so as to fulfill that role are set out in the first 4 regulations of the *Rituale*.

⁸⁹ Generally in late mediaeval practice the penitent had kneeled in front of the priest (or in the case of women to the side). The screen was introduced in the 15th century and prescribed in the 1614 *Rituale*.

⁹⁰ If the penitent is under censure or guilty of a so-called reserved sin absolution may be withheld; if the penitent lacks basic religious knowledge, the priest may give instruction at this stage.

Finally, and in the same scene, the priest gives a brief and formulaic absolution, followed by a (non-obligatory) prayer for the penitent.⁹¹

Repentance has become a single scene, a private scene - a primarily verbal exchange between two parties, the penitent and his judge/confessor. Its focus is now exclusively on the inner conversion and reflection of the penitent, and the assessment, attribution of punishment and judicial forgiveness by the priest.

The community is nowhere to be seen is, let alone their inclusion in the process. There is some remnant role of another person in the prayers of the priest, but now this is a matter of another, 'professional' person praying for, as distinct from praying with, or even in communion with the sinner. Inwardness, individuation and legalism have taken the place of communal integration and the re-establishment of the holiness of the church.

Indeed, the very existence of a collective form of repentance is nowhere to be seen. Trent did not simply authorize one form of the rite; its dogmatic claim was that the authorized form captured the eternal essence of the process of repentance. All other forms were now defined as deviations.

⁹¹ Chapter 2 provides the formula of words: "May almighty God have mercy on you, forgive you your sins, and bring you ever lasting life. May the almighty and merciful Lord grant you pardon, absolution and remission of your sins. May our Lord Jesus Christ absolve you: and I by his authority absolve you from every bond of excommunication [suspension] and interdict, insofar as I can and you need it. And finally, I absolve you from your sins in the name of the Father, and of the Son, and of the Holy Spirit. Amen."

To see the full significance of this split frame and the relegation of repentance to the realm of the individual's relationship with a transcendent God, one has to locate it in a broader historical-political context.

In the pre-modern context the church had been the single site of normative regulation, and indeed there had been no distinction between the public, social and political and the transcendent. The emergence of the modern state thus required and brought about a split in this undifferentiated authority. On the one hand, the state took over the role of organizing the public sphere and regulating the norms that would orient public life. On the other, the focus of the church's attention was increasingly the state of the individual soul, the quality of spiritual sinfulness as opposed to the externalities of action, punishment and regulated relations between persons – the space now regulated by secular institutions.

One might think of these levels of change, the conceptual and institutional, as two dimensions of a more comprehensive shift in what Castoriadis called the social imaginary. The institutional differentiation of the spheres that marked the development of the modern state was both made possible by and brought about a restructuring of concepts, and indeed the very concepts that defined religion or theology. The differentiation is manifest both institutionally and conceptually, but the two levels are mutually constitutive. At the institutional level, one sees the separation of church and state and a reallocation of the work that had previously come under a single head – the inward individual soul to the church, and the outward, public, collective life to the state.

At a conceptual level, the state of the soul becomes distinct from the concrete ordering of relations between persons. Thus, in this specific domain of church practice, the privatization of the penitential process was both made possible by a shifting understanding of the site of sin, and conditioned the individuation and the inwardness of subjectivity.⁹²

Certainly, the secular state developed its own public rituals to orient the community around its constitutive norms and consolidate its authority. Not only formal laws, but also flags, national anthems, public ceremonies, national myths and stories of origin or great acts, war memorials and the public display and rhetoric of the symbolic head of state continually converted individuals into members of a nation. One can see the formal relationship between apology as a means for organizing the collective and the forms adopted by the modern state, but collective apology and public repentance were decidedly not amongst these forms of secular symbolic constitution.

On the contrary, apology and repentance became processes solely concerned with the state of the individual soul - as distinct from both its effect on the temporal consequences of wrongful action and its role in orienting a collective, or individuals around public collective norms. That the proper sphere of influence of the apology is some "inner" or "spiritual" quality of the individual person appears perfectly natural to us because the

⁹² Cf. Dallen: "The Western system became aliturgical as well as private throughout, with little or no attention given to community worship. It is not surprising then, that it helped shape and individualized piety preoccupied with sin, where individuals were largely left to their own resources to deal with guilt, overcome sin, be converted and find salvation.....Monastic penance, however, helped shape a spirituality where one element, acknowledgment of guilt, became the focal point." p. 151.

grammar of apology had narrowed to its transcendental individual dimension. Yet, this naturalness was historically constituted.

It is this assumed naturalness that lies behind Rolph Trouillot's argument that the political apology mistakes the state for the modern liberal individual writ large. It is what makes it so difficult to think about a collective apologizing without projecting a particular type of subjectivity onto that collective. It is also makes it difficult to make sense of the relationship between apology and the modern state's more traditional mechanisms for dealing with wrongdoing - punishment and compensation. When apology reemerged on the public stage and as a response to grave violations committed in the sphere regulated by the state, we no longer had the grammar of the public apology, so were not sure what to make of it. If it is concerned with the inner soul, what place does it have dealing with serious violations? If it is supposed to deal with the temporal consequences of those violations, isn't it a poor substitute for punishment or material compensation?

What is particularly fascinating is that the Catholic Church itself began to expand the inherited grammar of apology at the end of the twentieth century, rediscovering and reinstitutionalizing the public, collective trope that had been marginalized and then doctrinally banished with Trent.

VI. Communal repentance in the Protestant Churches

At this point, I am going to interrupt the narrative of the trajectory of the Roman Catholic Church to look briefly at forms of repentance in the Protestant Churches. In the wake of the reformation, they did not follow the Catholic prescriptions, but developed their own understandings and practices of repentance.⁹³ What I want to point to here is the apparent anomaly that while virtually all modern forms of Christianity identify the individual conscience as the valid interpreter of Scripture and thus the individual as the site of sin or repentance, the collective and public ritual forms of repentance have remained a mainstay of worship.⁹⁴

As I noted earlier, one of the reformers' main criticisms was that the Church's Ministry had been corrupted, so that its mediation was no longer a clear path between humans and God.⁹⁵ The commonplace characterization of the subsequent split is that Protestant Churches eliminated or minimized mediation, replacing it with a direct (unmediated) relationship between each Christian and God.⁹⁶ What this portrait leaves out is the other side of the response – which was to make that ministry public and general. This

⁹³ Since then there has been a proliferation of Christian churches with distinct forms of ritual and theological orientation. A full exploration of the theologies or practices of repentance in Protestant Churches is certainly beyond the scope of this work. This brief treatment does not touch on the vast majority of churches.

⁹⁴ As I noted in chapter 3, this turn to the individual is often held as the distinction between Old and New Testament theology, from a God who visited the sins of the fathers upon the sons, to one that treated each individual soul as distinct. Cf. chapter 3 note 9.

⁹⁵ A key document here is Luther's 1520 sermon, *The Babylonian Captivity of the Church*, a powerful criticism of the medieval sacramental system.

⁹⁶ The degree to which the church's mediation was eliminated differs significantly in different churches, ranging from the High Churches, which retain a strong mediation to the congregationist churches where Jesus alone is seen as its head, and the various congregations are seen as members of a holy family.

alternative is manifest in the forms of confession and repentance Protestant churches adopted. In both the Anglican and the Lutheran Churches for example, one still finds strong and robust forms of communal repentance.⁹⁷

The Introduction to the morning and evening services in the Book of Common Prayer, for example, begins with a penitential service where the whole congregation expresses a general confession:

Almighty and most merciful Father we have erred, and strayed from thy ways like lost sheep. We have followed too much the devices and desires of our own hearts. We have offended against thy holy laws. We have left undone those things which we ought to have done; and we have done those things which we ought not to have done.....

In response, while the congregation remains kneeling, the Priest pronounces Absolution or remission of sins:

Almighty God, the Father of our Lord Jesus Christ, who desireth not the death of a sinner, but rather that he may turn from his wickedness and live; and hath given power, and commandment, to his ministers the absolution and remission of their sins: he pardoneth and absolveth all them that truly repent and unfeignedly believe his holy gospel. Wherefore let us beseech him to grant us true repentance, and his Holy Spirit...⁹⁸

⁹⁷ In fact, Luther did practice and preach the importance of private confession, and included a liturgical form in his Short Catechism, albeit opposing the Roman Catholic form. For a discussion cf. P.H.D. Lang, "Private Confession and Absolution in the Lutheran Church: A Doctrinal, Historical, and Critical Study." *Concordia Theological Quarterly* (October, 1992) 56(4):241-262. There are today, and have earlier in this century been moves to reintroduce private confessional forms into Protestant Churches.

⁹⁸ An alternate response is: 'Grant, we beseech thee, merciful Lord, to thy faithful people pardon and peace, that they may be cleansed from all their sins, and serve thee with a quiet mind; through Jesus Christ our Lord.'

In fact, in the 1928 edition of the *Book of Common Prayer*, based on the liturgies of 1549 and 1662, and used by the Episcopal Church in the USA until the latter half of the twentieth century, the Holy Communion included a collective representative form of repentance spoken by the Priest:

Almighty God, Father of our Lord Jesus Christ, Maker of all things, judge of all men: we acknowledge and bewail our manifold sins and wickedness, Which we, from time to time, most grievously have committed, By thought, word and deed against thy Divine Majesty..... We do earnestly repent, And are heartily sorry for these misdoings. The burden of them is intolerable. Have mercy upon us, Have mercy upon us most merciful Father; For thy Son our Lord Jesus Christ's sake, Forgive us all that is past; And grant that we may hereafter Serve and please thee in Newness of life, To the honor and glory of thy Name; through Jesus Christ our Lord. Amen.⁹⁹

Collective forms of repentance are in fact found throughout the liturgy, for example in the *Exhortations*, calling all who come to communion to fully repent, and the *Litany*. In the *Litany*, the refrains, “Have Mercy upon us”, “Good Lord deliver us”, “We beseech thee to hear us, good Lord” form repetitive tropes, woven through the liturgy like a drum beat driving the prayer.

In this liturgy one also sees, in a manner reminiscent of the Jewish prayers of repentance, a close weaving of confession of sin and profession of faith in God. This fusion evokes the original understanding of confession as profession and is indicative of the theological understanding that turning to God (Christ) is itself the path of redemption. Here again, the liturgy uses the first person plural: it is the ‘we’, the community who names God and acknowledges God as the condition of possibility of the holy community.

⁹⁹ *The Book of Common Prayer*, (With the additions and deviations proposed in 1928), London: Cambridge University Press, p. 314.

Within the churches themselves, there is a range of interpretations of the theological significance of this use of the first person plural. In her commentary on her father, Reinhold Niebuhr's theology, for example, Elisabeth Sifton remarks on the use of the first person plural through much of the liturgy. She notes both that there is "an entire school of thought that says that's the only kind of prayer that makes any sense", and that even as he himself wrote prayers in this plural mode, her father thought of prayer as essentially individual, even when people prayed together.¹⁰⁰

Certainly, whether those partaking in the service interpret the use of the first person as a mere remnant, and not actually representative of the quality of repentance, or whether they understand themselves as actually speaking as a collective is relevant. At the same time, the force of the form is not equivalent to this conscious self-understanding. The rich prose and the affecting rhythms, the persistence and heavy repetition of the trope provide templates of collective repentance, part of the assumed grammar. It may even be the case that they would not stand up to a rational analysis in search of a properly constituted subject, but none the less affective for this.

VII. Twentieth century Roman Catholic reform

Moving back to the Roman Catholic trajectory, the four centuries between Trent and Vatican II saw some minor theological and doctrinal shifts concerning penance and the occasional, albeit unsuccessful attempt to infuse penance with a more corporate

¹⁰⁰ Elisabeth Sifton, *The Serenity Prayer*, New York and London: W. W. Norton and Company, 2003, pp. 184-185.

understanding.¹⁰¹ Still, the individual Trentine model essentially persisted unchallenged through those four centuries. It was this template of repentance with its essential judicial orientation, its focus on lifting the transcendent punitive consequences of sin for the individual, and its assumption that the internal soul is the medium within which sin and repentance take place that we inherited at the end of the twentieth century.

The impetus to reform church practices grew largely from a general recognition of and dissatisfaction with the distance between what had become archaic rites and the experience of contemporary Catholics, and the sense that the rites and not only the people had to shift to close the gap. This sense of distance was captured by the popular slogan, “the signs should signify”.¹⁰² But it was not only this dissatisfaction with the church’s archaism that brought about a push to reform the rites of penance. Reformers in the church recognized that there were a number of specific ways in which this rite – in its privacy, its abstractness and its emphasis on the individual – was out of synch with important social, political and theological trends of the era.¹⁰³

¹⁰¹ An example of this was the Aufklärung Catholicism movement in Germany from around the mid 18th to mid 19th century, in which attempts to reintroduce a more ecclesial and communal form of penance were made. See Leonard Swindler, *Aufklärung Catholicism, 1780-1850: Liturgical and other reforms in the Catholic Aufklärung*, AAR Studies in religion, 17; Missoula, Montana: Scholars Press, 1978.

¹⁰² Cf. Hellwig, *op. cit.* p. 105. Martos puts the argument that this entailed a communal dimension: “Since the sacramental rituals always involve more than one person and ultimately relate the individual to the whole Catholic community, the social significance of the sacraments is often stressed. The sacraments are thus symbolic statements of what the community believes it is and hopes to be, and in this sense they are signs of the faith of the church.and so they offer social support to individuals by affirming common values.” Martos, *op. cit.* p. 147.

¹⁰³ Cf. Article 26 of the *Constitution On the Sacred Liturgy*: “whenever the particular character of the rites suggests a community celebration, with a congregation present and actively taking part, it should be stressed that this sort of celebration is to be preferred, as far as possible, to a celebration of them by one person alone, as it were, in private”. Printed in Walter Abbott, ed., *The Documents of Vatican II*, New York: the American Press, 1966, p. 161.

The overhaul of the penitential system might seem remarkable after so many centuries of almost complete stasis. Several factors working in combination help to explain the shift in awareness and consequently in practice.

First, the more open political and intellectual environment in the church in the twentieth century had supported more thoroughgoing research into the history of repentance in the church, and rendered permissible its influence on theological and doctrinal debate.¹⁰⁴

Starting in the late 19th century, and then through the mid 20th century, church historians had been rediscovering the penitential practices of the early church and, for the first time, documenting them in a scientific manner, that is according to a developmental model.

Initially, and into the mid twentieth century, the ideas suggested by this historical work were considered “modernist” and threatening to the church’s claims to absolute and eternal truth, and so staunchly resisted by the church hierarchy. However, as the church started to open to the influence of other intellectual disciplines, resistance to the implications of these historical studies softened and a debate within the church became possible. Catholic historians and theologians began to call into question Trent’s absolute doctrinal claims and started to uncover a more variegated history of repentant rites in the

¹⁰⁴ A primary example of the impact of history on theological thinking in this area can be found in Karl Rahner, “Forgotten Truths Concerning the Sacrament of Penance”, *Theological Investigations, Vol. II, Man in the Church*, Baltimore: Beacon Press, 1963. Cf. Also Joseph Martos, *Doors to the Sacred*, New York: Doubleday, 1981, Edward Schillebeeckx (ed.), *Sacramental Reconciliation (Concilium Vol. 61)* NY: Herder, 1971 and Michael G. Lawler, *Symbol and Sacrament; A contemporary Sacramental theology*, New York: Paulist Press, 1987: “.....the public involvement of the Church...[was] destroyed by the victory of Celtic penance over the ancient Roman practice....the shift from public to private penance was ultimately the most radical, in terms of both *theoria* and *praxis*. For it separated penance from its ritual root in the church.” p. 114.

church. As the discursive space within the church broadened, the notion that it had a history and that this history contained a more social conception of sin and repentance could take hold.

The ascent of structural analysis in the broader intellectual environment and its infusion into at least some parts of the church provided a foothold within the church for a social conception of repentance. Those members who had already been insisting that injustice and sin were social and not merely personal welcomed these “forgotten truths” about church practice, and embraced them as support for their argument that social injustice or social sin should themselves be concerns of the church, and not simply relegated to extra-religious political activity.

Christian Duquoc, a twentieth century Catholic theologian, points to the two way link between political views/ interpretive frames and support for or dissatisfaction with existing rites. On the one hand the relative weight placed on the individual or social dimension of sin informed the practices. On the other, the dominant form of penance had been constitutive of interpretive frames and views about the nature of sin and the church’s role. The institutional forms were at once symptoms of the shift to a highly individualistic conception of responsibility, and the practices that transmitted this conceptual frame. He writes, for example:

“[T]he form of the administration of the sacrament is not harmless; it favors one aspect of reconciliation. The private form favors reconciliation with oneself in the interior of one’s own conscience, sole seat of authentic relationship with God.

Other human realities, and notably economic and political relationships, escape all interference from Christianity”.¹⁰⁵

This critique of the private form of penance then had a highly political thrust. Those who frame their societal analysis in collective terms argued that the private form “robs sacramental penance of its social character and implies that forgiveness and reconciliation belong to an inner conscience....The sacramental symbol should make clear that forgiveness is a social function necessary to our history as it makes its way towards reconciliation.....”.¹⁰⁶

On instruction from Vatican II, a liturgical Commission was established to investigate the history of the rite of penance and develop options for reform, leading in 1973 to the official promulgation of *New Rite of Reconciliation*, which set out three new forms of the rite.¹⁰⁷ The change of name, from penance to reconciliation, announced and marked the change in focus and import - from a narrower concern with an individual’s sins, to a broader ecclesial process.¹⁰⁸

¹⁰⁵ Christian Duquoc “Real reconciliation and Sacramental Reconciliation” in Scheelbeeckx, (ed.) *Sacramental Reconciliation*, Herder and herder, 1971, p 36.

¹⁰⁶ *Ibid.* pp. 30-35.

¹⁰⁷ For a background on the preparation of this new rite and the work of the liturgical commission established to investigate the rite see Martos, *op. cit.* p. 359ff. The new rites themselves were not implemented until 1975.

¹⁰⁸ “Rather than penance, a word which stresses, at least in the contemporary mind, something to be done, or confession, which highlights only one aspect of the process, the term reconciliation seemed to represent the entire process by its focus on the culminating moment.” Kenan B. Osborne, *Reconciliation and Justification: the Sacrament and its Theology*, New York: Paulist Press, 1970, p. 205.

The first form (Form A) was consistent with the fully private rite sanctioned at Trent, while Forms B and C both incorporated some of the corporate/communal and public dimensions of the earlier Christian practices. Form B is a hybrid rite - moving from the communal to the individual and then back to the communal. It starts with open, communal greeting and prayer, silent examination of conscience and communal recitation of a general confession and again communal prayer. Each member then moves separately to individual confession and absolution. They then reform as a community for the final communal declaration of God's mercy, thanks giving prayer, blessing and dismissal.¹⁰⁹

Form C is fully communal. Whereas in Form B the community separates out for individual confession and absolution, in this final form they remain together as a community, where both confession and absolution occur.¹¹⁰

There is a debate within the Church about whether the new forms reflect a genuine shift in the understanding of repentance, or are simply a pragmatic exception - a grudging concession to the unfortunate realities of Catholic communities which impede the effective reach of confession in its essential and correct form.¹¹¹ The people who maintain that penance remains a rite concerned with the individual soul argue that even though communal forms are now included, they are carefully circumscribed by strict

¹⁰⁹ Cf. Canadian Catholic Conference, *Rite of Penance*, Ottawa: Publications Service, 1975, sections 22-30.

¹¹⁰ *Ibid.* sections 31.35.

¹¹¹ In particular, the practical difficulties involved in ensuring that individuals actually get to confession given the negative associations of private confession and the high ratio between congregants and confessors in some communities.

canonical restrictions, and the rite makes clear that they are to be used only in exceptional circumstances.¹¹²

Other interpreters argue that these restrictions are a sign of the doctrinal lag, and that in fact the communal forms are now the model rites - closer to the essence of repentance, now understood as a fuller ecclesial reconciliation.¹¹³ They too can draw support from the text setting out the rite, which elsewhere recognizes and affirms the way in which the communal form unites the community, knitting it together through the common process of coming to awareness of sinfulness.¹¹⁴ Moreover, Vatican II itself explicitly expressed a preference for communal over individual celebration of the sacraments.¹¹⁵

The communal forms allow for expression of the social nature of sin and repentance, reinstitutionalizing and thereby reinforcing a thread of theology and religious praxis that dropped out after Trent. Lucy Thorson, a theologian who has tracked the reemergence of

¹¹² The wording of the introductory paragraphs to the rite is very strong. The first paragraph on this form states: "Individual, integral confession and absolution remain the only ordinary way for the faithful to reconcile themselves with God and the Church, unless physical or moral impossibility excuses this kind of confession. Particular, occasional circumstances." *ibid.* para. 31. Further, the restrictions include the requirement that individuals confess grave sins in private within a year of taking part in this communal form

¹¹³ This is the case for Dallen, *op. cit.* and Hellwig, *op. cit.* as well as McManus, in Ralph Keifer and Frederick R. McManus (eds.), *The Rite of Penance: Commentaries: Understanding the Document, Vol. 1*, Washington, D. C: The Liturgical Conference, 1975, pp. 61ff. And James Crichton, *The Ministry of Reconciliation*, London: Geoffrey Chapman, 1974.

¹¹⁴ Para 5 for example, reads: "By the hidden and loving mystery of God's design, men are joined together in the bonds of supernatural solidarity, so much so that the sin of one harms others just as the holiness of one benefits others. Penance also entails reconciliation with our brothers and sisters who are always harmed by our sins." *cf.* Also para 22.

¹¹⁵ "Whenever rites, according to their specific nature, make provision for communal celebration involving the presence and active participation of the faithful, this way of celebrating them is to be preferred, as far as possible, to a celebration that is individual and quasi-private." In Walter M. Abbott, *op. cit.*, p. 148.

this communal form argues that far from being a deviation or pragmatic accommodation, it recaptures an essential dimension of repentance that had long been lost:

Like the practice of public penance in the early Church, Form C of the rite can be understood to be powerfully sacramental in effecting what it signifies, and indeed in effecting it in a way that is accessible to common experience. The sign and the symbols, such as communal confession of sins and communal absolution, are effective in signifying that the community is in solidarity in their recognition of sins and sinfulness and in their recognition of the need for common forgiveness and healing.¹¹⁶

Translating this language into more secular terms, one might say that the communal form performs and affects the idea that the community in question shares and affirms together a common set of values and allegiances. In their acting together, they are en-acting together a set of moral and behavioral precepts - which bind them, and to which they rebind themselves in the act of corporate repentance. This corporate dimension retains even though the sins that are the subject of confession are sins committed by the individual.¹¹⁷

The documents themselves will not provide the answer to which is the model rite or the one that embodies the “true” nature of repentance, because they are themselves the result of compromise between different camps within the church. In fact, rather than looking to the text for a definitive answer, one should read its ambivalence as the best clue to what is going on. The instability and tensions in the final documents evidence the continuing unresolved disagreements between those who support the doctrinal strictures of the

¹¹⁶ Lucy Thorson, *A Call to Communal Repentance, Jewish and Christian Liturgical Experiences: A Dialogical Approach*, M. A. Thesis, University of St. Michael's College, Toronto Ontario, 1993.

¹¹⁷ That is, although the practice is communal insofar as individuals confess together, it is still their individual sins which they confess, not those of the community per se.

Trentine rites, and those who wish to re-enliven the communal dimension of repentance. More importantly, they evidence the tension between these different tropes of repentance – a tension that had been concealed until Vatican II. Now that there is a doctrinal debate the two readings of the “essence” of repentance are not simply an abstract or esoteric debate, but are carried by different personalities in the church, with each party pushing for its interpretation, and final documents reflecting the compromise position they have been able to reach at a particular point in time.

At the time of the promulgation of the new rites and still today, what we see is a strong movement towards institutional expression of a communal form, dragged back by the resistance it provokes. The view that repentance is also a public, collective practice and concept, directly implicating the entire community, has gained significant ground, and institutional form, but still falls far short of universal acceptance in the church. In this push towards, and resistance against a more corporate practice, the tension between the ecclesial and individual dimensions of repentance remain evident.

Moreover, as I remarked in my commentary on the persistent communal forms in Protestant Churches, the significance and impact of the forms should not be reduced to their intellectual interpretation. In fact, to insist that their only affect is the one that passes the muster of rational scrutiny is to miss the unique dimension of ritual practice. As practical templates, they work on us, and often beyond what we might think we are doing.

VIII. Communal repentance in the church and political apology

What is the relationship between this re-emergence of the communal dimension of repentance at the institutional level in the Roman Catholic Church after 400 years in which the private form held exclusive dominion and the emergence of the political apology? There is no evidence here, nor am I suggesting a causal relationship, but their temporal simultaneity is certainly remarkable.¹¹⁸ The last quarter of the 20th century saw a marked turn towards a trope of repentance as a process implicating the community *qua* community.

This marked emergence of collective forms of repentance in the two spheres is evidence of a more general shift towards recognizing that repentance also works as a communal practice - and away from the insistence that it can only ever be a matter of the inner soul of the individual. Both the shift in the Roman Catholic practice and in politics emerged in the context of the factors set out above - greater recognition of the corporate quality of wrongdoing, communal responsibility for wrongs of the past, and mutual responsibility for wrongful and rightful action. Though not causal, the emergence of the collective form as a living praxis in the Roman Catholic Church (its institutionalization) strengthened the experiential base in which the political practice became more accessible. Moreover, in the Protestant Churches, this experiential base had long been available as ritual form, albeit without the same degree of conscious reconstruction, or explicit connection with collective responsibility. In both cases, the presence in the religious context furnished the

¹¹⁸ There are some important differences in the two practices - most notably that the communal form of repentance in the church does not involve a representative speaker repenting for the sins of the community *per se*. Nevertheless, the argument in this chapter has been that the communal form as

opportunity for this performative mode to be experienced, and thereby become part of the repertoire of practice available to those looking for ways to deal with the wrongs of the past.

These models also became more salient at a point in history where political actors were looking for effective ways of dealing with systematic violations in the course of reconstituting their polities. As the limitations of prosecutorial strategies and other traditional liberal strategies, which had been the mainstay of political strategy for wrongdoing became more evident, and the need to deal with violations more pressing, the search for alternatives intensified.

However, as this chapter has made evident, the grammar of apology we inherited was deeply inscribed with the form of the individual and strongly marked as belonging to the distinct sphere of religion, cordoned off from public politics. Even though apology had once been part of public regulation of norms (politics), and could still be understood as playing this regulatory role, the sharp differentiation between the modern secular politics and the sphere of religion entailed an implicit ban on the modes now associated with religion from politics. In this context, re-appropriation of repentance as a tool in the *political* repertoire was highly problematic. The split between the transcendent and the mundane and the inner and the outer that had characterized the constitution of both religion and the state meant that it was not simply a matter of readmitting apology into

practiced in the church similarly invokes the common standards of the community qua community.

the sphere of politics. Against the background of formal legal and material institutions, apology stood out as an anomaly.

The next chapter turns away from these religious and historical reflections to the contemporary scene. It looks in detail at the actual emergence of the apology in political discourse in Australia and the alliances and ambivalences this provoked. The interpretations of apology one sees here on the political stage closely track the tropes derived in these two chapters. This split interpretive frame proves to be a powerful tool in explaining the ambivalence and conflict that arises around contemporary political apologies.

Chapter 5: Saying Sorry in Australia

I. Constituting Australia in the late 1990s

The last ten years of the twentieth century in Australian public life were dominated by two national debates, one over the treatment and status of Australia's indigenous peoples, the other over drafting a new constitution to take Australia into the twenty first century. Both of these processes involved and invited profound reconsideration of the political and social map of the Australian nation, although they moved in apparently opposite temporal directions. The constitutional debates sought to clarify the fundamental values of the Australian nation and articulate them in a core, legally binding constitutional document for the future, while the debates around indigenous issues principally sought to deal with Australia's troubled past.

Nevertheless, the two are best understood as inter-dependent processes. If Australia needed a new constitution, it was largely because the existing one represented neither the demographic and geopolitical character of the contemporary nation nor the aspirational values and political principles that would carry it into the new century. At the same time, this movement forward was stymied by a past of systematic human rights violations against indigenous peoples that had not been adequately resolved politically, legally or socially. In simple terms, in order to articulate who Australians wanted to be and declare their normative political personality, they needed to deal with a past that had fallen well short of this ideal nation.

It was against this background that the apology debate emerged and took hold of the nation in the late 1990s. In this chapter, I suggest that it was precisely because the normative status of the Australian nation was such a pressing concern for Australians during this period that so much energy was drawn into the apology question. If the Australia of 2001 (the centenary of federation) was to declare itself a nation constituted according to principles of equality, diversity and respect for human rights, it had to find a way of positively distinguishing itself from the Australia of the twentieth century which had now incontrovertibly been shown to be one characterized by systematic inequality, intolerance and human rights violations against its own indigenous population.

A standard political theoretic or institutional analysis, would suggest that what is required to draw this distinction are positive legal and substantive social and economic measures. In this case, such reform would include overturning racist or neo-colonial practices, principally through the legal and institutional recognition of land rights and the full promulgation of anti-discrimination laws and programs. Certainly, such interventions to reorganize the legal, political and economic landscape were all necessary to promote and reflect different norms about the content and distribution of citizenship and rights, but they were not sufficient. By extension the theoretical analysis that identifies them as the sole sites of reform is overly constricted.

The Australian people themselves, who constitute the 'subject' dimension of the nation (to recall Castoriadis' analysis), also had to undergo a process of 'reconstitution', from the inside as it were. They too had to recognize themselves and others – most notably

indigenous others – as full subjects of citizenship rights and national membership. This explains the phenomenon, noted by Teitel in her genealogy of transitional justice of a movement in the development of transitional justice more generally “beyond legal notions of guilt and responsibility, towards a political theology, building on a discourse that incorporated moral imperatives”.¹

This need for a ‘social reconstitution’ was recognized and embodied through the large scale ‘Reconciliation’ project which the federal government sponsored beginning in 1991, to be completed in 2001 for the centenary of federation.² Largely through public education and civic participation, the *Reconciliation Process* was intended to take the strands of a racially hostile and divided Australia and weave them together into a united Australia in a manner reminiscent of Bishop Tutu’s image of the *Rainbow Coalition* of South Africa.³

However, this desire to move forward as a differently constituted nation also required an honest eye to the ugly past, and more than that a willingness to take responsibility for that past and to own it as part of the nation’s own history. To quote Michael Walzer,

¹ Ruti G. Teitel, “Human Rights in Transition; Transitional Justice Genealogy”, *16 Harv. Hum. Rts. J.* 69 at 83.

² The Reconciliation Council, comprising 25 prominent Indigenous and non-Indigenous figures drawn from a range of areas of public life and across the political spectrum was mandated to promote the reconciliation process. The functions of the Council are set out in the enabling legislation, *Council for Aboriginal Reconciliation Act 1991* and in Appendix 1 to the Council’s first Annual Report, 1992-1993, available at <http://www.austlii.edu.au/au/other/IndigLRes/car/1994/7/56.html>.

³ One of the mandates of the Council was to explore possible formal documents of reconciliation, such as a treaty or constitutional amendments. This formal legalistic dimension was not however its primary work.

Australian needed to “find some ritual processes through which the ideology it [the old regime] embodies.....[could] be publicly repudiated.”⁴

It was this role which the apology stepped in to play, hanging off the coat-tails of detailed government sanctioned exposés of past human rights violations. Yet, the multifaceted meaning of apology that I have elucidated and explored in the previous chapters prevented it playing this role in a straightforward or unimpeded way. Even as it rode on a powerful wave in Australian political life, those who saw it as a contravention of equally important political norms, most notably individual liberty and protection from crude collective blame or identity also fiercely resisted it.

The Australian debate illustrates the two tensions between collective and individual responsibility and between the public, collective trope of apology and the internalized individual apology discussed in chapters 2, 3 and 4. Through the apology debate one can see how Australians struggled with the idea of collective responsibility, on the one hand looking for some way in which to recognize that the violation of the rights of indigenous peoples was part of the nation’s past, while resisting being blamed for actions they did not *personally* take. At the same time, the apology debate folded in with the broader concerns about national identity that had come to the fore as Australia literally sought to reconstitute itself as nation. In so far as the apology responded to these politically salient questions of identity and constitution, it offered an appealing and resonant strategy and one sees how Australians intuited that it held important resources for dealing with their

⁴ Michael Walzer, ed., and Marian Rothstein, trans. *Regicide and Revolution: Speeches at the Trial of Luis XVI*, New York, Cambridge University Press, 1974, p. 88, quoted in Teitel, *op. cit.*, p. 29.

past. Still, they struggled with their discomfort with apology's religious and personal resonance, still sensing that apology evoked the image of the responsible, private individual repenting their sins in a way that was both inappropriate to the sphere of politics and contrary to some other sense of justice. In the way it navigated these tensions, the story of the Australian apology typifies the movement beyond the sphere of the law that was characteristic of developments in transitional justice in the latter part of the 20th century.

The strong connection between the apology movement and a more pervasive trend in Australian public political life supports my thesis that it is this 'constitutional' dimension of the apology that explains its salience. Had the apology not spoken to broader normative questions with which Australians were already deeply engaged – questions about its normative identity and the distribution of rights *now*, it would have remained a relatively peripheral suggestion.⁵

More broadly, the fact that the apology became such a prominent part of the national political debate further supports my challenge to standard modern conceptions of 'the political' and the thick line liberal theory has drawn between the modes of politics and the modes of religion. This case demonstrates that in order to alter how citizens act, one needs to attend not only to the shape of hard institutions such as the law, but also to the normative underpinnings of those institutions, and attend to them in a way which draws in citizen-subjects.

⁵ I will take up this question of when apologies are most likely to gain public salience at a more abstract level in chapter 6.

The theoretical difficulty is that when one tries to explain or categorize the types of interventions required to affect this work, the available categories prove inadequate. This often leads to interventions that lie outside formal and hard institutions being incorrectly classified as personal or quasi-religious, not political. However, rather than excluding them from the sphere of political action, the salience of this type of intervention, as illustrated here should provoke a reconsideration of those boundaries. The hybridity of the apology as the “personal political” is not a mistake, but a challenge to the scheme that renders this hybrid so problematic. The case of the removal of Aboriginal children illustrates this in the most powerful way, because it was at once a completely political and profoundly personal process. It reached down into the most publicly and politically salient norms of the Australian nation.

To locate the apology as it arose in the late 1990’s, the first part of this chapter looks in some detail at the racial constitution of the Australian nation. From there I tell the story of removal and characterize it as a poignant representation of the structural non-recognition of Indigenous Australians. I then analyze in detail the apology debate itself, mapping the arguments for and against an apology against the theories of responsibility and recognition discussed in the previous chapters. The final part of the chapter considers some of the ‘left’ criticisms leveled against apology, criticisms that recognize it as a form of reconciliation or recovenanting, but one which only solidifies the structural exclusion of the real challenge that the excluded other poses to the constitutional order.

II. Australian neo-colonialism: the invisibility and emergence of black Australia

Inattention on such a scale cannot possibly be explained by absent mindedness. It is a structural matter, a view from a window which has been carefully placed to exclude a whole quadrant of the landscape. What may well have begun as a simple forgetting of other possible views turned under habit and over time into something like a cult of forgetfulness practiced on a national scale.....(Bill Stanner, *After the Dreaming*, 1969).⁶

The practice of removal and the process of bringing the story of removal into the national discourse are each located within a broader context of colonial relations and changing national and international norms concerning race and human rights. In particular, two types of discourse or 'rights talk' underpin the normative and institutional dimensions of the indigenous rights movement. The first concerns equality and the denial of basic citizenship rights; the second the distinct rights of indigenous peoples. The apology appeared at the nexus of these two strands.

II. 1 Indigenous 'disadvantage' and the goal of equality

Aboriginal and Torres Strait Islander people, the indigenous peoples of Australia, now constitute approximately 1.6% of the population - a tiny, minority, but one which has always been significant on the Australian socio-political landscape.⁷ Their human rights

⁶ William Stanner, *After the Dreaming: Black and White Australians: The Boyer lectures*, Sydney: ABC Press, 1969, p, 67.

⁷ Definitions of Aboriginality are themselves highly disputed, and figures are based on the current criteria, which is a combination of descent, and self and community-identification. For a discussion see Michael Dodson, "The End in the Beginning: Re(de)finding Aboriginality", *Wentworth Lecture*, Australian Institute of Aboriginal and Torres Strait Islander Studies, 1994, available at http://www.hreoc.gov.au/speeches/social_justice/end_in_the_beginning.html.

situation has long been a blight on the record of a country otherwise known for, and confident about its relative wealth, stability and enjoyment of human rights.⁸

Of all Australians, Aboriginal people are the sickest but the least well served by the healthcare system.⁹ They die significantly younger, their children die at birth or infancy significantly more often, and they suffer and die from diseases long eradicated or rare amongst non-indigenous Australians.¹⁰ They are the most frequently homeless or poorly housed and the poorest. They have the worst access to institutional education, but populate Australia's prisons at a rate up to 26 times higher than would follow proportional representation.

Until the 1940s and '50s, a range of explicitly discriminatory laws were in place - depriving Aboriginal people of the vote and preventing them from having access to their wages, from marrying or traveling freely. Absent any constitutional protection, there were no legal provisions in place to protect them from or offer recourse in the face of the range of legal and socio-economic inequalities they suffered.¹¹ Many of the most

⁸ This situation has changed in recent years as Australia's treatment of refugees has also become a major point of contention and a source of much international criticism.

⁹ A survey of statistically studies across a range of socio-economic indicators including health (mortality and morbidity), housing, education, imprisonment and deaths in custody, education, income and employment is available on the website of the Social Justice Commissioner at http://www.hreoc.gov.au/social_justice/statistics/index.html#6.1

¹⁰ Leprosy, a disease one associates with another era still exists in some Aboriginal communities. Similarly, trachoma, the eye disease which the famous Australian doctor Fred Hollows went to Africa to cure continues to afflict Aboriginal people in Central and North Australia, and it was here with black Australians that he started his work with this "third world" disease.

¹¹ Note, Australia does not have a Bill of Rights, and the constitution does not prescribe racial or other forms of discrimination. For a history see Markus, A, *Australian Race Relations 1788-1983*, Allen and Unwin, 1994; Aboriginal and Torres Strait Islander Social Justice Commissioner, 4th *Annual Report*, 1996, Sydney: AGPS, 1997, available on line at http://www.hreoc.gov.au/pdf/social_justice/sj_report97.pdf

explicitly discriminatory laws were repealed in the 1950s and early '60s, but still into the mid '60s some states had voting restrictions, and Aboriginal people did not occupy an equal place within the Australian Constitution.

It was this constitutional disparity and the move to constitutional reform which brought the broader issue of Aboriginal disadvantage onto the national stage for the first time in the mid-1960s. In 1967, a referendum was held to amend the discriminatory provisions of constitution.¹² Although the actual changes to be voted on - to give the Commonwealth power to make laws regarding Aboriginal people, and to have them counted in the national census - were of a relatively technical nature, the referendum was presented and understood in a far broader light. It was held up as a national vote between discrimination and exclusion/segregation on the one hand, and bringing Aboriginal people into mainstream Australia on the other.¹³

In the lead up to the referendum campaign, dramatic images of Aboriginal camps, infested with mangy dogs and populated by dirty and deprived looking children were broadcast across the media, successfully provoking shock amongst ordinary (non-indigenous) Australians. The campaign was highly successful, at least in its narrowly understood objective of influencing the vote. The proposed amendments passed with an

¹² The Commonwealth Constitution, which distributes powers between the states/territories and the federal government, and sets out the powers of the Commonwealth, can only be amended by referendum, and amendment requires a majority of votes in a majority of states. Any power exercised by the Commonwealth must be explicitly set out in the constitution. For a detailed survey of the 1967 referendum, see Attwood, B. and Markus, A., *The 1967 Referendum or When Aborigines Did not Get the Vote*, Canberra: AITSIS, 1995.

¹³ The official "Yes" campaign for example, told voters that their vote would enable the Commonwealth to "co-operate with the states to ensure that together we act in the best interests of Aboriginal people in Australia", in "Constitution Alteration Australia, 1967: Argument in favor of the proposed law", in Commonwealth of Australia, *Referendum to be held on Saturday, 27th May, 1967*, Commonwealth Government Printer, May 1967.

unprecedented 90% majority. This vote, symbolically at least, marked a move amongst Australians to accord Aboriginal people the same rights as were claimed by other Australian citizens. Aboriginal people, who not so long ago had been classified as flora and fauna were now to be citizens. For that reason it is popularly mis-remembered as the referendum that gave Aborigines the vote, or made them citizens.

It was, however, less successful in sustaining or broadening the public interest. Following the burst of activity and public attention, the concerns of Aboriginal people all but disappeared from the mainstream media and the public agenda, much to the distress of Aboriginal people who had been assured that 1967 marked a genuine turning point in national policy.¹⁴ When, in 1975, the progressive left wing federal government passed a national race discrimination law, bringing Australia into conformity with its obligations under the United Nations *Convention on the Elimination of All Forms of Racial Discrimination*, the general assumption was that now civil/political and legal parity had been achieved, functional equality in other areas of life would follow.

¹⁴ The gap between the rhetoric of the referendum and the institutional changes that did not follow was provocation for some of the most intense activism. On January 26, 1972, for example, Aboriginal people established a "tent embassy" on the lawns of parliament house - symbolically claiming their rights as a sovereign people to be dealt with like any other country. Originally a beach umbrella, but later a camp of hundreds of people, it provided a dramatic platform from which to demand formal recognition of social justice and land rights claims.

II. 2 Indigenous dispossession and the goal of land rights

Parallel with these legal and constitutional developments, and also starting in the 1960s, was the struggle over the recognition of traditional land rights. The ostensible problem was that most Aboriginal people had been moved off their traditional lands and forcibly relocated to missions or reserves where they had no choice but to sell their labor, usually at a pittance, to retain a livelihood. The underlying issue was however more deeply rooted in the political constitution of the nation. Aboriginal people had not merely been removed, as individuals. Rather, the legal status quo, known as the doctrine of *terra nullius* (empty land) denied indigenous people any right to a legitimate claim to property on the basis of prior or traditional title.

According to this legal fiction, when the British colonized Australia in the late 18th century the land was “unoccupied” (at least as far as property title was concerned). As such, the assumption was that, upon attaining sovereignty, the Crown simultaneously acquired legal title to all land. This meant that at law all the land of the Australian continent (as well as offshore Australian waters) belonged either to the Crown, where it retained its original Crown Title, or to those to whom it had sold or allocated other forms of title according to its own internally valid procedures (leasehold, freehold etc.).¹⁵

Thus, although the land rights movement ran parallel with the efforts to eliminate discrimination and obtain substantive equality, it represented a struggle for a different type of recognition. The aim of the equality movement was recognition as co-citizens,

¹⁵ A challenge to this doctrine was mounted, but rejected by the federal court in *Milirrpum v Nabalco Pty. Ltd.*, (1971) 17 FLR 141.

color-blind treatment - the right to be treated in the same way as everyone else under Australian law. Successful resolution of the land rights struggle, by contrast required recognition of the distinct and separate rights of indigenous peoples – rights deriving from their status as prior land owners and even more radically as prior sovereigns.

Underpinning the land rights movement was a far more comprehensive political position that held that the post-colonial Australian state was legally and morally required to recognize Aboriginal communities as themselves a source or arbiter of rights.¹⁶

Just as the civil rights and feminist movements re-inspired the struggle for equality, so too the decolonization movement bolstered the struggle for distinct recognition. From the mid 1960s Aboriginal people agitated more vigorously for political recognition of their independent political status as indigenous nations (self determination), the legal recognition of their land rights and substantive return of their traditional lands.¹⁷

¹⁶ This point is not an argument against the foundation of natural law theory – that individuals are the source of rights, but rather an argument about the source of sovereignty. According to natural law theory and liberalism, even as one can assert that individuals are the source of rights, it remains necessary to recognize certain political institutions as having the legitimate authority to institutionalize rights and establish a political and legal order. It is this level of rights which is at issue here.

¹⁷ The *Wave Hill* strike is often considered the founding moment of the modern land rights movement. In August 1966, the Gurindji people, working on huge properties in the Northern Territory held by white owners, (the Vestey family) withheld their labor and ensconced themselves in a makeshift village close to the most sacred of their religious sites at Wattie Creek. Initially their action was misinterpreted as being simply a strike against the appalling work conditions of the Aborigines in the cattle industry, but it soon became evident that what they were demanding was recognition of their ownership of the land. In the words of Pincher Manguari: “We want them Vestey mob all go away from here. Wave Hill Aboriginal people bin called Gurindji. We bin here long lime before them Vestey mob. This is our country, all this bin Gurindji country. Wave Hill bin our country. We want this land; we strike for that”, see Frank Hardy, “This Bin Gurindji Country” in Barbara Leach, Paul Hamlyn, (eds.) *The Aborigine Today* 1971.

Aboriginal communities had of course long been keenly aware of the problems which the legal and functional obliteration of their political and land rights posed for them, and political campaigns had been launched, without success, already in the 19th and early 20th centuries.¹⁸ It was, however, only with the election of the progressive Labor Party Government in 1972 that they obtained a partner in mainstream politics, and their claims could move from the periphery to the mainstream political agenda. The federal government officially shifted from a policy of assimilation to one of ‘self-determination’, which, though far from adequate in its execution, did mark a nod of acknowledgement to the political claims of Aboriginal peoples. More substantively, it passed powerful land rights legislation for the Northern Territory, and made a further commitment to national land rights legislation.¹⁹ Absent broad political support, however, and in the face of strong objections from the powerful mining and farming lobbies, further progress on this front was truncated after the initial promise, and the “Aboriginal issue” was once again sidelined from mainstream politics.

¹⁸ The contemporary activism at times harks back poetically to earlier initiatives, largely unknown by most Australians. When, for example, in May 2000, thousands of Australians marched across Sydney Harbor Bridge to mark the Journey of Healing, Patrick Dodson, formerly head of the Council for Reconciliation, suggested that people carry a flower, as had Aboriginal protestors in 1938. They marked the celebration activities for the 150th anniversary of the arrival of the first fleet with their own *Day of Mourning and Protest* by throwing flowers into the sea as a mark of remembrance and respect for the Aboriginal people who had died since colonization, an expression of pain, and a call for recognition. See Patrick Dodson, The Wentworth Lecture, Australian Institute of Aboriginal and Torres Strait Islander Studies, May 14, 2000. For the history of black activism cf. Lowe, D. *Forgotten Rebels: Black Australians who fought back*. St Kilda Permanent Press, 1994; Reynolds, H. *Dispossession: Black Australians and White Invaders* (1989) Allen & Unwin, St Leonards, 1994.

¹⁹ Because the Northern Territory is constituted differently to the states, the Commonwealth retains more power with respect to land title there. The relevant act is the *Land Rights Act (NT)*, 1975.

II. 3 Placing indigenous rights on the national agenda: the Royal Commission

Two major developments in the 1980s pushed Aboriginal issues back onto the national agenda, and did so in a way which insisted that there was an intrinsic connection between the failure to recognize Aboriginal people as co-equal citizens, and the failure to recognize their distinct rights and political status.

First, a small group of Aboriginal families formed the *Deaths in Custody Watch Committee* to draw attention to and provoke action initially in response to the deaths of their own family members, and then more broadly regarding the disproportionate number of Aboriginal people dying in custody.

In response, the federal Government established the *Royal Commission into Aboriginal Deaths In Custody* (RCIADIC) in 1987 to investigate the deaths of those Aboriginal people who had died in police lock ups or prisons since January 1980. The Royal Commission interpreted the apparently narrow terms of reference extremely broadly as the mandate to inquire into how Indigenous people *in particular* came not only to die in custody, but to *be* there in the first place. Its final 5-volume report, accompanied by an additional 5 volumes on the states and territories and 86 volumes on the individual deaths, laid out before Australia (and the international community), for the first time, a comprehensive picture of the historical abuse of the rights of Aboriginal peoples and their contemporary disadvantage on every socio-economic indicator.²⁰

²⁰ The full report is available on line at www.austlii.edu.au/au/special/rsjproject/rsjlibrary/rciadic/

It covered not only the disadvantage suffered in the context of the administration of law, policing and the penitentiary system, but linked this problem with the systematic disadvantage of Aboriginal people, documenting their situation with respect to education, housing, health, employment and infrastructure. Notably, the report documented the fact that of the 99 Aboriginal people whose deaths had been investigated, 43 had been removed as children from their natural families through intervention by the State, mission organizations or other institutions. This fact, and the brief history of the forced removal of Indigenous children that the report provided was noted by some, but largely swallowed within the broader sweep of the report.

Importantly, the Royal Commission contextualized these specific disadvantages within the *political* history of colonization, the policies of integration and assimilation, the non-recognition of land rights, and civil and political inequality and exclusion. It framed them not as discrete acts of discrimination or inequality, but as part of a pattern of non-recognition. Moreover, the Royal Commission argued that the problem was not merely that Aboriginal people had not been recognized as full citizens of the post-colonial Australian state, but more radically that they had not been recognized as sovereign peoples with pre-existing rights. To this end, it recommended not only specific 'welfare' interventions, but also a general shift to greater recognition of Aboriginal peoples' right to self-determination. Of course, it did so only in a limited way, never suggesting that recognition of this right go so far as challenging the legitimacy of the sovereign claims of the state or Australia's territorial integrity. Rather it gestured towards more partial forms of self-determination that could be integrated into a system of universal citizenship.

For a brief time, the report brought the issue of Aboriginal disadvantage, broadly understood, onto the agenda of the press and public policy. All governments (federal and state) provided comprehensive responses outlining the legal and institutional measures they would take to address the report's 339 recommendations.²¹ In the main, these were framed as measures designed to ensure that Aboriginal people could fully enjoy their rights as Australian citizens.

The Commonwealth also made a gesture towards the Royal Commission's stance on the right to self-determination by overhauling the administration of Aboriginal affairs. Most substantively, the major federal government department responsible for indigenous affairs was reformed so as to graft a black elected arm onto what had been a white dominated, largely paternalist bureaucracy. This fell far short of the full-scale recognition of the collective political rights of Aboriginal peoples, allowing for a very safe and integrated form of self-determination.²² Nevertheless, by opening the way for the organizational philosophy and policy priorities to be determined by an independently constituted body of indigenous Commissioners (the Aboriginal and Torres Strait Islander Commission), each elected by and accountable to their regional Aboriginal community, instead of by parliament or bureaucrats, the reform provided institutional recognition of

²¹ For a summary and evaluation of responses, see *Five Years On: Implementation of the Commonwealth Government Responses to the Recommendations of the Royal Commission into Aboriginal Deaths in Custody*, Produced by the Monitoring & Reporting Section Aboriginal and Torres Strait Islander Commission, Commonwealth of Australia 1997, available on line at http://www.atsic.gov.au/issues/law_and_justice/rciadic/five_years_on/Contents.asp

²² There was significant debate about the extent to which the organization actually fulfilled the demand for self-determination, with many Aboriginal organizations highly critical of the Government's claim before the international community that its establishment of ATSIC affected recognition of that right. W. Sanders, "Towards an Indigenous order of Australian government: Rethinking self-determination as Indigenous affairs policy", Center for Aboriginal Economic Policy Research, ANU, Discussion paper No. 230/2002.

the connection between socio-economic inequality and the violation or non-recognition of the distinct political rights of indigenous peoples.

As a result of the Royal Commission, the Commonwealth also established the Council for Aboriginal Reconciliation (discussed above) and the office of an Aboriginal and Torres Strait Islander Social Justice Commissioner - a member of the Human Rights and Equal Opportunity Commission mandated to monitor and report annually on Australia's compliance with international and domestic human rights obligations vis a vis Indigenous Australians and make recommendations towards greater compliance.²³

These measures, and the ongoing work of the three bodies highlighting particular aspects of the situation and concerns of Aboriginal people sustained a degree of public and political attention, and certainly assured that the Aboriginal issue was known domestically and internationally to be the stain on Australia's human rights record. However, to the extent that the Australian public was engaged in the situation of Aboriginal people, the issue was still mainly seen in terms of inequality and the remnants of historical discrimination – both of which would be overcome in time through welfare programs and effective anti-discrimination laws.

This changed suddenly and significantly in 1992 when, in the case of *Eddie Mabo and others v. Queensland* the High Court belatedly recognized that Indigenous Australians

²³ The enabling legislation was the *Human Rights and Equal Opportunity Legislation Amendment Act* (No. 2) 1992. For a full discussion of the powers of the Commissioner see Aboriginal and Torres Strait Islander Social Justice Commissioner, *First Annual Report*, 1993, chapter 5, available at http://www.austlii.edu.au/au/special/rsjproject/rsjlibrary/hreoc/atsisjc_1993/.

retained distinct land rights.²⁴ These rights derived from a *sui generis* form of title known as ‘native title’, which predated and so perhaps partially invalidated the land title system introduced with colonization.

For my purposes, the most important aspect of the *Mabo* decision was that it brought to light not only the systematic failure to recognize the rights of Indigenous Australians, but the political motivation for that failure, and as such exposed the link between non-recognition and the constitution of the nation. It also smoothed the way for people to argue for the link between the failure to recognize the distinct and prior rights of indigenous peoples, the failure to accord them equal citizenship rights and the normative character of the nation.

II. 4 Mabo and the mirror of white Australia

As I noted above, the long campaign to gain recognition of land rights through the executive/legislative branch of the state eventually failed. This motivated a small group of Aboriginal activists, aligned with (Aboriginal and non-Aboriginal) historians, anthropologists and lawyers, to shift their strategy away from the executive to the judicial branch of the Commonwealth, and specifically mount a case before the High Court seeking to over turn the 200 year old common law doctrine of *terra nullius*.

²⁴ *Mabo and Others v. Queensland* (No. 2) (1992) 175 CLR 1 F.C. 92/014. The decision was belated not only in terms of how long it took in the Australian context, but also when compared with other common law jurisdictions. The independent land rights of native Americans had already been recognized in the Marshall decisions in the early 19th century, and in Canada in *Calder v. Attorney General of British Columbia* [1973] S.C.R. 313 in 1973.

Eddie Mabo, a member of the Miriam people (in the Torres Strait Islands off the north east coast of Australia) successfully argued, using a wealth of historical and anthropological evidence, that contrary to myth and legal doctrine, indigenous people did have a distinct form of land ownership prior to colonization. He was also successful in arguing that colonization, while giving the Crown sovereignty over the territory (a political right), did not automatically extinguish native title.²⁵

Finding in favor of the plaintiff in this action, the court ruled more generally that in certain cases, subject to subsequent grants of title, the descendants of the original owners retained a *sui generis* form of title known as *native title*. In the words of the leading judgment: “the Meriam people are entitled as against the whole world to possession, occupation, use and enjoyment of the island of Mer”, excepting where there has been a valid act of extinguishment of that title by the Crown.²⁶

What made the decision so stunning to the Australian public was not only that it opened the possibility for Indigenous groups to make claims on land which had been held by the Crown (and possibly under certain types of leasehold title). It also comprehensively exposed the links between the doctrine of *terra nullius* and the constitution of the Australian nation and correlatively between the ideological underpinning of this doctrine and the denial of the more general citizenship rights of Aboriginal people.

²⁵ Critics of the decision saw this failure to recognize the political dimension of indigenous rights as a legal setback. Indeed, the fact that the Crown’s power to extinguish native title was affirmed by the decision was seen by many as trumping the progress that the decision seemed to represent.

²⁶ Brennan in *Mabo op. cit.* at 97.

The justices showed how the doctrine of *terra nullius* was ideologically justified by the claim that Aboriginal society was so low on the scale of social organization as to have no legal system capable of giving rise to land rights as recognized by the common law.

Justice Brennan, in his lead judgment discussed this nexus between the way Aboriginal people were “seen” and the rights they were accorded in some detail. For example:

“The supposedly barbarian nature of indigenous people provided the common law of England with the justification for denying them their traditional rights and interests in land, as Lord Sumner speaking for the Privy Council said in *Re Southern Rhodesia*.....“The estimation of the rights of aboriginal tribes is always inherently difficult. Some tribes are so low in the scale of social organization that their usages and conceptions of rights and duties are not to be reconciled with the institutions or the legal ideas of civilized society. Such a gulf cannot be bridged. It would be idle to impute to such people some shadow of the rights known to our law and then to transmute it into the substance of transferable rights of property as we know them.”²⁷

This being the case, the Crown’s declaration of universal title did not constitute theft, because there was no *subject* deemed capable of a legitimate form of ownership.²⁸

Classifying Aboriginal people as *un-civilized* then also formed the basis for their exclusion from the reach of the new citizenship regime.

Thus, the normative system underpinning the different forms of non-recognition was continuous - made manifest in all the different types of discrimination, exclusion and inequality detailed above. These various levels of non-recognition rested on and were

²⁷ *Mabo op. cit.* at 58.

²⁸ It was of course this classification that also allowed for the declaration of sovereignty by the British Crown to be classified at colonization rather than war, which would have acknowledged the existence of another sovereign. The court did not however cross into this question of the illegitimacy of sovereignty, but in fact affirmed it.

justified by the general classification of Aboriginal people as incapable of occupying the role of citizen, but not only in the narrow sense of citizen of the new Australian nation, but as citizen qua one who holds rights and has legal and political responsibilities. The anthropological and political characterizations thus folded into and mutually reinforced each other.

The justices' comments made it clear that they understood this decision about property rights within a broader context of national identity and Australia's standing before itself and the world. They referenced and condemned the deeper underpinnings of the doctrine of *terra nullius*, and so threw back onto Australians the responsibility not only for institutional reform but also for confronting their retention of a profoundly discriminatory culture. The judges were explicit in pointing out that this form of recognition was required if Australia was to put behind it its history of racial superiority and discrimination and actively raise itself to the standards concerning racial discrimination which were articulated in the norms of international law. As Justice Brennan set out in his leading judgment:

The fiction by which the rights and interests of indigenous inhabitants in land were treated as non-existent was justified by a policy which has no place in the contemporary law of this country..... Whatever the justification advanced in earlier days for refusing to recognize the rights and interests in land of the indigenous inhabitants of settled colonies, an unjust and discriminatory doctrine of that kind can no longer be accepted. The expectations of the international community accord in this respect with the contemporary values of the Australian people.²⁹

This reflection, especially in the mouth of the highest Court in the land provided the impetus for a far more piercing examination of Australia's history, constitution and

²⁹ *Mabo, ibid.* at 42.

national character. As the Aboriginal and Torres Strait Islander Social Justice

Commissioner described the decision in his first annual “State of the Nation” report:

The deepest significance of the judgment is its potential to hold a mirror to the face of contemporary Australia. In the background is the history of this country. In the foreground is a nation with a choice. There is no possibility to look away. The recognition of native title is not merely a recognition of rights at law. It is a recognition of basic human rights and realities about the origins of this nation: the values which informed its past and the values which will inform its future.³⁰

Understood within this broader context, the decision was not simply a form of legal recognition in itself, but an invitation to contemporary Australia to rearrange its house so as to shift the window through which it viewed the Australian politico-historical landscape and bring into view what had been systematically covered over.

Moreover, because this ‘cult of forgetfulness’, this generalized *terra nullius* had been a condition for the establishment of the post-colonial Australian nation, the decision paved the way for Australians to revise their national self-identity, both ideologically and in the institutions that build and reflect it. Declaring that there had been rights bearing people in Australia prior to colonization, and that they had not relinquished their collective rights upon colonization caused the imaginary map of Australia to erupt. Underneath was revealed a previously suppressed subterranean layer of rights and claims that were now not only demanding attention, but doing so with the stamp of legitimacy from the highest court in the land. The institutional shift both reflected and demanded a shift in the

³⁰ Aboriginal and Torres Strait Islander Social Justice Commissioner, *First Report, 1993*, p. 12. Recent theorists have appropriately problematized this metaphor of history, including newer forms of narrative history as a mirror for the reality of the past “in no way displaced, dimmed or distorted” as Gerard Johann Vossius [De Vos] put it in his 1623 *Ars Historia*. One need not see this as a claim to a true mirror, but perhaps rather a claim to another mirror, a reflection now portraying the excluded image. See Reinhart Koselleck, *Futures Past: On the Semantics of Historical Time*, Keith Tribe, trans. Columbia University Press, 2004, 132ff.

national imagination and in turn in other institutions. In this sense one can locate it as a high point – at the level of formal institutions - in an ongoing conversation about the core norms of the nation, and the relationship between those norms (both as ideals and institutions) and “Australia” as an imagined and institutionalized nation.

The significance was evident to the then Prime Minister, Paul Keating, who used the mantle of his office to sharpen the demand. He delivered his speech for the launch of the International Year of the World’s Indigenous people on December 10, 1992 in Redfern Park, the heart of the Aboriginal ghetto in Sydney. Using the strongest language and the most uncompromising examples of the abusive past, he placed before the nation the unprecedented challenge of looking squarely in the mirror.³¹ The speech merits quoting at length:

This is a fundamental test of our social goals and national will: our ability to say to ourselves and the rest of the world that Australia is a first rate social democracy, that we are what we should be- truly the land of the fair go and the better chance.

It is a test of our self-knowledge

Of how well we know the land we live in. How well we recognise the fact that, complex as our contemporary identity is, it cannot be separated from Aboriginal Australia. How well we know our history..... How well we know what -Aboriginal Australians know about Australia.

And, as I say, the starting point might be to recognize that the problem starts with us non-Aboriginal Australians.

It begins, I think, with the act of recognition. Recognition that it was we who did the dispossessing. We took the traditional lands and smashed the traditional way of life. We brought the disasters. The alcohol. We committed the murders. We took the children from their mothers. We practiced discrimination and exclusion.

It was our ignorance and our prejudice. And our failure to imagine these things being done to us. With some noble exceptions, we failed to make

³¹ Keating’s speechwriter, Don Watson, is a famous left wing historian. Below I will discuss the subsequent ‘history wars’ which ensued.

the most basic human response and enter into their hearts and minds. We failed to ask - how would I feel if this were done to me? As a consequence, we failed to see that what we were doing degraded all of us.³²

Keating's framing of the issue represented a remarkable act of recognition and assumption of responsibility. In terms of form, it also represented a bold willingness to speak on behalf of the national collective. His employment of the subject 'we Australians' went well beyond the institution of the State and reached very personally to the Australian people – appealing to them in a very personal way to reexamine their relationship with the past and to accept a continuity between violations in the nation's history and their contemporary identity.

Although the official apology debate only began after the issue of the removal of Aboriginal Children came on the national agenda, in a sense it was Keating's speech that was the real and first apology. It was Keating who named the wrongdoing, took responsibility for it and expressed national shame. And it was Keating's speech that did what I have claimed an apology can do – it forced a national normative reorientation.³³

As will become evident when I move forward a decade to discuss the position which the next Prime Minister (John Howard) took on Aboriginal rights claims, Keating's position was exceptional, both formally (in his use of the collective subject) and substantively.

³² The speech has become known as "The Redfern Address". It is available at <http://apology.west.net.au/redfern.html>

³³ In chapter 6, where I look at the necessary conditions for a successful apology, it will become evident how far Keating's speech went in this regard.

Even at the time it was evident that Australians were deeply divided on the issue of the rights of Aboriginal people and their responsibility for past violations. During the period when the federal parliament was debating legislation to codify the common law established by the court in *Mabo*, the National Farmers' Federation and the mining lobby sponsored campaigns designed to convince non-Aboriginal Australians that it was white Australia which was at risk of an Aboriginal takeover, with the High Court leading the charge by placing in jeopardy ordinary Australians' family homes, the local beach and the nation's economic viability.

What, from the point of view of Aboriginal people and also the Prime Minister had been an opportunity for fuller recognition, was, from the point of view of many Australians a threat to the nation as they knew it, and to their own national identity. That only part of the Australian population endorsed Keating's position became all too obvious when he lost office in the next election. Nevertheless, his performative demand, his act of recognition forced Australia to come face to face with this normative conflict.

This heightened sense of threat was no doubt a backlash, because effectively, *Mabo* and the positive response from the Keating government had raised the stakes considerably. Certainly, earlier work such as the RCIADIC had located the violation of the citizenship rights of Indigenous peoples within the framework of self-determination, and had called into question Australia's self identity as a human rights respecting nation. The intuitional implementation of the report's recommendations had however at most supplemented the state's institutions by giving Indigenous communities a limited capacity for autonomous

decision making – one which in no way touched the core institutions of the nation itself. The legal recognition of native title by contrast reached down both into the material base of the nation and to its political legitimacy. While the immediate issue was reparation of the rights of Aboriginal peoples, the problem had now shifted to the legitimacy of non-Aboriginal institutions and the ‘white Australian’ nation.

It was in this context that the issue of the forced removal of Indigenous children from their families and the apology entered the public sphere.

III. Bringing violation into the family: the removal of Aboriginal children

In the mid-1990s, the status and rights of indigenous Australians held an ambiguous status in the national imagination. On the one hand, the repeated recitation by both government and non-government organizations of the systematic and politically based violation of Indigenous rights by the state itself left white Australia with no option than to see its part in the drama of recognition. On the other, many non-indigenous Australians now identified land rights as the main concern for Aboriginal people and technical/legal measures as the main mechanism for resolving the land rights problem. Consequently they saw the resolution as remote from their lives or identity.

When the forced removal of Indigenous children hit the public stage, the effect was measurably different. Here was a story of children, many of whom were the contemporaries of the politically active public (in their 30s and over), who had clearly done nothing other than be born to an Aboriginal mother, but who had suffered horrors

which anyone could relate to in a very personal way. Perhaps even more staggering was the national silence that had accompanied the practice, and the complicity this implied.³⁴ Both the practice of removal itself and this national silence forced Australians to think about how the whole nation, or the nation's political culture was implicated in the perpetuation of such gross human rights violations.

In 1997, the Human Rights and Equal Opportunity Commission released a nearly 700-page report telling the story of removal in graphic detail, and laced with personal testimonies.³⁵ Over the course of a little under two years, the Commission had examined documentary evidence and taken written and oral submissions from Government departments, non-government agencies (principally churches), expert witnesses and most importantly hundreds of Aboriginal people who had themselves been removed or had been directly effected by removal.³⁶

³⁴ Although during the 1980s there had been some academic studies investigating the phenomenon of Aboriginal child removal, and a brief mention of the issue in the RCIADIC, the Australian public remained almost completely unaware of this part of its history until the release of *Bringing them Home*.

³⁵ Following intense lobbying by Aboriginal groups, in 1995 the Attorney General referred a National Inquiry into the issue of Aboriginal child removal to the Human Rights and Equal Opportunity Commission. The terms of reference were: (1) to trace the past laws and practices and their effects; (2) examine the adequacy of and the need for any changes in current laws, practices and policies relating to services and procedures available now to those affected by removal; (3) examine the principles relevant to determining the justification for compensation for persons or communities affected by removal, and finally; (4) to examine current laws, practices and policies concerning the placement and care of indigenous children today.

³⁶ The Commission established the Inquiry in 1996, calling for written submissions and establishing public hearings across the country. Oral and written evidence was taken from organizations and individuals, State and Territory Governments, churches and other non-government agency representatives and former mission and government employees. Confidential evidence was taken in private from Indigenous people affected by forcible removal and from adoptive and foster parents. The Inquiry took evidence from 535 Indigenous people around the country affected by removal. Significantly not a single mother whose child had been removed came forward to give evidence.

Part of what lent the report its particular power was the way in which this text, the official report of the Australian Commonwealth, built its vision of history and its policy arguments up from the first person testimonies of Aboriginal people. Each section of the report is suffused with the voices of Aboriginal people telling the very stories that had been excluded from the official story of the Australian nation and most importantly telling them with their own voices – the voices that had not qualified as legitimate *subjects* (as distinct from objects) of history. In this way, the report already began to perform the inclusive vision that it would call for.

When the report was released amidst a storm of media activity, Australians learned that between about 1910 to 1970, between 1 in 3 and 1 in 10 and Aboriginal children had been taken under the sanction of the state, against their will and against the will of their families (usually their black mother), in most cases never to see their families again.³⁷ They also read or heard, for the first time, Aboriginal people speaking under the banner and with the sanction of the state about the very violations the state had inflicted against them.

Until the late 1930s, ‘protectionist legislation’ gave the ‘Chief Protector of Aborigines’ or the Protection Board in every state virtual total control over Aboriginal people, including the legal guardianship of children. Aboriginal people, unlike their white counterparts, did not enjoy the protection of the ‘private sphere’ of family. This meant that Aboriginal children could be, and were commonly removed from their families without need to show cause, and with no legal recourse.

³⁷ All details here are drawn from *Bringing them Home*, The Report of the Human Rights and Equal Opportunity Commission’s National Inquiry into the Forced Removal of Aboriginal and Torres Strait Islander Children from their Families, Commonwealth of Australia, 1997.

From around 1940, Aboriginal children were placed under general welfare legislation, which formally required welfare officers to show that a child was either neglected or uncontrollable in order to legally remove them. This presented few impediments, however, as poverty and the life style of many Aboriginal communities were held to be synonymous with neglect by welfare departments and the courts alike. In any case, the requirement of proof was often moot, as Aboriginal people were denied access to due process, both directly because of discriminatory exclusion from the courts and legal processes and indirectly through the de facto barriers of poverty, distance, language and lack of knowledge about the legal system.

Aboriginal parents who attempted to make inquiries about their children were denied access to all information, and communication which they sent, intended for their children, was not passed on but held in welfare departments until children came of age and were released from their status as wards of the state. In one particularly poignant testimony, a young Aboriginal man born in 1964 tells of the day when, at age 18, he was given his very thick file, including letters never passed on from his mother pleading for his return and information about him, as well as birthday cards for every year and photos.³⁸

Once taken from their families and communities, children were placed in institutions run by the state or by churches, in foster homes or were adopted by white families. In many cases, arrangements were made to ensure that they were sent as far as practicable from their home community, sometimes several thousand miles across the country. More than

³⁸ *Bringing Them Home, op. cit.* p. 68ff.

half of those who gave evidence to the Inquiry had experienced multiple placements. Many told stories of being repeatedly fostered or adopted, and each time returned to the institution because the white family was not satisfied, or because of the problems they had in adjusting.

Many of those who gave evidence to the inquiry recalled living under extremely harsh conditions, often poorly fed, clothed and with minimal education - sufficient only to equip them for menial work within the government or mission communities or to prepare them as cheap labor in the wider community where most were sent to work from a very early age.³⁹ Their wages - save a small amount of pocket money- were handed over to the Protection Board, putatively to be given to them when they came of age. Here, as elsewhere in the administration of Aboriginal affairs however, it appears that fraud was an institutionalized practice and the wages were rarely properly distributed.⁴⁰ Many

³⁹ “Young men and women constantly ran away (this was in breach of the *Aborigines Act*). Not only were they separated from their families and relatives, but they were regimented and locked up like caged animals, locked in their dormitory after supper for the night. They were given severe punishments, including solitary confinements for minor misdeeds”, Choo, Christine, *Black Must go White: The Removal of part-Aboriginal Children from their families - an exploration of the policy and practice of A O Neville, Chief protector of Aborigines 1915-1940* University of WA. M. Phil thesis, 1989 p. 46; “There was no food, nothing. We was all huddled up in a room ... like a little puppy-dog ... on the floor ... Sometimes at night time we'd cry with hunger, no food ... We had to scrounge in the town dump, eating old bread, smashing tomato sauce bottles, licking them. Half of the time the food we got was from the rubbish dump.” Confidential evidence 549, Northern Territory: man removed to Kahlin Compound at 3 years in the 1930s; subsequently placed at The Bungalow, cited in *Bringing them Home, op. cit.* p. 159.

⁴⁰ Paternalistic legislative schemes in various states prevented wages going directly to Aboriginal people right up to the latter part of the 20th century. The Human Rights and Equal Opportunity Commission, for example, found that the Queensland government had failed to provide equal pay for sugar plantation workers on Palm Island, and had misappropriated funds in its trust accounts. Subject to the *Racial Discrimination Act* (1975), the HREOC ordered it to pay compensation for the continuation of this practice after 1975. cf. Bob Ellis “Queensland Aboriginal Cultural Policy”, *Culture and Policy*, Volume 5, no. 1, 1993, available on-line at http://www.gu.edu.au/centre/cmp/5_08_Ellis.html

allege physical as well as sexual abuse, both in institutions (state and church) and in foster homes.⁴¹

Condemnable as these abuses are, what marked the experience of indigenous children out from that of other children who were institutionalized and similarly mistreated during this period was the particular denigration and annihilation of identity which they uniquely suffered.⁴² Certainly the damages inflicted and the injuries sustained included physical neglect and abuse, the failure to provide a decent standard of education or care, and sexual abuse in some cases. These classes of violation map well onto Honneth's first category of non-recognition or violation of the bodily integrity of the individual and the corresponding damage at the level of the person's basic self-confidence.⁴³

The heart of the specific damage however coincides with the basis for the practice - the denigration and destruction of Aboriginality. This corresponds with Honneth's second and third levels of recognition. From the point of view of the state, Aboriginality was a

⁴¹ I use the term allege because the claims were made as part of HREOC's administrative process and have not been subject to a judicial scrutiny. Almost one in ten boys and just over one in ten girls allege they were sexually abused in a children's institution. One in ten boys and three in ten girls allege they were sexually abused in a foster placement or placements. One in ten girls allege they were sexually abused in a work placement organized by the Protection Board or institution. By 1940 the NSW Board's record with respect to Aboriginal girls placed in service was well known and even condemned in Parliament. *Bringing them Home op. cit.* pp. 162-165.

⁴² Recent work on the experience of British child migrants sent to Australia in the 30s to 50s indicates similar patterns of abuse and harsh treatment. See Margaret Humphreys, *Empty Cradles*, Doubleday, 1994.

⁴³ This analysis is also be consistent with the finding that many of the people who were removed and abused experience substance abuse and other forms of physical and psychological self harm and adults.

racial anachronism and impediment to be eradicated; from the point of view of the individuals who were removed, it was their identity- even *them*.⁴⁴

It is at this point that one can locate the all-important nexus between the particular violations experienced by the children and communities affected, the broad policy objectives of the state and the political culture in which those policies emerged.

IV. Child removal, assimilation and the personal politics of colonization

1 The native and the construction of civic or civilized Australia

In the late 19th and early 20th centuries, under the sway of social Darwinism, the generally held belief in Australia was that Aboriginal people were not only an inferior, but also a dying race.⁴⁵ Initially, it was thought (and hoped) that the ‘black blood’ would simply become redundant as ‘pure blacks’ died out, and ‘half-castes’ merged into white society, overtaken by the stronger influence of the ‘white blood’.⁴⁶ This being the case, little was required in the way of direct racial intervention.

⁴⁴ I do not mean here that Aboriginality *is* the primary identity, in an essential sense. On the contrary, it was the fact that race (Aboriginality) was such a central term in the grammar of identity construction in Australian society and law that it was central in their experience and sense of self.

⁴⁵ For example: “The Australian nigger is the lowest type of human creature about....But having one splendid point in which he is far ahead of the chinkie. He'll die out and the Chinkie won't”, Inson, G. & Ward, R., "The Glorious Years", in *Boomerang*, 17 December 1887; A wealth of quotes reflecting the derogatory views of Aboriginal peoples can be found in Michael Dodson, “The End in the Beginning: Re(de)finding Aboriginality”, *op. cit.*

⁴⁶ “There is no biological reason for the rejection of people with a dilute strain of Aboriginal blood. A low percentage will not introduce any aberrant characteristics and there need be no fear of reversions to the dark Aboriginal type”, Norman B. Tindale, “Survey of the Half-Caste Problem in South Australia” from the *Proceedings of the Royal Geographical Society of Australasia*, Vol. XLII, Session 1940-41, p.67.

The early part of the 20th century, however, saw the emergence of a fear that the black would not be absorbed into the white after all, but the white into the black.⁴⁷ As I will take up at the end of this chapter, this metaphor of absorption, and the question of which way the color ‘leaks’ would again become prominent in contemporary debates over the cultural implications of reconciliation.

The existence of Aboriginal people in their “pure” state was not what most concerned white Australians, but rather the threat of hybridity - a threat to the very distinction between the civilized (white) and the savage (black). Provided that Aboriginal people could be held remote, both physically (by being kept on reserves) and in the ideation of national identity, they were relatively harmless. The existence of the “half-caste” or “mixed-blood” however called into question the all important boundary which reassured white Australians, themselves so far removed from England – the imagined heart of civilization - that they were indeed civilized, and proven to be so by their unassailable difference from the ‘native’.⁴⁸

This rising tide of concern, combined with the growth of the welfare movement and ideas about social engineering in the early part of the century led to a more aggressive policy

⁴⁷ In 1936 Cecil Cook, the Chief Protector in the Northern Territory, wrote: “My view is that unless the black population is speedily absorbed into the white, the process will soon be reversed, and in 50 years, or a little later, the white population of the Northern Territory will be absorbed into the black”, Commonwealth of Australia, *Aboriginal Welfare: Initial Conference of Commonwealth and State Aboriginal Authorities*. Canberra: Government Printer, 1937, p. 14.

⁴⁸ “Many of such children are so white that, were it not for their presence in camps or in association with blacks, the average individual would characterize them as practically normal. Beneath the skin, however, the taint is more marked, and it is in the correction of degenerate traits and the eradication of demoralised habits that the work of the expert psychologist and educationalist lies...’ extract from the Annual Report of the State Children Relief Board in 1915, *New South Wales Parliamentary Papers* 1915/16, Vol. 1: 851-933 at 880.

approach requiring active intervention on the part of white institutions so as to ensure the proper assimilation of “half-castes”.⁴⁹ This position was clearly articulated as national policy at the first Commonwealth and State Native Welfare Conference in 1937, where it was observed that:

Anybody who knows anything about these groups cannot deny that their members are socially and culturally deprived. What has to be recognized is that the integration of these groups differs in no way from that of the highly integrated groups of economically depressed Europeans found in the slums of any city and in certain rural areas of New South Wales. In other words, these groups are just like groups of poor whites. The policy for them must be one of welfare. Improve their lot so that they can take their place economically and socially in the general community and not merely around the periphery. Once this is done, the break-up of such groups will be rapid.⁵⁰

Translating this into national policy, it was resolved that:

... [T]his conference believes that the destiny of the natives of aboriginal origin, but not of the full blood, lies in their ultimate absorption by the people of the Commonwealth, and it therefore recommends that all efforts be directed to that end.⁵¹

These views and their concomitant policy implications make it clear that non-Indigenous Australia saw nothing of value for its own political identity in the culture of Australia's

⁴⁹ The most influential figure here was Mr. A O Neville, the chief protector (of Aborigines) in Western Australia and the man perhaps most responsible for refining the policy dimension of assimilation. His views are well represented in a 1937 article from the Brisbane *Telegraph*: “Mr Neville [the Chief Protector of WA] holds the view that within one hundred years the pure black will be extinct. But the half-caste problem was increasing every year. Therefore their idea was to keep the pure blacks segregated and absorb the half-castes into the white population. Sixty years ago, he said, there were over 60,000 full-blooded natives in Western Australia. Today there are only 20,000. In time there would be none. Perhaps it would take one hundred years, perhaps longer, but the race was dying. The pure blooded Aboriginal was not a quick breeder. On the other hand the half-caste was. In Western Australia there were half-caste families of twenty and upwards. That showed the magnitude of the problem.” Quoted in Toni Buti, “They took the Children Away”, *Aboriginal Law bulletin*, Vol.3, number 72, p. 35.

⁵⁰ From the first Commonwealth-State Native Welfare conference, 1937, quoted in Bell, James, H., ‘Assimilation in NSW’, in Marie Reay, (ed.) *New Perspectives in the Study of Aboriginal Communities*, London: Angus and Robertson, 1964, p. 68. The attention to Aboriginal people as a group is notable in this quote.

⁵¹ *Bringing Them home*, op. cit. p. 32.

indigenous people.⁵² Their placement on the national map was limited to the field of anthropology, ancient history and later tourism.

Even more importantly in terms of my analysis of the normative values of the nation, the policy regarding indigenous people and citizenship reflected the complex and contradictory version of liberal philosophy that the Australian state embodied. On the one hand, Australia had been committed to universal (male) suffrage and political equality since federation. Yet the criteria for being a subject of rights included thick identity markers – most notably race. And this was not just any racial divide, but one which drew a line between those who had come to Australia and those who were descended from the ‘race’ which had occupied pre-colonial Australia with their own forms of political and social organization.⁵³ The theory of race that infused the institution of the new citizenship justified the extinguishment of the pre-existing sovereignty and the political order that had organized the distribution of rights.

What one sees here is the disparity between an ideal or a-historical norm and an actual institutionalized norm, as explored in my discussion of Hegel in chapter 2 and the work of *teshuvah* in chapter 3. The ideal norm here is one of equality of right or of equal human dignity. The actual norm as embodied in Australia’s historical institutions was one in which the distribution of rights or the recognition of inherent dignity was filtered

⁵² Hasluck described them variously as “‘thousands of degraded and depressed people who crouch on rubbish heaps throughout the whole of this continent” Hasluck, P. *Native Welfare in Australia: Speeches and Addresses*. Perth: Paterson Brokenshaw, 1953: 9 and as a “primitive social order” characterized by “ritual murders, infanticide, ceremonial wife exchange, polygamy”, Hasluck “Policy of Assimilation”, *National Archives of Australia*, NTAC 1956/137, 2.

⁵³ Thus, while there was a great deal of discrimination against other non-whites, notably Chinese who had come for the gold rush, this was not never built into systematic policy in the way it was with indigenous Australians.

through the lens of race. The apparent normative commitment was negated by the actual institutionalization of the systematically unequal distribution of rights and citizenship.

Moreover, as I argued in chapter 2, this failure to universalize rights is not incidental, but flows directly from the construction of the particular identity of the political community. Honneth's insistence that we understand recognition not only in private 'personal' terms but also in terms of the institutional structures which embody and structure social attitudes is particularly useful in analytically unpacking what is going on here. First, the disrespect shown to Aboriginal people was not simply a collection of ad hoc interpersonal interactions, but was patterned and enforced through laws and institutions of degradation and exclusion.

Second, these patterns of disrespect were organized around a conception of racial difference - or more accurately racial hierarchy, which was itself a key component of the self-conception and constitution of the Australian nation. As came though in the analysis of *terra nullius*, this was not merely a morally or aesthetically based racism, but racism with a strong *political* dimension. An ideology that deemed Aboriginal people by definition incapable of partaking in the sphere of rights justified the imposition of British sovereignty without negotiation, accommodation or political recognition. Had Aboriginal peoples been deemed equally human (and thus potential rights holders), the question of their original political rights would have demanded an answer. And this inquiry, calling into question the very legitimacy of the nation, was taboo.

What one sees here then is an instance of the disparity between the ideal principle and its historical instantiation: the historical institution of citizenship or the historical interpretation of the norm of political equality was thus inconsistent with the ideal normative commitment to equality. Moreover, this disparity was not some type of mistake, or aberrant moment, but was built into the constitution of the post-colonial nation. The degradation of Aboriginality was built into the constitution of Australia (socially and politically), even as it contradicted an ideal normative commitment to Australia being a nation characterized by freedom and equality.

In turn, it is this contradiction, or rather the confrontation with this contradiction that would provide the opportunity to revise the historical institution of the norm, and with it the political identity of the nation. For this to happen, however, the point of view of the other had to be admitted into political discourse. Thus, political non-recognition safeguarded itself by the discursive exclusion of Aboriginal people. Excluding their point of view from the national political debate ensured that Australians were quarantined from the disparity between their ideal self-image and their actual constitution. So long as this perspective from the other side was systematically invalidated, and white Australians were only speaking amongst themselves, they were safe in believing that their constitutional norms, their understanding of the moral basis of their nation coincided with a universal or untainted justice.⁵⁴

⁵⁴ This resonates with my discussion of the need for the wronged other in order to move closer to a universal understanding in chapters 2 and 3. I will also take this up in relation to Arendt's theory of the link between plurality and morality in chapter 6.

This other point of view could also come from the outside, as it had so strongly in the South African case, where the international community pressed the other point of view onto the Apartheid regime. In the Australian case, however, as in so many others, the national story is no more visible, no more interesting, or perhaps no more convenient to the international community than it is to the national community, and often for the same reasons of systematic exclusion of certain politically destabilizing perspectives.⁵⁵

The key point here is that the source of the wrong is located at a pre-legal, constitutional level, one that is omitted in the standard liberal paradigm of justice. Such an analysis, confined to the recognition or non-recognition of the rights of individuals, omits the dimension of political power and the collective recognition this history displays. In the Australian case, the ideal norm of liberal equality, where individuals are identified as the source of natural rights (which are then recognized by the state) was already pasted over the Australian state's failure to recognize Aboriginal political orders. In fact, this prior non-recognition was a necessary condition for the new Australian state's being able to claim for itself the sovereign right to define the criteria of legal rights and to recognize rights. The whole liberal rhetoric of the individual then renders invisible the higher order decision about which political order occupies this sovereign position.

⁵⁵ Aboriginal Australians like indigenous peoples throughout the world had for example long been lobbying at the international level since early in the 20th century, to very little effect until the late 20th century when the UN took up the violation of indigenous peoples. In 1923, Haudenosaunee Chief Deskaheh travelled to Geneva to speak to the League of Nations and defend the right of his people to live under their own laws, on the own land and under their own faith. He was not allowed to speak and returned home in 1924. This international silence on post-colonial violation reflects the interests of the states represented at the UN.

Here one can see the dynamic between individual and collective rights. The alleged (anthropological) inferiority of Aboriginal social organization, argued in part on the basis of incompetence of individual Aboriginal people to support a civilized polity justified the failure to recognize the collective political right of the prior Aboriginal sovereigns. This same conception of Aboriginal people lacking the requisite qualities to qualify as citizens was then the basis for the failure to accord them the rights owing to individual Australian citizens.

Moreover, here one sees very clearly the movement between an abstract conception of societal non-recognition (structured around an identity based distinction) and the institutionalization of non-recognition. What I have identified as a politically motivated racism was realized through practical implementation.⁵⁶

The concrete institutionalization took the form of assimilationist policies that would effectively annul or expel all that was distinct about Aboriginal culture. Assimilation by no means implied a meeting of cultures, but quite vehemently meant becoming white.⁵⁷ This was not merely non-recognition, but institutionalized denigration of all Aboriginal people on the basis of their Aboriginality. Only to the extent that they could be purified of this backward strain (carried in their black blood) would they be able to enter the

⁵⁶ Here one sees clearly the process Castoriadis was talking about when he discussed the movement from frames of meaning to social institution. Importantly, this should not imply that the ideal exists and is then embodied – rather it exists through its embodiment.

⁵⁷ This was expressed unambiguously by Paul Hasluck, the federal Minister for Territories from 1951 and architect of assimilation policy: “Assimilation means, in practical terms, that, in the course of time, it is expected that all persons of aboriginal blood or mixed blood in Australia will live like other white Australians do.” Paul Hasluck, *Native Welfare in Australia*, Perth: Paterson, Brokenshaw, 1953, p. 16.

social and political order of the state. Moreover, on this view to do so represented an opportunity to partake in the elevated cultural achievement of European civilization—albeit in its imported form, thereby reaffirming the legitimacy of its claim to cultural and political superiority and sovereignty.⁵⁸

Of the various measures taken to affect assimilation, including tight control over Aboriginal people's movement, surveillance of their life styles, and tying the provision of basic goods and services to conformity with “appropriate” standards of cleanliness, housekeeping and so on, it was the removal of Aboriginal children and their relocation in white society which was thought to be most effective.⁵⁹

IV. 2 From policies to bodies; politics through bodies

Linking this back to my analysis of the injury itself, one can now see how it is that the heart of the injury lay here, at the level of the damage to social identity. Because assimilation and the destruction of culturally and politically viable Aboriginal societies

⁵⁸ Paul Hasluck, Minister of the territories told federal parliament in 1950 that “Their future lies in association with us, and they must either associate with us on standards that will give them full opportunity to live worthily and happily or be reduced to the social status of pariahs and outcasts living without a firm place in the community”; and further: “We recognise now that the noble savage can benefit from measures taken to improve his health and his nutrition, to teach him better cultivation, and to lead him in civilised ways of life”, Hasluck, P. (1953) *op. cit.* p. 6 and 17.

⁵⁹ As van Krieken argues, this policy built on “a particular social technology in place to deal with problems of social discipline among the degenerate convicts and working classes.....The concept of 'rescuing the rising generation' had been central to European church and state agencies' policies in relation to the children of the poor and the working class since the sixteenth century, and was a central element of the modern State's conception of the intersection of family life and liberal citizenship. The removal of Aboriginal children thus drew on pre-existing philosophies, policies and institutional practices concerning unacceptable, 'problem' groups in all the Western European countries and their colonies”, Robert van Krieken, “The 'stolen generations' and cultural genocide: the forced removal of Australian Indigenous children from their families and its implications for the sociology of childhood”, *Childhood*, 6 (3) August, 1999.

was the ultimate motivation of removing children, the transmission of culture and the work of sustaining social bonds were the primary media through which the policy operated. Once placed, Aboriginal children were denied all contact with their original family, all knowledge about their Aboriginal identity or where they came from, and were forbidden to speak their own languages:

“Y'know, I can remember we used to just talk lingo. [In the Home] they used to tell us not to talk that language, that it's devil's language. And they'd wash our mouths with soap. We sorta had to sit down with Bible language all the time. So it sorta wiped out all our language that we knew.”⁶⁰

Aboriginal people and culture were held up as objects of condescension, fear and ridicule, so that children's internalized images of their own Aboriginal identity was a source of contempt and shame. Most were never told directly that they were of Aboriginal descent or were instructed to conceal their Aboriginality by assuming some more 'palatable' ethnic identity (southern European was popular) to explain their darker skin. At the same time, the image of the dirty, inferior black was held over them as an object of fear and threat, ready to drag them into backwardness should they not conform with the behavioral demands of their educators:

“I got told my Aboriginality when I got whipped and they'd say, 'You Abo, you nigger'. That was the only time I got told my Aboriginality.”⁶¹

⁶⁰ Confidential evidence 170, South Australia: woman taken from her parents with her 3 sisters when the family, who worked and resided on a pastoral station, came into town to collect stores; placed at Umewarra Mission., *ibid* p. 154.

⁶¹ Confidential evidence 139, Victoria: removed 1967. *ibid*. p.157. Your family don't care about you anymore, they wouldn't have given you away. They don't love you. All they are, are just dirty, drunken blacks.' You heard this daily ... When I come out of the home and come to Redfern here looking for the girls, you see a Koori bloke coming towards you, you cross the street, you run for your life, you're terrified. Confidential evidence 8, New South Wales: woman removed to Cootamundra Girls' Home in the 1940s. *ibid*. p. 156.

In this sense, no inventory of the discrete damages sustained by the insult to and loss of identity tells the whole story. Certainly there were specific losses such as language, cultural knowledge and experience, access to land and now potentially to native title rights. But Aboriginal identity cannot be reduced to a sum of these components because it is embodied in concrete persons - and so (as Honneth and Mead agreed) the damage is inflicted at the level of the person's sense of self. Again, however, this is not a private sense of self, but a socially located one, and as such one can also locate the damage at the level of social relationship or social meaning.

An expert witness psychiatrist, giving evidence to the *Royal Commission Into Aboriginal Deaths in Custody* pinpointed this identity issue as the core of the damage to individual indigenous people who had been removed:

The most profound effect of institutionalization, which overrides other well-documented effects of institutionalization generally, was the persistent attempt by authorities to force the boys to identify as European..... One was positive reinforcement of the European model, the other was a negative portrayal of Aboriginality combined with a withholding from the boys of any particular knowledge of their immediate family or of Aborigines generally.⁶²

Even this portrayal does not fully capture the extent of the abuse or the injury. To achieve this one must widen the frame to take in its pervasiveness as a national policy applied across Aboriginal communities, and focused on the denigration and annihilation of *Aboriginality per se*. Each individual who was removed *as an Aboriginal person* from their family, community and their own identity became the nexus for the different dimensions of this eradication. The aim was to cleanse the Australian social landscape of

⁶² *Royal Commission Into Aboriginal Deaths in Custody, op. cit*, National Report Vol.2, p. 76.

a “type” - but this could only be done through its embodiment in particular individuals. Thus individual Aboriginal people became the site of specific and general annihilation. They were literally placed in an impossible situation - having to be both that which should be eradicated, and not to be it. Understood within this context, their classification as “half-castes” was less a biological category than a reflection of a racism that needed bodies on which do its work of racial progress.

In the debate which ensued after the report was released, one of the main comebacks from people seeking to defend the policy was that many of the children who had been removed received economic, educational and social opportunities which they would never have received had they remained with their Aboriginal mothers in remote and deprived communities. High profile Aboriginal leaders and professionals who had revealed their own story of removal were held up as paragons of the benefits of removal. Yet, as these so-called ‘successful examples’ themselves pointed out, the fact that they had managed to score significant achievements in the non-indigenous world misses the essential point which the report sought to make – that the practice of removal represented the contempt in which non-indigenous Australia held indigenous people. Moreover, the very idea that their success depended on their leaving behind their Aboriginal identity was just further evidence of the structural racism built into the system of citizenship rights.

Finally, because the practice of removal was so deeply entwined with the normative constitution of the Australian nation, it was not only Aboriginal people who it damaged,

but (perhaps ironically) the nation itself, or at least the ideal nation. For removal betrayed the disparity between its actual and ideal norms about how humans ought to be treated, and was thus testament to the failure of historical Australia to realize 'ideal' Australia.

So long as the disparity between the treatment of Aboriginal people and the national norms of equality and fairness was latent, or was tolerable because of the assumed equivalence between civilized humanity and whiteness, Australians did not experience it as a fault in the nation. But when the legitimacy of this equivalence was made apparent and challenged, not by the introduction of new information, but by the inclusion of new legitimized speakers, it became evident that 'Australia', as an ideal political community founded on the principle of equality, had also been injured by its own history. Suddenly, the other, speaking from the other side of the violation, had a legitimate voice – a voice that was also an Australian voice. It was this sentiment that the Governor General Sir William Deane was expressing when he said that:

“...[A]ll our citizens are entitled to expect and demand that the mutual respect and tolerance which are of its essence should be encouraged and, in some circumstances, protected. The reason why that is so is that to undermine that mutual respect or to defy or deny that tolerance within our land is to defy or to deny the very basis of our Australian nation..... “to hurt or diminish any of us is to hurt or diminish us all”⁶³

⁶³ Sir William Deane, *Australia Day 1997 Address*, available at <http://www.gg.gov.au/speeches/textonly/speeches/1997/970126.html>

Linking this with the project of the present, he made a similar connection between the specific attention to indigenous disadvantage and the health of the nation: “until true reconciliation with its indigenous peoples is reached, Australia is a diminished nation”.⁶⁴

Accordingly, when the Commission came to think through mechanisms for redress, it had to identify forms of justice which would address not only those forms of injury which could be conceptualized along more traditional lines (separation from family, physical and emotional abuse, loss of educational opportunities), but also the violation of and damage to identity – including the identity of the nation - and thus its normative constitution. This demanded that the institutions and conceptions of justice go beyond traditional notions of victim and perpetrator, because now the perpetrator was both perpetrator, and the victim of their own violation.⁶⁵ This also raised the question of who should rightfully be held responsible for this damage.

Already the form of the report, the emphasis on weaving Aboriginal memory and voice into the official history indicated a possible answer to these questions. If one understood the problem not only in terms of discrete acts of wrongdoing, but rather in discursive terms, as the foreclosure of certain voices, then the solution required a discursive intervention – recognition through new forms of address.

⁶⁴ Sir William Deane, The Inaugural Lingiari Lecture, Darwin, August 1996, available at <http://www.austlii.edu.au/au/other/IndigLRes/1996/2/index.html>

⁶⁵ The religious resonance is powerful here – the notion that the sinner is damaged by the sin. Recall the parable of the Prodigal son, where the movement away from the father deprived the son of the ground of his own being.

V. Reparative justice and the idea of the apology

1. Van Boven's categories of reparation

Methodologically, the National Inquiry looked for the answer to questions about how best to respond to the history of removal in the conversations it conducted with witnesses, in the submissions it received, and more broadly with reference to international practice and standards for responding to human rights violations. To this end, it conducted a detailed study of international law and practice with respect to compensation and reparations for gross violations of human rights.⁶⁶

Drawing on these sources, the Commission framed justice in terms of the goal of restoring the status quo ante- or repairing the damage done by the wrongful act. From this basic orientation it then set about to conceptualize and institutionalize reparatory justice in this context. In making this move it located itself broadly within the increasingly popular restorative or reparatory justice approach, as distinct from the more traditional criminal justice model.⁶⁷ In fact, this was not simply the outcome of its abstract analysis of the situation and subsequent conclusion about the best way to proceed, but was also imposed by the institutional constraints arising from the constitution and timing of the

⁶⁶ A version of the report commissioned by the Inquiry is published as Pritchard, S., "The Stolen Generations and Reparations" (1997) 4:3 *UNSW Law Journal Forum* 28. See also Buti, Toni and Parkes, Melissa, "International Law Obligations to provide reparations for human rights violations", *Murdoch University Electronic Journal of Law*, Vol 6, No 4, December, 1999.

⁶⁷ I draw this distinction in terms of institution (reparation versus punishment) rather than orientation or objective, because punishment is not necessarily justified on retributive grounds, but may also be understood as the means of restoring social harmony and reinforcing societal and legal norms. One sees this here in the fact that one of the mechanisms for restoration is "judicial or administrative sanctions against persons responsible for the violations", classified under the category of satisfaction. As I already discussed in chapter 2, the relationship between retributive and restorative justice is enormously complex, as evidenced by the difficult debates in Truth Commissions about providing legal amnesty in exchange for some type of truth telling, as opposed to punishing perpetrators.

inquiry. The prospect of indicting and prosecuting individuals who had perpetrated violations was never on the table.⁶⁸

The Inquiry took specific guidance from the so-called ‘Van Boven principles’- the recommendations of the study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms commissioned by the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities in 1989 and conducted by the jurist Theodore Van Boven.⁶⁹ The general principle of this report is that justice is rendered through reparation, where the latter means removing or redressing the consequences of the wrongful acts and by preventing and deterring violations.⁷⁰

The van Boven principles break the broader restorative goal down into four components: restitution, compensation, rehabilitation and satisfaction and guarantees against non-repetition, each of which is to be effected through concrete interventions. Restitution is here defined as seeking to re-establish the situation that existed prior to the violations. It

⁶⁸ The HREOC is an administrative body, not empowered to prosecute although arguably it could have recommended prosecution in some cases. The temporal constraint was that many of the people involved in actual removal were no longer alive, and the crimes would have exceeded statutes of limitations.

⁶⁹ Van Boven, T, 1996: Revised set of basic principles and guidelines on the right to reparation for victims of gross violations of human rights and humanitarian law prepared by Mr. Theo van Boven pursuant to Sub-Commission decision 1995/117, U.N. Doc. E/CN.4/Sub.2/1996/17, 24 May 1996 (hereafter the van Boven Principles).

⁷⁰ “In accordance with international law, States have the duty to adopt special measures, where necessary, to permit expeditious and fully effective reparations. Reparation shall render justice by removing or redressing the consequences of the wrongful acts and by preventing and deterring violations. Reparations shall be proportionate to the gravity of the violations and the resulting damage and shall include restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.” *Ibid* para. 7.

includes measures such as restoration of liberty, family life, citizenship, return to one's place of residence and return of property. Compensation refers to monetary compensation for any economically assessable damage resulting from violations. Rehabilitation includes medical and psychological care as well as legal and social services. In each of these categories, the clear emphasis is on restoration *for the victim*. Any impact on the perpetrator or broader society is incidental.

It is when one gets to the fourth category, satisfaction and guarantees against non-repetition, that the subject of repair extends beyond the direct victim to the social order more generally. Within this category are included cessation of the continuing violation, verification of the facts and full public disclosure of the truth, official declaration or judicial decision restoring the dignity, reputation and rights of the victim, judicial or administrative sanctions against persons responsible for the violations, commemorations and paying tribute to victims, inclusion in human rights training and history text-books of an accurate account of the violations, and a number of institutional interventions in the military and legal spheres designed to prevent recurrence. It is under this category that van Boven recommends apology, including public acknowledgment of the facts and acceptance of responsibility.⁷¹

To begin to understand what apology is supposed to achieve one must first explore more generally what dimension of reparation this fourth category represents.

⁷¹ Van Boven, *ibid.* pp. 4-5.

V. 2 Satisfaction as symbolic reparation or the reconstruction of meaning

The interventions classified under satisfaction cover a range that is both remarkably diverse and takes in strategies not normally thought of as falling under the category of *justice*. Many of the interventions recommended here would seem to fit more comfortably into categories like therapy, inter-personal healing, spiritual growth or community education than they would in the realm of justice.

What makes something an intervention of *justice* is that it addresses injuries that arose from a breach of rightful action (defined morally or legally) as opposed to natural disaster or accident. Thus, even as it focuses on restoring the victim, as distinct from punishing the perpetrator, reparative justice nevertheless implicates the party responsible for the injury by making them liable for the compensation and clearly distinguishing between victim and perpetrator. Yet the interventions recommended here do not operate in a field where victim and wrongdoer are neatly divided across the fence of compensation. The intervention of public education for example attends to restoring ‘truth’ to the whole society. This blurring of spheres and of the victim/wrongdoer distinction requires and opens the possibility of rethinking the meaning of the “justice”.

What form of justice is this category of satisfaction and guarantee of non-repetition? That it is delineated as a distinct category indicates that it cannot be reduced to the common denominators of restitution and compensation, but that something more than the latter two is intended. That said, the defining quality of the category is far from clear, and

despite the plethora of recent literature on restorative justice, there is very little elaboration on what *satisfaction* means.⁷²

At first, the diversity of the different members obscures any obvious common essence or goal. Looking more closely however, one sees in apology, public disclosure of the facts, official measures to publicly clear the names of victims and commemorations a common emphasis on the *symbolic* dimension of harm and the requirement to publicly establish the wrongfulness of the act and repair the public identity of the victim. Justice in this dimension is directed towards healing the damage to the identity of the victim, but with the understanding that the damage to identity occurred through specific forms of social and political relations, and as such that the restoration must occur in that social/political context, and not merely through a private victim centered healing.

A number of them are also communicative or discursive strategies, interventions in official narratives about the nation and the nation's history. They are interventions that alter communication by empowering or recognizing the legitimacy of voices, subject positions and recollections that had previously been marginalized or downgraded.

As I explained in chapter 2, the intervention at this level of normative identity has to be understood as an intervention in the being of the political community itself. The

⁷² One article specifically on this question treats satisfaction as a subjective state, in the sense of the various parties being 'satisfied', but also attempts to operationalize it. This does not get at what satisfaction means in this context. Cf. Van Ness, Daniel W., and Mara F. Schiff, "Satisfaction guaranteed? The meaning of satisfaction in restorative justice", in Gordon Bazemore and Mara Schiff (ed.), *Restorative community justice: Repairing harm and transforming communities*, Cincinnati, OH: Anderson Publishing Co. 2001, pp. 47-62

normative identity of a political community is not ‘added on’ to a fully constituted political community, in the manner of an attribute that could be shed.⁷³ It is constitutive of the political community’s existence as that community. It underpins both its legal and constitutional principles and the assumed normative orientations of its members. In terms of responsibility, this means that not only *can* the political collective be validly written into the story of wrongdoing; it *must* be written into that story if one is to fully account for systematic ‘legally sanctioned’ human rights violations. Traditional liberal frameworks of justice resist assimilating this type of responsibility and for that reason it finds little reflection in modern theories of justice.⁷⁴

This is not however merely a question of abstract theory or the stories we tell about responsibility. Broadening the conceptualization of responsibility in this way demands a correlative institutional expansion. Indeed, from a normative point of view, the absence of an institutional response to this form of responsibility is a form of injustice – or a failure to affect a complete justice. Traditional categories of reparative justice – compensation and reparation, do not adequately attend to the ‘pre-legal’ level of wrongdoing, or the level of meaning and the interventions included under van Boven’s fourth category are an attempt to bridge this gap in justice.⁷⁵

⁷³ I made a similar point in relation to the constitution of Israel in chapter 3.

⁷⁴ This is not to deny that other forms of intervention also effect social meanings. As Mark Osiel sets out, criminal trials have an important function in performing the norms embodied in the laws of the state. This is not however their primary objective. In fact, in many cases individual prosecution fails on technical grounds and so the overall normative message the state may want to convey is not transmitted at all. See Mark Osiel, *Mass Atrocity, Collective Memory and the Law*, New Brunswick and London: Transaction Publishers, 1997.

⁷⁵ This is also evident at the individual level. Thus for example, while ordering a responsible party to compensation no doubt has a symbolic effect, any repair it affects at the level of meaning is

In his introduction to a volume on the politics on apology, Rajeswari Sunder Rajan makes a similar point about the need to move reparation out to the cultural context. He writes: “the question of righting wrongs we have been talking about is in excess of the law....wrongs of such magnitude as slavery, genocide and colonialism, as transcendent acts of theft, pillage, murder and dispossession, have overwhelmed the law’s grasp and reach. Given the law’s socially, culturally and nationally defined limits it has not been able to comprehend acts of such natural or sanctioned aggression as being *illegal*, indeed as being anything but normative.”⁷⁶

V. 3 Intervening in social meaning: political sacraments

The challenge is to mold an institutional intervention that can go beyond the law and yet still be an intervention of justice, in the sense that it also attends to questions of responsibility. In chapter 2, I tracked the argument in the abstract and suggested that a fitting intervention would operate on the same register as the form of responsibility, that is on the register of social and political meanings and patterns of recognition. Where the wrong occurred in an extraordinary period this might involve either a restoration of the normative integrity that was ruptured. Where, as in the Australian case the wrong was built into the normative constitution of the nation, a far more comprehensive reconstitution of the habitual normative frame will be required.

incidental, rather than being its primary object. For this reason compensation payments in such cases are often supplemented by specific measures more directly addressed to restoring the reputation of the victim – principally public apologies.

⁷⁶ Rajeswari Sunder Rajan, “Righting Wrongs, Rewriting History”, *Interventions*, Vol. 2(2) 159-170, p. 165. He points to a second way in which the law is inadequate, that is the importance of a response that also works on the register of *affect*. The apology, as I have argued not unproblematically is one way in which this affective component is taken up.

Social meanings however, unlike hard institutions like the law do not offer themselves up to simple 'correction' or alteration. So finding positive institutional interventions at this level is extremely difficult. As chapters 3 and 4 illustrated, religious communities are well versed in this type of intervention, but it is relatively alien from the habitual modes of modern politics.

To work out how such an intervention might work, one has to start by understanding how meaning and social patterns of recognition are constituted. We already have the resources to do that: Mead and Honneth's sociological and political analyses of how meaning is constructed and transmitted. Identities and norms are not abstract concepts that float around in some disembodied ideal sphere. They are embedded in the forms of recognition that structure social relations. The social meanings of blackness or whiteness that form the background of systematic violations, the grammar of expectations (who deserves what) are transmitted through the communicative actions between different types of subjects (as well as by a range of other institutions in which they are encoded).

It is thus at the level of communicative actions and the institutions that encode the links between identity and rights that a reparative strategy must work. If the injury is the failure to recognize certain types of people as full rights holders, then repair is affected through counter messages. Declaratory actions like public truth telling or apology intervene in this way by defining certain types of actions or expectations as wrong, recognizing the right of the degraded group to claim they have been wronged and through this legitimizing previously excluded groups as legal and political subjects.

It is impressive that in identifying apology as an intervention to affect this level of justice, van Boven reaches the same conclusion as Jaspers – reparation through some form of public, collective repentance.

Moreover, as chapters 3 and 4 demonstrated, the apology is not only a logical candidate for this role, arrived at by this process of sociological analysis and deduction, but has a history of doing this very work. The template is already available as part of our grammar of public rituals. In its religious guise, it has long played precisely this performative/reparatory role, fusing confession and profession as the active reaffirmation of key normative principles in the face of the failure to ensure their actual observance. Directed both towards the wronged other and to the transcendent order of right itself (a structural role traditionally occupied by the term God), the public collective apology allows for the community to enter into the righting of wrongs by joining in the condemnation of the principle underpinning the wrongdoing, and acknowledging its role as the site where both the problematic and the corrective normative principles occur.

As in the religious context, where the sacrament is itself effective and not merely reflective, so here the apology is a performative as distinct from a constative speech act, accomplishing the action rather than reflecting or referring to an independent inner state. It positions the speaker and the addressee in a particular relationship, or more accurately alters the relationship in which they had previously stood.

Recall the potent image of the original '*kniefal*'. The power of this act lay in its dramatic performance of a change in the organization of the Jewish-German relationship. The German leader Brandt preformed Germany's transformation from the one who saw the Jew as less than nothing, to the one who now knelt before him, asking him for forgiveness and thus recognizing his humanity and right. Similarly here, the performances of repentance in Australia included dramatic reversals like inviting Aboriginal people to speak from the floors of the very parliaments that had legalized their exclusion from politics.

Understanding these symbolic forms of satisfaction as performative acts also makes sense of why van Boven combined satisfaction *and* guarantees against repetition into a single category. The performative act is at once a form of satisfaction, a guarantee concerning the future, and a form of political action. In conveying to the victims (and to themselves) the counter message that the political culture had changed, change is being effected in the political culture.⁷⁷

In fact, a number of community based groups made it clear in their submissions to *Bringing them Home*, that from their point of view the heart of an apology was official legitimate acknowledgment of the wrong inflicted by the nation, of the subsequent suffering borne by indigenous people and so of the validity of their experience. What Aboriginal people and their organizations were calling for, and what the Commission was seeking to achieve was a form of public address that would recognize and thereby

⁷⁷ This link with the future was present in a number of the apologies set out in chapter 1, and links with the relationship between apology and promising discussed there and in chapter 3. I will take this up more abstractly as one of the features of a fully effective apology in chapter 6.

legitimate the truth that Aboriginal people had been violated, that the state had been responsible, and that this had been wrong. The legitimation thus operated on two levels – of the substance of the truths themselves, and the competence of the ones who told it. This is of course what it means to be a recognized as a subject. More relevant than recognition of any particular statement is recognition that one has a legitimate point of view.

The publicity of the act and the status of the speaker were then both crucial to the reparatory value of the act. These two components transform the story of removal from the private and marginalized ‘perceptions’ or memories of Aboriginal people to official and legitimate history. This simultaneously brings a previously repressed truth into the well-lit space of the public record, and transforms the social position of the Aboriginal people who held the story. By the state aligning its truth with their stories, they move from being ‘untrustworthy’ and private sources of dissent, to being important sites of the nation’s truth.

The justice being done here is a justice that includes the act of witnessing - not as an optional enhancement, but as essential to its operation. As the different parties are *seen* and *heard* within a new narrative, their social identities are transformed - and that is the work of justice.⁷⁸

⁷⁸ Hence the importance of the Sorry Books not simply being written, but being written in a legitimate form and archived in an authoritative public place.

Moreover, it is not only the victim (the one giving testimony) who is transformed by the process but also the witnesses themselves - in this case the nation in whose name the apology is given. The act of witnessing and so recognizing the legitimacy of the speaking subject as a subject of political and legal rights becomes the sacrament through which the normative integrity and identity of the nation, which was also damaged by the systematic human rights violations is 'repaired'.

Just as Adorno writes that "Shudder is a kind of premonition of subjectivity, a sense of being touched by the other", so too hearing and entering into a discursive relationship of respect is the occasion for the witnessing subject to re-establish their broken normative integrity.⁷⁹ In the very act of recognizing the excluded other as a full subject of rights, a partner in dialogue, the nation that had been fractured by its own failure can now recognize itself as one capable of recognizing the other.⁸⁰ As in the Rabbinic notion of teshuvah as a three fold turning, so too here, the turn to the other is the occasion for the turn to the ideal norm (God) and to the ideal self. Neither the abstract turn to norms, nor the reconstitution of the self can occur however, without this horizontal relationship with the one that has been violated. The project of the moral correction of the self can never take place without the other.

⁷⁹ Adorno, Theodor W., *Aesthetic Theory*, trans. C. Lenhardt. London: Routledge and Kegan Paul, 1984, p. 455.

⁸⁰ In terms of speech act theory, this also indicates that the uptake of apology is largely in the court of the apologizing subject, and not principally the other's forgiveness. I take this up in chapter 6.

VI. Saying Sorry in Australia

The call for apology powerfully brought together the aspirations of those who had themselves experienced and suffered the denigration of removal and the recommendations derived from a more abstract analysis of how to institutionalize reparation for systematic human rights violations. From both perspectives, the apology takes up the distinct level of damage to social a meaning that, despite its analytic centrality and subjective poignancy, is the one generally omitted in traditional modern (liberal) institutions of justice. If my analysis is correct, and in particular if the apology is the response which most directly attends to the injury to politically and socially constructed identity, one would expect the apology to have a distinct and strong resonance in contemporary Australia. This is precisely what occurred.

The scope and effect of the apology movement in Australia exceeded any predictions which social commentators might have had observing the Australian social and political landscape. When *Bringing them Home* was initially publicly released, its provocative finding that the practice of removal constituted genocide under international law generated a heated public debate. This was relatively short-lived, and quickly gave over center-stage to the public's response to the apology recommendations. Within a year the apology movement, like the Sea of Hands had swept across Australia in a manner unprecedented by any public response to other significant domestic human rights concerns previously placed before the Australian public. Saying sorry and performing repentance became a national motif.

First, there were apologies from groups directly mentioned in the recommendations. Every State and Territory parliament tendered official apologies as part of a dramatic performative sequence. Aboriginal people were invited into the chambers as honored guests to tell their stories, parliamentary representatives responded from the floor (often highly emotionally) and then official apologies were delivered on behalf of the parliament.⁸¹ Chief Magistrates in two states apologized, and apologies were tendered on behalf of two State Police forces, as well as a range of governmental agencies implicated in the removal process. The official organs of a number of churches apologized—specifically those which were directly involved in the process of removal, but so did those with no direct historical role.⁸²

Apologies also went well beyond the formal recommendations, issuing from a plethora of groups not specifically mentioned, but which nevertheless felt called to the sorry discourse. In some cases, the groups drew an explicit connection between their role and the practice of removal. The Australian Council for Social Services, for example, specifically referred to the particular responsibility of welfare organizations, given their direct role in taking and keeping children.⁸³

⁸¹ South Australia: 28 May 1997; Western Australia: 28 May 1997; Queensland: 3 June 1997; ACT: 17 June 1997; New South Wales: 18 June 1997; Tasmania: 13 August 1997; and Victoria: 17 September 1997. The Northern Territory Government has not made a statement of apology. A booklet outlining the issue and responses, "Healing the Stolen generations" describes these apologies and the aboriginal responses as "heartfelt". See Dr Peter Read, Wayne Connop and John Bond (eds.), *Healing the Stolen generation*, available on line at <http://www.alphalink.com.au/~rez/Journey/qna.htm>.

⁸² Text of the apology from the Canberra Baptist church (November 14, 1997) at <http://www.canbap.org.au/apology1.html>

⁸³ "Collectively, we feel a particular sense of responsibility for the consequences of these racist policies because their implementation required the active involvement of community welfare organizations. We unreservedly and wholeheartedly apologize to the individuals, families and

In other cases, groups not directly implicated in removal nevertheless saw fit to tender formal apologies. These included trade unions, professional associations, civic clubs and associations, schools, parents and citizens associations and the Federation of Ethnic Communities Councils (representing immigrant Australians). This last apology is particularly significant because it was given on behalf of immigrant Australians, many of whom arrived in Australia after the practice of removal had ceased. In fact, when the Australian Prime Minister tried to garner support for his refusal to apologize by saying that “you can’t really apologize on behalf of people who moved here in the last 10 or 15 years and never knew anything about this”, the Chairman of the Federation of Ethnic Communities Councils responded with the Federation’s formal apology, adding that “We are part of the current society and society is a continuum.”⁸⁴

May 26, 1998, marking the one-year anniversary of the Report’s release was celebrated as *National Sorry Day*.⁸⁵ The National Sorry Day Committee, schools, churches and local councils organized public “Sorry” events in cities and towns across the country. Aboriginal people publicly told their stories of how they had been taken from their families and the repercussions on their lives. Public figures performed ceremonial apologies. “Sorry Books” - compilations of written apologies from individual

communities who have suffered such pain and grief from these terrible acts of injustice.”, Statement of Apology and Commitment to Aboriginal and Torres Strait Islander People by the Australian Council of Social Services, at <http://www.queers4reconciliation.wild.net.au/acoss.htm>

⁸⁴ “It hurts us, unapologetic PM admits”, *The Sydney Morning Herald*, December 13, 1997.

⁸⁵ The principle agency is the National Stolen Generation Working Group, an NGO coalition formed to oversee and lobby for implementation of the report’s recommendations. The group largely comprises persons and groups who had been involved in conducting the Human Rights Commission Inquiry. Within this group, a National Sorry Day Committee was formed to coordinate activities specifically related to the Sorry Day.

Australians, were ceremonially handed over to Aboriginal representatives. In Sydney, a *Welcome Home* ceremony was held, during which now adult “stolen children” (as those removed from their Aboriginal parents are known), were symbolically welcomed back with traditional smoking, dance and song by Aboriginal elders, before the witness of hundreds of Aboriginal and non-Aboriginal Australians.⁸⁶ In Melbourne thousands attended a service at the Anglican cathedral and then marched to City Hall where – in a remarkably literal act of political repatriation - the mayor handed over the keys to the city to representatives of the stolen generation. In Queensland, every prison (disproportionately filled with indigenous inmates) observed a minute’s silence.

The following year, the day was officially renamed the “Journey of Healing”, reflecting an attempt on the part of the organizers to respond to the negative reactions that the word *sorry* had evoked in some sectors of Australian society.⁸⁷ The new name was thought to present the process in a more positive, forward looking light - a nod of accommodation in the direction of those who were uncomfortable with the being asked to say sorry for something which, in their words, “they personally did not do”.⁸⁸

⁸⁶ Smoking, a ritual form of spirit cleansing involves burning plants and leaves in the space to be cleansed.

⁸⁷ The National Sorry Day Committee emphasized this shift in representation. In the words of the Committee co-chair Carol Kendall, the new day is about “recognition, commitment and unity”. Lowitja O’Donoghue, formerly head of the Aboriginal and Torres Strait Islander Commission (the major federal government agency concerned with indigenous affairs) who is a patron of the new day said: “Let’s try to move on... Some of the people who are nervous about the whole process ought to be able to take this journey with us.” See Debra Jopson “Between the Rock and...Nowhere”, *Sydney Morning Herald*, June 8th 1999.

⁸⁸ The latter phrase is in inverted commas to indicate that the issue of responsibility is itself contested, and to place a distance between my position, and that assumed in this statement about responsibility.

The change from ‘sorry’ to ‘healing’ was also intended to move the focus from a narrower “pathological” attention on those who were themselves removed, to the Australian community generally, thus normalizing or main-streaming the issue. The former, “sorry” approach frames the issue as a problem suffered by the (black) victims and inflicted by the (white) perpetrator; the latter tells a story in which all Australians bear the scar of removal in some way, and as such all share in, and are working together towards a mutually beneficial goal of national healing. Pragmatically, this shift marked an attempt to substitute a harmonious “win-win” dynamic for an oppositional win-lose one. More abstractly, this brings to mind the early Christian images of the Church as a body where all are infected through sin and healed through repentance and echoes of the collective prayers spoken by the congregation seeking a reconciliation it can only achieve as one.

The ceremonial activities in the second year, under the banner of the new name, began at Uluru (Ayers Rock), the symbolic heart of Aboriginal Australia. There the Mutitjulu people, traditional owners, handed people who had been removed ten pairs of music sticks for them to take back to each of the capital cities where ceremonies were to take place on May 26. The sticks were also passed to non-Aboriginal people taking part in the ceremony. They were painted with various symbols including shackles (of bondage and Australia’s penal colony past), teardrops above the Aboriginal flag (of sadness and mourning) and a boomerang - a call to return to place and to history.⁸⁹

⁸⁹ See Debra Jopson, “Radiating from the rock, Ritual of Hope”, *Sydney Morning Herald*, June 5th, 1999. The connection between repentance and return, which is so much part of the drama around removal, is strongly resonant of the meaning of *teshuvah* as return, not simply repentance.

Back in the capital cities and towns, the return to memory was marked by memorial marches and commemorative speeches. In Adelaide, 1000 people walked to places important in the story of removal, but largely forgotten in contemporary Australia, such as the site of Piltawodli, a Kurna school opened by German missionaries in 1839. There, school children sang in the traditional language, perhaps for the first time since 1845 when troops demolished the buildings and the children who had been placed there were moved to an English-language school which banned their language.

Public “Sorry” ceremonies during which people witness the spoken words of stolen children and public apologies have continued to take place each year since on May 26. In 2000, an estimated 1million people across Australia took part in the *Reconciliation March* - 250,000 crossing Sydney Harbor Bridge. “I’m Sorry” T-shirts are distributed and worn; and in 2002 a well known Australian band performed “Sorry”, a song paying tribute to the stolen generation and their families on the lawn in front of Parliament House.⁹⁰

While annual Sorry Day events are the focus of the year’s activities, they are not isolated moments of memory and repentance. Throughout the year “Sorry Books” circulate the country - large blank bound pages on which Australians can write some personal form of apology for the practice and impact of removal and sign their names. Brochures and the website provide specifications for the correct format for a sorry book. Already at the

⁹⁰ There was even a ‘reconcilioke’ - a karioke event dedicated to reconciliation and apology. Details on the activities, including the song lyrics and pictures of the t-shirts can be found at the official Apology website: <http://apology.west.net.au/index.html> and links.

point of inception, the place of these books in archives, that is for the purpose of record and witnessing is at the forefront of the process.⁹¹ People can also register their names on the apology website, which in early 2004 had about 250,000 names on it. Public fora focusing on the issue of removal and the need to forge ongoing responses are held regularly at a local level through civic associations, religious groups and schools.

The explicit long term and staunch refusal of the conservative Prime Minister, John Howard, to apologize has been highly significant in the dynamic of the debate. From the time that an apology came onto the political agenda, he very publicly mounted a number of arguments against the rectitude of his apologizing, the main one being that it was wrong for contemporary Australians to apologize for something for which they were not responsible. At the same time, he drew attention to what he saw as the justifiable basis for removal in many cases, and the genuine “good intent” behind an admittedly misguided policy. He was willing to express his sadness for the suffering of individuals, but this in an entirely personal and not a representative capacity.⁹²

In the face of this refusal, the leader of the opposition party in federal parliament apologized, as did numerous other members; including the Prime Minister’s own deputy, who also took part in “sorry marches”. Howard’s stance attracted support from a significant number of Australians and effectively raised the stakes of the debate,

⁹¹ www.nativetitle.aust.com/sorrybookwritepages.htm. Many of the Sorry Books are now being held at the Australian Institute of Aboriginal and Torres Strait Islander Studies.

⁹² At the National Reconciliation Convention in May 1997 when the report was released, Howard said: “Personally, I feel deep sorrow for those of my fellow Australians who suffered injustices under the practices of past generations toward indigenous people.” When he gave his speech a large number of people in the audience rose and turned their backs - a strong mark of contempt and refusal to recognize or respect *his* authority.

becoming an axis of contention. Outside parliament, many of the groups that had apologized now turned their public statements to calls to the federal parliament and the Prime Minister to apologize. Had the apology movement had some intrinsic half-life, his silence, or more accurately the particular form of words he was willing to enunciate and his deployment of the refusal as a political tool, ensured that the issue would remain on the public agenda.

On 26 August 1999 the Commonwealth Parliament did pass a motion expressing its “deep and sincere regret that Indigenous Australians suffered injustices under the practices of past generations, and for the hurt and trauma that many Indigenous people continue to feel as a consequence of those practices.”⁹³ The motion was the outcome of lengthy negotiations between Aboriginal groups and parties in parliament, and was largely catalyzed by the election of the first Aboriginal person to the federal Senate. In fact, the long anticipated motion dissipated the controversy over Howard’s refusal only to a small degree, in part because it was seen as grudging and given with heels dragged, and in part because the form of words fell short of an explicit assumption of responsibility. By expressing no more than regret, parliament placed itself adjacent to the problem - a compassionate bystander expressing empathy, but in no way implicated as an active player in the drama.

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A transcript of the Prime Minister’s motion of Reconciliation is available at <http://www.pm.gov.au/news/speeches/1999/reconciliation2608.htm>

VII. Interpretations of apology in the Australian context: responsibility, guilt and shame.

The multitude of apologetic rituals developed in Australia since the release of *Bringing them Home* are testament to the popularity and provocation of apology as a political form. The debates that ensued also provide a rich source of data for explicating how the apology was understood and how it actually worked as a political act. What is particularly striking is that the tensions and tropes that I derived in the abstract in the previous chapters emerge here in the real life arguments of political debate. Conflicts over whether a collective could apologize, whether it could be held responsible and whether apology was even admissible into the political realm underpinned the national debate.

Here, I begin with the Prime Minister's explanation of his refusal to apologize, and the arguments that developed in response to this refusal. These are illuminated by mapping them against the different conceptions of responsibility and tropes of apology developed in the previous chapters. Correlatively they support my thesis that the political apology is best understood with reference to these conflicts and range of meanings.

VII. 1 The cynical apology

Before even entering the debate about apology's coherence or political appropriateness, one has to address the cynical, but nevertheless common view that the whole apology movement was no more than a distraction for the real questions of justice. Saying sorry, so this argument goes, unlike restitution, compensation or rehabilitation, is cheap and

easy, and so relatively insignificant. If the apology became popular amongst ordinary Australians, this was only because it was empty and weightless: words cost the one who apologizes nothing, not even - given the possibility of hypocrisy - genuine sorrow.

In chapter 6, I will return to this question of the significance of words as political action and the problem of hypocrisy in general, but for now, the Australian situation provides some concrete evidence refuting this dismissal.

There is no doubt some truth to this argument. Because words can be detached from other forms of action and even from normative orientation, it is possible that saying sorry is doing nothing at all. But if words, (here apologies) are so weightless and insignificant, they would matter neither to the “victim”, nor to the one from whom the apology is sought. The investment on both sides of the Australian debate, including the enormous resistance to apologizing indicates that this was not the case.

One might explain this resistance by arguing that the apparent objection to apology masked a deeper resistance to the weightier consequences, which people feared might follow if they apologize. In the Australian case, there is evidence that this was at least partially true. Surveys indicated that one reason Australians were concerned about apologizing was that they feared that doing so would constitute an admission of liability and be garnered as evidence in support of compensation claims.⁹⁴

⁹⁴ Surveys in Australia indicate that one of the main reasons people give for not wanting the government to apologize is that they fear it will be drawn as evidence in courts, implicating governmental acceptance of responsibility, and thereby increasing the likelihood of its being held liable to pay compensation. Research undertaken in 1999 for the Council of Aboriginal

This explanation only goes so far, however, because as a matter of fact, as distinct from perception, an official parliamentary apology would be immune from further legal proceedings.⁹⁵ True, this technical legal fact does not discount the fear of ordinary Australians, who can be excused for assuming that an apology would work in a court as an admission of guilt. Others, however, and most notably the Prime Minister knew that apology had no further legal implications, but continued to use the compensation argument to bolster their refusal to apologize. Despite the fact that the Prime Minister had sought counsel on this question and had received clear advice from his own solicitor general about legal immunity, he continued to deploy the argument.⁹⁶ This being the case, one might argue just the opposite – that the fear of financial liability was instrumentally held up to mask the resistance to *apologizing* itself. It was not the financial liability, but the apology that they were resisting.

Reconciliation, cited in the Commonwealth Government's submission to *Healing: A Legacy of Generations*, The Senate Legal and Constitutional Committee's Inquiry into the Federal Government's Implementation of the Recommendations Made by the Human Rights and Equal Opportunity Commission in Bringing Them Home, Commonwealth of Australia 1997 p. 115. *Submission 36*, Minister for Aboriginal and Torres Strait Islander Affairs, p. 600.

⁹⁵ Advice given by Chief General Counsel Henry Burmeister was reported in "Howard Defends Stand on Apology", *The Age*, January 28, 1998. During an interchange with Senator Bolkus before the Senate Estimates Committee, Burmeister also agreed with Bolkus' hypothetical statement that it would be possible to "formulate a form of words that would not have legal implications." The Senate Legal and Constitutional Committee in *Healing: A Legacy of Generations*, *op. cit.* (at 113-114) similarly point out that the Parliamentary Privileges Act 1987 (Cth) protects all statements made within the parliamentary chamber from being used as evidence in a court. This position was confirmed in by O'Loughlin J in the judgment of *Cubillo v Commonwealth*, Federal Court of Australia 1084, 11 August 2000, Paragraphs 74-78: "The position with respect to the Commonwealth Parliament, requires special mention. At common law anything said or done in the House is protected by absolute privilege – a privilege that can be traced back to Article 9 of the Bill of Rights 1688. In Australia, the privilege of the Houses of the Commonwealth Parliament derives from s 49 of *The Constitution*".

⁹⁶ For example, "... a formal, unqualified apology does, according to legal advice that we have received have certain legal implications ...", The Hon. John Howard MP, Transcript of Interview with Paul Lyneham, *Nightline*, 29 May 1997.

So if the apology itself provokes resistance, what is it about apologizing that people find difficult or unacceptable?

VII. 2 Defining the terrain – what type of ‘responsibility’?

The Prime Minister’s resistance captured the most important planks of the argument against apology. The first and initially most prevalent of these was that contemporary Australians did not *personally* do it, so it is unfair to hold them responsible.⁹⁷ This objection was supplemented by the argument that one cannot judge the past according to the moral norms of the present. The acts under review, this argument pointed out, had been both legal and thought to be moral at the time, so it was unfair to retrospectively condemn them. Some opponents of the apology supplemented this objection to retrospective judgment with the more contentious claim that the policy was developed ‘for their (i.e. Aboriginal people’s) own good’, and was thus not only not condemnable, but morally laudable.⁹⁸ The third major plank of the argument against apology was that public policy should be oriented around future goals, not history. Focusing on the present and the future, not dwelling in the past, they argued, would achieve national reconciliation.

⁹⁷ Cf. For example “Is an apology more than mere words”, *Editorial, The Weekend Australian*, October 18-19, 1997.

⁹⁸ This latter position was most strongly endorsed by the most extreme right wing *One Nation* party, but was frequently expressed in letters to the editor and other public commentary. The following is typical: “I then ask, the apologetic guilt industry, where would many of these people be today had they not been removed from these sad conditions and given the lives they are now living?” Mailbox, *The Age*, March 18, 1998.

The most important of these objections, that contemporary Australians (or Australia) could not (logically/morally) apologize for a wrong that they had not *personally* committed tracks the fundamental liberal objection to collective and inter-temporal responsibility discussed in chapter 2.⁹⁹ Jaspers' categories of guilt prove particularly useful in mapping the different conceptions of responsibility that were assumed by different parties in the subsequent debate.

Thus, when the Prime minister objected to holding contemporary Australians responsible for taking children away, he was in fact arguing that the past practice of removing indigenous children did not legitimately give rise to *criminal guilt* amongst contemporary individual Australians. Within his own frame of reference, he was undeniably correct – there was no direct connection between the *actus reus*, defined as the physical act of removing the children, or even authorizing or making the laws which sanctioned removal, and Australians alive today (save some individual exceptions).

From here he argued that in the absence of legitimate guilt (a guilt his rhetoric did not differentiate), apology was not appropriate, thus further demonstrating that he understood apology as a form of compensation or punishment that responded to guilt on the individual criminal model.

⁹⁹ The key term here is *could*. How that word was used is key to understanding the apology. As I indicate here, it was used to indicate that they believed they were not able to apologize, because only the one who committed the act can apologize, *and* because apology is a moral act, with moral implications, to do so was in some way a morally impossible act.

By pegging guilt at this most demanding, individualistic level, he was attempting to undermine the argument that apology was a just response - an argument which had been based on the notion that Australians bore *political* not *criminal* guilt. The Senate Committee mandated to examine the implementation of the Inquiry's recommendations remarked on this shift in levels when it assessed the Commonwealth's response.¹⁰⁰ It pointed out that despite the fact that the Commission had recommended a *parliamentary* apology (emphasizing the institutional dimension of the wrong), the Prime Minister had consistently shifted the frame to Australians as a collection of individuals. The following statement is typical:

To say to them that they are personally responsible and that they should feel a sense of shame about those events is to visit upon them an unreasonable penalty and an injustice.¹⁰¹

This statement is particularly interesting because of what the Prime Minister does with the idea of *injustice*. He draws it away from the original victims, and delivers it to white Australians who, in being blamed for something they did not do, can now justifiably count themselves as victims.¹⁰² Correlatively, it is now those who would falsely accuse who are guilty of an injustice. This reversal is effected by assuming the relevant category underpinning the apology is criminal (direct individual) guilt.

¹⁰⁰ Senate Legal and Constitutional Committee, *HEALING: A Legacy of Generations; The Report of the Inquiry into the Federal Government's Implementation of the Recommendations Made by the Human Rights and Equal Opportunity Commission in Bringing Them Home*, November 2000, section 4.25; available at http://www.aph.gov.au/senate/committee/legcon_ctte/stolen/report/index.htm.

¹⁰¹ House of Representatives *Hansard*, The Hon. John Howard MP, 26 August 1999, pp. 9206-9207.

¹⁰² A similar reversal was developed in response to the *Mabo* decision and Native title legislation, where white Australians were presented as the victims of a new form of land theft.

As discussed in chapter 2, this insistence on the category of individual criminal guilt is consistent with the strong ethical individualism that follows from the liberal political philosophy characterizing mainstream Australian politics - and certainly that of the Prime Minister. In general, this political ideology resists any transfer from the collective to the individual or across generations (the sins of the fathers.....). Correlatively, this ideological position is consistent with the understanding of apology as an individual, personal expression and sits uncomfortably with the collective/performative trope of apology.

From the individual responsibility perspective typified by the Prime Minister, what was unjust was attributing responsibility where it did not lie. This fear of mis-attribution was fully consistent with the fundamental liberal principal that no individual should be punished for what she did not actually do. Public policy had to be tailored to avoid this injustice. From the alternative perspective I argued in chapter 2, and argued by his critics, what was unjust was the failure to attribute responsibility where it *does* lie. Mapped against these two types of injustice, one can see how the refusal to apologize represented a fear of straying too far towards the first type of injustice (wrongful attribution of criminal guilt), and the impulse towards the apology represented an appeal against the omissions of the second (failure to attribute political guilt). If the Prime Minister stood for protection of the individual at all costs, the apology movement represented an attempt to balance out the excesses wrought by this principle.¹⁰³

¹⁰³ This is the practical analogue of Van Boven's attempt to redress an imbalance by supplementing traditional forms of reparative justice with the fourth category of satisfaction and guarantees against repetition.

Depending on which perspective one takes, which definition of responsibility one assumes, and where one locates apology against the different forms of responsibility, justice demands different responses. The most comprehensive and fullest expression of justice, however, requires a differentiation of forms of justice and responsibility and clarity about where apology lies.

Mapped against these categories of individual and political guilt or responsibility, the Australian debate seems reasonably strait forward. On one side are the liberals defending the sanctity of the individual. On the other are the communitarians or those who adopt a more structural analysis advocating a collective response. The former assume that the apology is individual; the latter accept that it implicates the collective *qua* collective. In truth, however the field was not so clearly divided.

Critics of the Prime Minister pointed out that his apparently staunch individualism was based less on principle than on pragmatics. He did not, for example seem to have an in principle objection to the notion that contemporary Australians might be linked with other aspects of their collective past. He had never shied away from encouraging Australians to swell with pride when they contemplated the heroism of the Anzacs at Gallipoli during WWI or the lauded cricketer hero Don Bradman's batting record.¹⁰⁴ Clearly, his brand of liberalism did not preclude all recourse to the thicker notion of the nation, either inter-temporally or across bodies. What seemed to be a problem was not inheritance per se but the negative inheritance. His critics pointed out this asymmetry:

¹⁰⁴ cf. Stephen Muecke "No guilt with black armband", *The Australian Financial Times Review*, April 11, 1997.

“..if it is possible to feel pride in the achievements of our forebears, it surely cannot be regarded as impossible or unjust to feel shame about past wrongs.”¹⁰⁵

As became evident in the subsequent debate, the Prime Minister was in fact not immune to broader discussions about the collective history of the Australian nation. On the contrary, he revealed himself to be heavily invested in protecting a particular understanding of Australia as an honorable, egalitarian nation from the destructive effects of what he called ‘black arm-band history’. His refusal to have Australians implicated in removal was thus not simply a refusal to link contemporary debates and political action into a broader engagement with the nation’s history and identity. At a certain point, his refusal to apologize also became a representative collective act: he was representing (both in the sense of speaking for and giving a representation of) the Australia that had consistently acted in accord with its morally laudable constitutional principles.

Nevertheless, the Prime Minister’s rhetorical stance on the defense of the individual from collective blame proved ironically useful in strengthening the case *for* apology. It forced the advocates of apology to develop a far more sophisticated justification for a collective inter-temporal apology and with this a deeper exploration of its meaning.

¹⁰⁵ Robert Manne, “Forget the Guilt, Remember the Shame”, *The Australian*, July 8, 1996. What is important and interesting about Manne’s commentary is that he is a strong and very public liberal himself, who stresses the value of preserving individual responsibility. The sentiment recalls Hannah Arendt’s point that “[W]e can no longer afford to take that which was good in the past and simply call it our heritage, [and] discard the bad and simply think of it as a dead load which by itself time will bury in oblivion”. Hannah Arendt, *Origins of Totalitarianism*, p. ix.

VII. 3 The first attempts to justify the apology: sidestepping responsibility

Several moves were deployed to counter the objection to wrongful collective attribution. The first was a side step away from the problem of responsibility altogether by redefining apology as an expression of regret or empathetic sadness rather than an assumption of responsibility in any form.¹⁰⁶ Saying sorry did not mean: “I/We did this terrible thing, I/we acknowledge my/our wrongdoing and apologize” but rather: “I am sorry that this happened to you (or to us).” In Australia, some people, including (at times) Sir Ronald Wilson who co-headed the National Inquiry, took this avenue, both by shifting the rhetorical form from “I am sorry for...(our actions or inactions)” to “I am sorry that/I regret that...” and by explaining that their apology was an act of solidarity, not an admission of responsibility.¹⁰⁷

This move did not work because it attempted to move the debate away from what had made the recommendation so poignant and evocative in the first place, and from where everyone knew it really lay – with hard questions about responsibility. When the federal

¹⁰⁶ The Senate Committee made note of this difference: “An apology, by definition, is a ‘frank acknowledgment’, by way of reparation, of offence given, or an explanation that offence was not intended, with ‘expression of regret’. By contrast, the intention of an expression of regret may be defined as a ‘grievance at’, or ‘feeling of distress’ on account of an event, fact or action. By these definitions, an expression of regret may be seen as something less than an apology as it is only one aspect of a complete apology. Commemoration may be seen as a natural progression whereby ‘regret’ is institutionalised.” *Healing: A Legacy of Generations, op. cit* at 112.

¹⁰⁷ In a letter to *The Australian* written in response to an editorial criticizing the apology on precisely this point Sir Ronald Wilson wrote: “I hope that your readers will not understand the plea for an apology that comes the Stolen Children Report to be a plea for that kind of apology.”, *The Australian*, November 10, 1997. A similar sentiment was expressed by Gatjil Djerrkura, head of ATSIC to a large meeting at Parliament House; “Sorry Day is not about guilt, it is about understanding. For our people, saying sorry is simply a way of recognising another person’s feelings.”

parliament finally issued its muted expression of regret, for example, it only provoked further scorn.¹⁰⁸

The more direct and complex responses attempted to retain the link between apology and responsibility by re-framing the nature of the wrong and the attribution of responsibility. Although this conceptual re-framing took various forms, in all cases, it involved a shift from the level of the individual to the level of the collective/society or the state (and in some cases then back to the individual). These moves track the theoretical permutations discussed in chapter 2.

VII. 4 The second attempt to justify the apology: institutionalizing responsibility

The simplest version of this move was to define the agent of wrongdoing as the institution of the state, thus attributing responsibility along formal institutional lines consistent with liberal principles. Recall that the formulation, legitimation and implementation of removal were all effected under the authority of the Australian state. So, for example, when the Commonwealth responded to the call for an apology by saying that “this generation should not be asked to ‘accept responsibility’ for earlier generations”, HREOC pointed out that the state is an institution across time, and as such, the contemporary state inherits the debts (as it does the surfeits) of its earlier incarnations.¹⁰⁹ By way of analogy, it pointed to the arena of international law, where each government inherits the legal commitments, economic debts etc. of its predecessor governments.

¹⁰⁸ As I will argue in chapter 6, the apology must include accepting responsibility.

¹⁰⁹ *Healing: A Legacy of Generations*, *op. cit* at 112.

As I discussed in chapter 2, there are several problems with this move. First, in this case, one cannot make a simple claim that the state was acting illegally. The heart of the claim is precisely that it was acting according to a legality that is wrong, either according to a higher law (international law or natural law) or according to a higher morality that trumps law. As soon as one makes this move from law to morality, one is also moving beyond the formal institution of the state to society. Thus, to make sense of the claim, one has to assert that Australian society should have prevented these wrongful laws from being enacted. In that case however, arguing that the transfer worked along formal institutional lines does not work. The legal and moral inheritances are in conflict.

More practically, this move to a purely institutional level of responsibility missed something very important about the apology as a particular type of social act – its human dimension. Certainly, I have argued that the political apology should not be cast entirely within the discourse of the modern liberal individual (as per Trouillot's critique). At the same time, it is equally wrong to cast it as an entirely formal and institutional mechanism.

This points to a more comprehensive problem with the assumptions at work here. If one assumes that action can only be *either* formal and institutional *or* individual and personal – an act of the state or an act of the individual, then one is forced into one of the two following characterizations of apology. Either apology adheres to the state in a dry institutional sense, thus in no way engaging the members of the political community. This avoids the problem of blaming the wrong individuals, but leaves us with a very dry characterization, which does not fully capture what it means to apologize. Or, the apology

adheres to each member of the nation in a very personal way. In this case, one has regained the sense that the apology implicates human subjects, but opened up the habitual problems of collective guilt. Constrained within these permutations one is left with no choice but to conclude that if it is an apology (and hence reflective of the inner subject) it is not political (institutional), and if it is political/ institutional, it is not an apology.

But this conclusion is an artifact of the framework – the assumption that there are only two, mutually exclusive realms of action. And it was precisely this assumed framework that dichotomizes the formal/institutional and the internal/subjective that I deconstructed in chapter 2.¹¹⁰ This dichotomy, and the assumption that political action neatly aligns with the formal institutional side is the product of a historically narrowing of the key concepts we are dealing with – the apology, the collective and responsibility. The re-emergence of the political apology forces a re-evaluation of this framework as a model for contemporary political action.

My argument in chapters 3 and 4 that there was a form of collective apology that is neither a hard institutional mechanism, nor an expression of the internal soul provides a template for conceptualizing the apology *and* political action outside the constrictions of this set of distinctions. Returning to the actual terms of the Australian debate, one can see how the conceptual scheme Australians developed to make sense of their political apology resonates with this trope. They were looking for a way to attach the apology to

¹¹⁰ One sees a similar problem with this categorization in the confusion between the nation and the state in political literature. The nation is a term often used to try to pick up this social dimension that the state omits, but does not fully work because of the connotations of ethnic or some other essential unity it continues to have.

society so as to retain the subject quality without forcing the type of category mistake Trouillot assumes.

VII. 5 A third attempt to justify apology: shame, society and norms

Participants in the debate made various attempts to explain the link between the state as the agent with continuous responsibility and society or the population. First they drew this link through the notion of representation and the institution of democracy. In its response to the Commonwealth's claim that one generation should not inherit the responsibility of the last, for example, HREOC attempted to bring the people back into its institutional argument by framing responsibility not only in horizontal terms across time - from government to government as representatives of the state - but also vertically from the people to government in its capacity as their democratically elected representative.¹¹¹ Insofar as the people are the source of the government's authority, they are then tied in with each government's assumed obligations. The major weakness of this move was that even if it explained the link between society and the government in a single time frame, it did not explain how the vertical and horizontal could combine to link society in one moment with a government in another.

A variant on this move, which went some way in overcoming this temporal restriction, drew on the idea of the "name of the people". According to this argument, the people of

¹¹¹ "HREOC submitted that "the claim of a current government's lack of any direct responsibility for the actions of past governments overlooks 'a fundamental and enduring feature of Australian democracy, that of continuing responsible government' That is, the concept that governments are 'responsible' in the sense that they are answerable to the people through an election. This responsibility becomes continuous through being an integral part of the institution of government." *Ibid.*

the nation should not be understood simply as particular bodies, but as a source of authority and legitimacy for the state. In this broader capacity, they are always in some way responsible for actions committed under the stamp of their name, given that it is this name that lends the actions their authority.¹¹² Like the democratic argument, this is an argument about authorization, but it emphasizes the symbolic more than the institutional.

Still, many Australians remained uncomfortable with this deployment of the idea of the nation as an identity across time; a discomfort that was only heightened by their assumption that apology in particular implicated them in a very personal and individual way.

The richest move taken to finesse what appeared to many an unacceptable attribution of collective *guilt* started with the rhetorical shift from the language of guilt to the language of shame.¹¹³ Shame, it was argued, does not imply the same type of direct assumption of responsibility for past wrongs and so people can be asked to partake in shame without feeling that they are being blamed for the wrongdoing itself. The claim that shame, as distinct from guilt was a justifiable response to the situation built on certain understandings of the difference in the logical structures of guilt and shame.

¹¹² This is reminiscent of German Chancellor Adenauer's 1952 statement to the Bundestag, that the crimes "were committed in the name of the German people", quoted in Frank Stern, *The Whitewashing of the Yellow badge: Antisemitism and Philosemitism in Postwar Germany* Pergamon Press, 1992, 367-368.

¹¹³ Robert Manne explains this with reference to an earlier article written by the philosopher Raymond Gaita in the politically conservative journal *Quadrant* to address the failure amongst Australians to distinguish between collective guilt and historical shame. "Because guilt for wrongs done is always a matter of individual responsibility and idea of collective guilt genuinely makes no sense. An individual cannot be charged with the crimes of others.....however talk of sharing a legacy of shame is quite another thing." Robert Manne, "Forget the Guilt, Remember the Shame", *The Australian*, July 8, 1996.

Specifically, having actually committed the particular wrongful act oneself is not a necessary condition for shame, whereas it is for guilt. A more indirect association with wrongdoing or harm is sufficient for shame. To explain why action is not a necessary condition for shame and to elaborate what is, shame's proponents argued that guilt and shame correspond to two distinct dimensions - action in the former case, identity in the latter. Legal theorist Desmond Manderson, for example, argued that whereas "guilt is about taking responsibility for what we did - it stems from our actions...shame is about *who we are*."¹¹⁴

This linguistic move closely resembles Jaspers' shift from causality to identity in the category of political guilt.¹¹⁵ More generally, it tracks my argument in chapter 2 that there is a generalized responsibility which adheres to the political collective by virtue of its providing the normative framework for the wrongful action. This type of responsibility is not subject to the same objections that arise if one tries to pin the *wrongdoing* on a collective.

Those defending the apology as an expression of shame also argued that for the purposes of political shame, one could legitimately assume an expansive conception of identity. As

¹¹⁴ Desmond Manderson, "Shame is part of healing process", *Sydney Morning Herald*, January 28, 1997.

¹¹⁵ In recent years, the concept of shame has been thoroughly explored, particularly in the fields of psychoanalysis and anthropology. Because it is less formulated at the level of popular thought, it was not automatically clear how shame differed from guilt, or what shame entailed. This lack of clarity or universal agreement on the meaning of the term, combined with the fact that many people still felt shame implicated them too directly prevented this move from being totally "successful". Nevertheless, in the elaborations of the significance of shame, one can discern some of the sophisticated attempts to work out the distinct connection to between contemporary Australia and the wrongs of the past towards which the apology seems to be gesturing.

Manderson argues, the subject whose identity is the basis for shame extends across bodies and time: “because shame is about identity, an identity which extends beyond my body to my society, I can and do feel shame for acts which I did not cause or bring about.”¹¹⁶

At the same time, there must be limits to this identity; otherwise all human beings should equally feel shame for every human wrong across space and history. If shame is to be a meaningful term and a basis for arguing that a political community has some particular obligation, there has to be some way of specifying the boundaries of this more expansive identity.

Again, the language used by some of the more thoughtful commentators in their elaborations of this alternative conception of an expansive identity is highly reminiscent of Jasper’s concept of *Dasein* as the basis for a justifiable political guilt and my broader argument about political culture or normative orientation as the background condition for wrongdoing. One of the central figures in the public debate, the liberal conservative political philosopher Robert Manne, for example, explained the justification for feeling collective shame by arguing that this (Australia) is the place where we form our identity: “To be an Australian is to be embedded or implicated in this country’s history in a way outsiders or visitors cannot be.”¹¹⁷ The word embedded, like the word “dwelling” (used

¹¹⁶ *Ibid.*

¹¹⁷ Manne, *op cit.* The constant use of the word “dwelling” with reference to the past is also interesting here. When objecting to the apology, many critics spoke about not dwelling in the past, thus invoking the conception of the past as a home, and environment, a *Dasein*.

most often in a negative sense of “dwelling in the past”) conveys the idea I developed in chapter 2, that wrongful acts, (or the failure to condemn acts as wrongful and thus the propensity to commit them) emerge from our social home.

Structurally, shame arises because of the way in which we have *been* and *are* with the other – the way in which we have defined and treated them in general, the meaning we ascribe to their public (ascriptive) identity. Shame goes behind the specific wrongs to the basic orientation – for example to the way in which socially dominant groups look down on minorities. Recall, in chapter 2 I argued that this sense of being looked down upon is the most pervasive experience of people in marginalized groups, but the one that cannot be captured in anti-discrimination law.

Specifically in this case, the shame of non-Indigenous Australians lay in their failure to recognize the full personhood of indigenous Australians – in the pervasive association between whiteness and civilization. Shame lay in the fact that it had been so easy to exclude Aboriginal from the human and civil rights that should have been available to all Australians by virtue of their humanity and status as co-nationals. Making this connection with the broader story of violation, many of those who framed the apology as an expression of shame tied it into the broader reconciliation and nation-building project.¹¹⁸

¹¹⁸ It is in this context that commentators have located the apology as part of a nation building process. See for example Gooder, H. and Jacobs, J. “On The Border of the Unsayable; The Apology in Postcolonizing Australia”, *Interventions*, Vol.2(2) 229-247, p. 233, referring to the reference in the first report of the Council for Aboriginal Reconciliation to the “marvelous opportunity” reconciliation provides all Australians to be participants in a worth-while nation building exercise”, Council for Aboriginal Reconciliation, *Walking together: The First Steps*, Canberra: AGPS Council for Aboriginal Reconciliation, 1994, ix.

More practically, the advocates of shame suggested that shame is not simply about ‘feeling bad’, but has a more positive forward-looking direction. It opens the possibility of altering these background assumptions and orientations. Just as shame arises because subjects recognize something unethical about the way they construct themselves and other types of subjects, when one acknowledges shame and faces the other with the aspect of shame one is actively changing those constructions. As in the *kniefall* when the German Chancellor placed the head of the German State at the feet of the persecuted Jew, the relationship between subject positions is transformed. In this encounter, I recognize myself as one who failed to live up to a fundamental norm I claim to uphold and in fact claim as part of my identity. I recognize the other as a subject with rights. And then I can recognize myself as one who is now affirming my own normative commitments.

The apology, as the relational expression of shame is then the performative mechanism for effecting this remapping of identities, not simply a constative speech act reflecting internal personal guilt. As a relational expression of shame, the apology announces the active presence of a different cultural context in which the wrongful actions are broadly and publicly recognized as wrongful and in so doing constructs conditions in which specific wrongful actions and laws could not proceed with the people’s stamp of legitimacy.¹¹⁹ It is a completely political and sacramental act, transforming recognition into declaration.

¹¹⁹ Again, this is in keeping with van Boven’s combination of satisfaction and guarantees against repetition.

Through the apology, the Australian nation would be reconstituting itself on the foundation of a normative framework where whiteness was not a condition for full citizenship (both in terms of membership and rights) and thus where substantive respect for the rights of Aboriginal people would be the normative default position.

In the words of Australian commentators: “Shame ignites a healing process in which our changing sense of who we are changes our relationships with others”,¹²⁰ “Shame can, in a sense be a spur back into our common humanity”.¹²¹

VIII. Shame, time and history

Moving the debate into the arena of shame also provided the framework for addressing the three objections to an inter-temporal apology. Recall, these were: (1) that reconciliation should be about the present and the future not the past; (2) that one cannot judge the past according to the moral or legal standards of the present, and (3) that contemporary Australians cannot be held responsible for the actions of their predecessors.

Framing the apology as a statement about and active intervention in ongoing, continuous norms of the Australian nation provided a way of bypassing or blurring the apparently thick lines between the past and the present or future that underpin all three objections.

¹²⁰ *Ibid.*

¹²¹ “Guilt is not the same as shame and trying to get out of one doesn’t let us out of the other. Guilt...operates in the realm of personal breach. Shame, on the other hand, operates in the realm of honour and dishonour.....while guilt is often limiting in that it draws down into individual acts of wrongdoing, shame can in a sense be a spur back into our common humanity.” Drusilla Modjeska, “A Bitter Wind Beyond the Treeline” Address at the 1997 NSW Premier’s Literary Awards, excerpt published in *The Sydney Morning Herald*, September 18, 1997.

VIII. 1 Reconciliation and inter-temporality

Thus, one could affirm that reconciliation is primarily about the present and the future, but with the understanding that there is some aspect of the body politic that persists through the past into the present, even as the particular individuals who comprise it have changed. Indeed, it is precisely the persistence of the norms which underpinned past discriminatory social organization which impedes a 'future oriented' reconciliation. Elaborating Alex Boraine's admonishment that you have to read the page of the past before you can turn it, one might say that we need to read the page of the wrongs of the past because we are, in a sense, still on that same page.¹²²

What one sees in the Australian debate is a very practical application of the abstract conceptions of time that I articulated through my discussions about political culture in chapter 2 and *teshuvah* in chapter 3. Recall that there it was the shift from positive events, actions or concrete individuals themselves to narratives about or retellings of those actions and events which allowed for a movement beyond a unidirectional, linear conception of time.

The logic of *teshuvah* rests on the idea that while the line between the past events and the present is immutable, the way we ethically position ourselves in relation to the past and the judgments we make about it are not. Far from being passive, recollection and

¹²² Speaking at the Reconciliation Convention the day before the launch of *Bringing Them Home*, Alex Boraine, former deputy chair of the South African Truth and Reconciliation Commission said: "It is wrong to simply say, "Turn the page." It is right to turn the page, but first you have to read it, understand it and acknowledge it. Then you can turn the page." Quoted by Andrea Durback in her speech "Moving forward; Achieving reparations for the Stolen Generations" at the *Moving Forward* Conference, Sydney, August 15-16, 2001.

remembering are highly active and productive processes. It is this creative flexibility at the level of ethical evaluation that can alter the trajectory of the future. This is particularly true when it comes to the normative expectations that are inherited from the past but continue to shape relationships between people and identities.

Similarly here, publicly and shamefully recollecting the dark side of white Australia's record exposes the normative assumptions that underpinned that history and so opens new possibilities for how black Australians will be seen and treated.

In the Australian case, the years of exposure of violations against Indigenous Australians had laid the ground for asserting this continuity. With Indigenous people continuing to occupy the most disadvantaged position on every socio-economic indicator, advocates had plenty of ammunition for arguing that the norms which underpinned the horrendous stories and events of the past continue to inform current social and political conditions.¹²³ The apology was very quickly connected with the recognition of native title, the health status of Aboriginal Australians and deaths in custody, which were together contextualized within the broader reconciliation movement.¹²⁴ The particular wrong of removing children became an emblem of a pattern of failure on the part of white

¹²³ In its educational material on racism, for example, the Chief Executive Officers of education systems across Australia provides: "Until recent years, racist policies and practices were also embedded within Australian laws and institutions. The most telling examples of these were the removal of Aboriginal children from their families and the denial of full citizenship rights to Aboriginal people and Torres Strait Islander people... While legislation now exists to protect the rights of all citizens, there is a continuing legacy today from the effects of these racist practices." *The Racism. No way!* http://www.racismnoway.com.au/library/understanding/index_What.html

¹²⁴ Much of the work on the apology has been done, for example, by the group called "ANTAR" – Australians for Native Title and Reconciliation. In the huge reconciliation rallies that took place in 2000, the apology was clearly located within the broader reconciliation agenda.

Australia to act decently - the occasion for shame. Reparation for this failure was then emblematic of the change in national character. In framing their apologies, Australians named themselves Australians for Reconciliation - explicitly placing themselves in the stream of this nation building process.

More specifically to the issue of removal, *Bringing them Home* contained an entire section on contemporary forms of removal, pointing out that the hugely disproportionate representation of Aboriginal children in juvenile detention centers and state care was continuous with the more obvious historical forms of removal.

Indeed, it was undoubtedly the fact that Indigenous inequality continued to be a live social and political issue that made the stories of the past so provocative and compelling. If the normative orientation of contemporary Australia had been radically severed from the normative orientation of the past, then the stories of the past would have struck living Australians as little more than just that – stories. In Australia, the story of removal could not just be a story, but was a highly charged commentary on the quality of the nation.

This case suggests a broader hypothesis about the conditions under which apology is likely to become a socially salient intervention. Apologies for past wrongs are most likely to capture the contemporary political community in those cases where it is still engaged with similar normative conflicts. In situations where the apology concerns normative conflicts that are relatively peripheral vis a vis issues of contemporary identity or the

current political agenda, it will attract relatively little attention. I will return to consider the applicability of this hypothesis to other cases in chapter 6.

In Australia, there was no getting away from the conflicts and disparity between Aboriginal and non-Aboriginal people – in the past and in the present. In the face of this continuity, many Australians recognized that they had to positively distinguish themselves from the past incarnations of white Australia if they were to stand in a different relationship with black Australians. Once the issue of removal had come into the public sphere, and once the call for an apology has been raised, *not* apologizing could no longer signify mere omission. Silence itself becomes a significant act, a failure to apologize, an act of positive rejection. As one letter to the editor in the main daily newspaper framed it: “I stood up...and said I was sorry...this was not an admission of guilt but an expression of empathy. I will only feel guilty if now, having learned about the stolen generations...I do nothing to help Aboriginal people overcome the past and build a better future.”¹²⁵

¹²⁵ Letters to the editor, *Sydney Morning Herald*, December 15, 1997.

VII. 2 Judging the past as declaring the present

This understanding also provided a response to the second objection -that apologizing meant inappropriately judging the past according to standards of the present and as such constituted an unacceptable form of retroactive justice.¹²⁶ The original strategy to meet this objection had been to find evidence of contemporaneous condemnation of removal, both by non-government organizations like the anti-slavery society and in the form of international law.¹²⁷ Now however, a more substantive response could be found by asserting that apology differed from the traditional forms of justice in a way that exempted it from this objection. A traditional approach to 'justice' requires that events and actors of the past be judged solely according to standards applicable at the time. By contrast, this form of 'narrative' justice was not limited by the same temporal constraints because the judgment it conveys is only partially a judgment about particular people in the past and what they should have thought or believed *then*.¹²⁸

¹²⁶ At law, condemning or punishing a person who commits a particular act on the basis of a moral or legal judgment which was not encoded *as law* at the time constitutes illegitimate retroactivity - a contravention of one of the cardinal principles of the rule of law - *nulla poena sine lege*. This basic principle is affirmed in the constitutions of a number of countries, for example section 10 of the US constitution provides that: "No state shall..... pass anyex post facto law..."; the Penal Code of the Federal Republic of Germany provides that: "Conduct may be punished only Article 1, if it has been made punishable by statute prior to the commission of the act." General part, title 1, section 1; similarly the UK *Human Rights Act*, 1998. More generally, at international law, non-retroactivity is considered one of the seven non-derogable rights (Article 7, *ICCPR*).

¹²⁷ The Commission itself argued in the original report that at least in the post WWII period the policies and laws of removal had in fact contravened international legal standards, in particular the United Nations Genocide Convention which Australia had ratified in 1949 and implemented as domestic law as the *Genocide Convention Act* No. 27, 1949. Also in response to this objection, those supporting the apology argued that the wrongs which had been committed were so grave that any attempt to relativize them in this way detracted from the force of the condemnation. This strong statement about the absolute nature of the wrong is consistent with my interpretation that the apologetic act represents a statement of contemporary value.

¹²⁸ In practical terms, that question is really moot, especially because no one is talking about imposing retrospective punishment.

So when contemporary Australians say that ‘we (taking in Australians of the past) were wrong’, they are using the past as the story through which to examine and judge the frames of meaning which inform the nation across time and into the present. The judgments that an apology implies about the past are not directed to amending the (dead) past, but to reshaping the (living) present and future. They are declarative statements by *and* about Australians in the present and what they continue to believe *now*. In fact, the very inter-temporality which apparently renders the apology illogical (how can *we* apologize for what *other people* in the past did?) is what makes its apparent judgment about the past viable.

VIII. 3 The problem of retroactivity

In this way, the response to the problem of retroactive justice was also a response to the third temporal objection, that people today cannot take responsibility for actions of people in the past. Those contemporary actors who did not feel constrained by the principle of non-retroactivity were willing to speak across time because they accepted that the referent of the apology is also located, at least partially in the present and not uniquely in a sealed past.¹²⁹ The continuity on which the apology rests is not one of actor and action, considered discretely, but rather the continuity of the moral ethos of the nation. And just as members of the political community play a role in supporting the continuity of a particular political culture, so too they have the capacity to shift the narrative through their public actions and the positions they declare through symbolic political action and speech.

¹²⁹ Sunder Rajan makes a similar point: “[I]t is today, in the light of what the ‘world’ knows and accepts differently from the past, that it must condemn the past.” “Righting Wrongs, Rewriting History”, *op. cit.*, p. 165.

Their apology was by way of saying: “We, here, today as a nation condemn the values and beliefs according to which such laws and actions were seen as acceptable.”

Apologizing for an event in the past, particularly one so stark as the forced removal of children becomes the dramatic occasion for declaring one’s colors. It effects a very literal rhetorical move - towards the other - a regrouping towards unity and support.

This is the paradox of the apology: the one who apologizes simultaneously acknowledges their identity as the one who did wrong *and* establishes for themselves a new normative identity as the one who condemns the wrong. One sees here clearly how apology is not a form of constative speech labeling the past, but is performative speech instituting these different norms as the authoritative values of the nation and thereby affecting a shift in national identity.

Understood as performance, it is not relevant that the particular individuals alive today who make up the human dimension of the Australian nation did not remove children. It is neither a statement about those dead Australians, nor an expression of *their* remorse. It is a public constructive act by those who comprise the nation *now* about and towards the nation from here on in.

Mick Dodson, the Aboriginal man who headed the Inquiry made explicit this interpenetration of time in his public presentations of its recommendations:

And it’s also not just about our national honour, it’s about the legacy we want to leave our children and our grandchildren. Will we be the

generation of Australians who go down in history as denying the truth that's been placed in our hands? Are we going to be the generation that will go down in history as being unable to face and amend the wrongs of our past? Are we going to be the generation that's recognised as being complicit in the ongoing dispossession of indigenous Australians? Or will we be the generation that insists that we move forward into the next century of our nation with honesty, with an acceptance of shame at the parts of our history that fill us with shame? And with courage - are we going to go forward with courage, with pride, and maturity, and above all with honour?¹³⁰

Similarly, the chairperson of the Council for Aboriginal Reconciliation's stated that:

"Issues such as the Stolen Generation and Native Title will always be part of Australia's history and the reconciliation process. In responding to these issues, the Federal Government has the opportunity to confirm its commitment to the reconciliation process and fulfill its promises to address issues of indigenous inequality."¹³¹

VIII. 4 National pride and the dynamics of shame

Of course, mobilizing shame in this way requires people to recognize their own failure to live up to an ideal self – a requirement which is not always met, particularly where there is a strong and rigid investment in a particular self image. Shame is in fact one of the most difficult emotions to confront and the initial experience or inkling of shame can provoke a more pronounced and severe defense against recognizing that aspect of oneself of which one is ashamed. This principle applies equally where the self with which one identifies is the nation.

¹³⁰ Michael Dodson, Speech at Southern Highlands Community Center, May 1997, available at <http://www.hinet.net.au/~sally/cultures/reconc4.htm>

¹³¹ Council for Aboriginal Reconciliation, Media Release, "The Council for Aboriginal Reconciliation sees Inspiration in the Canadian Government's Apology", January 8, 1998.

The commentators who advocated shame spoke on behalf of the many Australians who did want to acknowledge that all had not been well in their social home. The recent years' pounding exposure of systematic violations against indigenous peoples and the connection between this history of violation and the constitution of the nation left no option than for decent Australians to acknowledge that history both with honesty and, as Australians, with shame.

As came through in the native title debate, however, many other Australians vigorously insisted on a very different history – an honorable history untarnished by this supposed stain of racial violation. This was precisely the position of Prime Minister Howard. His opposition to the apology increasingly became the platform for his lauding the egalitarian political culture of Australia past and present. His refusal to apologize crossed time in the same way as did the arguments of those supporting it. Not apologizing was the platform for denying that racism or the systematic denigration of people on the basis of their indigenous status persisted in contemporary Australia.

From the point of view of my larger project, this point of the Australian debate was particularly powerful. Initially, the argument had been between those defending an individualistic conception of responsibility and those advocating some broader collective conception – the two positions also representing the two different tropes of apology.

But when the apology proponents made the link with shame they shifted the center of gravity of the debate to the collective plane. Now, opponents of the apology also began to argue in terms of the normative characterization of the Australian nation.

Everyone could see that *Bringing them Home* had not been narrowly about child removal and Aboriginal suffering. The image of white Australia reflected back through the mirror of child removal was both ugly, and remote from the ideal type of the 'fair-go' Australian. The Prime Minister's vehement protestation that Australia's history stood unblemished and the apology movement's repentant posture represent two responses to the view in the mirror and to the suggestion of shame.

On one side were those who recognized that this image was continuous with the story of violation exposed over the last 30 years and were willing to recognize and tolerate the dissonance. They saw the apology movement as an institutional opportunity to transform the nation's normative frame and its identity along this racial axis.

On the other side were Australians deeply invested in the belief that Australia had always stood out and continued to stand out internationally as the land of the 'level playing field', and for whom the dissonance of the reflected representation was too great to tolerate or accept. Either denying the facts, explaining them away or insisting that they represented exceptional moments, their commitment was to unflinchingly uphold the nation's honor.

Most importantly, both assumed that the debate was now about the character of the nation. In other words, despite the individualist rhetoric of the Prime Minister, despite his insistence that the problem with apology was that it was a form of unacceptable collective attribution, *in fact* he also understood the apology as an indictment of the nation's political culture. In his case however, he refused to accept that there was anything to be ashamed of. He refused to accept that Australia was anything other than a country in which the norm of equality informed what Australians thought was right and what they did.

In the eyes of both its proponents and opponents, apology was now clearly understood as a judgment of the nation and a performative intervention in the national political culture.

VIII. 5 The history wars

This became even more evident when the apology debate expanded into the so-called 'history wars' – with historians lining up behind political positions with their evidentiary documentation of diametrically opposed histories.¹³² On one side were the histories documenting massacres and gross violations of the full range of civil, political, social, economic and cultural rights. These were the histories that had underpinned the High Court's recognition of native title in *Mabo* and which *Bringing them Home* had told, often drawing on the memory, via first person testimony of Aboriginal people.¹³³ They

¹³² "History Wars: the TLS debate", *Times Literary Supplement*, August 29, September 26 2003. For further links to coverage of this debate see *the Sydney Line* at <http://www.sydneyle.com/Fabrication.htm>

¹³³ The principle figure here was Henry Reynolds whose various publications had been the backbone of the *Mabo* case. Once the debate became more political, a collection of defenses was published

were also the histories that had been completely absent from text and school curricula until very recently. On the other side were the 'backlash historians', launching high profile attacks on these 'new' histories, denying the massacres and reaffirming a comforting tale of a relatively peaceful settlement with peripheral instances of minor struggle.¹³⁴

Far from being a peripheral academic debate, this history war was taking place on a highly political stage, with Prime Minister Howard decrying the 'black arm band' history that he attributed to those with no pride, no patriotism and an agenda to undermine the nation. At the same time, this war over the words of history was entwined with the battle over representation in the new constitution of Australia, which was to be put to a national referendum in the final year of the millennium. In the lead up to the referendum and the centenary of federation, as Australians were seeking to forge a constitutional foundation to orient themselves for the 21st century, the representation of their past took on a particular salience. Although perhaps better described as provocative than great, these histories exemplify the English historian E. H. Carr's maxim that "Great history is written precisely when the historian's vision is illuminated by insights into the problems of the present".¹³⁵

as *Whitewash: On Keith Windschuttle's Fabrication of Aboriginal History*, Edited by Robert Manne, Black Inc. Agenda, 2003.

¹³⁴ A major representative of this trend was Keith Windschuttle, *The Fabrication of Aboriginal History, Volume One: Van Diemen's Land 1803-1847*, Macleay Press, 2002.

¹³⁵ E.H. Carr, *What is History?* Penguin Books, 1990, p. 37.

VII. 6 Representation and constitution

When a Constitutional Convention was convened in February 1998, the representation of indigenous people in the preamble was one of the most contentious issues debated - the main axes of contention being references to land ownership and rights.¹³⁶ In its final recommendations, the Convention offered a general statement about the original occupancy and custodianship of Australia by Aboriginal peoples and Torres Strait Islanders – a compromise that did not reflect the more intractable disagreements which had taken place during the convention. The draft put to the referendum offered an even more watered down statement. Closely resembling the Prime Minister’s own draft preamble, it conveyed a romantic vision of indigenous peoples’ kinship ties to the land and their enriching cultures, but avoided any statement about political rights or distinct status.¹³⁷

The partisan quality of this representation and the range of representations Australians advocated are apparent in the draft preambles that emerged from the different political camps.¹³⁸ While some, like the Prime Minister’s reduced Indigenous peoples to their benign cultural eccentricity, others explicitly committed to ongoing recognition of

¹³⁶ The Constitutional Convention comprised 152 delegates from a range of sectors and political affiliations, half of whom were appointed and half elected.

¹³⁷ The actual wording was: “honouring Aborigines and Torres Strait Islanders, the nation’s first people, for their deep kinship with their lands and for their ancient and continuing cultures which enrich the life;” The relevant section of the Prime Minister’s draft read: “Since time immemorial our land has been inhabited by Aborigines and Torres Strait Islanders, who are honoured for their ancient and continuing cultures. In every generation immigrants have brought great enrichment to our nation’s life.”

¹³⁸ The Constitutional Centenary Foundation, an independent organization established to encourage public debate on the Constitution, conducted a Preamble Quest. The Quest was intended to provide an opportunity to respond to the recommendations of the Constitutional Convention and to participate in debate in the lead up to a referendum on the Constitution.

indigenous rights or even to the fact that Indigenous peoples had never ceded ownership of the land.¹³⁹

As had been the case in the apology debate, some underplayed the importance of the verbal representation itself by arguing that the real concern was the legal implications constitutional provisions might have vis a vis land rights and other forms of compensation. Yet here too, it was apparent from the vigor of the debate that the public collective words articulated about Aboriginal people were in themselves highly significant in the context of the representation of the nation.

IX. The conservative apology

The objections to the apology I have explored so far all came from those broadly identified on the “conservative” side of the political spectrum in Australia – critics who did not support the political agenda of positively recognizing the justice claims of indigenous Australians. Perhaps ironically, commentators on the critical left (who did want to see Aboriginal claims prioritized in Australian politics) were also highly critical of the apology. Their objection was that it was overly conservative.

This critique from the left starts with the understanding of political apology I have argued in this dissertation – that apology works to reinforce core principles which constitute the

¹³⁹ Phillip Adams, a left wing public intellectual suggested: “... the Republic of Australia honours the Aboriginal people. We recognise their ancient occupation of this continent and pledge to respect their rights and culture in the centuries ahead.” The writer Thomas Keneally similarly suggested: “We acknowledge that Australia is an ancient land previously owned and occupied by Aboriginal peoples who never ceded ownership”. For a range of preambles see <http://www.home.aone.net.au/byzantium/constit-preamble.html>

polity and political identity. The problem, according to this criticism, is not that apology constructs or reconstructs the nation's normative orientation, but with *how* it does that. Specifically, the problem is that ideally, apology would create a conflict free social cohesion, but one still based on the exclusion of the perspective of the 'other'. As part of the rhetoric of reconciliation, the apology pastes together the political imaginary of "one Australia" in a way that forecloses representation of the very real divisions and inequalities. Because harmonious unification is the ultimate value, the apology project renders invisible the differences that continue to disadvantage Aboriginal people without actually addressing them.

To understand the thrust of this critique, it is important to differentiate it from more standard criticisms that apology is hypocritical or worthless because it is a superficial 'merely symbolic/ rhetorical' measure, substituting 'harder' forms of 'real' justice - monetary compensation for example.¹⁴⁰ This analysis accepts the value and importance of the symbolic in the construction of the political field and social relations, but faults the type of symbolic work that the apology does.¹⁴¹

Despite its pretensions to be a project of recognition, the apology is in reality more tailored to the interests of the ones giving than the ones receiving it. It recognizes the wrong and the other's experience only as far as is necessary to assuage the guilt of white

¹⁴⁰ "We....do not attempt to calculate the relative merits for indigenous people of, say, a symbolic gesture as opposed to more materially grounded ones....Rather we reflect specifically upon the 'psychic life' of the apology." Haydie Gooder and Jane Jacobs, *op. cit.*, p. 231-2.

¹⁴¹ "The Australian apology..... has the power to form and reform what and who is considered to be legitimate within the reconstituting imaginary. It is an utterance...which has immense potential as a redistributive force, both material and symbolic." *ibid.*

Australians and allow them to reconcile themselves with their own troubled past. This is not an authentic recognition of the black other in their distinct experience - a recognition that could genuinely alter the map of social/racial relations. It is an instrumental recognition ultimately directed to covering the rift and reforming an ideal self. In this sense, the apologetic act is ultimately one of narcissism and not recognition.¹⁴²

Moreover, it does not mark a break with the past at all, but merely takes up the self same strategies of absorption and assimilation it pretended to condemn. Cleansed of the sallying sense of itself as the perpetrator of an illegitimate theft (of children, of land of sovereignty), Australia can now stand proud in its national identity and better carry on the basic colonial project.¹⁴³

According to Gooder and Jacobs, for example, the apology did not become popular in Australia because of what it offered to Aboriginal people in the way of genuine recognition, but on the contrary because it eased the “unsettlement” of those they labeled the ‘sorry people’ - primarily middle class Australians. They suggested that ‘settler Australians’ suffer from a perennial form of ‘unsettlement’ - a sense that their sovereign claims to the nation are unstable and their legitimacy called into question by the presence of a belonging which is older and therefore more legitimate than their own.

¹⁴² “Relatedly, let us remember that the apology is as much an act of narcissistic will and desire as of humility and humanity.” Gooder and Jacobs, *op. cit.*, p.244.

¹⁴³ This critique is structurally similar to recent critical work on the use of traumatic witnessing in truth commissions. Here, the act of giving testimony of traumatic events is understood not as a liberating process that breaks the relations of violence, but as a mimetic form of violence where the one giving testimony is positioned within existing (dominant) structures of juridical and medical emplotment. See Allen Feldman, “Memory Theaters, Virtual Witnessing and the Trauma Aesthetic”, *Biography: An Interdisciplinary Quarterly*, forthcoming.

Until the latter part of the 20th century this sense of unsettlement had been offset by a range of justifying discourses (cultural, anthropological, political), supported by the laws of *terra nullius* and through complicit silence. So long as the official discourses “successfully” legitimated white sovereignty, the sense of unsettlement was attenuated. But the comfortable silence was disrupted over a period of time by a series of political movements and public rememberings - the Royal Commission into Aboriginal Deaths In Custody, the land rights movement, the *Mabo* decision and the other developments I discussed above. When these were topped off by the very intimate and affecting narrative of stealing Aboriginal children, Australians could no longer avoid the “uncanny sense that the nation is not as it once was”.

While from a material point of view, these movements and memories may have achieved only minor advances in the situation of indigenous Australians, they did strengthen and legitimize the claims of Indigenous Australians in the national imaginary.

“Indigeneity”, Gooder and Jacobs argue, “seems to have assumed a legitimacy in excess of that which can be claimed by the colonial”.¹⁴⁴ Non-indigenous Australia may have lost little in the way of property title or absolute political power, but it had experienced a loss of surety in its rightful claim over them.

Faced with their experience of “lack” (of a long or dignified history and hence of legitimate sovereignty) and the corresponding projection of indigenous Australia as “abundance” (of history and “true” connection to the country), white Australians turn to indigenous Australians for forgiveness as a way of restoring the lost ideal of legitimate

¹⁴⁴ Gooder and Jacobs, *op. cit.* p. 236.

place and nationhood. Yet even as they attribute to Aboriginal people this apparent power, they do little more than project onto them what Wolfe has called the position of “repressed authenticity”.¹⁴⁵

Gooder and Jacobs use Freud’s theory of melancholia to explain Australia’s response to this loss of legitimacy or surety. In melancholia, as distinct from true mourning, the subject refuses to break with the lost object or ideal. Instead, they retain it by absorbing it into the ego - albeit with guilt and rage in combination with love. Here, the lost object is the experience of having a rightful place in the nation and the very legitimacy of the nation itself - “a properly constituted national selfhood”.

When Australians lost this ‘object’, they did not actually give it up. Because doing so would demand a genuine reconstitution of the nation, taking into account the original Indigenous Sovereignty. Rather, as in the melancholic response, they hung onto the lost object (here the ideal Australia) by ‘making themselves /taking into themselves the indigenous’. By unifying themselves with indigenous Australia, they could restore to their own national identity its lost legitimacy.

This, argue Gooder and Jacobs, is exactly what the reconciliation process and the apology were about. They were not directed towards the type of genuine recognition of indigenous people in their distinct identity and claims - a recognition that would demand major institutional reform. On the contrary, they were directed towards drawing them

¹⁴⁵ Patrick Wolfe, “Nation and MiscegeNation: discursive continuity in the post-Mabo era”, *Social Analysis*, 36: 93-152, at 126-7.

back into the self-same national form and institutional rules so as to re-legitimize those rules. In the first instance the apology recognizes the historical conflict between the indigenous and non-indigenous. But this is only a way station to blurring the difference between them so that all can become legitimate Australians. By distancing themselves from the acts of dispossession, white Australians symbolically “join with” the dispossessed and perform their allegiance to the “rightful values” of respect and recognition. With this they can re-settle, but without subjecting those values themselves to the critical evaluation that the indigenous perspective should be opening up.¹⁴⁶

The post-apology Australia according to this argument, is one which has absorbed the groundedness of indigenous culture and stories into the national imaginary – another (albeit subtler) version of absorbing the black blood into the white

In support of their analysis they cite the Council for Aboriginal Reconciliation issues paper:

“It is only through indigenous Australians that non-indigenous Australians can claim a long-standing relationship with and deeper understanding of

¹⁴⁶ The Marxist/structural underpinning of the critique of ‘ideology’ is evident here. Povinelli refers, or example to a ‘collective moment of shame and reconciliation in which the nation will be liberated into good feelings’, supported in part by the liberal faith in democratic institutions’ capacity to tinker at the margins to achieve equity and inclusivity. “Alterity is not seen as a threat or challenge to self and national coherence, but is seen instead as an incorporative project.....In short, in this liberal imaginary, the now recognised subaltern subjects would slough off their traumatic histories, ambivalences, incoherences, and angst like so much outgrown skin rather than remain for themselves or for others the wounded testament to the nation’s past bad faith. The nation would then be able to come out from under the pall of its failed history, betrayed best intentions, and discursive impasses. And normative citizens would be freed to pursue their profits and enjoy their families without guilty glances over their shoulders into history or at the slum across the block.” Elizabeth Povinelli, “The State of Shame: Australian Multiculturalism and the crisis of indigenous citizenship”, *Critical Inquiry*, 24: 575-610 at 581-2.

Australia's land and seas, in a way possible to other nations who have occupied their native soil for thousands of years."¹⁴⁷

Thus, reconciliation becomes the first "Aboriginal policy to be structured around what might be thought of as a settler problem", directed as much towards non-indigenous Australians as indigenous Australians.¹⁴⁸

The first thing to notice about this line of criticism is that structurally, it conforms with the argument I have been making throughout this dissertation. The principal object of the apology is not the other, but the self, even as the other is a necessary player in the game of reforming the self. What is distinct about the Gooder and Jacobs' criticism is that it assumes that the victim other is only an instrument for what amounts to little more than a superficial reformation of the self.

As Gooder and Jacobs frame it, apology effects a healing which is the very opposite of the ideal projected by its advocates. Apparently, the apology is a form of restorative justice attending to the losses suffered by *indigenous* people - of land, dignity and sovereign political rights. Apparently it is white Australia that is returning to *indigenous people* their lost ideal and objects. In fact, it is white Australia's loss that motivates the apology. And in turn it is the sovereignty of white Australia that is secured through a comforting discourse and the forgiveness that will calm all bad conscience. If restitution is at work here, what is restored is white Australia's national imaginary - its conception

¹⁴⁷ Clark, Ian D. *Sharing History: A Sense for All Australians of a Shared Ownership of Their History*, Council for Aboriginal Reconciliation, Key Issues Paper, No. 4, Canberra: AGPS, 1994, p. 28.

¹⁴⁸ Gooder and Jacobs, *op. cit.* p. 233.

of itself as the principled legitimate sovereign nation.¹⁴⁹ Taking this critical stance, Gooder and Jacobs ask whether this project is not, perhaps, a little *too* post-colonial?

Their argument puts a bitter twist on this apparent act of recognition and respect. The indigenous other is asked to affirm their oppressor as worthy of love after all - even as legitimate in its sovereign claim, despite *the very history that this process has brought into view* - a history of hatred and disrespect on the part of non-indigenous Australia.

This critique recalls the paradox of the apology that I discussed earlier. In apologizing, the people are both identifying with and distancing themselves *from* the wrongful action. In the very act of taking responsibility one assumes a new identity and therein creates a distinction, a break between the identity of the future and the one of the past - “Now that I name and judge what I was, I am no longer that”. The past becomes an earlier stage in a progressive, even a redemptive history. All the threads and perspectives, no matter how disparate can apparently stitched together into the grand national narrative, now in the form of the sorry nation. Ideally, there would be no residues, no experiences, events, perspectives of or patterns of relation that resist integration and remain, uncoded, unspeakable, beyond apology.¹⁵⁰

¹⁴⁹ “For settlers so afflicted, the postcolonial apology becomes a lifetime to the restitution of a legitimate sense of belonging”. Gooder and Jacobs, *op. cit.* 243.

¹⁵⁰ Cultural theorist Raymond Williams’ distinction between dominant, residual and archaic perspectives, beliefs or practices and the way in which the latter two categories are incorporated into the dominant is useful for mapping the process of assimilation that is going on here. See Raymond Williams, *Key Words*, New York: Oxford UP, 1983.

No doubt, there was a certain 'self congratulatory' quality to the apology movement. White Australians, the 'sorry people' could now stand proud before an international community that, as the Justices in the *Mabo* decision noted, now looked askance at the old norm of racial discrimination. The myth of national harmony had a deeply seductive quality for Australians, enhanced by the relief this new romantic status offered their long felt sense of cultural lack. No longer the poor replica of Great Britain or the United States, Australia was now the nation of the oldest civilization on earth, flying the Aboriginal flag and dot paintings for themselves as much as for the prospective tourist market.

Moreover, the very idea that all history, however horrific can be integrated into the normative framework of the nation presumes that the existing culture is sufficiently capacious to include all strands, however disparate. Surely, one must be suspect of a theory that supposes that it is possible (or even ideal) to integrate all points of experience or perspectives, leaving no residues. Can this past of abuse, exclusion and non-recognition, so deeply built into the constitution of the nation just shift into recognition and inclusion?

The answer is certainly that they cannot. Not every experience or perspective can be written into the story, at least not without doing violence to it and the experience of the person who would have to translate it. That not a single mother whose child had been taken gave testimony before the Commission (even in private or in writing or by representation) poignantly exemplifies the places that cannot be integrated. At a more

structural level, the comprehensive legal, political and social forms of organization that mapped the continent before the arrival of the colonizers cannot be revived. They are, in our terms, beyond sorry.

The real question is then whether the reform of the self only involves an aesthetic rearrangement of existing norms, or whether it puts those norms into question. Or, in other words, does the voice of the excluded other actually enter into political discourse, or is it admitted only conditionally, only through the filter of entrenched norms that will always exclude its most challenging claims?

This line of critique raises the all-important question of the status of the Aboriginal other in this interchange. How are the emerging stories of dispossession and genocide deployed? Are they the occasion for a shocking recognition and subsequent structural reformation, not only in the institutions of law and citizenship rights but also of identity and meaning? Or, is this an instance of “imperialist nostalgia...that curious phenomenon whereby colonizing agencies often celebrate native society as it was before they came and destroyed it.”¹⁵¹ From the point of view of these critics, the apology prematurely glosses the ‘fractured Australia’ – a symbolic representation still required to support the institutional reform required to do justice.

Stepping back from the particularities of the objections from the left and right respectively, one can see that both movements were reacting to this same conceptualization of the apology as a constructive performance directed to reconstituting

¹⁵¹ Wolfe, *op. cit.*, p. 127.

the nation. Those on the right objected that the apology represented the nation as overly dark or unprincipled; to those on the left, the representation was falsely and problematically harmonious. This confluence of understanding supports my thesis that it is this trope of apology that is most important in explaining its contemporary salience.

It also invites a more scrupulous and critical analysis of the relationship between the principles that are being affirmed and the wrongs that are being addressed. In chapters 3 and 4, I suggested that apology is a means of re-covenanting. This criticism demands a closer scrutiny of the status of the principles to which one is re-covenanting, and their relationship with the wrong in question.

The distinction I drew earlier between the equality and difference perspectives on indigenous human rights is helpful here. Those who supported the apology in Australia assumed that the injustice committed against Aboriginal people comprised unequal distribution of citizenship rights and inconsistent application of the moral principles that underpinned Australian national political culture, or the liberal ideal that certainly formed part of its normative horizon. Had these national principles been applied equally to all (including Aboriginal people), there would have been no injustice. Seen from this perspective, it was possible for Australians to condemn their own actions as unjust from within their own ideal normative frame, by recognizing that they had not fully realized their own commitment to equality.

If this is the injustice, then the apology effects justice by declaring that henceforth such exclusion from basic rights of citizenship is no longer acceptable. It reaffirms the existing constitutional or human rights values, now expressly extended horizontally to include groups previously excluded from their purview. The ideal principles are not themselves called into question - only the scope and consistency of their application.

Critics on the left share the basic analysis that the apology is a reaffirmation of certain values constitutional to the nation, but argue that these values *are themselves* also a source of injustice. In other words, the injustice did not simply comprise unequal application of principles that are themselves just, but reached down into the principles themselves. On this analysis, the injustice runs far deeper, down to the imposition of an alien legal and political system onto an indigenous people.¹⁵² If one accepts the more radical argument about justice as difference, then justice requires a more radical expansion of principles - not only quantitatively (who is included?), but also qualitatively (what are they included in).

It is not sufficient to extend the rights assumed by the colonial legal and political system, because these were and are themselves partial, representing justice and rights as defined by a colonizing people. Moreover, the assumption that justice comprises their universal application is just another the product of the underlying failure to recognize the *different* political culture and social organization of the indigenous peoples.

¹⁵² This discussion raises issues similar to those dealt with in contemporary debates about a politics of difference, as distinct from a politics of equality - a debate that has echoed through the philosophical and legal considerations of feminism and racism. Is it enough to accord to women or indigenous people the "same rights", or do these rights themselves need to be revised in the light of an analysis that has been repressed because of the structures of exclusion?

For these critics, it is not sufficient to bring indigenous people into the existing set of rights, norms and understandings. In fact, the apparent good of 'equal treatment' can become another means of foreclosing the distinct claims that are the most essential indigenous rights, but also those that most deeply threaten the dominant cultural/constitutional system.

Seen through this lens, integrating indigenous people into the system of citizenship does not repair the injury, but simply renders the fractures between their perspectives and experiences and those of the one nation invisible. This fracturing, this dissonance is necessary both to sustain attention on residual inequalities even in the face of apparent gains and to achieve a fully-fledged institutional recognition of the special rights that arise by virtue of indigenous peoples' original sovereign status.¹⁵³ And it is this fractured discourse that they fear is pasted over by the rhetoric of reconciliation.

This critique raises in very practical terms the abstract question I posed in chapter 3 about the limits of apology and the status of the norms according to which right and wrong are judged. There I argued that apology *logically* requires that there to be some background normative commitment or ground against which historical normative standards are assessed, but that this ground need not be a set of fixed absolute and immutable laws. Rather, the so-called absolute normative pole (in the religious context called God or God's laws) is itself open-ended and continuously created through a history in which current articulations of the absolute confront their own limitations. Nevertheless, in my

¹⁵³ The two may be, but need not be at odds. The way in which this equality and difference balance is worked out is clearly an important question, but beyond the scope of this work.

discussion of *Mishnah Horayot*, I suggested that when one is considering a particular group which identifies as a collective by virtue of its ascription to a set of norms, there has to be some intrinsic relationship between the laws it affirms at different moments in its history and those constitutional norms.

In that text, dealing with a community unified and identified around religious norms, the continuous relationship was etymologically conveyed in the internal connection between *Torah* (representing the pole of the background or absolute) and *Horah* (representing the laws in history). In a political community, it will be expressed through the relationship between the constitution and the historical laws. The concrete laws or particular norms can change, but must in some way be continuous with the community's normative identity. If the connection is completely severed, the community can no longer be thought of as the same community but will be a different community with a different identity. There may be a transformation of norms, but unless there is some continuity, there is no basis for thinking that the historical community is the same political community at different points of time.

At what point then do we think that the expansion of the original expression of the constitutional laws is 'development' of those norms, and at what point does it constitute a definitive break in identity?

This is pertinent here because an inter-temporal collective apology only makes sense if there is continuity of identity. If a political community is apologizing for its normative

orientation, then even as it is shifting that orientation, it must be doing so within some broader identity frame. Change must be development, not an absolutely new and detached identity.

The norms against which the act is now judged to be wrong need not have been embraced by the community at the time, and in fact, the cases I am dealing with here are precisely those where acts were not considered wrong at the time. But the norm which would have deemed them wrong, as I argued in chapter 2, had to have been somewhere on that community's normative horizon.

It is this requirement which leads Gooder and Jacobs to argue that the Australian apology can only expand existing norms within the constitutional framework, which they see as essentially colonial and structurally incompatible with the rights claims of Indigenous peoples. What the apology recognizes is that the historical Australia has not been true to its own normative claim to be a liberal egalitarian nation. It recognizes and then seeks to repair the disparity between the vertical and horizontal norms. It can even expand the conceptualization of those vertical norms themselves – to whom equality applies and what it means for example. But, it cannot fundamentally contradict the essential normative orientation of the neo-colonial state. If it did, they argue, it would be effecting an absolute break in its identity and undermining its own legitimacy. And this, they contend is *logically* beyond the limits of apology.

In fact, they argue, were it to take in the normative orientation of the Indigenous other, it would have to give up the identity of the Australian nation, as constituted on the ground of unrecognized Aboriginal sovereignty. To fully recognize the otherness that Aboriginal people represent (from a constitutional normative point of view), it would have to become another political community. And this, they suggest could not occur through an apology, because an apology can only ever hark back to the original constitutional norms – even in their most expanded form.

If one accepts that the foundational normative commitments of the Australian nation are fundamentally incompatible with the normative claims that underpin the Aboriginal case, this criticism is unavoidably correct. But the claimed incompatibility is arguable, assuming an absolute opposition between the ‘Australian’ and the ‘Aboriginal’ perspective that is over-drawn.

Thus, for example, one could argue that as a member of the international community the Australian nation is also committed to the norm of recognizing the sovereign rights of other peoples (the right of peoples to self determination).¹⁵⁴ A logical extension of that norm to define indigenous peoples as legitimate claimants of this collective right would then define Australia’s historical failure to recognize Aboriginal self-determination as a breach of its own ideal norm. Starting with this normative frame, as distinct from the

¹⁵⁴ The meaning and application of this right is highly disputed. Nevertheless, it is considered customary international law and is articulated as the common 1st article of the *International Covenant on Civil and Political Rights* and the *International Covenant on Social, Economic and Cultural Rights*.

national frame of post-colonial liberalism, one can locate the absolute normative pole required for Australia to apologize.

Indeed, many advocates of indigenous rights argue that it is *this universal* principle that underpins indigenous claims and not, as is often thought, a claim to special or different treatment by virtue of their indigenous status. Certainly, indigenous political claims challenge the existing distribution of sovereignty across nation-states, but they do not challenge the structure or principles of sovereignty that underpin the system. In *practical terms*, their claims demand major reform of the existing distribution of sovereignty and probably also new forms of shared or split sovereignty. But these are institutional adjustments not challenges to the principle.

Similarly, in recent years, Indigenous rights advocates, like feminists, have argued for a reconceptualization of equality. Equality and difference do not stand in an oppositional relationship, or at least not in all cases. Specifically, when one is dealing with different types of subjects, *equality* requires different treatment or different rights. This argument powerfully takes an existing norm and applies it to an apparently anomalous or even excluded argument, thus allowing for a normative continuity.

The second problem with the Gooder and Jacobs argument is that it assumes that the apology encounter can only ever involve white Australia rearticulating the values it already has. The image they evoke to describe the reconciliation process harks back to

the assimilation model: the white overwhelms and absorbs the black, leaving no trace of the black other in the final product of a reconciled nation.

But this view overlooks the important dialogical potential of apology and reconciliation more generally. Apology may be a monological act in which I look to the other as a voiceless projection of my own needs (for affirmation, for legitimacy). But the apology encounter may also be one in which the other is not only recognized on ‘my terms’, or recognized because ‘now I can see that they are like me after all’. In a more engaged and demanding dialogue, indigenous Australia would also be communicating its perspective on its rights and identity to non-indigenous Australia. If the encounter included a conversation where Aboriginal people were also subjects, the recognition that would follow would be one that included their perspective.¹⁵⁵ The expansion of the meaning of equality is an example of this type of dialogical process.

This may seem to contradict the requirement that an apology must refer back to values that belong to the apologizing community. However in this case, where what is at issue is the constitution of Australia and the genuine inclusion of indigenous Australians into the nation, the apologizing community also, perhaps ironically comes to include the excluded other. This is a complex relationship in which the Australian nation and Aboriginal Australia are both distinguished –as the subject giving and receiving the apology – and merged, as a nation with a citizenry including indigenous peoples.

¹⁵⁵ Similarly, Feldman argues that in the South African TRC, it should not be assumed that African witnesses operated within the talking cure model because, even if this represents the framing of the TRC itself, it omits the “Africanization of remembrance.”. Allen Feldman, “Strange Fruit: The South African Truth and Reconciliation Commission and the Demonic Economies of Violence.”, *Social Analysis*, Vol. 46, No. 3, Fall 2003, 234-265.

Nor is this structural ambiguity unique to this case where the apology is directed to a national minority. In other cases, say apologies between nations, part of the work of the apology is to create a more expansive identity that includes both parties. In fact, what allows for a development of the existing norms beyond their historical expression is precisely this encounter with the other. Recall, it was this type of encounter with difference that provided Hegel (and Castoriadis) with the answer to the problem of explaining history and normative progress. The new community may be a reformed nation, humanity or the international community. The point is that it is constituted around a broader ethical frame large enough to include the subject perspective of all parties, or at least to move in this direction.

Of course, the new identity will only provide genuine recognition of the subject perspective of the excluded group to the degree that it is the product of an engaged dialogue between the parties.¹⁵⁶ Far more likely the apology will only involve an accommodation within the existing normative framework. My point is that it is premature to insist that the apology is, by definition, never more than an incorporative project where the incorporating body is not altered. Under certain conditions of dialogue, the act of incorporation also changes and expands the body politic itself.

Certainly, one must be alive to issues of power and where the victim other represents a minority, the danger that its perspective will be drowned out by the majority perspective is very real. However, the dynamic of power here is far more complex than this type of

¹⁵⁶ Even then there will be residual differences and perspectives that cannot be integrated into a single frame.

gross quantitative analysis would suggest. The metaphor of conversation, with its qualitative dimension is more accurate than that of an economic exchange. Different discursive styles and different messages *also* have differential power. Moreover, if the normative claims of the excluded and minority other form part of a broader normative demand articulated in, for example international fora and international human rights law, their normative weight is multiplied.

In the encounter between the dominant political community and these new rights bearing groups, qualitative change to the constitutional or orienting principles of the nation may or may not occur. This can only be evaluated by looking at the dynamics of the conversation and the broader norms that provide the context for the exchange, including those supported by the international community. Moreover, if the national imaginary of Australia is already damaged and unstable, it will be more permeable to the shaping influence of Indigenous Australia. As in the religious context, it is in the moment that the sinner recognizes and experiences the injury of their own sin that the greatest possibility for redemption or a change of orientation occurs.

In the Australian case, there are good reasons to question this view that the apology was little more than a continuation of the discourse of the post-colonial nation. Recall, the argument in favor of an apology as articulated in *Bringing them Home* encoded the recognition of the particular meaning that removal or dispossession had for Aboriginal people. The text and the call for the apology emerged from the first person narrative of Aboriginal people who had experienced violation from the other side. Their call for

apology assumed that apology entailed recognition of *their* experience of removal as a form of collective denigration, not only their pain as hurt individuals.

In this way, the apology discourse invited non-indigenous Australians to go beyond empathizing with the other as a mirror of their (individual) selves and to expand their imaginative space so as to include different categories of experience - in particular the collective dimension of identity which is central to Aboriginal experience of removal and colonization. This demanded more than an extension and application of a pre-existing concept of right. It entailed an expansion of the conception itself.

More poetically, 'sorry' itself carried a different set of meanings that became apparent through this conversation. For Aboriginal people, 'sorry business' is what a community does by way of mourning, usually involving public rituals. When the suggestion of apology first entered the public arena, apology carried no trace of this meaning. But as it filtered through the community, apology gradually also became sorry business and non-indigenous Australians were drawn into the ritual of Indigenous mourning, and the sound of their sorry ceremonies.

That said, the performative value of sorry is fragile and must ultimately be grounded in the concrete institutions that will transmit its normative possibilities. It suggests what is possible and provides a ritual for making a transition, but unless that transition is entrenched in law and crosses over into the default grammar of recognition, it will ultimately be a futile melancholy.

X. Conclusions

In the Australian case study one sees how the two major tropes of apology derived from the religious sphere and the different understandings of responsibility canvassed in chapter 2 underpin the debates surrounding political apologies. Competing interpretations of what one is doing by apologizing on behalf of a political collective and different ways of attributing responsibility inform different views on whether an apology is appropriate as part of liberal democratic public policy. Importantly, although to date theory on political apologies has interpreted it through the lens of the internal, individual trope, and assumed that contemporary citizens will do so also, once apologies enter the public and political sphere, the second, political trope quickly gains currency in the popular debate.

With this detailed empirical at hand, read through the theoretical lenses of the previous three chapters, we are now equipped to assess the political apology in general as a form of political action. In the final chapter I take up this task both at a practical or policy-oriented level and at the more abstract, political theoretical level. With respect to the practical dimension, I set out what an effective apology would look like, the conditions under which apologies are an appropriate mechanism for addressing systematic violations and the conditions under which they are likely to capture the polity. On the theoretical dimension, I return to the questions raised in the introduction of whether apology is compatible with the principles and institutions of liberal democratic politics. More broadly, I consider the implications for our conceptualization of the political sphere of the emergence of this form of symbolic or sacramental representative speech.

Chapter 6: Apology as political action

I. Apology and political action

1. Evaluating the apology

Apology, it turns out, is not an apolitical interloper into politics. Not only does it have a rich history as a public and collective form of action concerned with the normative constitution of a community, but also on the contemporary political stage it is picking up live issues of political identity and collective responsibility. Moreover, its emergence on the contemporary political stage speaks to gaps in existing conceptualizations and institutions of justice – albeit gaps that flow from modern politics' self-conscious rejection of pre-modern forms.

Still, one can hardly say that political apology has been established as a 'conventional procedure' (in Austin's terms) – one that is broadly understood as achieving the conventional effect of collective normative recovenancing. At this stage, the establishment of the political apology remains a work in progress.

This final chapter assesses this 'work in progress', both practically and normatively. The first, 'policy-oriented' part of this assessment is concerned with how it is that apology has taken up its political dimension and what it would take to establish apology as a fully effective form of political action. If the most relevant, powerful and appropriate work that apology *can* do in the political sphere is the work of normative recovenancing and recognition, what are the conditions under which it can do so? How can the procedure be

stabilized and perfected? Under what circumstances is it most suited? What would an ideal apology look like?

The second, normative dimension of this inquiry returns to the questions raised throughout this dissertation about the political theoretical implications of apology being used as a form of political action. What are the normative implications of apologetic speech being admitted into the political sphere? What does this emergence of sacramental, repentant speech imply in terms of our institutions and conceptions of the political? This second, theoretical dimension looks through the particular analysis of the apology to broader disciplinary questions about how to characterize the sphere of politics, what type of actions count as distinctly political and how the answers to these questions change over time.

I.2. How the apology ‘becomes’ political

Before moving to these two dimensions of assessment, a few comments about apology’s transformation into a political act are still in order. Irrespective what theorists say about apology’s suitability to the sphere of politics, apology *has* assumed a political dimension, albeit one still flanked by its non-political implications. How this has occurred and how apology’s political identity could be strengthened and sharpened are worth some reflection.

This specific inquiry points to the more general question of how the meaning of social practices is constituted. Specifically, can social practices be interpreted from an

ahistorical, transcendental perspective, or do they require an analysis that attends to historical contingency and pragmatics? Recall, in chapter 1, I argued that the sociological/political theory analyses of political apology to date erred primarily because they assumed that apology *is* a particular type of act, specifically one requiring a certain type of individual reflective subject. In its characterization of apology, speech act theory suffered similarly from its assumptions about what type of work apology essentially does, its illocutionary and perlocutionary force. In more abstract terms, both approaches failed to recognize the breadth of the significance of the living phenomenon because they insisted that apology has an essential meaning and structure.

As the examination of the historical practices and conceptualizations of apology in the religious context made evident however, these putatively essential meanings represented only one trope or one historical deployment. This slippage between contingency and essence concealed the alternative forms and potential forces of apology, or categorized them as deviations or abuses of the 'real' apology. Apology's work is not determined in some transcendental realm or even in one ultimate constitutive moment. It can change and be changed through practices and the sense that people make of those practices given their needs and context.

At the level of theoretical analysis, the result of assuming an essential meaning is that theorists are armed with a very thin and rigid repertoire for thinking through the contemporary political apology. When apology *did* appear in a different form in the public sphere the only criteria for assessing it were those given by the putatively essential

apology. When one widens the lens to allow that apology as a form has the space for different tropes, and that those tropes can themselves shift contextually, one can take up more tools for interpreting what is, after all a novel application.

It is not however only the theorist trying to make sense of the apology who is infected with this tendency to assume transcendental meaning. The actual audience of apologies, the people of today's political communities who witness and are invited to partake in this discourse also carry strong assumptions about what it means to apologize. It may be Rolph-Trouillot who applied the technical term 'category mistake' to the political apology, but it is the 'person in the street' who complains that you cannot blame a whole country for what a few people did or that it is ridiculous to think that a nation can feel remorse. She too assumes that apology just *is* a certain type of speech act, judges the political deployment accordingly as an aberration and walks away unconvinced. This was very clear in many of the responses in the Australian debate.

In this very practical sense, even the fact that apology has a range of possible meanings and *can* do different types of work, including the work of collective normative change is not sufficient to this trope being transformed from an abstract possibility into a living part of people's interpretive repertoire. This is the case even if, from an ideal point of view, it is the one that would be most useful, given contemporary political problems and needs. In the case of the apology, this is all the more true because of the various barriers to its being taken up as a viable or appealing mechanism for dealing with contemporary violations. The fact that citizens of contemporary liberal polities are so wedded to the

principle of moral individualism, hostile to the notion of collective responsibility and resistant to seeing themselves as embedded in collective norms only makes it less likely that they will simply shift their interpretation and use of apology. Similarly, their unfamiliarity with this type of ritual speech as a form of political action impedes an interpretive shift.

What then are the factors that allowed for or supported this shift in interpretive frame? What were the conditions that catalyzed and supported it? And how does an interpretive frame become established as a convention of political apology?

In response to the first two questions, I have already suggested that the emergence of 'collective' forms of justice is linked with the limits of existing institutions of justice. As contemporary political actors became more aware of the confluence of issues of identity and systematic human rights violations, they were forced to recognize the need to go beyond institutions that focused on individual aberrance and seek out those that could speak to the broader patterns of denigration that underlie abuses. In this sense, there was a conceptual and institutional vacuum that 'pulled in' alternative strategies that would speak on this collective and normative level, apology being amongst these. In the next section I go more deeply into this question by examining the conditions under which apology is a suitable form of political action.

The contemporary international political context, and in particular shifts in the role of the nation state are also apposite in explaining apology's emergence into the repertoire of

political action at this historical juncture. In the context of globalization and widespread political transition, international actors and international norms on the one hand, and sub-state, civil society actors on the other have augmented their political roles. In this process, they are also pressing in on the state, diminishing its role as the dominant political actor and loosening its hold on both the content and the form of political action. As this shift in power is occurring, so too the scope for novel forms of political action can expand.

Still, the question remains as to how apology in particular came to be part of this broader repertoire. The basic pieces of this jigsaw are apology's potential as a powerful mechanism for addressing the collective dimension of wrongdoing, the fact that this trope is part of the background cultural grammar of western polities and the ripeness of the conditions. The confluence of these factors laid the ground. But this cannot be the whole story. Political apology is not simply 'there' as a latent potential to be caught like a virus or catalyzed like a genetic predisposition in passive actors under the right environmental conditions. Contemporary political actors, both those crafting political strategies and citizens who interpret them are also active participants who co-create the contemporary interpretive lens. There are a range of meanings from which they can draw, but how they locate themselves on this range, how they make sense of the apology and how apology is deployed will itself construct its 'meaning'.

At a certain point someone (or more likely several people or movements) introduces this novel form of action into the political sphere. In the case of apology, one might locate this moment as German Chancellor Willie Brandt's dramatic performance of repentance,

kneeling down in the Warsaw Ghetto. This initial act catalyzes in the contemporary imagination a template or a form, but its direction is still undetermined. It is then, in the controversial space that this anomalous act creates that the real transformation and constitution of meaning can occur. The political debate that happens in this space provides the stage for alternative and perhaps more latent interpretations to be more fully articulated and so to reoccupy a more prominent place in the popular interpretive repertoire.

It is at this point that one can see the operational relevance of my observations about the transitional context and the heightened political role of non-state actors. Specifically, religious organizations have been prominent amongst this expanded set of political actors and religious discourses and processes have entered into political discourse in a more vigorous manner. Accordingly, language and processes traditionally held to belong to religion, not politics can gain currency in this expanded political field. Recalling the apologies listed in chapter one, one saw that in many cases apologies from political actors followed, or were actively supported by apologies from religious organizations.

This process will then be supported where the practice is crystallized and officially legitimated in some type of legal (political) document, such as the Van Boven principles, which is then taken back into living practice. It is, after all, by actually using forms of speech to achieve particular effects, deploying convincing arguments about such usage

and bringing these alternatives into popular currency that interpretations shift and practices undergo historical transformations.¹

Again, this was clear in the Australian debate, where the proponents of the apology sharpened their analytic tools and public relations skills for explaining why an apology was appropriate and politically useful. The clear discussions about shame and the dignity of the nation did not appear at the very beginning of the debate, but were the outcome of struggles to make sense of the apology and make it meaningful to contemporary Australians. This included a vertical appeal to authoritative standards or requirements like the Van Boven principles and a horizontal appeal to other instances where apology was used to deal with serious violations of the past. If at the beginning people were confused about why the apparently personal act of apologizing was meaningful or how it could be consistent with important principles of individual responsibility, several years down the track the notion that an apology could speak to broader political cultural norms had become part of the public grammar, albeit still in the space of interpretive flux.

Even then, the presence of an interpretive frame is not the same as a distinct, well-established and broadly recognized convention. Recall, Austin's first condition for a successful performative was that there existed a conventional procedure having a certain conventional effect. Such a convention for the political apology has certainly not yet been achieved and the fact that apology already strongly invokes existing (interpersonal and

¹ Think for example of the shift in the concept of international humanitarian intervention or human rights as a justification for military intervention. Just ten years ago, this concept would have been anomalous and human rights would not have constituted one of the range of justifications acceptable in the conversations amongst international actors. This is certainly no longer the case, even if the norm is disputed.

individual/religious) conventions only makes the establishment of a new and stable one more difficult. This is all the more so because the existing, well-established patterns carry assumptions that are often in tension with characteristics or principles of the liberal political sphere, giving rise to a type of interpretive confusion. One can see this in the contemporary debates, where what is at issue is not simply whether one should apologize, but behind this question, the meaning of the act itself.

Thus, even as political apologies are being performed, they are also creating or constituting the convention of the political apology, and through this reintroducing a conception of collective responsibility and atypical political forms into contemporary political thinking and practice.

In this sense, if political actors have an interest in strengthening the potential force of apology as a political intervention, they would do well to supplement the apology itself with broader explanations and justifications. Importantly, they should address the concerns about protecting individuals from unjust blame and collective and inter-temporal responsibility that apologies provoke. The types of arguments I made in chapter 2 about the compatibility between individual and collective responsibility should not remain the property of intellectuals, but should also provide resources for settling some of the felt tensions that impede the institutionalization of responses to collective responsibility. Linking the particular apology with authoritative standards and other powerful instances of the practice will also enhance its reception as a legitimate convention.

It is a little like the precedent in litigation. If prosecutors choose powerful cases early on in their litigation strategy and make convincing arguments, then cases with a similar structure are more likely to succeed. If they choose weak cases and argue them badly, the later, thematically similar cases may not even receive a hearing. Brandt's first apology in gesture - on his knees in the Warsaw ghetto - provided a powerful precedent.

Unfortunately, the abuse of apology and the failure of those deploying it to elaborate the force and power of their acts may have weakened the trend his action initiated. On the other hand, one might hope that communities will make use of these 'failed' or weak apologies to learn how to construct meaningful and successful apologies. For this to happen, they will have to think through the different tropes of apology, which is most appropriate to the political scenario (and if it is appropriate *at all* in the given case) and the rhetorical and performative structure of the apology. The next sections map the appropriate conditions for, and ideal forms of successful political apologies.

II. If we could apologize *politically*, how would we?

The previous five chapters have provided the resources to describe the contours of the political apology and to set out the criteria for apology to successfully achieve its political work. These criteria operate at two levels, first the contexts in which they are most appropriate and second the substance and form of the apologetic act itself.

1. Under what circumstances is apology most appropriate?

As the inventory of apologies illustrated, apologies are deployed under a range of circumstance. One important dimension along which they differed was temporality: some

concerned wrongs committed in the immediate past, wrongs directly related to a still volatile conflict; others were directed to wrongs in the more remote past, still alive from a moral point of view but not directly destabilizing the political order.

A second dimension, connected but not identical to the first concerns the status of the group to whom the apology is directed and correlatively of the people directly responsible for the violations.² In some cases, for example in Argentina, the Balkans and Indonesia the members of the directly violated group and those who committed the atrocities are still alive and the former are actively seeking more 'acute' forms of justice - primarily the punishment of perpetrators. In others, for example the Holocaust apologies, most of the direct victims and direct perpetrators are no longer alive (though some are, as are their immediate descendents) and other forms of justice (principally victim compensation) have been effected, albeit incompletely. In still other cases, although the wrongs occurred long ago, they were never subject to other forms of (retributive or reparatory) justice.

Given this range, one might ask, which circumstances are most conducive to the apology affecting its work? This dissertation does not provide the comparative data to answer this question from an empirical point of view, but my conceptual analysis of the distinct work of apology and its relationship with a dimension of collective responsibility suggests some schematic answers.

² By status I do not mean what type of group or people they are, but rather in what form they currently exist.

At the most general level, just as the punishment should fit the crime, the institutional intervention should fit the appropriate level of responsibility and effect the political work that is required at the specific temporal juncture. In chapter 2, I already used this formula to argue that from a structural point of view, apology corresponded to political responsibility, just as punishment corresponded to criminal responsibility. One might think of these different forms of responsibility and institutional intervention as nested within each other. Now, I would add a temporal or sequential dimension to this analysis.³

If criminal prosecution (punishment) corresponds to the most direct dimension of responsibility - the responsibility of the people who actually committed specific violations – it also responds to the most acute experience of the violation and is the vehicle for dealing with the most intense emotional and political reactions to violation. In simple terms, punishing wrongdoers directly expresses the strongest and most immediate condemnation of the violations, both emotionally and politically. If a person has been tortured, then our strongest reactions are directed towards the people who tortured them. Punishment is the vehicle for the emotions of horror, anger and revenge and the urgent political imperatives of sanctioning the act of torture.

By contrast, apology corresponds to a more diffuse form of normative responsibility and so responds to and is a vehicle for less acute emotional and political imperatives. Again, if a person has been tortured, we will have feelings about the political community which

³ Waldron makes an analogous argument by proposing that rights generate waves of duties, appropriate to the stage of intervention, as distinct from a single duty or conflicting duties. Thus for example, duties corresponding to the right to be free from torture will come in waves, where each wave requires a certain type of intervention. In the first instance the right requires that norms against torture be established in the polity. Later on it requires that those who commit torture be brought to justice and finally institutions designed to prevent recurrence of the offense. See Jeremy Waldron, "Rights in Conflict", *Ethics*, Vol. 99, No. 3 (April 1989), 503-519, at 509ff.

allowed this to happen, and it will be important to deal with this normative framework, but both the emotional and the political imperatives are less pressing. Apology is in this sense a 'cool' intervention or mechanism for dealing with the past, as distinct from the 'hotter' intervention of punishment.

So where the conflict remains volatile, the violations are ongoing and perpetrators are visibly living with impunity in the public space, apologies are likely to be overwhelmed by the more urgent and passionately felt demands for justice. Their resonance is not sufficiently sharp to speak to the intensity of felt demands in the living community. In fact apology under such conditions may, and often does feel like an insult.

It is when these more urgently felt and politically required demands for justice recede that the space for apology becomes available. This is not to say that they are no longer on the agenda for victim groups, but rather that some of the heat has gone out of them and the rule of law has become sufficiently strong and stable to ensure that acts of torture are themselves condemned. Thus, from a negative point of view, one might say that the apology is most appropriate where the pressing demand for bringing perpetrators to justice has moved from center stage.

At the same time, there has to be a positive reason for the apology, or a political imperative to which the apology positively responds. Given that what the apology does is address normative failures in the political culture and provide a means for its reconstituting itself around different norms, the most appropriate time for it to make its

entry onto the political stage is when the need to address the more deep seated issues of political/normative orientation is on the political agenda.

So, for example, in the Australian case, there was no political imperative from the point of view of the state to prosecute the people who removed children in the 1990s, nor was it high on the agenda of the Aboriginal rights movement. However, the structural inequalities that continued to pervade Australian society and the failure to recognize the rights claims of indigenous Australians were very much part of mainstream political debate and the Aboriginal rights movement. More concretely, as I discussed in chapter 5, at the same time as the apology movement arose, Australians were steeped in a national debate about a new constitution for the centenary of federation, becoming a republic and accordingly about the type of nation Australia was and wanted to be. The apology, with its orientation to Australia's normative identity spoke directly to this contemporary political agenda.

But then what about the Holocaust apologies, where the victim group was no longer a highly active or visible segment of the contemporary political community and where anti-Semitism was certainly not on the top of the contemporary agenda of political cultural conflicts? On the one hand, these cases meet the negative criterion that they are no longer dominated by urgent and passionate demands for justice (prosecution), but they also seem to lack the positive motivation for normative recovenancing that would be present if the anti-Semitic norms that underpinned the Holocaust were central concerns in

contemporary political debate about the status of the nation. Yet it was precisely under these circumstances that many European countries issued apologies.

To explain why apology was such a popular strategy in these circumstances, one has to reconsider the way one defines the normative concern to which an apology to Jews for actions during the Holocaust speaks. Broaden that lens from the norms concerning the treatment of Jews to the higher order normative principle of equal respect for the human rights of all citizens, irrespective religion, ethnicity, nationality and so on and it is evident that this *is* a live normative concern for member countries of the new Europe. In the latter part of the twentieth century, as Europe was looking to constitute itself as a political community with a set of foundational principles, including human rights standards, European nations' norms concerning discrimination and equality were very much on the political agenda. It was after all, only fifty years ago that they had betrayed those principles in the most horrific way. Jews per se may have no longer been the burning issue, but a commitment to equal treatment and protection of the dignity of all citizens was.

In the case of Austria, where the power that the fascist right continued to exert posed a real threat to its admission to the European political community, this connection was clearly politically salient and in fact explicitly articulated in their apology. Recall, the words of the Austrian leader: "Any person who denies or minimizes the Holocaust does not have the basic human qualities that are a precondition for any responsible activity in

politics.”⁴ But Austria was only the most acute example. To a lesser extent, right wing parties with racist, even if not *primarily* anti-Semitic agendas continued to play significant political roles in the other European countries that were offering apologies for their affiliations with Nazism fifty years ago.⁵ Seen through this broader lens, it makes sense that they too had an interest in establishing and reinforcing their normative commitment to equal respect, to reassuring themselves and the world that they were no longer the type of country where minorities could be transported to their deaths.

To sum up, the most appropriate or conducive circumstances for apology are then those where, on the one hand, it speaks to normative breaches and principles that resonate with contemporary concerns and on the other the contemporary political community has some distance from the actual wrongs it addresses. This may explain why there is often a generational gap between the actual violations and an apology movement, a gap in which the experience of injury does not disappear, but perhaps loses some of the charge that would render the apology more of an insult than a form of respect.

This notion of sequencing the different approaches to responsibility also provides a response to the oft raised concern that apology implies the suspension of justice or even impunity for wrongdoing. In chapter 2, I approached this criticism indirectly by arguing that apology in fact mediates the tension between justice approaches and identity or

⁴ Remarks by Federal Chancellor Viktor Klima at the Stockholm International Forum on the Holocaust A Conference on Education, Remembrance and Research Stockholm, 26 January 2000 at http://www.holocaustforum.gov.se/conference/official_documents/messages/klima_eng.htm.

⁵ Of course, as the recent turn of events has made clear, it would have been a mistake to deduce from the relative absence of overt anti-Semitism in Europe in the latter part of the century that more virulent anti-Semitism was not potentially on the horizon.

peace/reconciliation approaches to political conflict, in so far as it responds to the failures of recognition or identity discrimination that underpin specific acts of wrongdoing, or in other words to the identity conflicts that underpin acts of injustice.

Now, the objection can be answered more directly. No doubt the logical structure and the dynamic of apology, punishment and material compensation are very different. This is not in itself a problem. The problem arises because apology gets classified under the category of mercy, where justice and mercy are mapped as mutually exclusive approaches and in fact mercy requires the suspension of justice. From here, it is a short move to concluding that a political apology is incompatible with punishing perpetrators or demanding material compensation. The wrong turn was to miss the fact that the mechanisms are operating in different dimensions. Apology is not addressed to the responsibility of the individual perpetrator but to the responsibility of the collective and moreover a very particular aspect of collective responsibility.

In relation to this form of collective responsibility, punishment would itself be unjust and the justice of other forms of compensation has to be assessed in terms of other dimensions of collective responsibility. Nevertheless, just as in his principles for complete *teshuvah* Maimonides insisted that one must pay compensation to the wronged person and apologize, so too the collective apology absolves neither the individual wrongdoers nor the political community from other forms of justice to which they might rightly be subject. Van Boven recognized this when he included both material compensation *and* apology as required forms of reparation and compensation for

systematic human rights violations, understanding that they respond to different dimensions of responsibility and comprise different dimensions of an adequate response.

In this sense, despite appearances, political apology is best not classified as a form of mercy, where mercy is understood as the opposite or suspension of justice. At the same time, classifying it as a form of justice is also not fully adequate, given the strong association between justice and an individualistic and direct conception of responsibility. If it is to fall within the realm of justice, that concept needs to be broadened to include mechanisms that respond to the indirect responsibility of the norm-setting community. I take this up in the final section of this chapter.

II. 2. What would a ‘good’ political apology look like?

(i) The status of the speaker

Not only the quality of the speech itself, but also the characteristics of the *speaker* impact the success of political apologies. The speaker must be recognized as representing (having the authority to speak on behalf of) the collective and must make it explicit that she is apologizing in this representative capacity. Apologies given by someone without the capacity to represent the polity, as in the case where a senior bureaucrat delivered the apology to Native Americans, suffer because they fail meet the first of these requirements.⁶ Apologies given by someone who *does* have that authority but apologizes in a personal capacity, as in the Australian and Balkan cases suffer because they do not meet the second. Moreover, formal delegation from the head of state to a lesser

⁶ Recall the apology for wrongs committed by the Bureau of Indian Affairs against native Americans was given by the Kevin Grover, the Assistant Secretary for Indian Affairs.

representative will not substitute status in this respect, because the speaker is relying on her authority and stature to bring the polity along. One saw this in Canadian case where the apology was criticized because it was delivered by a Minister even as the Prime Minister was in the capital.⁷

In this respect the political attributes or past of the speaker may themselves be relevant. One might speculate for example on whether a member of the denigrated group who later comes to power as the leader of the entire political community could apologize on behalf of the state for abuses against the group to which he belonged (and still, in a sense belongs). Could Nelson Mandela apologize on behalf of South Africa for the abuses committed against black South Africans? Technically he could, but his overwhelming association with the ANC and anti-apartheid movement would detract from the sense that the apology emitted from the South Africa that had endorsed apartheid and systematically discriminated on the basis of race – a pattern of abuse that Mandela's long-term imprisonment had come to symbolize. Thus, although the apology is not personal to the leader who speaks, his ability to stand in for the political culture that is being condemned will be one factor fortifying the apology.

If, however one looks at the Argentine case, the very opposite seems to apply. There, the President who apologized for the violations committed during the military dictatorship was a man who had himself been imprisoned during the dictatorship, but his association with the opposition was not seen as undermining the apology's impact. To make sense of

⁷ The apology for the removal of Aboriginal children and their placement in residential schools was given by the Honorable Jane Stewart, Minister of Indian Affairs and Northern Development, not by the Prime Minister.

this, one must return to the apparent paradox of the apology. In apologizing one is speaking both as the wrongdoer (or the political community that underwrote the wrongdoing) and as the one who condemns the wrong. In this sense, the representative function of the speaker is bifurcated: he is standing in for the old and the new political culture. Using this more differentiated analysis, even though Kirchner's past opposition to the military regime undermined his ability to stand in for the responsible political community, this very opposition reinforced the sense in which he was standing for a definitive normative shift. His Presidential apology strongly performed the distinction between the moral orientation of the new and old Argentinas.

This points to an interesting interplay between the personal and political body of the head of state and more broadly my meta-questions about the relationship between emotions, personal engagement with norms, social norms and politics. When a political leader apologizes, it is his acting in a *representative* capacity as the symbolic voice of the polity that is important. That is why when John Howard expressed his *personal* feelings of sympathy for those who had been removed, he was well aware that his act did not constitute a political recognition on the part of the nation of the violation in question.⁸ He, John Howard the private individual was willing to entertain the language of personal apology (although then only with qualifications) but not the apology in its political dimension.

⁸ See footnote 9. Although his personal apology did not have political relevance vis a vis the apology itself, it was still a performance on the political stage of his 'humanity' and responsiveness to suffering.

At the same time, the converse does not seem to be strictly true. If a political leader apologized in his representative capacity, but quite *clearly* did not feel remorse at all, this would surely undermine the force of the apology. The *clearly* is crucial here. It is not what he expresses in the privacy of his home that matters, but the public display, the tone of voice, the facial expression, the absence of sarcasm. In other words, ‘authenticity’ is attached to his political identity more than to his personal private identity. For the purposes of the political apology, whether the person, as a private individual actually feels remorse is not really the issue. The issue is whether the person embodies public remorse, which he will do as the political leader. This suggests that sincerity has a public analogue, and it is this public dimension that is most relevant.

That said, the leader’s personal feelings of remorse might have a more indirect and general political relevance in the sense that people will judge her suitability to high political office in part on the basis of personal characteristics. Thus, an individual who does not *personally* respond to gross violations of human rights might well lose credibility as the nation’s representative. What this points to is an unavoidable or even necessary blurring between the personal and the political bodies of the representative leader and beyond that to the way in which the leader’s own humanity allows her to represent the normative dimension of the polity.

This blurring or merging of the two bodies is particularly marked here, where the leader is not speaking about, say a treaty into which the state has entered, but rather to cultural norms, to the subjectively held meanings and values of the citizenry. In fact, one might

see the necessary interplay between the two bodies of the symbolic head of the polity as indicative of the difficult interplay between the soft/normative dimension of the polity and its institutional characterization – the very interplay that makes the whole practice of repentance in politics so difficult to integrate into standard conceptions of the political sphere. Apology is different from legal or hard institutional interventions precisely because it seeps into the normative frame through which those institutions are articulated. At the same time, I have insisted that it is not equivalent to an expression of ‘feelings’ as if the polity were the single soul writ large. Neither the language of hard collective institutions nor that of the individual self are adequate to articulate the register on which apology operates. I will return to this thorny question of authenticity below.

II. 2. (ii) The form and content of the speech

Turning then to the components of the speech act itself, the most comprehensive apology will achieve all the illocutory functions I set out in chapter 1: establishing that certain events did in fact occur and giving this narrative the state’s stamp of legitimacy; declaring that certain acts are wrong and condemning them in the name of the political community; taking responsibility for them; and, committing to a different approach and normative identity.

First, the apology should include a comprehensive inventory of the normative failure to which it is responding. The more fully the breach is articulated, including the dissonance between the problematic norm (e.g. blacks do not count) and the political community’s ideal normative commitments (e.g. all humans are to be treated with dignity), the more

complete it will be. The Australian Prime Minister, Paul Keating's Redfern address, though not usually considered an apology represents a fine example in this regard, setting out in painful and graphic detail the silenced violations. This more detailed articulation need not itself be contained in the actual official apology, but the apology should refer to and thus endorse it. In Australia, for example, *Bringing them Home* constituted the full articulation and a Prime Ministerial apology would have implicitly drawn on this broader acknowledgement. Similarly, when the Polish President apologized in Jedwabne, the detailed history of the massacre that Jan Gross had produced and had been widely circulated was implicit in that apology.

Correlatively, an apology that leaves undisclosed the facts of the abuse and opaque the nature of the normative breach will be relatively weightless, especially if these facts are not widely known or acknowledged amongst members of the political community. Thus, for example, Clinton's apology to Rwanda did not articulate and was not backed by a comprehensive narrative of the way in which the United States had failed to respond to the Rwandan genocide, including its suppression of information and its refusal to use the term genocide so as to avoid the international legal obligations this usage would incur. This gap in Clinton's apology was particularly problematic because the US public was (and still is) largely ignorant of these facts of responsibility.

Second, the apology must explicitly assume responsibility. Expressions of regret that locate the speaker as a sympathetic bystander are not adequate because the apology must make it clear that the speaker is taking responsibility on behalf of a political collective.

They must place the collective subject as an actor in the drama of violation, not on the sidelines. Ideally, given the complexities of responsibility and the resistance that such an assumption of responsibility is likely to provoke from an individual rights perspective, a political leader should take it upon herself to explain the way in which the polity is responsible and distinguish this responsibility from the problematic model of the guilty collective. This type of sophisticated articulation is certainly beyond what we have come to expect in political rhetoric. Nevertheless, this more nuanced approach would fortify the apology by making explicit that it does not violate other important norms. As I discussed earlier, this active construction of the meaning of apology will impact not only the particular apology, but also the status of apology as a viable political convention.

Apologies can also fail on this dimension if they do not connect the collective with the wrongdoing, but locate responsibility exclusively with particular actors. US Defense Secretary Rumsfeld's recent apology for the torture of Iraqis by US military personnel illustrates this failing well.⁹ Even as he accepted responsibility as part of an institutional chain of command, Rumsfeld was careful to insist that the "acts were perpetrated by a small number of U.S. military" and that the behavior "was inconsistent with the values of our nation, it was inconsistent with the teachings of the military to the men and women of the armed forces, and it was certainly fundamentally un-American."¹⁰ Contrast this with

⁹ It also demonstrates a number of other failings. For example, Rumsfeld failed to disclose all relevant information, specifically concerning the role of higher authorities. He also refused to define the acts in question as the violations that they were by calling them *torture*. Both would be required to meet the criterion of giving a full account of the wrongs. Further, the apology was not connected with a broader program of systemic changes.

¹⁰ Statement by Defense Secretary Donald H. Rumsfeld before the Senate Armed Services Committee, May 7, 2004, recorded by the Federal News Service Inc. and reported in "My

Australian Prime Minister's description of the abuse against Aboriginal people: "...it was we who did the dispossessing. We took the traditional lands and smashed the traditional way of life. We brought the disasters. The alcohol. We committed the murders. We took the children from their mothers. We practiced discrimination and exclusion."¹¹ Nowhere in Rumsfeld's words does one find an acknowledgment that the violations emerged from some broader normative or institutional failure to ensure full and equal respect for Iraqis, as the 'other' in an international conflict. The actions are defined as singular and aberrant and the US is quarantined from their implications by being preserved as the normative community that then, as now condemns such violations by its military personnel.

Third, the assumption of responsibility and the condemnation of the norms must come together as the explicit and performative expression of regret. The expression of regret is the way in which the apologizing subject takes responsibility for the wrong, announces that they condemn the wrong, displays recognition of the experience of the other, and declares the will to shift its normative orientation. It says, 'Not only is this wrong and not only did we support the wrong, but in the light of these two facts, we are sorry. We want to be otherwise.' This is why it is crucial that the representative actually speak the direct words, "I am sorry that (we did 'X')". This condition of categorical admission explains why formulations like, "I am sorry if (we hurt you)" or "I am sorry that (you feel a certain way)" will not suffice.

Deepest Apology' From Rumsfeld; 'Nothing Less Than Tragic,' Says Top General", *New York Times*, May 8, 2004.

¹¹ Cf. chapter 5, note 32.

That this “I am sorry” primarily represents an assumption of responsibility and an authoritative condemnation of public norms helps elucidate the performative quality of political apology and distinguish it from the notion of apology as the mere (and thus dispensable) signifier of an internal state of affairs. Recall, Austin originally classified apology as a *behabitive*, a form of speech that expresses an attitude to, or feeling about certain states of affairs. From this classification, one might easily deduce that the apology was a label for attitudes or feelings that were fully present. As a performative, however, the expression of the feeling or attitude gives form to and even constitutes those attitudes and feelings, making them present in a way that they had not been prior to their representation.¹² Moreover, in the act of constituting the ‘attitude or feeling’ it provides the means for making a commitment and orienting towards a different course of action. Thus, using Austin’s inventory, apology is not only a *behabitive*, but also a *commissive* (a way of making a commitment), and an *exercitive*, (speech that advocates for or favors a certain course of action), in the sense that both of these make explicit apology’s active work.

Similarly, as I argued in chapter 1, where apology takes the form of a plea for forgiveness, this is better understood as a declaration on the part of the apologizer than as a request directed to the victim. The primary uptake of the apology is not the victim’s forgiveness. Indeed the victim group is not the subject primarily responsible for the uptake at all. It is rather the group in whose name the apology is made that will take up

¹² Hannah Pitkin links this conception of representation to the Latin word *repraesentare*, meaning to bring into presence something previously absent. Pitkin shows how this performative constitutive dimension remains an important part of the modern political usage. Hannah Fenichel Pitkin, *The concept of Representation*, Berkeley: University of California Press, 1967, p. 3 and more generally chapter 5.

the apology's performance of a different normative orientation by inscribing the new pattern of recognition into its laws, institutions and treatment of others.

Note however, this claim that the primary uptake lies with the political community in whose name apology is made does not imply that this community can remain sealed from the victim as the source of its own reorientation. The criticism of the 'conservative' or narcissistic apology I raised at the end of chapter 5 warns of the danger that this attention on the apologizing self will slip into a reaffirmation of the very norms that ought to be called into question, albeit dressed up in new clothes. It is only through engaging with the perspective of the victim that the normative assumptions that excluded the victim from the circle of rights holders and sanctioned violations against them can be called into question and genuinely altered.

More practically, in so far as this new orientation directly involves the victim group and a relational change, both will be required to partake in the business of establishing a different dynamic in their political relationship. Both will be parties to developing a political identity built on trust and mutual recognition, as distinct from relations patterned by or reacting against the historical violations. As the German Chancellor Rau put it in his apology before the Israeli Knesset, the uptake of the apology would take the form of the children and grandchildren of Germany "intertwined with the children of Israel".¹³ This raises the fourth requirement, envisioning a different future. As a performative, the apologetic act already establishes this different future. Nevertheless, because it still takes place against the background of the existing and problematic political culture, apologetic

¹³ cf. my discussion in chapter 1, p. 31 and note 11.

speech is at its strongest when it reinforces its own promise by articulating a different future beyond itself. It can do this by explicitly pointing to, advocating and connecting itself with actions that also manifest this new normative pattern. So, for example, the fact that the New Zealand apologies formed part of modern treaties setting out formal recognition of the territorial and cultural rights of Maori groups substantiated the shift from a norm of non-recognition to one of recognition. Similarly, by combining the apology with recommendations directed towards stopping contemporary forms of removal, *Bringing them Home* strengthened the connection between the apology and recognition of the rights of Aboriginal families to retain their cultural/communal integrity.

This extrinsic dimension suggests that an apology's success depends in part on other actions being carried out. It was to this dimension of the speech act that Austin was referring when he proposed that the final condition for success was that "Where the speech act initiates certain actions, the person must carry them through."¹⁴

Here, we are entering very difficult conceptual territory. On one side lies the danger that by recognizing 'extrinsic' conditions for apology's success we will reduce apology to a mere signifier of these harder institutional shifts. Recall that when I parsed Austin's final condition in chapter 1, (and the condition of authentic thoughts and feelings which I will discuss shortly) I insisted that one not confuse this connection with 'certain actions' with the idea that apology is a constative, announcing or naming them.

¹⁴ Austin, *op. cit.* p. 15.

On the other side lies the danger that we will see apology as a completely self sufficient performative, disconnected from anything else that happens in the world. My argument that apology operates within the register of *meaning* may lead one to conclude that it need have no implications for action. But to do so would be to fall prey to the splitting off of speech and in particular apologetic speech that I have critiqued throughout this dissertation. How can one possibly take an apology seriously as an act of covenanting or normative condemnation when the apologizing party fails on every other count to act contrary to the condemned norms? To take one of the most disturbing examples, how can one take Clinton's apology to Rwanda seriously when we see daily how the United States continues to manipulate international human rights commitments, including the condemnation of genocide and the obligation to act in the face of genocide? As J.M.Coetzee put it so bluntly in his novel of repentance, *Disgrace*, "We are all sorry when we are found out. The question is what lesson have we learned? The question is, what are we going to do now that we are sorry?"¹⁵

Normative shifts are neither equivalent to, nor independent of shifts in the hard institutions such as the law and distributive systems. Meaning, as I have stressed repeatedly is not a distinct ideal sphere, but the grammar through which action occurs. Thus, even if the apology does not itself operate at the level of hard institutional changes, the normative shift to which it is committing the speaker and the recognition it performs must have their analogue in hard institutional changes. If these do not occur, then there cannot have been a shift in the normative grammar, because a thoroughgoing recognition of the vilified group entails legal recognition and a just distribution of rights.

¹⁵ J.M.Coetzee, *Disgrace*, Viking, 1999.

This explains why the revelation that the US administration had sought assurance that its actions in Iraq and Guantanamo Bay would be exempt from the strictures of the Geneva Conventions (and other international and domestic law pertaining to torture) and its subsequent failure to address this legal manipulation so thoroughly undermined Rumsfeld's apology for the abuse of Iraqi prisoners.¹⁶ The recognition of apology has to ultimately correlate with the recognition of law and distribution. Recall, Maimonides' test for seeing whether *teshuvah* was complete was to see whether the subject, when placed under exactly the same conditions, would act as they did before, or would act consistent with their new commitment and new identity.¹⁷

That said, the failure to follow through with other normative shifts is not proof that the apology *itself* failed. Apology cannot in itself shift an entire political culture but only contribute to that shift. If significant impediments to this more comprehensive reorientation remain in place, apology alone will at best contribute to their eventual demise, but will hardly be sufficient to displace them.

A more practical difficulty in assessing an apology's success or completeness in terms of commitments to action is that people disagree about what those actions ought to be. Changes in legal and distributional structures will certainly be indicators of shifts in patterns of recognition, and the failure to bring them about is a likely sign of a failure to

¹⁶ The internal memo examining requirements for US compliance with the Geneva Conventions and relevant domestic law is discussed in Michael Isikoff, "Memos Reveal War crimes Warning", *Newsweek* Online Updated: 9:14 a.m. ET May 19, 2004.

¹⁷ The party must confess orally, resolve to act differently *and* act differently. Maimonides, *Mishnah Torah*, The Hilchot Teshuva (Treatise Concerning Repentance), Book 1, V, chapter I.

carry through the implied commitment of the apology. But what about the more direct material forms of compensation for the violations themselves? Many people, particularly victims believe that a proper apology entails such compensation, and that the apology itself is empty in the absence of material compensation.

In my reading of the van Boven principles, I argued that apology constituted a distinct and *sui generis* dimension of reparation, operating at the symbolic dimension. It certainly does not replace material compensation and other forms of reparation, which may also be required by justice, but nor is it reducible to them.¹⁸ At the same time, these different forms of justice or recognition have an *intrinsic* connection. They are not discrete acts that simply add together to form a more or less complete response to the past, but different dimensions of the higher order requirement of full reparation or complete teshuvah as articulated by Maimonides. A fully adequate response requires both the speech act and the material measures, and the failure to carry through on any of the core dimensions of justice or recognition will undermine the success and reception of the others.¹⁹

This correlation or intrinsic connection with other (extrinsic) institutional commitments should not however, be confused with reducing the apology to a signifier of more substantive compensatory actions. Apology is not a way of naming the real change that is

¹⁸ I say *may* be required by justice because the fact that the conditions requiring an apology are present may not mean that the conditions requiring compensation are present. Different criteria apply to the different dimensions of reparation.

¹⁹ As in the previous note, this should be qualified. Under certain circumstances, the apology would not be undermined by the absence of material compensation. For example, an apology for the culture of Christianity that supported the crusades need not be accompanied by compensation for the communities that they ravaged several hundred years ago. This will have to be judged case by case.

taking place elsewhere and thus meaningful to the extent that this ‘real’ change actually occurs. Rather, its own capacity to effect shifts in the framework of norms will be supported by corresponding changes in other parts of the institutional framework and should in turn support those changes as appropriate. As in the framework offered by Castoriadis or the practice approach, these different parts of the system do not stand in a causal relationship, but are interdependent – or at least they are so long as speech and action are not radically detached.²⁰

This brings us back to the ever-troubling question of authenticity - whether the apology has to be *authentic* in order to be successful and effective. Authenticity has 2 aspects here. The first, discussed above concerns whether the speaker authentically intends to do what would seem to logically follow from an apology. The second, articulated as Austin’s fifth condition for the success of a speech act, denotes the existence of real thoughts and feelings corresponding to the words of apology.²¹

As I argued from the outset of this dissertation, it is the uncritical projection of this criterion, as applied to individual apologies onto the political apology that leads many observers to conclude that political apology is *by definition* an abuse, because political communities are just not the type of subject that *can* have thoughts or feelings. This does

²⁰ As quoted in chapter 1, “exigency and commitment, interest and ideal - that is, myth and reality - are not entirely independent logics. They are two sides of a coin, mutually constitutive and, at the limit, each non-sensical without the other.” Olick, J. and Levy, D., “Collective Memory and Cultural Constraint: Holocaust Myth and Rationality in German Politics”, *American Sociological Review*, 1997, Vol. 62 (December: 921-936), p. 934.

²¹ “Where the procedure is designed for use by people having certain thoughts or feelings... then a person participating in and so invoking the procedure must in fact have those thoughts and feelings and the participants must intend so to conduct themselves.” Austin, *op. cit.* p. 15.

not, however, get rid of the authenticity requirement; it just means that it has to be redefined to fit the context of a collective subject.

I already touched on this in my discussion of the status of the speaker, where I argued that it is not the *personal* feelings and thoughts of the individual giving the representative apology that count, but rather the political normative commitment. The distinction I emphasized was between the political apology, which entails a commitment to a shift in generalized public patterns of respect, and the more familiar trope of the *personal* apology, which entails a change of heart, an internal shift on the part of the individual speaker.

When, however, one tries to go further in articulating what this normative political shift entails, or fleshing out the political correlate to authentic 'thoughts and feelings', one meets the same difficulties as those that arose in the effort to articulate a more general characterization of political culture in chapter 2. On one side is reductive structuralism, on the other over-personalization.

Thus, in the preceding section, I rejected the idea that normative commitment is equivalent to actually *doing* certain things or making certain institutional changes. At the same time, it is not an aggregate of what goes on in people's heads or hearts, where the latter are understood as individual, closed and private spheres. To navigate this apparent impasse, one has to cut through the internal/external, personal/political dichotomies that force one to make a choice and come down on one side or the other.

As both Mead's and Castoriadis' analyses of the inter-penetration of subjectivity and social institutions made clear, the thoughts and feelings of individuals do not exist within a closed and private sphere, but are constituted by and constitute public and institutionalized patterns of recognition and norms. The reason that one needs to articulate political culture as a non-reducible dimension of social existence is precisely because it encompasses both the public institutions and the subjective experience. Cultural norms are as powerful as they are precisely because individuals experience them as *their own*. But it is the role of the analyst to know that they are also never only the personal, private subjective experience of individuals, just as public institutions are never just detached public institutions, disconnected from the people who invest meaning in them.

One might then say that authenticity in the context of a political apology resides in the political culture of the polity, where this is understood as engaging the subjectively experienced, but socially oriented norms of the citizenry. There are no 'thoughts and feelings' on the *inside* of the apologizing subject that can be authentically represented or misrepresented, but there are cultural normative orientations. In the case of norms concerning identity, these orientations organize social relations and shape the way people experience and treat each other and their sense of who has a right to what.

To make this concrete, authenticity does not mean that individuals who belong to apologizing polity feel sad about individual cases of suffering or violation. It means that as a collective, there is recognition that the individual cases of suffering and violation are

linked with systematic patterns of denigration that reside in their political culture, and a condemnation of those patterns. What an authentic political apology requires is genuine political recognition of the community's active part in sustaining unequal recognition and affirmation of the rights of the wronged other. This means that the authenticity requirement will be met to the extent that the apology does in fact express and contribute to a shift in the normative expectations and more specifically the patterns of recognition in the political community.

Contrasting this with the emotional authenticity associated with personal apologies can sharpen its particular character. One might for example imagine a case in which individuals in the political community (and the speaker herself) did feel very sad about the sufferings and violations, but their sorrow did not have a political or structural dimension and was not linked with a sense of social responsibility. In the case of Clinton's apology to Rwanda, both Clinton and many Americans probably did feel sorrow, but not sorry in a political sense. His apology may well have been a very authentic *personal* apology, but it was not an authentic *political* apology. An authentic political apology in this case would entail a commitment to addressing the structural and normative failure to recognize the exclusion of Africans from the universal circle of humanity protected by international commitments to prevent genocide.

In fact, in cases like this one, I would suggest that the expression and presence of *authentic* personal feelings of sorrow substituted the political expression of normative orientation. Yes, we felt really sad about the genocide, but neither prepared to own the

sense in which we were implicated nor to make the shifts that would be required to ensure that genocides committed against distant, poor, black people impacted us as much as those against people we think of as 'like us'.

In this sense, the fact that an apology is performed on the political stage does not in itself make it a *political apology*, or a successful political apology as I have characterized it. For apology to count as productive political speech – speech that affects the normative judgments and actions of people within a polity - it has to be articulated and interpreted within this public political register in a manner consistent with the conditions I have set out.

Linking this back with my earlier discussion of the establishment of a conventional repertoire of political apology, here one sees how the political apologies are not simply performing an existing convention, but are still in the process of constructing themselves as an accepted conventional procedure. Moreover, it is not only the content of the convention that is being created, but the very capacity of political speech to effectively constitute or reorient political culture.

This means that a great deal is at stake in this question of authenticity. At its best, performative speech can itself create truth, or create a new state of affairs, forging or reforging political relations and covenants. This constitutive power is what sets apology apart from other interventions. In truth, however, the ideal of a fully integrated practice (as envisioned by Maimonides or van Boven) where words, thoughts, feelings and actions move in concert and are mutually constitutive is only that – an ideal. Words are not only

theoretically detachable but are frequently detached from these other dimensions. Words can deceive and apologies can fail to reach out beyond the personal to the cultural norms that actually underpin the way groups of people see and treat each other, even if they are articulated on the political stage.

Moreover, in this specific context, there are good reasons to suspect political leaders of hypocrisy, cynicism and pragmatics. Governments would generally prefer to avoid the financial cost of material compensation, and politics may continue to be strongly invested in and committed to the very patterns of cultural denigration that underpinned the violations. Apologetic words, detached from other dimensions of justice may, quite literally be the 'cheap' alternative.

This points to the broader normative question about the implications of apology's admission into the realm of political action for our conceptions of the political and the principles of modern, liberal politics. Given that the dynamics of apology differ on a number of dimensions from those which normally characterize the modalities of contemporary liberal democratic politics, what does the political apology say about the political itself?

III. Speech, sincerity and the boundaries of the political

In the introduction, I suggested, following Arendt's comments on forgiveness, that the dynamic of repentance may provide an important piece in the jigsaw of responding fully to violations of the past and lifting political communities out of cycles of systematic

abuse. Still tracking Arendt's argument, I also raised the question of whether this dynamic of repentance, for all its potential to free subjects from the determinism of the past and create genuinely new beginnings, can be brought into the political sphere. Arendt's arguments about the nature of speech, politics, forgiveness and promises have very ambivalent implications for the relationship between apologetic speech and politics, implications that bare directly on the my attempts to articulate a conception of political authenticity and to capture the particular form of action that political apology represents. Tracking Arendt's arguments provides a way of navigating the tensions at issue in this question of the relationship between apology and our conceptions of the political.

III. 1 Arendt's conceptions of speech, politics, forgiveness and love

Hannah Arendt's work does not address the issue of apology as such, but it does address forgiveness and promising, both of which, I have argued coincide with part of apology's work. I have already argued at some length how apology constitutes a form of promising. However, as the first part of my analysis focuses on forgiveness, before entering into Arendt's arguments, a word about the link between forgiveness and apology is in order. The two characteristics of forgiveness on which Arendt focuses are first, its strongly relational quality and second its essential dynamic of release and recommencement. With respect to the first, the link is clear - apology is also clearly a relational act. With respect to the second, although one might normally think that it is the act of forgiveness that releases and puts an end to the inexorable chain of events, apology, as I have argued also establishes a new state of affairs. Even before the response of the other party, by condemning their own past actions and their past identity as the one that supported those

actions, the apologizing subject has interrupted the narrative and redefined the identities of, and relationship between the parties. Already when I apologize, I have created a distance, a break between who I was and who I will be. It is in this sense that I argued that forgiveness by the party to whom my apology is rhetorically directed is not the principle form of uptake required for apology to achieve its work of breaking and recommencement. Recognizing this intrinsic link and shared dynamic, Arendt's arguments concerning forgiveness can be applied equally to apology.

In her initial take on forgiveness, Arendt argues that for all its radical creativity, forgiveness has no place in politics. “[O]nly love has the power to forgive”, she insists, and “love, by its very nature is unworldly and it is for this reason, rather than its rarity that it is not only apolitical, but anti-political, perhaps the most powerful of all anti-political forces.”²² Her argument here actually rests on two claims: that forgiveness is an expression of love; and that love and politics must be kept radically distinct.

Each is characteristic of Arendt's more comprehensive position on the respective role of passion, sentiment and reason in politics. One of the places where we see her most vehement is in her role as self appointed guardian of the boundaries that set the political and the personal apart, boundaries that she insists preserve the integrity of each. If the heart is not shielded from the harsh light of politics and politics is not fortified against love, then the one will be corrupted and the other will degenerate into violence.²³ From

²² Arendt, *op. cit.* p. 242.

²³ Her concerns with the boundary between matters of the heart and politics is distinct from her more well known theories on the distinction between the social and the political discussed primarily in

an Arendtian perspective, if apologetic discourse is equivalent to this forgiveness of love, its entry into politics may not be merely a category mistake, as Rolph-Trouillot argued, but an abuse with dangerous implications.

Arendt's argument concerning the use of speech in politics has to be articulated with considerable care here, because it potentially pulls in very different directions. It is not speech as a form of political action *per se* that Arendt warns against, but the speech of the heart. In fact, for Arendt, if there is anything that human beings do that characterizes their acting in the political mode, it is speaking.²⁴ In this sense her arguments could provide some of the strongest ramparts to support the view that the performance of apology, as a form of political speech is neither superfluous nor reducible to concrete institutional changes.

Arendt describes political speech in terms that resonate remarkably with my characterizations of the apology as a form of constitutive and performative speech. She argues that in order to ensure that speech can continue to act as the central medium of politics, it must be forged with action, not as its signifier, but as the way in which humans disclose realities. In her words, "Power is actualized only where word and deed have not parted company, where words are not empty and deeds not brutal, where words are not

The Human Condition. She raises this question in relation to her discussion of forgiveness in that text, but explores the problems of bringing the heart into politics more extensively and thematically in chapter 2 of *On Revolution*, *op. cit.*

²⁴ "The action he begins is humanly disclosed by the word, and though his deed can be perceived in its brute physical appearance without verbal accompaniment, it becomes relevant only through the spoken word in which he identifies himself as the actor, announcing what he does, has done and intends to do." *The Human Condition*, *op. cit.* p. 179.

used to veil intentions but to disclose realities.”²⁵ Of course, as she warns us, for all its revelatory potential, speech can always become “‘mere talk’, one more means toward the end, where it serves to deceive the enemy or dazzle everybody with propaganda.”²⁶

Nevertheless, the performative, creative dimension of speech she evokes here is precisely the one assumed and institutionalized in religious ritual and the one that political apology, as a form of political recovenanting ideally achieves. As performative speech, the apology would seem to be exactly what she had in mind when she wrote about speech’s unique capacity to reveal and true action’s need for speech. Arendt’s characterization of repentant speech, however, attributes it with qualities that disqualify it from this role.

In order to protect the political sphere Arendt cautions against overburdening political speech by using it to disclose realities that are by definition private and inaccessible to the public stage – the definitive instance being realities of the heart. No one, she argues can truly know what goes on in the heart of another person, perhaps not even in their own heart, and thus the speech of the heart will necessarily invoke suspicion. One can hear in this echoes of Augustine’s teaching that it is impossible to know what goes on in the darkness of another’s heart, and his counsel that one must thus look out to objective norms.²⁷

²⁵ *The Human Condition, op. cit.* p. 200.

²⁶ *Ibid.* p. 180.

²⁷ I discussed this in chapter 4, cf. note 43. Arendt wrote her doctoral dissertation on Augustine’s theory of love so was certainly familiar with these writings.

Precisely because speech plays such a critical role, not only in carrying out the business of politics but also in building and preserving the political space itself, a great deal is at stake in mediating how speech can be used in politics. The risk is of abusing speech is not merely that it will degenerate into an instrument to promote or veil intention - that speech will become empty. It is that admitting the speech of the heart will undermine political speech itself by turning politics into an infinite and futile search for an authenticity that can never be verified. The gravest danger is not simply that particular acts of speech will deceive, but that by tying truth to the darkness of the heart, authenticity becomes an ever-receding object and with it the very distinction between truth and untruth falls from our grasp. Without this distinction, speech itself as a form of action and the very possibility of meaning will be undermined. Lying is always possible in speech, but if there is no way of knowing whether something is a lie or not, speech undoes itself. If politics becomes a stage in which people bring the 'truth' of their hearts, she warns, then the fragile conditions of political trust upon which any social order rests will inevitably decay.²⁸ She evokes the image Robespierre's boundless search for a patriotism of the heart and its murderous outcome to illustrate how the relentless and unattainable demand for authenticity rips open the fabric of political relations.²⁹ The speech of the heart is not only unsuitable to politics, she concludes, but anti-political.

²⁸ Cf. *On Revolution, op. cit.* p. 96ff. Interestingly, Arendt references the French moralists as well as Kierkegaard, Dostoevski and Nietzsche, but not Augustine.

²⁹ See *On Revolution, op. cit.* Chapter 4(2). Arendt's arguments about the negative impact of allowing the passion of compassion to drive politics provide a useful lens for thinking through contemporary US politics.

The second danger of this speech of the heart emerges more directly from Arendt's association between forgiveness and love. What distinguishes *political* relations from other types of (personal or social) relations is that they preserve the space between actors. Indeed it is this space, this *topos* of distinction that makes action, the capacity to bring something new into being, possible.³⁰ If human beings are only against each other, as they are in war, they cannot act. But also if they are only *for* each other, as Arendt contends they are in love, that space collapses, bringing each so close to the other that they must be able to feel each other's deepest recesses, but will also thereby lose the very separateness that allows them to act.³¹

Arendt's concern here is not however only with the preservation of this revelatory space, the space of glory in the public realm one might associate with acting in the Greek polis.³² What is at stake is also the condition of plurality, which is ultimately the only bulwark against a loss of reality and more importantly here, the loss of all moral compass. So long as each person lives only inside their own individual sense data, "which in themselves are unreliable and treacherous", there is no way to perceive moral truth.³³

³⁰ In this context, Arendt claims that the orientation to the objective world that forms the content of political action can be reframed as the organization of individuals around *inter-ests*, which she breaks down to literally denote that which lies between them and keeps them distinct. See *The Human Condition, op. cit.* p. 181ff.

³¹ For example, "the *polis*, properly speaking, is not the city state in its physical location; it is the organization of people as it arises out of acting and speaking together, and its true space lies between people living together for this purpose, no matter where they happen to be." *The Human Condition, op. cit.* p. 198. This forms part of Arendt's more comprehensive thesis on action as the highest dimension of the human condition.

³² Not to underestimate what is at stake here, which for Arendt is the very possibility of genuine human creativity: "Without action to bring into the play of the world the new beginning of which each man is capable by virtue of being born, "there is no new thing under the sun"; without speech to materialize and memorialize, however tentatively, the new things that appear and shine forth, "there is no human remembrance." *Ibid.* p. 204.

³³ Hannah Arendt, *The Origins of Totalitarianism*, Harcourt Brace and Company, 1976, p. 475f.

The only way to stay on track, morally speaking is to keep plurality alive so that together people can create a “common sense”. The resources to act morally exist neither within the individual, nor are they available in forms of political organization that either isolate people from each other or destroy the space between them. These resources exist only when individuals can relate to each other as distinct and yet mutually interested subjects. Although Arendt does not have the model of violations against others (sin) and repentance in mind here, her analysis fits well with the basic logic of the sin/repentance dynamic. There, what makes it possible for a single person to recognize his or her own immorality is that the other stands away from them but can also impact them with their separate experience. It is this condition of being able to speak across differences and recognize the perspective of the wronged other that provides repentance’s particular motive for normative transformation.

Arendt’s concerns about preserving the distinct space of politics are in many ways legitimate, although, as I shall go on to argue overdrawn. And if one applies them to apologetic speech, presuming for now that apology belongs to the same class as forgiveness, her arguments would provide a strong basis for concluding that apology does not belong in the political sphere or that its presence there poses a danger to the preservation of important political principles. This assumes, however, that apologetic speech does in fact emerge from and refer to the realm of the heart, this most private inner space. As is now clear, in the case of political apologies, this assumption is incorrect.

If political apologetic speech in fact referred only to this dark recess of the heart, to highly personal truths with no external analogue, it would have little relevance for political action. Those truths may well be unverifiable, but they are also politically superfluous. The apologetic speech that engages politics necessarily refers to aspects of human experience or subjectivity that have a public dimension and public implications. Admittedly, these referents are not easily mapped along the internal/external distinction, but they are certainly not 'private'.

Similarly, with respect to her insistence on distinguishing politics from love, if the goal of apology in politics were to turn relationships between citizens into intimate relationships of love, it would be impossible, or possible only in the most ephemeral way. Political relations require a far more stable foundation than a spontaneous and individual compassion for the other. And again, if indeed apologetic discourse did operate at this intimate, personal register, it would have little if any bearing on the forms of recognition that are patterned into a political culture and that underpin systematic violations perpetrated on the basis of very general attributes.

In other words, the first mistake Arendt makes is precisely the one I have attacked throughout this dissertation and specifically in the last section – that repentant speech in politics is speech of the heart and that the truth to which it corresponds is one locked away in the darkness of a private individual. What Arendt seems to miss and what this part of her schema does not fully allow is that apology in the political context does not partake only in the realm of the heart, but rather in the realm of political cultural norms.

Because she collapses this dimension of political norms into the personal, her dichotomous classification forces it into the class of the apolitical.

In its political dimension apologetic speech does not reach down into the darkness of the heart, but out into the grammar that orients the judgments of members of the political community and thus the way in which they recognize and treat each other. In order to make sense of this type of speech requires rethinking this dichotomy between the heart and the political persona that she assumes. Between the speech of the pure political persona, stripped back of all pre-political characteristics, and the confessional speech of the irreducibly individual soul, lies speech that corresponds to the subjects embedded in the normative identity of the community.

This insistence on such a radical splitting of the political and the personal is Arendt's second mistake, and one that has serious consequences both for the reach of Arendt's theory and, more seriously, the type of mechanisms permitted to operate as part of politics' machinery. In her dogmatic exclusion from politics of anything that she would deem as belonging to the social, she deprives political action of the rich base from which politics inevitably draws. The law sits on top of and draws on patterns of meaning, organized largely around identity categories. What the law sanctions and how it distributes rights is not distinct from the *socially* patterned norms concerning who has a right to what. Her ideal of a political sphere that is pure action, entirely quarantined from the meanings that circulate in our homes and parochial communities either overestimates the capacity of human beings to check their pre-political selves at the door or narrows the

sphere of political action to such a degree that it would have nothing to say about the atrocities we nevertheless commit. For even if everyone enters and speaks as an equal in this narrowly defined sphere of equals, and can thus perform without preconceived motivation, this is not true of the rest of life where unquarantined motivation, too often mediated by norms of hatred and discrimination *does* drive action.

The problem is that the wall that protects politics from this overwhelming force, at least as she seems to set it up, also deprives it of important resources and leaves untouched vast stretches of social life and so of human action. Were human beings motivated by nothing but reason, then the rule of reason would be sufficient. But they (we) are not, and for that reason, politics and political rhetoric has to speak to and speak for all of what motivates action and judgment. This, I would argue, is the ‘speaking across’ that apology attempts to achieve.

III. 2 Respect, recognition and the distinct form of political relationship

Looking beyond Arendt’s arguments about forgiveness, love and the dangerous discourse of the authentic heart, one finds, quite to the contrary that she recognizes this in between space and the importance of speech as the medium that can carry it. In fact, her characterization of the distinct form of relationship that constitutes the political cuts across the dichotomy between the public/institutional and the personal in a manner consistent with my characterizations of political relations in terms of structures of recognition.

To describe the manner in which citizens relate to each other she calls to mind Aristotle's *philia politikē*, political friendship, a form of relationship as poorly captured by the idea of citizens relating through objective laws and institutions as it is by the idea of the intimacy of friendship or love.³⁴ This mode of political friendship is far closer to the concept of recognition I discussed in chapter 2. Political relationships, she argues take place through the mode of respect, which is mediated neither through the intimate, private realm of the heart, nor through detached institutions external to the subject. Respect, like the concept of recognition concerns the public person, the person whose status and normative expectations are created and sustained by politics or a grammar of political identities. At the same time, it resides in their subjective experience and the normative expectations that people have of each other. Respect is not some pre-political achievement or characteristic that a neutral politics evaluates or encodes, but nor is it an artifact of politics that people wear outside themselves, as if they could discard it to reveal their true feelings and relationships. Moreover, respect is not simply the mode politics happens to choose, but is the medium of relationship that sustains the political sphere, because unlike love respect does not destroy but in fact retains the *in-between* that is the condition of plurality.

What is most remarkable is that despite her initial pronouncements against forgiveness in politics, Arendt actually suggests that forgiveness may enter politics through this most political form of relationship – respect. A few pages past her claim that there is an

³⁴ The explicit reference is in *The Human Condition*, *op. cit.* p. 243, but Arendt's more comprehensive exploration of the type of relationship that constitutes the distinct sphere of politics and in particular the importance of distance are to be found in section V of this text, as well as *On Revolution*, *op. cit.* cf. especially chapter 4.

essential connection between forgiveness and love that renders forgiveness anti-political, she suggests that not only love but also *respect*, may be an acceptable foundation for forgiveness in the public sphere. This is not merely a concession, a recognition that love, with its demand for intimate engagement with each individual other is too high a bar to ground general political relationships, whereas respect is less demanding. It is an admission that repentance may be of the essence in politics. For if love is the anti-political, respect is *the* mode of political relationship.

III. 3 Apology, promising and plurality

The argument that apology might in fact belong to the political (in Arendt's terms) gains further support if one approaches apology through the lens of promising as against forgiveness. If love (and thus perhaps forgiveness) is anti-political, then promising, for Arendt, lies at the heart of politics. She suggests that human sociality exists suspended between these very two poles: forgiveness and promising. Just as forgiveness opens to human beings the possibility of escaping the apparently inexorable chain of cause-effect-effect-effect, so promising provides the remedy to 'the ever-recurring cycle of becoming'. Promising is the only faculty that allows human beings to predict and rely on each other without imposing structures of domination. Mutual promises bind voluntarily and *from within*, thereby creating the stability and continuity which are the condition for law and political community, but in a way that does not violate the freedom of those who participate in the promise. Whereas, forgiveness' connection with love renders it suspect from a political point of view, Arendt's political sphere cannot exist without promise.³⁵

³⁵ "In contrast to forgiving, which – perhaps because of its religious context, perhaps because of its connection with love attending its discovery – has always been deemed unrealistic and

Indeed promising is one of the fundamental conceptual building blocks of political constitution.

What is particularly interesting about political promising from my point of view is that it belongs neither in the sphere of private friendship, nor in the externality of institutions. The bond that promising establishes is, as noted above, a bond *created from within* but producing expectations and understandings oriented outwards – to other people, including relative strangers. That is what allows it to be so convincing and powerful without constraining the freedom of subjects. The promises that political subjects make to each other create the forms of their political relationships and the maps of their political culture, their judgments about what is right and wrong and what they can do to each other. They have a strongly subjective dimension, but they are certainly not private.

Returning more directly to apology, an apology is not the first promise but the second – the promise one makes after the first has already been broken. Here too, the second promise requires plurality, although in a slightly different way. The dynamic of apology is to cross over out from one's own world and perspective to recognize the point of view of the other, be transformed by that recognition and then to alter oneself and one's social orientation. Walking across to this external perspective and then back commits the subject to a new identity. The impetus for apology is the other's complaint that a promise has been broken (perhaps not a promise to them but a promise nevertheless) and their demand that the promise be honored; its object is recognition of that other and its

inadmissible in the public realm, the power of stabilization inherent in the faulty of making promises has been known throughout our tradition." *The Human conditions, op. cit.* p. 243.

consequence is a shift in the orientation of the self. This shift in the self is not, however a solo act. It occurs only by virtue of recognizing the claim of the previously excluded other and including them in the circle of respect.

What had been *their* external critique of my identity now becomes my own critique of that identity. Were it not for this outside space, this perspective beyond the one the subject had embodied, that subject would be condemned within the confines of the eternal past and a set of closed normative expectations. In this sense, it is the polar opposite of the putative privacy of the discourse of the heart, as Arendt notes in her argument that promising (and forgiveness) exist only under the conditions of plurality. Apologizing as a form of promising may well be articulated as the speech of a particular subject and be concerned with the transformation of that subject, but it is only through shifting its relationship with a party outside and separate from its original identity that the subject can alter itself. This plurality is structurally necessary, even if the ultimate object of the apology is the apologizing self and *its* normative identity.

More radically, as I argued in chapter 1 in my critique of Tavuchis' claim that the essential structure of apology is dyadic, this is not a plurality of two, but always of three or more. Not only the wronged other, but also the third party forms part of the plurality necessary in this drama of remaking ourselves. I set this argument out in detail in my analysis of *teshuvah*, where one saw how the Jewish requirement that one repent for sins committed against another person both before the other person *and* God mapped the intrinsic relationship between the vertical and horizontal axes of apology.

In the case of political apologies, this third party plays two main roles in this drama of normative transformation. First, it may be the source of the alternative norms against which the political community condemns its own past norms. The international community for example, understood as the repository of human rights standards might play this role. By drawing on those norms, the political community is in fact appealing to its own higher order identity as a member of this international community, with normative commitments to these standards (explicitly through human rights treaties or implicitly through customary international law). In this sense, the international community occupies a structural position somewhat (though not completely) analogous to God in the religious apology. Here, as in the religious scene, the international community is the ‘vertical’ source of the norms that ought to guide the relations between members of the international community and their treatment of their own citizens – the horizontal relations. The apology to the other for breaching those norms is then also an apology to the international community (God) for failing to adhere to the covenant, for not keeping the promise to abide by its universal human standards.

It is the presence of this third party that transforms the horizontal dialogue from a single, unthematized exchange into a dialogue of justice or ‘objective’ right. This is the second role of the third party, as witness to the apologetic communication. In the case of political apologies the international community, or even the witness that the primary community creates for itself in the form of the media, commentary and documentation may occupy this position. Recall, for example that even as the sorry books were being circulated around Australia, individuals were inscribing their names into pages already destined for

bound volumes to be archived and placed in repositories of historical truth to act as witnesses to the act.

The witness, like the chorus in Greek tragedy stabilizes the exchange, turning it into a narrative, which can then orient future action. As Levinas argues, the recognition of the other's suffering gives rise to a direct responsibility to respond, but it is only once the third enters the scene that this moral relation is stabilized into justice.³⁶ It is only the presence of the third that makes it possible for the relationship between the one and the other to be anything other than identity or opposition.³⁷

In summary, apologetic discourse, despite its apparent personal quality, can constitute a medium for political relations. Moreover, because it is concerned with the quality of political norms and in particular norms that orient political relations, apology brings resources to intervene at critical junctures where something has gone wrong in the practice of ideal norms, fracturing social relations and political integrity. The very fact, however, that it operates in this dimension of political culture and recognition means that it eschews traditional categories of political action.

³⁶ The comparison that the third introduces "is the birth of thought, consciousness, justice and philosophy", Emmanuel Levinas, "Substitution" in *The Levinas Reader*, Sean Hand (ed.), Blackwell, 1989, p. 118. This comparison "'is superimposed onto my relation with the *unique* and the incomparable," and I must consider demands of equity and equality". See Levinas, "Peace and Proximity", in Peperzak, A., Critchley, S. and Bernasconi, R. (eds), *Basic Philosophical Writings*, Indiana University Press, 1996, p. 168. Levinas calls this move initiated by the presence of a third, (the other of the other) transcendence, but one can think of it here more usefully as an order of justice.

³⁷ Michael Sandel makes a somewhat analogous argument about the form of relationship that precedes justice in *Liberalism and the Limits of Justice*, Cambridge University Press, 1998. The form in which these two thinkers conceive of this prior relationship is somewhat different – Levinas insisting on an infinite and asymmetrical responsibility, but both want draw our attention to the structural shift that the entry of the third effects and makes possible in terms of political organization.

In order to carve a space for this quality of political action, one has to find a way of encoding this zone of political culture in one's map of the political. Theoretically, articulating a space for this realm that is both public and experienced as one's own subjective orientation is tremendously difficult, haunted on one side by a pure individual subjectivism and on the other by a reductive institutionalism. Institutionally, it is only poorly captured by the legal and institutional interventions usually invoked to deal with past violations. Patterns of recognition may shift as a by-product of legal or other institutional interventions, but they are not their primary targets. It is thus both theoretically and practically important to shield this space and to attempt to articulate it albeit clumsily and to create a site for it in our political strategies. This is where the political apology speaks – as a fumbling attempt to create a mechanism to address this dimension of political life and this fragment of the collage that underpins how actors in a political community treat each other. If one leaves this out, one misses, not the heart, but the lens through which action and judgment are filtered.

IV. Reconceptualizing the political

As I suggested earlier, the fact that apology speaks at this level of political cultural norms explains in part why this apparently anomalous mechanism entered the political repertoire when it did – at a juncture where there was an excess of social conflicts or political fragmentation, a deficiency in the institutions available to address them and an expanded political space due to the broader context of globalization. Pressing social and political conflicts and human rights abuses that revealed systematic and socially and

politically sanctioned derogation from fundamental norms forced political communities to confront their own failures to ensure fidelity to the principles of respect to which they had aspired. When they turned to existing institutions of justice, they discovered their inability to fully do justice in the face of these systematic and often 'legal' abuses. At the same time, the expanded context of globalization and the augmented role of non-state actors provided a richer repertoire of languages and institutions from which to draw. Apology's emergence did not signal a fundamental break in the norms that underpin liberal institutions, but rather responded to the shortfall in the gamut of liberal political tools previously available.

So apology, albeit unusual as a form of political action in modern liberal politics, may not after all be incompatible with its principles or modalities, but a much needed supplement to its self understanding and institutions. Approached through this lens, one might then reread the arguments of this dissertation as answers to the question of whether apologetic discourse is compatible with liberal principles of political organization.

First, my argument in chapter 2 addressed the concern that as a mechanism addressing collective responsibility apology was incompatible with liberal principles of individual freedom and shielding the individual from collective blame. Second, in my discussion of the different levels of responsibility, I argued that apology can be understood as a component of justice, or more accurately a means of addressing the identity dimension of political relations that informs actors' judgments about right and wrong. To this end, I also argued that if apology is understood as part of a sequence of responses to violations, rather than as a discrete intervention, one can harmonize it with the apparently

incompatible institution of punishment. Similarly, if one recognizes apology as a *sui generis* dimension of reparation, it need not be seen as in competition with, or a poor substitute for material compensation.

This last part of the argument is particularly important because it calls up the interface between religious and modern political modalities of mediating the collective and establishing the covenant that organizes action. It is not only religions' thick values that modern secularists shy away from, but also the sense that ritual *does* have the power to transform concrete relations. There is a strong tendency in contemporary liberal theory to assume that anything associated with religion can, at best, be unhelpful. As I set out in chapter 3, this derives from a number of assumptions about the difference between religious and modern/secular political forms: the place of the Absolute; the role of thick norms; the relationship between the group and the individual; and, the place of ritual or external/performative processes. In our dogmatic insistence that what we do depends solely on what we, as individuals are interested in doing or on what we are legally obliged to do, but not on what we are oriented to do, we blind ourselves both to the complexity of motivation, and to the resource ritual offers as a way of reorienting us.

It is not, to return to Arendt, our individual hearts that are being reformed in the ritual speech of apology, but our shared way of seeing and judging. And surely, in the face of overwhelming evidence that human beings are capable to committing horrific violations against each other, even in the face of laws and reason, there is more than a good enough reason to reach to wherever our tendencies to act well come from. In the Jewish and

Christian framework, this place of morality was called God – the source of norms that would orient rightful action, if only human beings could align themselves with God (sic) and not stray from the path (sin). And the ritual practices of religions, the sacrifices, their substitutes and the sacraments, were designed to allow human beings to approach this source of rightful action and to undergo the transformations that would bring them to a different orientation.

Secular political communities put down that language and disengaged with those practices – often for very good reasons. In doing so, however, they also deprived themselves of the resources these concepts and mechanisms offer in achieving exactly what the liberal ideal seeks to achieve – a political community in which the norms of equal recognition and respect increasingly mediate all relations between citizens, and eventually all human beings.

Perhaps, in our vehement reaction against the abuses of collectivism and our enthusiastic discovery of the inner light of reason, we lost sight of the power of ritual and the importance of outwardness. When ritual practice was relegated to the sphere of the irrational and the religious, it was to our detriment, and we would do well to re-member it in politics. As secular moderns we are no doubt wary as apologetic ritual re-enters the political sphere. We should, however, be equally wary of our tendency to over-estimate the power of our ‘rational’ interventions. Systematic, identity-based violations are not simply the product of rational choices by individual actors, nor will individual ‘rational’ interventions put an end to them. The gestures, the tonalities, the rhythms and prose of

apology may be precisely what we need to break through the patterns of violation that hold us as ‘irrationally’ as these shunned rituals.

The emergence of the apology within the context of liberal political communities shows liberalism partnering or supplementing itself with a discourse that engages citizens at a symbolic, emotional and transcendent level in order to strengthen and expand civil commitments. Interestingly, Arendt herself, while not speaking to the power of the ritual dimensions of religion, pointed out the political wisdom and indeed the political necessity of a *pre-rational* commitment to an absolute as the ground for any horizontal agreement between those forging a political covenant. She argues that even when “natural law stepped in to take the place of divinity”, this model of commandment and the Absolute, transcendent source of commandment, binding men beyond any choice or reason remained the template of all covenanting.³⁸ She even refers to the nation and public law as “the new vicar of God on earth.”

In Lincoln’s proclamation of a day of National fasting, humiliation and prayer that I referred to in the introduction, one sees the extent to which the architects of modern politics, those who attended so closely to crafting a strong and upright nation, conceived of this art in terms of fidelity to the absolute. As Lincoln expresses so graphically in that call to collective repentance, if the citizens of the nation allow themselves to become uprooted from the primary connection and source, to stray from the path, the integrity of the nation was at risk. Indeed he suggests that the civil war, the disintegration of the

³⁸ *On Revolution, op. cit.* p. 190.

union was the punishment for national sin. And although he does not say as much, one can infer that the national sin to which he was referring was slavery – or the failure to abide by the constituting (and Divine) principles of equality and liberty. Recognizing this national sin was thus also the opportunity to return to the original promise, only this time more fully, understanding that liberty and equality are non-discriminatory principles, not the property of whites.

Arendt argued that the explicit reference to a transcendent source of authority in the American constitution was not a reflection of religious conviction – but rather a matter of political expediency. The founders, she argued, recognized that without this source of a moral order beyond reach of an unhinged secular order, anything, including any breach of fundamental norms, would ultimately be possible. Reason, and the very possibility of reasonable political community of people who live according to the laws they create sit on top of these truths that they neither create nor hold, but which hold them.³⁹ Without a pre-rational fidelity to the absolute, this vicar of the nation “was liable to do very wrong indeed.”⁴⁰

But what if this vicar of God does do very wrong indeed, as it has so often? It is nations who commit genocide and covenantal political communities that sanction torture and the removal of indigenous children. This may be because they failed to adhere to the norms of the original covenant, norms that would have prohibited such violations, but from which they strayed, in the literal sense of the Hebrew *chet*, to sin. Or, as in the Australian

³⁹ *Ibid.* p. 193

⁴⁰ *Ibid.* p. 190

case, it may be because the norms of the original covenant were themselves the basis for violations, in so far as the nation was founded on the systematic exclusion or denigration of a particular group of people.⁴¹ In the former case, the hope that the foundational covenant with the absolute would be sufficient to hinge men to some basic standard of good thereafter was not realized. In the latter, the interpretation of the absolute was parochial, partial and self interested.

Because those foundational norms, the definitions of right and wrong and who is entitled to what (its political culture, *Dasein* or *Sittlichkeit*) are a dimension of the political community's identity, woven into its habitual way of being, under normal conditions they are rendered invisible, or beyond doubt - at least from within.⁴² From the inside, it is all of a piece. The political community locked in its limited normative perspective and most probably its self-interest has lost the condition of plurality required to earth its moral compass. Only from the outside does the deviation or the parochial interpretation of absolute moral norms become visible. As Levinas argued in his analysis of the horizontal and vertical dimensions of *teshuvah*, one only has access to God, to the absolute through ones relations with other humans. Without the other person, there is always a danger that

⁴¹ One could make the same argument in relation to the exclusion of slaves in the US, although on economic and political grounds rather than in terms of political sovereignty. The constitution of the US as a prosperous nation was built on the back of a huge, unpaid and disenfranchised labor force.

⁴² For example, I argued in chapter 5 that by conferring legitimacy on the practice of removing Aboriginal children from their families, the Australian community was performing, justifying and creating its identity as a legitimate sovereign post-colonial nation. However, this interplay between assumed moral orientations, action and political identity would not have been evident to the people living on the inside of the political cultural space itself.

even the relationship with God or the absolute will collapse and the possibility of moral judgment will be lost.

At the same time, while normative reorientation and moral correction requires the wronged other, it cannot occur unless the political community is permeable to this other perspective and can link it with its own commitments. A conflict between what it has been and what it ought to be, according to some external point of view will not in itself bring about the internal confrontation required to motivate repentance. In chapter 2, I put this in terms of the requirement that the political community have this alternative orientation on its normative horizon, or somewhere in its grammar of norms.

For it to *own* the observation that it has done wrong, and moreover to see that this wrongdoing is rooted in its political identity, the community has to be able to recognize the dissonance between its habitual actions, its implicit norms of recognition and what it considers right *itself*. This may occur through the passage of time and the introduction of dissent, both internally and through international exposure. Alternatively, it may be catalyzed by a political crisis rendering existing norms unsustainable. At this crisis point the gap between the identity it has embodied through its actions and its ideal identity becomes evident. Confronting this gap between what one thinks one is and what one *actually* is, is the occasion for shame.

This moment of shame is the moment of possibility, but also, as I discussed at the end of chapter 5, it is the moment where the nation, shocked by the ugly face in the mirror, will

look for strategies to convince itself that it is beautiful after all. The uncomfortable experience of the disparity will motivate some type of change, but whether that change genuinely involves recognition of the perspective of the other, of the one who holds the truth of its failure, depends on the actions it takes at that point and the qualities of the transitional strategies it is willing to undergo.

Apology in this sense can go either way. It might represent the most self serving, narcissistic strategy, ‘words that veil intention’. Or it might disclose a new reality, engaging the nation with the experience of the other in a manner omitted by the institutional changes that will also be required. Just as the initial covenant required a process beyond the day-to-day operation of rational politics, so too does the moment of recovenancing. It “must find some ritual processes through which the ideology it [the old regime] embodies.....can be publicly repudiated.”⁴³ Political repentance is such a ritual. And if the religious overtones of self-evident truths and nature’s God were not incompatible with the principle of liberal democracy at the founding moment, why should the religious overtones of repentance be incompatible with its improvement or repair thereafter? Rather than dismissing the religious overtones of apology as incompatible with the tenets of modern political communities, one can see in it an attempt to overcome the limits of liberal politics without contravening its core principles. This claim certainly requires a reconceptualization of the modalities of the modern state – but one that expands norms and institutions, rather than demanding entirely new ones.

⁴³ Michael Walzer, ed., and Marian Rothstein, trans. *Regicide and Revolution: Speeches at the Trial of Luis XVI*, New York, Cambridge University Press, 1974, p. 88.

There is, admittedly a utopian aspect of this claim – a notion in the background that as an act of recognition, apology forms part of a movement towards an ever expanding circle of people whose right to have rights will be recognized. And as we have seen in the case of religion, this universal God is usually a mask for a far more particular God whose definitions of rightful behavior favor some and exclude others, albeit under the cover of a universalism. This is the danger to which the critics I discussed at the end of chapter 5 were pointing – that the apology pretends to expand recognition by recognizing the claims of the excluded other, but in the end only assimilates them into a pre-existing set of norms, all the better to exclude the difference that would really challenge those norms.

This tension between the possibility of expanding recognition and the danger of disguising assimilation in the clothes of equality will unavoidably haunt the apology. If, however, one understands that universalism is not an already existent ideal to be discovered, but a condition to be achieved through historical movements, movements generated by our recognition of the failure to recognize the other, then one sees that this tension is not a defect, but is built into the process. In Hegel's terms, the beautiful soul could never be in the world, could never actually exist in history, because every commitment to action is particular, and so falls short of the universal.⁴⁴ It is only the impurity of the commitment, the willingness to fall short of the universal that brings the universal into a sharper (though always incomplete) focus – and then only because of the damage it brings about and the cry it provokes in the other who becomes my accuser.

And it is only my confession, my apology to the other that drags me past that

⁴⁴ See Hegel, G. W. F. *Phenomenology of Spirit*, tr. A.V. Miller, Oxford: Oxford University Press, 1977, paragraph p. 659, ff. p. 400, ff, paragraph p. 659, ff.

particularity. The universal cannot be accessed as immediacy, but only mediated through my encounter with the other whom I have failed to recognize as a subject who has access to a part of the universal that I do not.⁴⁵

In its determination to ground political relations on a firm foundation of justice, modern political theory has perhaps refused to see that beneath the move to justice (or to injustice), there already was an ethical relation. Justice stabilizes recognition, but justice is not itself fertile. Only the ethical recognition that arises from opening up to the perspective of the one who was not-me, or not us can give birth to a movement beyond the justice we already had. Only opening to the perspective of the other can reorient us so as to recognize the injustice of our apparent justice.⁴⁶ In the original sense of apology, only when one is called to justify oneself before the other, and most importantly before an other who accuses me of the inadequacies of the justice I was so sure of, only then can a genuinely new movement in justice occur.

⁴⁵ In the case of the apology movement, there are two senses in which the other may provide the opportunity to move beyond the parochial. First, in the apologetic relationship itself, and second in witnessing the actions of other political communities and thereby recognizing possibilities for moral action.

⁴⁶ In this regard, even while recognizing the importance of trying individuals for the crimes of Nazism, Arendt acknowledges that the speechless horror of the crimes and the refusal to think the unthinkable has “perhaps prevented a very necessary reappraisal of the legal categories.” Hannah Arendt, “Some Questions of Moral Philosophy”, *op. cit.* p. 56.

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