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A Different Kind of Justice: Transitional Justice as Recognition

How should societies emerging from massive human rights violations reckon with their evil past? In addressing this burning issue, the recent debate has focused on “Transitional Justice”, a term increasingly used to describe the process by which a society seeks to recover from episodes of mass violence or state repression. The label “Transitional Justice” seems indeed to provide scholars, policy-makers and activists with a shared vocabulary naming the issues at stake. Political actors and academics are, however, divided over the question of what, if anything, states or international bodies ought to do about human rights atrocities committed by a prior regime. What ends and means should be pursued in confronting past wrongdoing? What role can and should the law play in bringing about political and social change? Questions such as these lie at the heart of an ongoing debate.

Strategies employed by governments to confront regime atrocities have taken a wide variety of forms. All policy options involve necessarily an answer to one key question: whether to forget and move on or to keep the past alive. One way to acknowledge past atrocities is the criminal prosecution of those responsible for large-scale brutality. The Nuremberg trials, held immediately after World War II, marked in this respect a paradigm shift shaping a vocabulary of international criminal law and opening the path to the creation of ad hoc tribunals for the former Yugoslavia and Rwanda in the 1990s. This trend toward international prosecutorial mechanisms continues as evidenced by the recent creation of a permanent International Criminal Court. At a domestic level, National Socialism-related prosecutions have been ongoing from the 1950s to the contemporary period and recent years have seen a surge in the use of criminal trials to punish crimes committed in countries such as Argentina, Post-Communist Germany, Ethiopia and Rwanda. However, alternative processes have emerged in the 1980s and 1990s, in particular the Truth Commissions as mechanisms for identifying and documenting past human rights abuses. These fact-finding bodies with no authority to prosecute crimes are usually designed to mark a

break with a past record of human rights atrocities as a first step toward acknowledging responsibility and promoting reconciliation. Truth commissions as a response to repressive rule were created throughout the Americas – in Argentina, Chile, El Salvador, Honduras, Haiti – and in African countries such as Uganda and Chad. But the most widely known example is probably the South African Truth and Reconciliation Commission. This panel was launched in 1995 by a democratic legislative act, the Promotion of National Unity and Reconciliation Bill, which granted conditional amnesty to those who provided a full account of their crimes committed during the years of apartheid.

This paper seeks to describe and to evaluate some moral arguments as to how societies in transition should confront their evil past. Throughout the paper, I argue that “transitional justice” as an ever-expanding field of academic and politic interest should not be confined to considerations of empirical and strategic nature, but should address fundamental questions about the nature of transition and the relevant moral norms.

The paper advances an initial normative framework for exploring standards of evaluation, the focus of which is rectificatory justice. It discusses, in particular, two species of rectificatory justice: retributive and restorative justice. In doing so, it suggests that the common tendency to frame the debate in terms of an opposition – retributive justice v. restorative justice – should be avoided and that each dimension of justice has mutually supplementary roles in achieving the goal of transitional justice. My main point will be that rectification, as a matter of correcting historic injustice, is primarily about the vindication of the victim, and that it involves accounts of compensation, restoration, apology, and punishment as forms of *recognition*.

Transitional Dilemmas and The Ethics of Memory

Transitional Justice is a term in vogue used by a wide range of legal scholars, social scientists, policy analysts, historians, philosophers as well as policy-makers and institutional actors to name the problem of reckoning with an unsavoury past. Now, popularity in itself does not prove anything about intellectual insight. Sometimes an expression may even become a victim of its own success, giving the way to handy labels and oversimplifications rather than elucidating the complexity of the issues at stake. Having this in mind, it is worth taking a closer look at the meaning and the wider implications of transitional justice as an enduring dilemma.

Transition involves, as its etymology suggests, a passage or journey from one stage to another. This of course begs the question of transition *from* what *to* what. The literature usually identifies

two distinct starting points of transitional processes: non-democratic regimes and conflict situations. In some cases, like that of the transition in the former Yugoslavia – conceived as a movement towards peace as well as towards some kind of a democratic model (for instance, that envisaged for Bosnia Herzegovina in the Dayton Accord) –, the two situations clearly overlap. However, current transitional justice discourses largely focus on one particular aspect of transition: that of authoritarian regimes in the process of change to stable democracy. In this context, special attention is given to what Samuel Huntington has described as “The Third Wave”, that is, the *fin de siècle* movement towards democracy occurring in societies all over the world, throughout Latin America, Eastern Europe, the former Soviet Union, and Africa.¹

To be sure, the transition from non-democratic to democratic political systems constitutes an important global political development of the late twentieth century. It is, therefore, understandable that transitional justice discourses display a heavy emphasis on the consolidation of new democracies. An exclusive focus on democratization, however, may fail to capture the full range of perspectives, challenges and paradoxes arising in transitional contexts. Authoritarian states may be not the only kind of entities to leave in their wake a legacy of massive human rights abuses. A similar legacy may manifest in societies wrecked by violent conflict (such as Rwanda, Bosnia, Sierra Leone, Somalia, Kosovo, Angola, and Haiti, among others) or even in broadly democratic states that have experienced prolonged political violence (both Northern Ireland and Sri Lanka are telling examples of such “conflicted democracies”).²

At what point does the transition end? Ideally, the closure of transition is related – as the term “transitional justice” implies – to the realisation of justice. But this, of course, leaves open the very sticky question about the notion of justice at work in cases of transition. What ideals of justice should guide the transitional process in particular cases? Attempts to answer this question have essentially resulted in two alternative conceptions of transitional justice – retributive justice and restorative justice. Retributive justice involves giving everyone his or her just desert. Thus, it seeks to provide an impartial system to hold offenders accountable for what they have done. Restorative justice, the alternative theory, focuses on the healing and renewal of community relationships. Such a paradigm argues that overcoming past crimes and injuries will necessitate forward-looking strategies associated with truth telling, forgiveness, reconciliation and

¹ Samuel P. Huntington, *The Third Wave: Democratization in the Late Twentieth Century* (Norman: University of Oklahoma Press, 1991).

² See Fionnuala Ní Aoláin and Colm Campbell, “The Paradox of Transition in Conflicted Societies,” *Human Rights Quarterly* 27 (2005): 172–213.

rehabilitation. It is commonly believed that these two conceptions of justice are fundamentally at odds with each other and that a society must choose one or the other. This view has, however, been challenged by alternative approaches arguing that transitional societies must strive to realise both retribution and restoration and balance them in an appropriate way.³

However divergent, all these conceptions of transitional justice seem to share one underlying assumption: that a policy of collective amnesia, based on neglect and even denial (“forgetting and moving on”), should be ruled out. Memory, then, is a central part of transitional justice. Trials, reparations, rehabilitation and restoration processes are, as one might say, means by which a state can acknowledge past wrongdoing so as to preserve the memory of crimes and their victims. Accordingly, it is the work of justice to bring the truth to light and to fight against the erosion of memory brought about by the passage of time. This concept of “memory-justice”, however, leads to one question which is central to the contemporary debate: What do we ought to remember, and how and why?⁴ In addressing this issue, we need to explore what philosopher Avishai Margalit calls “The Ethics of Memory” – a topic that can be rendered by a series of open questions:

Are we obligated to remember people and events from the past? If we are, what is the nature of this obligation? Are remembering and forgetting proper subjects of moral praise or blame? Who are the “we” who may be obligated to remember: the collective “we”, or some distributive sense of “we” that puts the obligation to remember on each and every member of the collective?⁵

Beyond that, memory as backward-looking attitude raises fundamental questions about the nature and the role of law in periods of political transformation. At any such time of radical change, the law is – as Ruti Teitel puts it – “caught between the past and the future, between backward-looking and forward-looking, between retrospective and prospective, between the individual and the collective”.⁶ Massive paradigm shifts in understanding of justice create a dilemma over the rule of law. If in ordinary times the rule of law means adherence to settled rules, as opposed to arbitrary governmental action, in transformative periods this value of legal continuity (captured in the principle of *stare decisis*) seems seriously challenged. In such times of upheaval, what does

³ David A. Crocker, “Punishment, Reconciliation, and Democratic Deliberation,” *Buffalo Criminal Law Review* 5 (2001–2002): 509–549.

⁴ The expression „memory-justice“ is borrowed from W. James Booth, “The Unforgotten: Memories of Justice,” *American Political Science Review* 95, no. 4 (2001): 777–791.

⁵ Avishai Margalit, *The Ethics of Memory* (Cambridge, MA/London: Harvard University Press, 2002), 7.

⁶ Ruti G. Teitel, *Transitional Justice* (New York: Oxford University Press, 2000), 6.

the rule of law mean? Is substantive political change incompatible with a commitment to the rule of law?⁷

Such questions about moral and legal memory need to be addressed. This paper focuses on justice-related issues arising in the context of political transition. In doing so, it concentrates on one specific sense of justice, that of rectificatory or corrective justice. Throughout the paper, my primary concern is with “radical evil”. Most of us would not hesitate to name the horrendous events witnessed in the twentieth century – genocides, massacres, killing fields, torture, slavery, mass rape and death camps – as extreme and radical forms of evil. The term “Transitional justice” is used here as unifying label standing, essentially, for the entire spectrum of efforts to capture and amend such traumas of the past.

But what are we really saying when we speak of radical evil? Despite our readiness to classify and condemn some phenomena as evil, there is a great deal of uncertainty about the meaning of this word. In the wake of the unspeakable and incomprehensible, we seem to be at loss for proper responses. Moral and political philosophers have been surprisingly silent on the topic. Some of them have even claimed that the theme of radical or extreme evil should be dropped from contemporary moral and ethical discourse.⁸ Others, however, have sought to explore what is distinctive about “radical evil” – an expression that goes back to Kant.⁹ Contemporary contributions to the problem, namely the thinking of Hannah Arendt, Karl Jaspers, Emmanuel Lévinas, Hans Jonas (and of many others, including Theodor Adorno), have been shaped by the experience of twentieth century evil – especially the unprecedented radical evil of the Holocaust.¹⁰ Their reflections are best understood as an attempt to rethink the very meaning of evil and human responsibility after Auschwitz as a rupture and break with tradition. This is not the place to study in appropriate depth these philosophical interrogations. For the sake of orienting my discussion, let me just highlight a passage from a letter that Arendt wrote to Jaspers in 1951:

Evil has proved to be more radical than expected. In objective terms modern crimes are not provided for in the Ten Commandments. Or: the Western tradition is suffering from the preconception that the most evil things human beings can do arise from the vice of selfishness. Yet we know that the greatest evils or

⁷ For an insightful account of the rule-of-law dilemma raised by radical political change, see *ibid.*, 11–26.

⁸ See, eg., Alain Badiou, *Ethics: An Essay on the Understanding of Evil* (London: Verso, 2001), 58–67.

⁹ Immanuel Kant, *Religion within the Limits of Reason Alone*, T. M. Greene and H. H. Hudson, trans. (New York: Harper and Brothers, 1960), bks. 1 and 3.

¹⁰ See the excellent discussion of these issues in Richard J. Bernstein, *Radical Evil: A Philosophical Interrogation* (Cambridge: Polity Press, 2002).

radical has nothing to do with such humanly understandable, sinful motives. What radical evil is, I really don't know, but it seems to me it somehow has to do with the following phenomenon; making human beings as human beings superfluous (not using them as means to an end, which leaves their essence as humans untouched and impinges only on their human dignity; rather making them superfluous as human beings).¹¹

Much could be said about the chilling poignancy of these remarks. There are, however, two dominant themes that I want to underscore: superfluousness and excess.¹² Radical evil, for Arendt, emerges in connection with a system that makes human beings as *human* superfluous. It means literally the attempt to eliminate human nature by total domination. This “logic” of human domination is epitomised in the extermination and concentration camps. It is in these “laboratories” of totalitarian regimes that all individuals are treated as if they were completely superfluous and dispensable. As described in *The Origins of Totalitarianism*, this process of total domination – as core and horror of radical evil – comprises three analytical stages: the killing of the juridical person, the killing of the moral person, and ultimately the elimination of human individuality and spontaneity.¹³ Arendt further argued that with the emergence of twentieth century totalitarianism we are confronted with an unprecedented type of evil – an “excess” – that demands *new* philosophical orientations. There is, she claimed, something about the most extreme and radical forms of evil that reveals the inadequacy of ordinary accounts of morals and ethics to deal with evil. But she also believed that these events “at the limit” resist and defy any *total* comprehension. Nevertheless, there is a significant emphasis in Arendt's thinking on personal responsibility and accountability, leading her to argue that we can hold individuals responsible for their failure to think and judge.

This account, I suggest, helpfully elucidates basic concepts to guide our approach to radical evil as focal point of transitional justice discourses. We have an intuitive sense that not all wrongdoing, but only serious wrongdoing is evil. Underground riders who do not pay their fare do wrong, but not evil.¹⁴ Arendt helps us understand what makes wrongdoing serious enough to count as radical evil. Atrocities such as genocide, enslavement, torture, and rape as a weapon of war have to do with the following phenomenon: treating humans as nonhumans. Radical evil,

¹¹ *Hannah Arendt/Karl Jaspers. Correspondance, 1926-1969*, Lotte Kohler and Hans Saner, eds. (New York: Harcourt Brace Jovanovich, 1992), 162.

¹² In what follows, I rely heavily on Richard J. Bernstein's insightful analysis (*Radical Evil*, 205–235).

¹³ Hannah Arendt, *The Origins of Totalitarianism* (New York: Harcourt Brace Jovanovich, 1968 ed., 1951 orig.), 447–457.

¹⁴ Laurence Mordekhai Thomas, *Vessels of Evil: American Slavery and the Holocaust* (Philadelphia: Temple University Press, 1993), 74.

then, is about humiliation in its strongest form. It is, in other words, a fundamental assault against the most common denominator of being human: dignity. This suggests, one might argue, that radical evil undermines the very idea of shared humanity. In this line of thought, Margalit rightly reminds us that the word “radical” is derived from the Latin word “radix”, meaning “root”: radical evil, he suggests, consists of acts that undercut the very foundation – the root – of morality itself.¹⁵ Hence, it is a direct onslaught on mankind as a moral community: a crime against humanity.

So, what sets radical evils apart from ordinary crimes is that, in some sense, humanity is harmed when these crimes are perpetrated. Harm generally is defined as a setback on an important interest of a person.¹⁶ But what does harm to humanity mean? In his book-length treatment of the philosophical foundations of international criminal law, Larry May goes a long way to shed some light on this question. As he argues, analogising humanity to a club or even a community properly so-called can help us to make some sense of how humanity could be harmed in its interests.¹⁷ Similarly to a club, humanity has an interest that its members, as members, be not harmed. Depriving a person of the basics that make a life tolerable or decent may, then, constitute a harm to humanity.

But when we ask about the strong interests of international community, we may need to show more than just that a person’s corporeal and spiritual integrity has been jeopardised. As May suggests, there is some reason to think that the international community should particularly care about group-based harms, rather than about individualised crimes.¹⁸ What makes a crime a group-based crime is that it is either committed against individuals because of their group affiliations *or* occurs due to the involvement of a collective entity such as the State. Group-based crimes, so defined, are likely to be either more widespread, in that there is a tendency of the assaults to spread throughout a population, or more systematic, in the sense of being committed in a coordinated and planned manner, than harms that are directed against the victim’s individuality or are merely perpetrated by an individual human person. These considerations provide arguments for thinking that the international community has more of an interest in group-based

¹⁵ See Margalit, *Ethics of Memory*, 79. It is useful in this context to emphasise Margalit’s distinction between ethics and morality; the latter guides our behaviour towards those to whom we are related just by being fellow human beings (“thin relations”), whereas the former refer to relations backed by attributes such as parent, friend, lover, fellow-countryman (“thick relations”) (ibid., 7, 37).

¹⁶ See Joel Feinberg, *Harm to others* (New York, NY: Oxford University Press, 1984), Chapter 1.

¹⁷ Larry May, *Crimes Against Humanity: A Normative Account* (Cambridge: Cambridge University Press), 82.

¹⁸ Ibid., 83–94.

acts of violence than in random acts of violence, because of fears that the harm will spill over borders and damage the broader world community. Such risks to the security of international community form, then, a justificatory basis for international intervention to prohibit a State from attacking its own subjects, or allowing attacks to occur unpunished.¹⁹ At the level of international law, this assumption seems to be supported by the most recent attempts to define crimes against humanity – namely the Statutes of the former Yugoslavia and Rwanda Tribunals and the International Criminal Court. All of these major definitions of crimes against humanity suggest, indeed, that such crimes must entail more than merely isolated instances.²⁰

Whatever its theoretical underpinnings, this approach is particularly valuable in revealing central aspects of transitional justice that have so far been left unexplored. Transitional justice has to do with *collective* wrongdoing. It is confined to situations where the overall circumstances are such as to result in or threaten significant political violence.²¹ There must be, in other words, a deep seated and sharp division within the societal body as a result of deliberately inflicted human suffering. As an illustration, consider the case of rape. Even though rape – as an isolated act directed against a particular person – is an assault against a person’s worth as a human being and as such constitutes evil, it should generally not be a concern of “transitional” justice but rather of “ordinary” justice. The same act, however, should be a concern of transitional justice when it is perpetrated as a widespread strategy of intimidation and terror – the ethnic cleansing campaign in the Balkans is the most recent example of such forms of sexual exploitation. Here rape is a matter of transitional justice because of its overwhelmingly disruptive effects on the peace, stability, and integrity of the entire society – indeed, of humanity as a whole.²²

This presupposes that there *is* something special about transitional justice. We are dealing here with events which defy our ordinary conceptual and representational categories – events at the limits.²³ To say that transitional justice is concerned with these situations at the periphery, the margin, the extremity; that it involves the task of capturing the “unrepresentable” nature of

¹⁹ Ibid., 255.

²⁰ ICTY Statute, art. 5; ICTR Statute, art. 3; ICC Statute, art. 7. On this point, see Steven R. Ratner, and Jason S. Abrams, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy* (New York: Oxford University Press, 2nd ed., 2001), 58–62.

²¹ For such an argument, see Ní Aoláin and Campbell, “The Paradox of Transition in Conflicted Societies,” 176–179.

²² On this point, see the parallel analysis of rape in May, *Crimes Against Humanity*, 96–111.

²³ See Saul Friedlander, ed., *Probing the Limits of Representation: Nazism and the “Final Solution”* (Cambridge, MA: Harvard University Press, 1992), 3.

radical evil – this is to expose the very limits of law.²⁴ The ordinary measures that are usually applied to “common criminals” seem indeed oddly inadequate when it comes to deal with large-scale atrocities. Traditional criminal justice paradigms focusing on individual conduct such as murder, rape, assault, and torture, utterly fail to grasp the larger social and political context within which widespread human rights abuses occur. Not surprisingly, legal discourses concerned with issues of transition largely insist on novel concepts of criminality – namely, genocide and crimes against humanity – or promote less formal, quasi-legal processes such as truth commissions. All of this suggests that there is something exceptional about transitions. But it does *not* suggest that we should draw too stark a line between “transitional” societies and “nontransitional” societies. Nor should we ever be complacent about a society’s stability or justice. One should rather recognise, that “any people anywhere have the potential for evil on a massive scale” and that “no continent, no region, no people are immune from it”.²⁵ Societies, then, are not static, but constantly in flux.

Drawing on these considerations, this contribution argues for an approach that is at once idealistic, minimalist, and pragmatic. It is idealistic because it assumes that governments everywhere should guarantee certain basic rights to everybody within their borders. In making the normative claim that some basic human rights should be universal, I am not under the illusion that basic human rights *are*, as a matter of fact, universally respected; nor do I claim that everyone agrees that human rights should be universally respected. What I do claim is that some basic rights involve moral judgments capable of meeting the test of universalisability – that is, judgements stated so as to apply to all human beings everywhere. The main focus of the book is, however, on what Will Kymlicka calls “intolerable human rights violations” as distinguished from merely “bad” ones.²⁶ I argue, with Kymlicka, that in principle only human rights violations of that kind can justify breaches of national sovereignty. It is here that moral minimalism comes into picture. If we think that outside coercive intervention (e.g., prosecutions by international tribunals) can be an appropriate response to human rights violation, then the international community should remain cautious about interfering unduly, if at all, in the internal affairs of a sovereign state. Moreover, the cultural relativism argument still weighs heavy on the project of

²⁴ For an account of the concept of limits as applied to theories of law, see Austin Sarat, Lawrence Douglas, and Martha Merrill Umphrey, eds., *The Limits of law* (Stanford, California: Stanford University Press, 2005).

²⁵ Judge Richard J. Goldstone in his foreword to Martha Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence* (Boston: Beacon Press, 1998), ix.

²⁶ Will Kymlicka, “The Good, the Bad and the Intolerable,” *Dissent* 43 (1996): 22–30. See also William J. Talbot, *Which Rights Should Be Universal?* (New York: Oxford University Press, 2005), 7.

universal human rights. In cases of radical evil, as above defined, we may have the most compelling arguments against the relativist claim. Significantly, international criminal law has adopted a relatively cautious course, focussing on “the most serious crimes of concern to the international community as a whole” – namely genocide, crimes against humanity, war crimes and crimes against aggression.²⁷ Finally, my approach is pragmatic in that it is both context-sensitive and practice-oriented. When we ask about the ends that particular societies in transition should seek to achieve and the means they should adopt to achieve them, overly rigid “one size fits all” models of moral and legal reasoning are likely to be inadequate. What is needed, I argue, is to balance moral and legal perfectionism with the practical constraints of institutional life. The practical demands of a concrete case might indeed require that some legitimate goals be only approximately realised or postponed until conditions are improved. For we should not let the best become the enemy of the good.²⁸

What Ends?

When a society seeks to recover from episodes of mass violence and gross human violations it must decide what it aims to achieve and how it should go about doing so.²⁹ There have been a variety of ends that societies have pursued in reckoning with an evil past. The various strategies have included revenge and resentment, amnesia, retribution, trials, purges, reparations, truth telling, apologies, reconciliation, mercy and pardon. In this section, I will address some of the most prominent objectives that have emerged from the worldwide deliberation on transitional justice. Before doing so, I will briefly discuss two goals both at the extremes of the spectrum: vengeance and amnesia. These two ends are, I shall argue, morally defective and should be ruled out as goals of societies seeking transitional justice.

Vengeance is the impulse to inflict suffering on someone who has done harm to another. It is a desire to bring harm as a retaliatory measure. Often this is expressed in terms of “getting one’s own back”, “matching like with like”, “getting even”, “giving what’s coming to the wrongdoer”, or “an eye for an eye”. In some cases, we might be tempted to sympathise with an avenging person. Consider an example: Someone is murdered in a most dreadful way and the identity of

²⁷ See ICC Statute, article 5.

²⁸ This point is well made by David A. Crocker, “Transitional Justice and International Civil Society: Toward a Normative Framework,” *Constellations* 5, no. 4 (1998): 497.

²⁹ My approach here has greatly benefited from the work of David A. Crocker, *ibid.*, 495–517; and “Reckoning with the Past: A Normative Framework,” *Ethics & International Affairs* 13 (1999): 43–64.

the murderer is known beyond any reasonable doubt. But, for some reason, the killer is absolved and the spouse of the victim sets out to get revenge by killing the offender.³⁰ So apparently justice has been done: the villain did not simply get away with murder but was made to suffer and “pay” for his wrongdoing. I might seem, then, that there is a moral case for revenge. Jeffrie Murphy, for instance, thinks that “at least some vindictive passions (particularly resentment) are tied to self-respect and self-defence, and since self-respect and self-defence are good things, a reasonable degree of resentment is a good thing to the degree that it is so tied.”³¹

Yet there is something fundamentally wrong with the desire for revenge. In a recent book, Trudy Govier shows why this is so. Revenge, she argues, undermines moral integrity. It diminishes morally the victim, who though initially innocent “puts herself on the same level as the offender, because she responds to the fact that she has suffered one wrong by committing another.”³² The avenging act that is supposed to “bring justice back” is still, in the end, *wrong*. Wrongs have then been multiplied, not be cancelled out. However much one may sympathise with the victim, it is quite something else to argue that her innocence gives her a right to commit, herself, a terrible wrong. As Govier puts it: “If the acts undertaken are immoral, as they must be if the original act to be avenged was wrong, then the avenging part will have descended to the level of the wrongdoer.”³³ But there is something more about revenge that makes it fundamentally immoral – satisfaction and pleasure in the fact that suffering and harm has been brought to another. In any case of revenge the suffering of a person is used to soothe the wounds of insult and bring a feeling of satisfaction and contentment at having settled account and “got even.” The offender is then treated as a means only, failing to respect her or his human worth and dignity.³⁴ For at the very basis of revenge is hatred that goes so far as to take satisfaction at humbling the persons who hurt and humiliated us. This is a fundamentally unworthy emotion – a morally evil desire.³⁵

³⁰ I owe this example to Stephen Nathason, *An Eye for an Eye? The Immorality of Punishing by Death* (Lanham, Md.: Rowman & Littlefield, 2nd ed., 2001), 115–116.

³¹ Jeffrie G. Murphy, *Getting Even: Forgiveness and its Limits* (Oxford: Oxford University Press, 2003), 18. For a similar view, see Susan Jacoby, *Wild Justice: The Evolution of Revenge* (New York: Harper & Row, 1983).

³² Trudy Govier, *Forgiveness and Revenge* (London: Routledge, 2002), 12.

³³ *Ibid.*, 12.

³⁴ This clearly contradicts Kant’s well-known second formula of the categorical imperative: “Act so that you treat humanity, whether in your own person or in the person of any other, always as an end and never as a means only.” Immanuel Kant, “Foundations of the Metaphysics of Morals”, in: Lewis White Beck, ed., *Kant: Selections* (Englewood Cliffs, NJ: Prentice Hall, 1988), 273/429.

³⁵ See Govier, *Forgiveness and Revenge*, 13.

Also when it comes to society as a whole, revenge is not a moral option. One crucial reason for having a government is the control of private vengeance. If each and every citizen had the right to judge and punish criminals, there would be absolutely no checks or procedures to prevent the escalation of vigilantism and private vengeance, and innocent persons would be sure to suffer.³⁶ As John Locke noted, one of the best reason for wanting a functioning government might be that people are not apt to be fair judges where their own feelings and interests have been hurt.³⁷ The intervention of “neutral” judges might be a way of breaking the cycle of reprisals and continued violence. These concerns are nowhere better placed than in the context of political horrors and mass atrocities, for at no other time are campaigns of revenge and counter-revenge more costly in terms of human suffering and degradation. Yet the transfer of responsibilities from individual victims to public bodies is no guarantee for respectable results – the danger of turning a public inquiry into a legal farce by using “kangaroo courts” or “show trials” is all too real.³⁸ Any kind of “victor’s justice” must be rejected as a form of revenge. Hence, fair procedures are needed to prevent either the punishment of the innocent or the imposition of unjustly harsh punishments. Finding some alternatives to vengeance is, then, a matter of justice.

On the other end of the spectrum is amnesia. In one sense of the word, amnesia connotes an attitude of “selective overlooking or ignoring of those events or acts that are not favourable or useful to one's purpose or position.”³⁹ As individuals, we are often unwilling to acknowledge our errors, failings, and shortcomings. There are many ways of denying, avoiding, or ignoring shameful truths. We may turn our attention away from them; we may detach ourselves emotionally from them; we may deny or deceive ourselves about them. Similarly, we may also deceive ourselves when we deny, avoid or ignore unpleasant aspects of our societies.⁴⁰ At the societal level, this phenomenon of ignoring past wrongs may lead to a policy of forgetting expressed through strategies of not looking back. The general attitude then is: let bygones be bygones; look to the future instead of raking over old coals; the past and its undressed grievances are best buried by deliberately forgetting them, by drawing a thick line between past and present.

³⁶ See Nathanson, *An Eye for an Eye?*, 114–115.

³⁷ Locke, *Two Treatises of Government*, ch. 9, section 125.

³⁸ See Minow, *Between Vengeance and Forgiveness*, 12–14.

³⁹ Merriam-Webster Online Dictionary (www.m-w.webster.com).

⁴⁰ See Trudy Govier, “What is Acknowledgment and Why Is It Important?,” in *Dilemmas of Reconciliation: Cases and Concepts*, Carol A. L. Prager and Trudy Govier, eds. (Waterloo, Ontario: Wilfried Laurier University Press, 2003), 69–79.

As Timothy Garton Ash observes, there is some historical evidence that “the advocates of forgetting are numerous and weighty”.⁴¹ For example, French post-World War II democracy was constructed on a foundation of suppressing the painful memory of the Vichy collaboration, emphasising Charles de Gaulle’s unifying myth of French resistance. In West Germany, Konrad Adenauer’s democratic government also showed little interest in investigating individuals accused of crimes related to National Socialist rule; a vast purge process (denazification) was set in motion, but turned de facto into a “machine for political rehabilitation”. Think, too, of Spain after 1975, where no efforts were made to confront General Francisco Franco’s legacy of human rights abuses.⁴² The major justification that has been offered for such a policy of historical amnesia is the claim that forgetting facilitates the institutionalisation of democratic structures and the rule of law. Along these lines, one might argue that in countries such as Spain, or more in recently Poland, a policy of drawing a “clean slate” was successful, if success is measured exclusively in terms of democracy and stability.

Yet there are important moral objections to historical amnesia. Forced silence might create what Paul Ricœur calls “imaginary unity” (*unité imaginaire*) – a kind of artificial stability fostered by communal rites and ceremonies.⁴³ But the moral price is high. The result is a peace built upon the public suppression of memory. The wounds from historical wrongs are thus erased from official discourse, debate, and narratives, turning the victims into nameless, faceless abstractions. The victimised are then treated as though they simply do not matter – as though their suffering and needs, and indeed their dignity and moral status as equal human beings, do not need to be taken into account. With this message of moral insignificance the initial wound of insult and humiliation develops into “a second wounds of silence”, a deep sense of hurt stemming from the feeling that “people condone the wrongs and do not care about the baneful results”.⁴⁴ While the wounds of humiliation and pain are still bleeding, insult is added to injury by the denial of recognition.

⁴¹ Timothy Garton Ash, “The Truth About Dictatorship,” *The New York Review of Books* 45, 19 February 1998, 35.

⁴² For an account of transitional justice in a historical perspective, see Jon Elster, *Closing the Books: Transitional Justice in Historical Perspective* (Cambridge: Cambridge University Press, 2004). Other examples of official amnesia are the continuing efforts of Turkey to deny the 1915–1917 genocide of Armenians and Japan’s policy of denial about World War II. On this point, see Mark R. Amstutz, *The Healing of Nations: The Promise and Limits of Forgiveness* (Lanham, MD: Rowman & Littlefield, 2005), 20.

⁴³ Paul Ricœur, *La mémoire, l’histoire, l’oubli* (Paris: Editions du Seuil, 2000), 588.

⁴⁴ Govier, “What is Acknowledgment and Why Is It Important?,” 85.

What is needed, then, is not a policy of simply forgetting, but acknowledgment and responsible memory. To acknowledge our wrongdoing, is to communicate a recognition of the victims as human beings of equal worth. Such recognition conveys, at its core, a fundamental moral message. Morality, we might say, is deeply rooted in relations of mutual recognition, such as love, respect, and social esteem. There is, that is to say, an inherent connection between negative emotions – such as humiliation, insult, and suffering – and the denial of personal or social recognition.⁴⁵ Now in a backward-looking sense, recognition involves memory. When we remember events, names and faces, as though paging through a photo album, we engage in an act of recognition: “That’s him, that’s her!” By this we indicate that some people and things from the past *mean* something to us. Memory, then, may be a strong symptom that we care about other people – that their feelings of hurt, anger, or resentment are not indifferent to us. This sense of caring, which involves a true concern with the past, may provide the ingredient for what Ricœur calls “serene memory” (*mémoire heureuse*) – the kind of collective memory that offers soothing, relief and a basis for open, honest and constructive relationships.⁴⁶ But be this as it may, there is a more fundamental argument for explaining why we should remember moral nightmares. Radical evil is a direct attack on the very idea of shared humanity – as such it should be recorded and remembered. The obligation to remember, then, stems “from the effort of radical evil forces to undermine morality itself by, among other means, rewriting the past and controlling collective memory”.⁴⁷ In face of radical evil, defending society is not only desirable, it is a must.⁴⁸

In calling as I do for acknowledgement, I assume that we should share in responsibility for past wrongs done to other people – wounded others, in our own society and nation. Why should we do so? Because as members of a political community we are somehow associated with its policy and actions, whether good or bad. By virtue of our association, we – citizens of a nation or members of a society – are part of a collective and as such we can be held responsible for its outcome.⁴⁹ Karl Jaspers, in *The Question of German Guilt*, refers to this as political responsibility. Speaking as a German citizen confronting the National Socialist past, he argues:

⁴⁵ For such an analysis, see Axel Honneth, *The Struggle for Recognition: The Moral Grammar of Social Conflicts*, Joel Anderson, trans. (Cambridge, MA: Polity Press, 1995).

⁴⁶ Ricœur, *La mémoire, l’histoire, l’oubli*, 643–646.

⁴⁷ Margalit, *The Ethics of Memory*, 83.

⁴⁸ This echoes, of course, Michel Foucault’s “*Society must be defended*”, Lectures at the Collège de France 1975–76, Mauro Bertani and Alessandro Fontana, eds., David Macey, trans. (New York: Picador, 2003).

⁴⁹ The topic is, I hasten to say, far more complex than this. For a comprehensive analysis, see the fine collection *Collective Responsibility: Five Decades of Debate in Theoretical and Applied Ethics* edited by Larry May and Stacey Hoffman (Savage, Maryland: Rowman & Littlefield, 1991).

“We are all politically responsible for our regime, for the acts, for the start of the war in this world-historical situation, and for the kind of leaders we allowed to rise among us.”⁵⁰ This, however, is not quite the same as collective guilt. Guilt, unlike responsibility, implies moral blame on the basis of individual actions and intentions.⁵¹ The charge of collective guilt then makes no sense, because we “cannot make an individual out of a people”.⁵² This would be unjust and even counter-productive: “Where all are guilty, nobody is.”⁵³ Collective responsibility, on the other hand, refers to a vicarious liability predicated on group membership. But why should members of a “perpetrating community” acknowledge a share of collective responsibility for wrongs they neither personally committed nor personally supported? Hannah Arendt gives us a good reason why:

This vicarious responsibility for things we have not done, this taking upon ourselves the consequences for things we are entirely innocent of, is the price we pay for the fact that we live our lives not by ourselves but among our fellow men, and that the faculty of action, which, after all, is the political faculty per excellence, can be actualised only in one of the many and manifold forms of human community.⁵⁴

Said this, let us turn now to the question what are morally defensible goals that might guide societies making a transition. Philosopher and policy analyst David Crocker identifies eight such objectives: truth, public platforms for victims, accountability and punishment, rule of law, compensation to victims, institutional reform and long-term development, reconciliation, public deliberation.⁵⁵ To be sure, this approach highlights some of the pressing moral problems that need to be addressed. It however obscures, I believe, the distinction between ends and means, which for the sake of conceptual clarity should be made. Measures such as compensation, punishment, public platforms and institutional reforms are means to achieve morally urgent ends. Whether these measure are morally justifiable depends largely on the legitimacy of the goals they are meant to realise. I would suggest, tentatively, that there are at least three distinctive but somehow interconnected goals: justice, truth, and reconciliation. Together these ends might provide, I suggest, a moral narrative capable of capturing the challenges that must be faced in the aftermath

⁵⁰ Karl Jaspers, *The Question of German Guilt*, E. B. Ashton (trans.) (New York: Capricorn Books, 1961), 78.

⁵¹ See Andrew Schaap, “Guilt Subjects and Political Responsibility: Arendt, Jaspers and the Resonance of the ‘German Question’ in Politics of Reconciliation,” *Political Studies* 49 (2001): 750.

⁵² Jaspers, *The Question of German Guilt*, 41. Paradoxically, Jaspers is not always clear on this distinction between collective guilt and collective responsibility (which he misleadingly refers to as “political guilt”).

⁵³ Hannah Arendt, *Responsibility and Judgment*, Jerome Kohn, ed. (New York: Schocken Books, 2003), 147.

⁵⁴ *Ibid.*, 157–158.

⁵⁵ Crocker, “Reckoning with Past Wrongs: A Normative Framework,” 1343–64.

of mass violence. I thus argue for a comprehensive approach to transitional justice, bridging the gap that often separates the advocates of strict justice and full prosecution and those of reconciliation and national healing.

A comprehensive analysis of these different moral values is beyond the scope of this paper. More modestly, I want to focus on one specific sense of justice relevant in the context of transitional societies, that of rectificatory justice. To begin with, however, it is worth looking at the broader moral context surrounding the act of acknowledging and judging the unjust.

Judging the Unjust

As mentioned, my primary concern in dealing with transitional justice is radical evil. The central focus, then, is on moral emotions that are negative rather than positive – say humiliation rather than pride, dishonour rather than honour, rejection rather than recognition, a sense of injustice rather than of justice. This makes it necessary to take a closer look at injustice – non only justice – even though this is an unusual enterprise.⁵⁶ Unlike art and drama, moral philosophy has widely shunned injustice. “What is justice?” asked Socrates in Plato’s *Republic*, and, ever since, this has been a central question of social and political ethics. But where is injustice? Most moral and political philosophers have treated injustice as the simple absence of justice, as a sort of conduct that the rules of justice are designed to control or eliminate. On this account, injustice is an abnormality that must and can be avoided, a preliminary to the analysis of justice. Justice, then, is the real business of ethics.

In *The Faces of Injustice*, Judith Shklar proposes to question this conventional account. She invites us to think more deeply about the sense of injustice that we know so well when we feel it.⁵⁷ Most of us have said “this is unfair” or “this unjust”. We feel a special kind of indignation and outrage when we or others are unjustly deprived, despised and rejected. We might even say that without this sense of injustice, the very idea of what it means to be treated unjustly, there is no moral knowledge, no moral life. But what is really involved in the experience of injustice? To appreciate the moral meaning of the sense of injustice, one best turns to the victims, the people who feel the fury and resentment of being humiliated and treated unjustly. If we listen carefully to their voices of despair and anger, we might perceive most clearly the sense of injustice. To be

⁵⁶ Margalit, *The Ethics of Memory*, 112–117.

⁵⁷ Judith N. Shklar, *The Faces of Injustice* (New Haven: Yale University Press, 1990). The following remarks are based upon this inspiring work.

sure, it will always be easier to see misfortune rather than injustice in the afflictions of other people. We like to treat painful events as unavoidable or natural and are eager to stress that “life’s unfair”. And there is always a strong impulse to do nothing at all, to turn away and forget the victims.⁵⁸

It is here that the notion of “passive injustice” comes into play. We are passively unjust when we close our eyes to private or public injustices and just look the other way. But, as Shklar suggests, passive injustice is more than being indifferent to others and their needs; it involves a specifically civic failure to stop or recognise acts of wrongdoing.⁵⁹ To be passively unjust, then, is to fall below moral standards of citizenship. As free and equal citizens we have different rights, responsibilities and expectations of each other, to which we may refer as democratic ethos. If we are all “created equal”, then our expectations as human beings do matter equally, and when some of us do not get what we believe to be their due we should protest in public. There is, therefore, a democratic sense of injustice that involves a public recognition of the victims as full-fledged persons and citizens. As Shklar puts it,

If democracy means anything morally, it signifies that the lives of all citizens matter, and that their sense of their rights must prevail. Everyone deserves a hearing at the very least, and the way citizens perceive their social and personal grievances cannot be ignored. The democratic ethos assumes that we all have a sense of injustice and that it plays an important part in the way we judge each other and our society. The voice of the victim, of the person who claims that she has been treated unjustly, cannot therefore, as a matter of democratic principle, be silenced.⁶⁰

It is significant that, in making this point, Shklar refers to the notion of judgement. Our sense of injustice, she says, asserts itself as a way of judging each other and our society. When we refuse to resign ourselves to experiences of injustice and cry out in anger, we make in some sense a judgement about what we owe each other. But what exactly do we do when we make such judgements? To judge something or someone is to express an opinion about that thing or person – to opine, value, assess. For instance, we may say about a political leader that he is untrustworthy, manipulative, slippery, or opportunistic, and when we do so we make a moral and political judgement. There is, however, a stronger sense of the word “judge” which is more closely related to what courts or similar institutions do when they decide, say, whether a workman has a legal right to damages or whether the accused is guilty beyond any reasonable doubt of committing a

⁵⁸ For a discussion of the relation between injustice and misfortune, see *ibid.*, 61–82.

⁵⁹ *Ibid.*, 6, 41.

⁶⁰ *Ibid.*, 35.

crime. To judge in this sense is more than just to appreciate, estimate, or evaluate – it is to rule, sanction and reach a verdict. The sword of *Justitia*, the Roman Goddess of Justice, prominently reflects this idea of a final ruling sanctioned by public force.

In this sense, judging means putting an end to uncertainty. When everything is said and done, and all the parties have been heard, a verdict is reached and a sentence passed. There is something here like a final act, a closure of a drama with several protagonists (typically, in a criminal case, the accused, the defendant, their lawyers, the witnesses, the jury, the prosecutor, and so on). With the judgement, the back-and-forth play of arguments comes to a close and a conclusive decision is rendered. But, as Paul Ricœur suggests, the act of judging involves more than just ending uncertainty.⁶¹ It consists, he says, in drawing a line between “yours” and “mine” and in delimiting our claims. Giving each his or her own is, after all, what judges are supposed to do: *suum cuique tribuere*. The German word for judgment – *Urteil* – expresses this well (*Teil* meaning share or part). Of course, we will not make sense of this unless certain assumptions are made about how benefits and burdens should be distributed between individuals and social groups. If we think that the interests of each member of the community matter, and matter equally, then the act of judging can be seen as a part of ensuring fair distribution.

What is more, this notion of judging bears on a preference for discourse over violence. It breaks, in some sense, with the archaic cycle of ongoing feuds and vendettas. Sometimes we say that to take revenge is to obtain justice for oneself. But we are wrong in saying so. As Ricœur reminds us, seeking justice is profoundly different from seeking vindictively to injure.⁶² What is needed, instead, is a kind of impartiality and critical distance to make sure that both sides – the accused injurer and the putative victim – are heard and treated fairly. The act of judging, then, is an expression of mutual recognition, rather than of violence. With it, both parties, winners and losers, are recognised as subjects of equal rights and obligations. Significantly, such acknowledgment may provide a basis for alleviating feelings of resentment and anger, avoiding violent conflict, and making reconciliation possible. Perhaps it is through the idea of sharing that we can best appreciate what is involved here.⁶³ To share (out), in one sense, is to divide something among, or between, several people. To share (in), in another sense, is to engage, take

⁶¹ Paul Ricœur, *The Just*, David Pellauer, trans. (Chicago: University of Chicago Press, 2000), 127–132. The account here draws on that work.

⁶² *Ibid.*, 131–133.

⁶³ *Ibid.*, 132.

active part in a common undertaking. Both meanings are relevant if we think of judging as an act of social cooperation between free and equal citizens.

No doubt, there is a clear message of justice here. The whole idea that people should be judged fairly is an idea of justice. We feel, and rightly so, that nobody should undergo undeserved or excessive punishment; that something is wrong with biased judges and foregone conclusions. Justice, we think, demands procedural fairness, transparency, impartiality and so on. But we do also feel, and very strongly, that the victims, those who have been wronged, deserve compassion and respect; that things must somehow be put right. Society, we may say, cannot tolerate moral free-riders, taking advantage from the system without doing their share. This, however, supposes something like a social contract model of society, according to which the benefits and costs of social arrangements are, at a fundamental level, equally shared. There are, I suggest, three forms of justice emerging from this account: legal, rectifying, and distributive.

This way of putting it may especially bring to mind Aristotle's categorisation of justice. In Book V of the *Nicomachean Ethics*, Aristotle divides justice into general and special justice. He identifies universal justice with "the lawful" assuming that the aim of the law is to promote virtue and prohibit vice.⁶⁴ Special justice, on the other hand, is justice in the sense of "the fair and the equal". According to Aristotle, there are two species of particular justice: distributive and rectificatory justice. Distributive justice is concerned with the distribution of goods and honours in a political society. A distribution is just, for Aristotle, if it conforms to "proportionate equality": equal shares to equals, unequal shares to unequals.⁶⁵ Rectificatory justice, Aristotle's second species of particular justice, requires – roughly speaking – that wrongs be rectified. Here the persons involved are not to be taken into account, but the relationship between the gain to the offender and the loss to the victim. Rectificatory justice, then, is a matter of equalising – of taking away from the advantage of the one and adding it to the disadvantage of the other.⁶⁶

The latter conception of justice – rectificatory justice – is of crucial importance with respect to the moral challenge of reckoning with past evils. In what follows, I shall shed some light on this specific sense of justice by analysing two standards of rectificatory justice that are particularly relevant in the context of societies seeking a just transition – retributive and restorative justice.

⁶⁴ Aristotle, *Nicomachean Ethics*, Terence Irwin, trans. (Indianapolis: Hackett Pub., 2nd ed., 1999), 1129^b20–5/70.

⁶⁵ *Ibid.*, 1131^a10–1131^b24/71–2.

⁶⁶ *Ibid.*, 1131^a25–272/72–4.

Rectificatory Justice

If we think of morality as a practical matter, then moral judgements have clear implications for action. To judge an act unjust or wrong is to commit oneself to avoiding it; it is to commit oneself to the prevention of injustice.⁶⁷ But what about past injustices? What is the practical importance of a judgement that something wrong *did* happen? Even though we cannot undo the action itself, there is a sense in which we may be able to reverse the past. Somehow we feel that there must be a way of redressing past wrongs, of setting unjust situations right. We would want to see property returned, compensation paid, or wrongdoers punished. All this may play an important role in the righting of wrongs as a matter of justice. The conception of justice we are looking for, then, is one of rectification.

While legal and distributive aspects of justice have been extensively discussed over the centuries, relatively little scholarly attention has been paid to questions of injustice and its rectification. As Rama Mani observes, an obstacle in applying standards of rectificatory justice to transitional societies “lies in the difficulty of locating a body of relevant philosophical literature on the subject”.⁶⁸ While Aristotle’s view of rectification is still discussed and while the more recent discussion on affirmative action has often connects with rectificatory concerns, no one has come close to producing a comprehensive and integrated theory of rectificatory justice. An important exception, however, is a recent essay by Rodney Roberts. In what follows, I briefly sketch his taxonomy of justice, which provides a basis for my analysis.

Roberts, in *Justice and Rectification: A Taxonomy of Justice*, advances an initial framework for a moral theory of justice, the focus of which is on framing a conception of rectificatory justice.⁶⁹ The taxonomy of justice which emerges from his discussion consists of two species of justice: distributive and rectificatory justice. As Roberts notes, distributive justice is primarily concerned with establishing a just distribution of rights and duties among the members of society. Included in this concern for a just distribution of rights and duties, is a concern for those individuals who are disadvantaged in their opportunity to participate in positions and resources and in pursuing self-fulfilment; for Roberts, compensation as a measure of counterbalancing is appropriate to alleviate disadvantages or natural loss which stand in the way of equal opportunity

⁶⁷ See Jeremy Waldron, “Superseding Historic Injustice,” *Ethics* 103 (1992), 4–7.

⁶⁸ Mani, *Beyond Retribution*, 31.

⁶⁹ Rodney C. Roberts, “Justice and Rectification: A Taxonomy of Justice,” in *Injustice and Rectification*, Rodney C. Roberts, ed. (New York: Peter Lang, 2002), 7–28.

for all (he calls this “compensation in the distributive sense”).⁷⁰ Ideally, this just division of advantages from social cooperation will be maintained, securing the basis for a properly ordered society. Our world, however, is not an ideal one, and all too often the system of rights and duties prescribed by distributive justice breaks down. When an injustice occurs, that is, when one’s actions fail to be consonant with principles of moral right, then distributive justice cannot provide a means by which we can set right any unjust state of affairs. Rather, it is the aim of rectificatory justice to set unjust situations right.⁷¹ But what does that imply? Roberts mentions three concepts required by rectificatory justice: compensation, restoration, and apology. Justice, he says, demands not only that we provide an equivalent in value to the thing that was lost and restore the exact same thing whenever possible, but also that an apology from the perpetrator of injustice must be rendered to the victim.⁷² In addition, there is a fourth concept that may be a part of rectificatory justice: punishment. Roberts is willing to admit that retributive punishment – as a matter of righting wrongs – may play a role in his conception of rectificatory justice.⁷³

As this account indicates, to tell the full moral story of the relation between injustice and rectification we need a clearer sense of what it means to “make things right”. That is where the victims, those who have been wronged, come into picture. What do we do with their feelings, their moral indignation in response to unjust treatment? As J. R. Lucas notes, “injustice betokens an absence of respect, and manifests a lack of concern”.⁷⁴ The voices of the victims, their resentment, anger, and alienation, express indeed a sense of not being regarded as worthy of consideration. Hence, we may think of rectification as a matter of reaffirming that the victims do matter – that they are human beings and so have moral standing. In the context of profound wrongs, such recognition of the human dignity and worth of the victim is of tremendous value because it assists the victims to maintain a sense of self-worth, self-trust, and self-respect.

In what follows, I shall pursue the discussion by analysing two species of rectificatory justice: punitive and restorative justice. My main point will be that rectification, as a matter of correcting historic injustice, is primarily about the vindication of the victim, and that it involves accounts of compensation, restoration, apology, and punishment.

⁷⁰ Ibid., 10.

⁷¹ Ibid., 10, 24.

⁷² Ibid., 15–21.

⁷³ Ibid., 21–27. Roberts argues that retributive punishment is a part of rectificatory justice, *if* it is justified. His argument, however, does not reach any further, since it does not involve justification for a particular form of punishment.

⁷⁴ J.R. Lucas, *On Justice* (Oxford: Clarendon Press, 1980), 7.

Punitive Justice

Punishment, by definition, is the deliberate imposition of suffering. It involves doing harm in response to wrongdoing: the deprivation of life, liberty, or property, or the infliction of pain. As Bentham candidly put it, “all punishment is mischief; all punishment is in itself evil.”⁷⁵ Therefore, we do well to ask whether these harms of punishment are necessary, just, right and proper. What can justify practices of this kind? To be sure, that question is crucial for anyone who cares about how political communities should treat their members, but it is especially insistent in the context of societies resurfacing from an evil past.

Some philosophers believe that punishment is to be justified insofar as it tends to increase social goods or decrease social ills. This sort of justification is rooted in the philosophical tradition known as utilitarianism. For utilitarians, an act or policy is morally right to the degree that it maximises human welfare or utility, giving equal weight to everyone in society; something has moral worth, on utilitarian reasoning, if it promotes some social good, thus making people “better off”. Utilitarianism, as a version of consequentialism, holds that the justification of a practice depends only on its consequences for society at large, and this involves showing not just that the practice does some good but also that it does more good than harm. Finding the right moral answer becomes then a matter of “trading off” the benefits accruing to some against the harms accruing to some others. So punishment is to be justified in utilitarian terms, if it can be shown that it does more good than harm when everyone’s interests – including those of the offenders – are considered.⁷⁶ This leads to the question: Is punishment necessary to produce a greater public good? Punishment is often thought to prevent crime through deterrence (i.e., giving potential offenders reason to refrain from crime), incapacitation (i.e., making some kinds of offence against some kinds of victims impossible) and rehabilitation (i.e., seeking to improve the life prospects of offenders through educational or vocational programs). This may support the view that punishment does indeed do more good than harm, and thus that punishment is justified on utilitarian grounds.

⁷⁵ Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation*, Ch. XIII, para. 2.

⁷⁶ For an illustrative discussion of this point, see Deidre Golash, *The Case against Punishment: Retribution, Crime Prevention, and the Law* (New York: New York University Press, 2005), 22–24.

The claim, as it stands, is however open to objection. To start with, it is empirically uncertain whether punishment has any crime-preventive effects at all.⁷⁷ But the more fundamental criticism is that utilitarianism tends to be consistent with a permission to punish innocents, in that it does not make guilt a necessary condition of punishment. So long as we think that morality requires promoting the greatest good of the greatest number, and that the greater social good of preventing crimes is a sufficient reason for harming individuals, then we cannot rule out the possibility that severe harm to a small group of individuals, even innocent ones, may be justified by the benefit to a large number of others. On this view, there may be occasions in which the need to reinforce law and order – for example in the wake of a dangerous riot – may justify practices of deliberately punishing the innocent and of imposing disproportionately harsh punishments. If it were possible to establish that performing such exemplary punishments is the only way to avert the occurrence of greater evil or injustice, then, for a utilitarian, that would be the right thing to do.⁷⁸ Critics will object that this account fails to take seriously the rights and moral status of individuals. It appears that achieving a greater social good is *not* sufficient to justify sacrificing innocent individuals and using them as mere means to the good of others. The punishment of the innocent seems still wrong even if it is a cost-effective way of producing certain beneficial consequences – it is intrinsically wrong.⁷⁹

This, with minor variations, is the line that is adopted by the defenders of a retributive theory of punishment. For retributivists, it is not such consequences as the deterrence of other would-be wrongdoers that justify punishment; rather it is the wrongness of the criminal act that morally legitimates and requires the performance of a parallel act against the offender. At the heart of his approach is the claim that all and only wrongdoers deserve to be punished. That involves a “positive” and a “negative” claim: anyone who is guilty *ought* to be punished and anyone who is not guilty *ought not* to be punished. But why should we punish the guilty? What are the grounds for the widespread intuition that “the guilty deserve to suffer”? In their many attempts to answer these questions, contemporary retributivists often take a Kantian view, appealing to the idea that the offender “wills his own punishment”. Because we are rational agents, Kant maintains, we are committed to moral rules that everyone could reasonably agree to – rules such as “no killing” or “no stealing”. The offender, in committing the crime, chooses to flout the moral law in his

⁷⁷ For an account of the difficulties of providing empirical evidence for deterrent effects, see *ibid.*, 24–38.

⁷⁸ See Geoffrey Scarre, *After Evil: Responding to Wrongdoing* (Aldershot: Ashgate, 2004), 131–132.

⁷⁹ See R. A. Duff, *Punishment, Communication, and Punishment* (Oxford: Oxford University Press, 2001), 10.

treatment of others and, thus, consents implicitly that others treat him in a similar way. By breaking the moral law, he acts in a manner unfitting to a rational agent, and if others reciprocate in kind, then he can be said to “have brought the punishment on himself”. Kant says:

No one suffers punishment because he has willed *it*, but because he has willed a *punishable action*; for it is no punishment if what is done to someone is what he wills, and it is impossible to will to be punished. Saying that I will to be punished if I murder someone is saying nothing more than that I subject myself together with everyone else to the laws, which will naturally [include] penal laws if there are any criminals among the people.⁸⁰

Even if we accept this account, it does not tell us *what* the practice of punishment is supposed to achieve. In the *Metaphysics of Morals*, Kant spoke of restoring the moral balance that is upset by the offence.⁸¹ Later versions of retributivism, however, stress at this point the importance of fairness, or reciprocity. Suppose we see a system of law as a set of rules bringing goods (safety, security, protected freedom) that are for the advantage of all – typical criminal laws against killing, theft, and so on benefit everyone by defining basic rights (such as rights to life and property) with which others may not interfere. We can then say that those who break the law take unfair advantage of their fellow-citizens because they benefit from the existence of a legal order without doing their share to make it work.⁸² For example, a bank robber who steals money can only maintain possession of that money if others refrain from taking it; she is a moral free-rider, taking the benefits of the law-abiding self-restraint of others but refusing to accept the burden of her own self-restraint.⁸³ It is fair, on this account, to punish her in order to remove this unfair advantage and thus to restore the balance of costs and benefits.

Despite its intuitive appeal, this account of retributivism is open to a number of objections. One fairly obvious difficulty is that it presupposes an initially fair distribution of social benefits and costs. The apparently generous assumption that we are all engaged in a just and mutually beneficial enterprise obscures an important truth: Given the realities of socio-economic life, the burden of punishment falls more heavily on the disadvantaged and socially marginalised groups (among whom most offenders are found) who tend to receive fewer benefits than others while

⁸⁰ Kant, *Metaphysics of Morals* @

⁸¹ Kant, *Metaphysics of Morals* @

⁸² For such an account, see Jeffrie G. Murphy, “Kant’s Theory of Criminal Punishment”, in Jeffrie G. Murphy, ed., *Retribution, Justice and Therapy: Essays in the Philosophy of Law* (Boston: D. Reidel, 1979) 82–92. Murphy has since expressed doubts about his account. See also Herbert Morris, “Persons and Punishment”, in Herbert Morris, ed., *On guilt and Innocence* (Berkeley: University of California Press, 1976), 31–88.

⁸³ The example is taken from Govier, *Forgiveness and Revenge*, 17.

paying great costs.⁸⁴ Insofar as some individuals are more likely to commit crimes because of their social circumstances, it seems far from evident, if not absurd, to claim that they have taken more than their share and must accept additional burdens. Besides, not all crimes can be sensibly thought of as the seizing of an unfair advantage. For wrongs such as sexual assault or domestic violence, for example, it is hard to see what advantages the offenders have gained by their crimes. Moreover, compliance with fair rules does not necessarily involve a cost or burden – most people do not commit murder, fraud, bank robbery, or blackmail, simply because they do not wish to do so.⁸⁵ Finally it may be questioned whether the “unfair advantage” theory can accommodate the Kantian principle that we should always treat people as ends and never merely as means to others’ advantage.⁸⁶ An essential part of retributivism, as so far construed, is proportionality (“just deserts”): offenders should be punished to a degree that matches the scale of the undeserved benefit they have gained. The trouble is, however, that it provides no guide for establishing when punishments are proportional to the crime. One way to address this issue would be to insist on a hard-line version of the *lex talionis*. Applied strictly, the principle of “an eye for an eye” would require that we treat people with the same degree of cruelty as they have treated others – that we torture torturers, rape rapists, mutilate mutilators, and burn arsonists. Needless to say that many people would find such cruel and barbaric punishments morally unacceptable; they would rightly insist, with Kant, that punishment must avoid compromising the human dignity of the lawbreakers, and that we should ban all forms of degrading and dehumanising treatment.⁸⁷

In the light of these and other difficulties, some recent retributivists have moved away from theories of reciprocity towards accounts of punishment that stress the importance of promoting moral reflection in the wrongdoer. What justifies retributively imposed suffering, according to the proponents of this view, is that it conveys a moral message – a message aimed at communicating to wrongdoers an understanding that what they did was wrong. Punishment, then,

⁸⁴ See Jeffrie G. Murphy, “Marxism and Punishment”, *Philosophy and Public Affairs* 2, no. 3 (Spring 1973), 107, 239–243. See also Golash, *The Case Against Punishment*, 74, 82.

⁸⁵ This point is well made in Govier, *Forgiveness and Revenge*, 17.

⁸⁶ Kant, “Foundations of the Metaphysics of Morals”, 273–278/429–436. For Kant, each individual must be treated as an end in himself, rather than as mere instrument for the furthering of another’s purposes. Although Kant insists that not to punish a criminal is to treat him in a manner inconsistent with his status as an end in himself, he also contends that punishment must avoid compromising the human dignity of the criminal.

⁸⁷ A good discussion of the relation between retribution and respect in Kant’s moral philosophy may be found in M. Margaret Falls, “Retribution, Reciprocity, and Respect for Persons”, *Law and Philosophy* 6 (1987), 25–51. Falls argues, plausibly, that Kant’s respect for human persons as beings capable of autonomous moral choice is incompatible with “an eye for an eye” of unqualified retributivism.

is a way of teaching a moral lesson, of getting the offender to reflect on the barriers that society has erected against a certain kind of action and on the reasons for these barriers being there.⁸⁸ On this account, retributive punishment may be understood as carrying an *educative* message not only to the convicted criminal but also to everyone that might be tempted to do what he did. This implies that harsh punishments (including torture and killing) are never justified, because they are not conducive to moral reflection in the wrongdoer. Moreover, if the point of punishment is to announce the wrongness of certain acts and to send a moral message to the society at large (for example, the message that it is *not* all right to murder or rape), then it displays a public recognition of and concern for the victims of wrongdoing. To call those who wronged them to account, through the criminal system, is to that extent to acknowledge that these things happened, that they were wrong and should not have happened.

To say that criminals need “education” may, however, imply a paternalistic view of them. After all, isn’t this theory saying that the state can punish people simply to promote their own good? Doesn’t it involve treating the offenders as like children whose parents punish them for their own good, seeking to improve their moral behaviour and characters? All this seems difficult to reconcile with the liberal idea that we promote people’s interests by letting them choose for themselves what sort of life they want to lead. No one expressed this more eloquently than John Stuart Mill: “...the only purpose for which power can be rightfully exercised over any member of a civilised community against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant.”

These problems may be avoided if we move away from moral education to a view that emphasises the role of moral responsibility. As Margaret Falls suggests, punishment can be seen as a way of treating persons as autonomous, responsible moral agents.⁸⁹ On this account, punishment is only justified if it holds the wrongdoer accountable for choosing wrong – as a person with the ability to choose and act autonomously she deserves that the state calls her to answer for acts threatening human welfare. Punishment, so understood, is a way of “showing intolerance for the act now and forever”.⁹⁰ But, according to Falls’ interpretation of retributivism, this does not involve an obligation to ensure moral improvement – the possible responses to her wrongdoing (e.g., remorse, acceptance of guilt, recognition, self-defence, defiance etc.) are freely

⁸⁸ See Jean Hampton, “The Moral Education Theory of Punishment”, in: Michael J. Gorr and Sterling Harwood, eds., *Crime and Punishment* (Boston: Jones and Bartlett, 1995), 356–375.

⁸⁹ Falls, “Retribution, Reciprocity, and Respect for Persons”, 25–51.

⁹⁰ *Ibid.*, 43.

chosen by the offender.⁹¹ The account Falls offers is insofar non-paternalistic. At the same time, however, it preserves the idea that punishment should be a communicative enterprise that seeks to convey a moral message. Punishment, for Falls, is a morally legitimate response to wrongdoing “only if it is an appeal to the criminal’s powers of reasoning rather than to sheer animal fear or human degradation”.⁹² Dreadful forms of punishments (like torturing torturers or killing killers) are therefore unjustifiable because they make responding to them as a moral agent impossible.⁹³

Even if we are ready to understand and justify criminal punishment as a method of moral communication, it is still unclear why it should be the *preferred* method. There are non-punitive ways of repairing the harm wrought by wrongdoing: apology, compensation, reparation, acknowledgement, repentance and so on. We might indeed say that the wrongs and harms done by crime can be acknowledged and condemned in a more meaningful way without punishment. That is the view taken by advocates of restorative justice who, while seeking to dissuade hasty resort to punitive rectification, insist that in our responses to, and understanding of, crime we should promote restoration through voluntary consultation and negotiation in mutual respect. Such deliberative processes, it is argued, are better ways of expressing a moral message, leading to understanding and even healing. (I shall discuss this approach in the following section.)

However, arguments for *punitive* communication may draw on the idea that sometimes an apology, even if expressed by some mode of reparation or compensation, is not enough. Some harms, it seems, go so deep that something more is owed to the victim – something that will recognise and address the seriousness of the wrong that she has suffered.⁹⁴ The moral wound involved in a rape, for instance, goes so deep that a mere apology made by the offender, however sincere, seems cynically inadequate. To think that the rapist could just apologise, and then return to normal life, would be to minimise and trivialise the victim’s trauma and loss of trust in moral social order. What we owe the victim, we may argue, is apologetic reparation *plus* some further and separate measures – measures that exclude the offender from his normal life and relationships. Imprisonment, for instance, can serve this purpose of cutting off the offender from participation in the ordinary life of the community. But how can this exclusionary function be justified on an account that considers punishment as a communicative (or even educative)

⁹¹ Ibid., 43

⁹² Ibid., 46.

⁹³ Ibid., 50–1.

⁹⁴ This way of putting the argument is due to R. A. Duff, *Punishment, Communication, and Community* (Oxford, Oxford University Press, 2001), 94–6.

enterprise? An answer to this question may be that imprisonment can do more than just exclude the offender – it can be a way of bringing the offender to acknowledge the wrongness of his actions and, if ever possible, of reconciling him with those he has wronged. What is needed, then, is a kind of prison regime that is suitable to this purpose.⁹⁵

The account we have outlined so far is retributive in some sense, but not in others. It is retributive insofar as it asserts the principle of fairness in imposing penalties that are, in some conventional or symbolic sense, proportional to the crime; insofar as it expresses the fact and degree of the community's active opprobrium; insofar as it involves the suffering of offender without being vengeful; and, therefore, insofar as it excludes the punishment of an innocent for some utilitarian purpose. Within these retributive limits, punishment may also be thought of as being forward-looking, as aiming to realise certain good states-of-affairs: the prevention of the repetition of the crime, the reassurance of the victims (actual and potential), or the repentance of the perpetrators. What matters, in retributive terms, is that punishment should be a *just* response to someone who has committed a crime and not simply as a means of utilitarian engineering.⁹⁶

But can this theory give a satisfactory account of radical evil? As Hannah Arendt acutely observes, there is something about the most radical and extreme forms of evil that resists any closure or final comprehension. What is more, such deeds seem so monstrous, atrocities so appalling, as to be beyond forgiveness and punishment.⁹⁷ Can the punishment of those who have committed terrible wrongs provide a basis for moral transformation? Or are these people simply moral monsters incapable of significant moral change? Should we then give up on them and treat them as permanently and incorrigibly evil? This last suggestion might have a superficial appeal, but it carries a message that is profoundly unethical for it writes off a human individual or an entire group as devoid of any capacity of positive change. Of course, it is tempting to brand single leaders – whether named Hussein, Milosevich, bin Laden, Stalin, or even Hitler – as purely and simply evil. Here again, Arendt is extremely insightful in her exploration of twentieth century evil: totalitarianism, she suggests, shows that individuals who are not demonic monsters but ordinary people motivated by little more than ambition – desk murderers like Eichmann – can

⁹⁵ See *ibid.*, 149–50.

⁹⁶ See Nigel Biggar, “Making Peace or Doing Justice: Must We choose?”, in Nigel Biggar, ed., *Burying the Past: Making Peace and Doing Justice after Civil Conflict* (Washington D.C.: Georgetown University Press, 2001), 12–14.

⁹⁷ Hannah Arendt, *The Human Condition* (Chicago: The University of Chicago Press, 2nd ed., 1998, first published in 1958), 241.

commit horrendous crimes.⁹⁸ Furthermore, in political conflicts evils are committed with the support and condonation of many others; to treat perpetrators as “morally rotten” and beyond redemption will then mean dismissing large numbers of people, if not entire nations or communities (whether Serbs, Moslems, Iraqis, or Germans). Such notions should be rejected in the end because they deny people the capacity for moral change as a basis for an ethic of respect for human beings.⁹⁹

Restorative Justice

In recent years, a new way of thinking has challenged the retributive paradigm. Known as “restorative justice”, it revolves around the idea that, once the facts of a crime have been established, our priority should be repair instead of punishment, healing the wounds of injustice rather than inflicting further retributive suffering. It is a community-oriented way to resolve conflicts, seeking to restore the dignity of both victim and offender by reintegrating them into respectful and healthy communities. Three elements are often portrayed as fundamental elements of restorative justice definition and practice: First, crime is viewed primarily as the wrongful violation, not of an impersonal set of rules, or an abstract notion of “the state”, but of a *person* by another person; second, restorative justice processes should be committed to repairing relations and to establishing communities capable of supporting practices of equality and respect; third, they should promote face-to-face meetings between the victim and the offender, in a safe setting, and guide them towards a constructive dialogue and a mutually agreeable resolution.¹⁰⁰

It remains somewhat unclear, however, what the precise meaning of these restorative aims and principles is. Although variously and at times ambitiously described, restorative justice is notoriously difficult to define. Standard definitions are, perhaps inevitably, rather vague and leave open crucial questions about the specifying outcomes and limits of restorative justice. It may, therefore, be helpful to step back and to reflect upon the basic idea of restoration.¹⁰¹ What does restoring individuals or societies actually mean? We might at first think of kinds of things that can be “restored”. Typically, property which was lost or damaged can be restored – it can be

⁹⁸ See, especially, Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (New York: Penguin Books, 1996, first published in 1963), 287.

⁹⁹ See Govier, *Forgiveness and Revenge*, 137–140. See also Avishai Margalit, *The Decent Society*, Naomi Goldblum, trans. (Cambridge, MA: Harvard University Press, 1996) 70–75.

¹⁰⁰ See, for instance, Galaway B & Hudson J. (eds.), *Restorative Justice: International Perspectives*, 2.

¹⁰¹ In what follows, I draw extensively on R. A. Duff, “Restorative punishment and punitive restoration”, in Lode Walgrave, ed., *Restorative Justice and the Law* (Cullompton, Devon: Willan Publishing, 2002), 84–91.

given back to its owner and the damage be repaired. But also more personal things can be restored, things such as health (the sick becomes well again), reputations (false accusations are refuted), security (the threat is removed), or trust (former relationships of mutual respect and concern are renewed). What is common to all these cases is that the original condition – of health, of good reputation, of safety or trust, for instance – is reinstated: the *status quo ante* is retrieved. But sometimes the good cannot be regained: it might be destroyed, sold on beyond recall, or lost forever. The most I can hope for, then, is compensation or reparation rather than restoration: some replacement or recompense will to some degree “make up” for my loss.

More specifically, we must ask what “restoration” should mean in the context of *wrongdoing*. Our concern, here, is with the fact that someone has been wrongfully injured; she has not simply lost her property or suffered injury through natural or unlucky circumstances – she has been wronged by being burgled, threatened, attacked, or worse. What can “repair” or “restore” the wrong that has been done?¹⁰² Stolen property might be returned or replaced; material damage might be repaired; and physical injuries might be cured. But the sense of indignation, mistrust or fear, of those hurt by wrongdoing cannot thus be wiped out. The wrong done to the victim of rape, or wounding, or burglary, goes too deep for that – such an action is a breakdown in the victim’s human relations for it denies the basic values, the mutual respect, by which social life is supposedly defined. How, then, can these communal bonds be repaired? Friends, fellow citizens and the wider community can of course do something towards restoring the victims, by offering material help, and sympathetic support. But there is a kind of restoration that only the offender can provide: apology. By apologising, he can indicate that he came to see his own actions as wrong; that he recognises the victim’s moral standing as someone who deserves respect and concern. Such recognition may provide a basis for moving beyond anger and resentment towards renewed relationships.

So, what restoration requires is recognition. To recognise my past wrongdoing, is to express that the victim does matter – that his needs and interests, and indeed his dignity and status as a moral being of equal worth, need to be taken into account. If my wrongdoing expressed a message of moral insignificance, because the victim was treated as if he didn’t count, then my repentant recognition of the wrong negates that radical denial of moral status.¹⁰³ Such

¹⁰² For a fuller discussion of these issues, see R. A. Duff, “Restoration and Retribution”, in Andrew von Hirsch, Julian v. Roberts, Anthony Bottoms, and Mara Schiff, eds., *Restorative Justice and Criminal Justice: Competing or Reconcilable Paradigms?* (Portland, OR: Hart Publishing, 2003), 43–59.

¹⁰³ See Govier, “What is Acknowledgement and Why Is It Important?”, 83.

acknowledgement may be a necessary first step in the direction of soothing, relief, and more trusting relationships. For this to happen, I must truly recognise the wrong as wrong and make commitments to avoid its repetition. There is a need for a genuine apology that expresses not just regret but a sense of empathic caring and concern for those whom I wronged. It is simply not enough to say “Yes, I realise that I did wrong, but so what?”. Rather, to repent my past wrongs is to accept responsibility for it, and the acceptance of such responsibility involves my apologetic repudiation of that wrong as something that now I wish I had not done. Thus, I express my desire, or hope, for moral transformation and reconciliation with those whom I wronged.¹⁰⁴

This may bring us to a specific vision of justice, that of *justice as recognition*. Justice, in the Kantian sense of moral respect, involves a form of recognition: because dignity is something that all human beings have in common, each of them is to be recognised as equal among equals. This is usually expressed in fair procedures which recognise one as deserving the same rights as all other members of society. Through this form of legal recognition, individuals may achieve self-respect for themselves as equal citizens capable of making autonomous decisions.¹⁰⁵ But there is a form of recognition that is not captured by legal justice. As André du Toit asserts, recognition as justice seeks to restore both the human and civic dignity of the victims.¹⁰⁶ Whereas human dignity refers to the inherent worth of every human being as such, civic dignity is intimately related with a person’s identity as a full-fledged member of the political community (*civis*). Justice as recognition entails, in other words, restoring the socially recognised self-esteem of the other by including his or her stories in our collective memory. Such practices of a victim-centred justice are reminiscent of Charles Taylor’s argument that we define our identity always in interaction with others – in dialogue, that is, with what others want to see in us.¹⁰⁷

One might raise the conceptual question whether such restorative benefits constitute aspects of justice. If restorative models aim to achieve a certain measure of recognition, and to enhance the victim’s healing from the pain and trauma of the crime, is this a matter of justice? Or are we dealing here with other moral values, such as care, compassion, empathy, altruism or hospitality?

¹⁰⁴ See Duff, “Restorative punishment and punitive restoration”, 87–89.

¹⁰⁵ For an insightful account of the relation between legal recognition and self-respect, see Axel Honneth, *The Struggle for Recognition: The Moral Grammar of Social Conflicts*, Joel Anderson, trans. (Cambridge: Polity Press, 1995), 107–121.

¹⁰⁶ André du Toit, “The Moral Foundations of the South African TRC: Truth as Acknowledgement and Justice as Recognition”, in Robert I. Rotberg and Dennis Thompson, eds., *Truth v. Justice: The Morality of Truth Commissions* (Princeton: Princeton University Press, 2000), 135–139.

¹⁰⁷ Charles Taylor, “The Politics of Recognition”, in *Philosophical Arguments* (Cambridge, MA: Harvard University Press, 1995), 230.

The question matters if we assume, with Rawls, that our moral responsibility for others should be limited to claims of justice as objective fairness. Now, we might say that restorative processes tend to redress the unfairness involved in the violation of just laws. Such programmes and policies are, arguably, committed to the fair redistribution of those social goods (including health, liberty, and property) that have been undermined through wrongdoing: they seek, in other words, to “do justice” for the victims. But this does not tell the whole story. Indeed, some key defining elements of restorative justice fit uneasily with the liberal idea that people are individually responsible for their ends, and that we should only be concerned with objective unfairness rather than carelessness or the absence of solidarity. Most of its advocates portray restorative justice as “hospitable, non-alienating, victim-centred and community-centred way to resolve conflicts”.¹⁰⁸ Or as Lodge Walgrave puts it: “The priority given to restoration focuses on social life rather than an abstract moral or legal system of any kind”.¹⁰⁹ Not surprisingly, restorative theorists seek to uncover the moral foundation of restorative justice by referring to alternative theoretical frameworks such as “ethics of care”¹¹⁰, “communitarianism”¹¹¹, or “ethics as hospitality”¹¹². Justice theorists might claim that to some crucial aspects of “restorative justice” are not, strictly speaking, a matter of justice but something of different, possibly lower, moral significance.

If our response to crime should aim for recognition, the prerequisite for restorative transformation, the question is how we can achieve this objective. “Restorative” theorists often assume that punitive retribution cannot serve the aim of restoration. Conventional punitive justice, they say, ignores the needs of the victims because of its focus on the perpetrator and its blindness to the fact that crimes are violations of a person by another person rather than offences against society. The adversarial structure of criminal justice, it is claimed, tends to aggravate rather than heal the victims who may be subject to potentially gruelling cross-questioning – an experience which, especially but not only in criminal trials for rape, may add injury and insult. Accordingly, restorative models focus on alternative forums and processes (e.g., victim-offender mediation, community conferencing, and neighbourhood panels) which share a common

¹⁰⁸ George Pavlich, “Towards an ethics of restorative justice”, in Lode Walgrave, ed., *Restorative Justice and the Law* (Cullompton, Devon: Willan Publishing, 2002), 1.

¹⁰⁹ Lodge Walgrave, “Imposing Restoration Instead of Inflicting Pain: Reflections on the Judicial Reaction to Crime”, in Andrew von Hirsch, Julian v. Roberts, Anthony Bottoms, and Mara Schiff, eds., *Restorative Justice and Criminal Justice: Competing or Reconcilable Paradigms?* (Portland, OR: Hart Publishing, 2003), 67.

¹¹⁰ Guy Masters and David Smith, “Portia and Persephone revisited: Thinking about feeling in criminal justice”, *Theoretical Criminology* 2 (1998), 5–27.

¹¹¹ Walgrave, “Imposing Restoration Instead of Inflicting Pain”, 69.

¹¹² Pavlich, “Towards an ethics of restorative justice”, 3.

objective: a systemic shift from judicial punishment to informal, participatory, consensual, community-based resolution of conflicts.

But is restoration really incompatible with punishment and retribution? Must we choose between the “retributive paradigm” and the “restorative paradigm”? As Anthony Duff argues, there might be an alternative.¹¹³ Simply put, his thesis is “Restoration through retribution”. Restoration, he claims, is not only compatible with retributive punishment, but requires it. The underlying argument is that mediation, of the criminal kind sketched above, can have appropriate apologetic meaning only if it is burdensome for the offender: “He should be pained by the recognition of his wrongdoing, since that should be a repentant recognition, and repentance is necessarily painful.”¹¹⁴ Undertaking a task that imposes no or little burden on me (like making a payment that does not impinge even briefly on my financial well-being) may not be adequate to the seriousness of the wrong done – it costs too little to give forceful expression to my apology.¹¹⁵ What is required, then, is a process of *punitive* communication – a process of being confronted with his wrongdoing, of being censured, which is intended to be burdensome or painful. Criminal mediation, as Duff understands it, is thus a retributive process: it is a way of bringing to suffer the offender what he deserves. But this is not to say that we should make suffer the offender just for its own sake – what matters is that “her suffering is meaningful, as being intrinsically related to a repentant recognition of wrongdoing”.¹¹⁶

Duff’s restorative account of punishment is intriguing. Reaching beyond the supposed contrast between “restorative” and “retributive” justice, it offers a *via media* that enables us to see that punitive retribution can serve the aim of restoration. But how does this alternative conception fit into the general system of criminal law? The process that Duff has in mind is, of course, very different from the criminal punishment typically imposed under the existing penal systems. It involves, ideally, some kind of direct victim-offender mediation followed by punitive reparation. For Duff, such negotiated punishment would need, however, to be approved by a criminal court to ensure that it constitutes an adequate response to the crime.¹¹⁷ Courts would impose punishments without any such negotiation only when it proved impossible or inappropriate. Mediation is clearly not possible, for instance, if the offender or the victim refuses to take part. In

¹¹³ Duff, “Restorative punishment and restoration”, 82–100.

¹¹⁴ *Ibid.*, 96.

¹¹⁵ *Ibid.*, 89–90

¹¹⁶ *Ibid.*, 97.

¹¹⁷ Duff, “Restoration and Retribution”, 57.

such cases, Duff argues, the offender will undergo more familiar kinds of punishment, but the sentencing process should be as far as possible “a formal analogue of the victim-offender process” – some kind of criminal mediation “between the offender and the political community”.¹¹⁸ A trickier question is that of when criminal mediation would be possible but inappropriate. Duff seems to suggest that the seriousness of a crime may, in some cases, justify the offender’s temporary exclusion from ordinary community: the offender, by undermining the community’s most basic values, has made it impossible for his fellow citizens to live with him in a societal context. Now, the meaning of such punishments provides reason, Duff says, for insisting on a more public condemnation of the crime through a criminal court.¹¹⁹

Transitional Justice, Restoration, and Recognition

Having outlined some aspects of restorative justice we may now turn to examine its potential role in the *specific* context of transitional societies. Nowhere is the need for social reconstruction and reconciliation more apparent than in countries emerging from violent ethnic or political conflict. Where neighbour has turned against neighbour, and friend against friend, the daunting task is to restore the social fabric of broken communities and relationships. It is no coincidence, then, that South Africa’s Truth and Reconciliation Commission (TRC), which has become a model for alternative (non-prosecutorial) forms of uncovering truth about past evil, was founded in restorative justice principles. Some prominent designers and advocates of the TRC have explicitly claimed that it may achieve a different, possibly better, kind of justice than do normal criminal justice procedures – restorative justice. As Archbishop Desmond Tutu, former chairman of the TRC, noted:

We contend that there is another kind of justice, restorative justice, which was characteristic of traditional African jurisprudence. Here the central concern is not retribution or punishment. In the spirit of *ubuntu*, the central concern is the healing of breaches, the redressing of imbalances, the restoration of broken relationships, a seeking to rehabilitate both the victim and the perpetrator, who should be given the opportunity to be reintegrated into the community that he has injured by his offence.¹²⁰

Interestingly, Tutu traces the notion of restorative justice to the “African value” of *ubuntu*, literally “I am because you are”. *Ubuntu*, a term from the Xhosa saying “a person is a person

¹¹⁸ Ibid.

¹¹⁹ Ibid., 58.

¹²⁰ Desmond M. Tutu, *No Future without Forgiveness* (New York: Doubleday, 1999), 54–55.

through persons”, refers to a philosophy of humanism, placing a premium on harmony, friendliness and community. The implication seems to be that there is a different kind of justice, distinct from retribution or punishment, which requires a commitment to repair broken relationships, to heal the wounds of victims and offenders alike, and to restore the health and well-being of their communities. For Tutu, such an “enriched conception of justice” that subordinates sanctioning to the goals of reconciliation and communal solidarity provides a moral foundation for a Truth and Reconciliation Commission that shares these aims.

A commonly voiced objection to truth commissions, in general, and to the South African TRC, in particular, is that these institutions sacrifice the pursuit of justice as properly understood for the sake of promoting some higher social good – national healing, reconciliation, civil peace, unity, and so forth. Such commissions are, so the argument goes, a kind of “moral second best”, disguised by considerable rhetoric. But the most troubling issue about creating truth commissions is the place of amnesty, whether it involves general or particularised exemptions from civil and criminal liability. Can one accept the spectacle of torturers and state-sponsored killers getting off “scot-free”? To be sure, some survivors of past attacks and families of victims don’t think so and make what Michael Walzer calls “elemental claims for retributive justice” – for instance, the families of the murdered antiapartheid activists Steve Biko and Griffiths Mxenge, who vehemently opposed the TRC because they believed that it would prevent justice from being done.¹²¹ “Once you know who did it”, said Griffith’s brother Mhleli, “you want the next thing – justice!”¹²²

Amnesty, we might then be tempted to say, is unjust because it lets murderers and torturers walk free; because it gives the victims a cold shoulder. If we believe, as moral absolutists do, that certain acts – such as torture or rape – cannot be justified no matter what the consequences, shouldn’t we also believe that the granting of an amnesty to rapists or torturers is intrinsically wrong because it involves trading justice for some general social benefit (say, unity or reconciliation)? There is something to this position. What is wrong does not become right just because it serves some desired ends – that is what people usually mean when they say “The ends do not justify the means”. This emerges more clearly when seen in the perspective of those who are, in the literal sense of a word often used loosely today, victims. If we owe the victims the satisfactions of seeing justice done, then there is something wrong with denials of guilt and

¹²¹ Michael Walzer, “Judgement Days”, *The New Republic* (15 December 1997), 13.

¹²² Quoted in Mark Gevisser, “The Witnesses”, *New York Times Magazine*, 22 June 1997, 32.

efforts to shift the blame, even in the service of an end worth pursuing. It seems inappropriate, if not cruel, to say to someone who suffers in the aftermath of terrible wrongs “You understand, it’s time to forget and move on for the better of all”.

Now, most defenders of the TRC, or of other truth commissions operating throughout the world, explicitly reject total or blanket amnesty. Much emphasis is put on the idea of striking a balance between dealing with past injustices and finding a way forward in the best interest of society as a whole. The moral objective, it is claimed, is “how to achieve both justice and reconciliation – not just one or the other”.¹²³ The basic idea here is that of compromise. Truth commissions, it is assumed, should not simply sacrifice justice to a “higher goal”, but should strive for a defensible moral compromise. If we accept the notion of value pluralism, as I do, we should attempt to achieve a genuine *balance* between the moral values involved in every case of conflict. On this assumption, simple sacrifices or trade-offs are morally suspicious. This, of course, raises the question whether the TRC, or any other truth commission, would pass the moral test. Do these institutions simply trade justice for other moral ends (social unity, reconciliation or the common good)? Or is there a principled compromise at work here?

A discussion of these issues, which would require a careful examination of the various moral values involved (justice, reconciliation, social unity, and so on), is beyond the scope of this chapter.¹²⁴ Let me, however, conclude with some tentative suggestions as to how the attributes of justice and recognition might relate to each other. If we think of recognition as an essential part of doing justice to the victims, then “a different kind of justice” might be required, one explicitly aimed at restoration and healing. But this does not mean, necessarily, that we are dealing here with two separate, mutually exclusive systems of justice – “retributive” and “restorative” justice. There is, as we have seen, room for alternative theories. If we take Duff’s account seriously, and I think we should, then restorative aims and retributive principles of justice can be combined in some way. What is required, then, is a more comprehensive, enriched vision of justice, beyond the opposition “punishment v. restoration” or “trials v. truth commissions”. At the heart of such a concept of justice is the need for recognition as an intrinsic requirement for the restoration of social equality. What we owe the victims as equal fellow-citizens is that their dignity and worth

¹²³ Johnny de Lange, “The historical context, legal origins and philosophical foundation of the South African Truth and Reconciliation Commission”, in Charles Villa-Vicencio and Wilhelm Verwoed, eds., *Looking Back, Reaching Forward* (Cape Town: University of Cape Town Press, 2000), 23.

¹²⁴ For a thoughtful treatment of these issues, see Jonathan Allen, „Balancing Justice and Social Unity: Political Theory and the Idea of a Truth and Reconciliation Commission”, *The University of Toronto Law Journal* 49 (1999), 315–353.

and the wrongs done to them by governments or the broader society are publicly acknowledged. This is, it seems to me, a minimum requirement of transitional justice as *justice*.

On this account, the criterion of recognition provides a critical yardstick, among others, against which to measure the moral legitimacy of a transitional regime and its ways of dealing with the past. Recognition, as I understand it here, involves what Thomas Nagel once called, in another context, “the maintenance of a direct interpersonal response to the people one deals with”.¹²⁵ From this we can identify three elements which, I suggest, are essential to the character or meaning of recognition: responsiveness, immediacy, and reciprocity. First, recognition requires an appropriate response to crime: the offender faces up to what he has done, addresses the factors or motives that led him commit the wrong, and expresses his desire for the reconciliation with those whom he wronged. The tones in which he avows his wrongdoing are not the neutral tones of bare description, but the tones of sincere apology for that wrong that now he disowns as something he wishes he had not done. Second, the kind of recognition that is an adequate response to crime should come directly from the offender; while others might criticise him for what he did, or might provide material help or sympathetic support to the victim, only the offender can offer a personal apology that expresses both a repentant recognition of the wrong done and a commitment to avoid its repetition. Third, the wrongdoer’s recognition is directed at the victim as a subject, rather than at the situation. It is a form of interpersonal confrontation that is offered to the victim as a response to a *special* relation to him or her – a relation that was damaged by the wrongdoer’s deeds, and thus needs to be restored. Perhaps, such recognition reveals itself most clearly in the face-to-face interaction between two human beings, the victim and the offender. We might indeed say, with reference to Lévinas, that the very sense of moral responsibility, in its original form of response and recognition, manifests itself most urgently in the encounter with “the face of the other” (*le visage d’autrui*).

To meet the moral test of recognition, transitional societies must provide public platforms to make visible the victim’s suffering, and to bring that suffering into moral view so as to recognise its truth and injustice. Both trials and truth commissions, I believe, can be used in such promising ways. In terms of recognition, the difference between trials and truth commissions seems to be one in emphasis and degree rather than in kind. It is true that, compared to truth commissions, criminal justice systems tend to be more formalistic, selective, and adversarial. But, the centrepiece of both mechanisms is the victim, the one who embodies the memory of a violent

¹²⁵ Thomas Nagel, *Mortal Questions* (Cambridge: Cambridge University Press, 1979), 67.

past: the common aim, after all, is to give the victims a public voice and thereby to recognise them as moral agents and citizens deserving equal consideration and respect. From this point of view, there is no reason to think of trials and commissions as antagonistic, mutually exclusive models for responding to radical evil. Rather, there may be room for both TRC-type initiatives *and* judicial proceedings as complementary forms of recognition. What we need, then, is not an “all-or-nothing” solution, in the sense of “justice v. truth”, but a critical assessment of the moral strengths and weaknesses of each approach to dealing with conflicts of the past in transitional societies.

This does not take us very far, of course, since we still need to decide which approach is better suited to deal with *specific* problems arising in the context of recovering states. To illustrate this difficulty, we may focus on two moral key issues. The first issue relates to the fact that there are different kinds and degrees of wrongdoing. There is, obviously, an enormous difference between severe crimes – murder, rape, or torture – and other crimes such as burglary or shoplifting. When it comes to severe cases, a “purely restorative” approach, outside the realm of criminal justice, may raise objections from the perspective of the victim. Following Duff’s argument, we may say that the offender has, by his horrible crime, made it impossible for the victim to live with him in ordinary community – what is required, then, is temporary exclusion from such a community. Can we expect the victims of atrocity to engage in restorative relationship with their torturers and executioners? Once asked whether the executioner (*bourreau*) has a face, Lévinas replied: “The executioner is one who threatens the neighbour and calls upon violence: in this sense, he no longer has a face.”¹²⁶ The second issue I want to address is the so-called “bystander phenomenon”. In most episodes of mass violence or state repression only a fraction of the population commits criminal acts; a large number of individuals do not actively participate in violence, but also do not actively intervene to stop the horrors. Now, since they “did nothing wrong”, bystanders have no criminal liability. The focus of trials on the individuals responsible for ordering or carrying out acts of mass leaves this category of persons or groups largely untouched. Proponents of truth commissions argue that such forums for witnessing and truth-telling can contribute more effectively to telling a larger story about the collective past, and to mediating the remaking of an inclusive national community. These two examples, I suggest,

¹²⁶ See Lévinas’ response to an interview that took place in 1983 (“Philosophie, justice et amour: entretien avec Emmanuel Lévinas, R. Fornet and A. Gomez, in *Esprit* 8-9 [1983]).

illustrate some of the moral dilemmas involved when a transitional society seeks to decide among these various tools to reckon with past evils.

This concludes our discussion of “restorative justice”. Let me recap some of the points that have been made. I have argued that “restorative justice” as *justice* has at its centre the notion of recognition. Recognition, as I understand it here, is primarily victim-centred: it involves a specific emphasis on the perspective of the victims of repression. This is not to suggest that transitional justice mechanisms should only consider the victim; what it *does* suggest, however, is that other justice-related interests, such as the rights of alleged perpetrators to due-process, should fall under separate headings (“legal justice”, “retributive justice”, and so on). I have further argued that this account makes room for retributive accounts of restoration, like the one elaborated by Anthony Duff. Finally, my account of justice as recognition is distinct from more community-based notions of restoration. I am indeed critical of the priority given to the community in restorative rhetorics; such an emphasis on community involvement tends to add further confusion to a new vocabulary – “restorative justice” – which remains relatively undeveloped as a conception of justice. Rather than “inflating” the conception of justice to a point that it loses its meaning and precision, we should accept a notion of value pluralism and recognise the existence of conflicts between moral values: In the aftermath of collective violence, recovering societies must attempt to find a morally acceptable compromise between values such as justice, national unity, reconciliation, or the interests of democracy, which exist in conflict or potential conflict with each other.¹²⁷

The suggestion, of course, needs much more development. In what follows, however, I want to embark on another track – that of restoring *decency* in a human landscape disfigured by loss and humiliation.

Widening the Lens: Restoring Decency

There is a tendency among most philosophers to focus on “positive” concepts such as “good”, “right”, “duty”, “obligation”, “justice” and so on, and to ignore evils, wrongs, injuries, or vices. The common assumption is that these negative emotions may be regarded simply as the absence of the positive. Recently, this view has been challenged by philosophers such as Judith Shklar,

¹²⁷ For an inspiring discussion of these issues, see Allen, *op. cit.*

Avishai Margalit, and Axel Honneth, who apply a kind of “negative moral psychology” by reflecting on the moral significance of negatives experiences of cruelty, injury, humiliation, hypocrisy, injustice, betrayal and so forth. These attempts to shape a “negative morality” reveal a commitment to a “realistic” outlook capable of seeing and responding to these types of threat.

There may indeed be good reasons for placing phenomena and concepts of injury, cruelty, injustice, and suffering, at the start of a moral and political philosophy. The picture of political life seems incomplete without a closer analysis of practices conducive to disrespect, degradation, humiliation and so on. By paying attention to these types of human threat, we might gain a better understanding of positive values and disposition such as love, respect, honour, loyalty, or justice. But the central moral reason is that there is fundamental difference between promoting good and eliminating evil. The moral reason for that is simple: it is “much more urgent to remove painful evils than to create enjoyable benefits”.¹²⁸ This is easily seen with regard to societies seeking recovery from political evil. When it comes to such societies, the priority is to put an end to, mark a break with, the legacy of the past.

This way of putting moral negatives first may allow us to work out an enriched, more “realistic” account of recognition and self-respect, sensitive to the sense of disrespect, suffering and cruelty experienced by the victims of atrocity and repression. In what follows, I want to call attention to a moral conception which, I suggest, provides us with a persuasive account of why human beings owe each other some kinds of positive recognition – Margalit’s conception of a “decent society”. “What is a decent society?”, he asks, and answers, “A decent society is one whose institutions do not humiliate people”. This statement is further clarified as it follows: “A society is decent if its institutions do not act in ways that give the people under their authority sound reasons to consider themselves humiliated.”¹²⁹ The focus of Margalit’s theory, then, is on a specific kind of injury, which he terms “humiliation”. This, of course, stands in need for further clarification. What is it that makes us feel humiliated? When do we have reasons for considering something as humiliating? For Margalit, humiliation is an injury to self-respect, that is, to the “respect that a human being deserves for the very fact of being human”.¹³⁰ While self-respect involves an attitude towards oneself, dignity is an external aspect of self-respect: it is “the

¹²⁸ Avishai Margalit, *The Decent Society* (Cambridge, MA: Harvard University Press, 1996), 4.

¹²⁹ *Ibid.*, 11

¹³⁰ *Ibid.*, 19

expression of the feeling of respect persons feel toward themselves as human beings”.¹³¹ On this account, to humiliate is to reject human beings as human – to treat them as if they were inferior beings, beasts, objects, machines.

Expressed in positive terms, Margalit’s decent society is “one that accords respect through its institutions to the people under its authority”. As such it is not reducible to a Rawlsian type of just society. Although a Rawlsian just society is a decent society “in spirit” (since self-respect is considered the most primary good), it is not necessarily a decent society “according to the letter”. As Margalit points out, in some cases the distribution of goods may be just and efficient, yet still inhumane and humiliating in the way in which it occurs: “We might, for instance, see people distributing food to famine victims in Ethiopia throw the food out of the truck as if the recipients were dogs, while still making sure that all the recipients get their just portion in an efficient manner.”¹³² According to Margalit, this illustrates

the old fear that justice may lack compassion and might even be an expression of vindictiveness. There is a suspicion that the just society may become mired in rigid calculations of what is just, which may replace gentleness and human consideration in simple human relations. The requirement that a just society should also be a decent one means that it is not enough for goods to be distributed justly and efficiently – the style of their distribution must also be taken into account.¹³³

At this point, I want to briefly mention three issues that Margalit discusses in *The Decent Society*: citizenship, bureaucracy, and punishment. Margalit claims, rightly, that a decent, non-humiliating society does not injure what he calls the “civic honour” of its citizens. In such a society, there are no second-class citizens. Second-class citizenship involves “not only depriving people of essential resources and being unwilling to share authority but also the idea that second-class citizens are not in essence whole human beings”.¹³⁴ One form of second-class citizenship is, of course, the denial of full citizenship rights to someone who is a citizen. What about bureaucracy? Bureaucracy, Margalit says, creates potential new ways of treating human beings as nonhuman. One way of expressing this modern (“bureaucratic”) type of humiliation is through the idea of turning human beings into faceless, anonymous numbers. This occurs, for instance, “when the only identity traits recognised by the society’s institutions for an individual or a group are the

¹³¹ Ibid., 51.

¹³² Ibid., 280

¹³³ Ibid., 280-281.

¹³⁴ Ibid., 152

numerical tags”.¹³⁵ Punishment, finally, is “the limitus test of the decent society”.¹³⁶ As Margalit suggests, the question we need to ask is whether it is possible to think about punishment without any inherent association with humiliation. In other words: How can we “transform the idea of disgrace inherent in punishment into a concept involving only the loss of social honour without personal humiliation as well”?¹³⁷ For Margalit, there is only one conceptual answer to this problem: “A decent society cares about the dignity of its prisoners.”¹³⁸

Such an account of a non-humiliating society provides, I suggest, a powerful narrative for capturing the moral essence of transitional dilemmas and conflicts. As I argued at the beginning of this paper, transitional justice discourses can be understood as attempts to deal with extreme forms of evil, events “at the limit” – “radical evil”. Now, Margalit’s model of “negative morality” strikes me as consistent with a conception of human beings that accommodates their capacity not only for morality but also for monstrosity.¹³⁹ If we think of radical evil as an effort to undermine morality itself, then it seems adequate to put negative phenomena at the start of our moral reflection. Without this change of perspective, we might miss out the “negative essence” of those nightmarish episodes from which transitional societies try to recover. Traumatic history involves a deep sense of injustice, suffering, loss, disrespect, and humiliation – we must start from here, rather than operating in a abstract space filled with positive principles. What does it mean to feel humiliated, abandoned, betrayed, lost? By paying attention to these basic moral emotions, rather than ignoring them, we might gain a deeper understanding of positive notions of dignity, integrity, respect, and so on. But, more importantly, a focus on negative morality might allow us to avoid distorted moral priorities. I agree with Margalit that there is asymmetry between eradicating evil and promoting good. Creating positive wellbeing is desirable. Stopping humiliation is a must.

There are, I suggest, meaningful lessons transitional societies can draw from Margalit’s reflection on negative morality. In the immediate aftermath of totalitarian repression and mass atrocity, one of the most urgent goals is indeed the restoration of minimal decency. To move towards decency, a society should ask how to stop humiliation; it should ask if those whose wounds of humiliation and pain are still bleeding have *reasons* for feeling humiliated again. The

¹³⁵ Ibid., 220

¹³⁶ Ibid., 262

¹³⁷ Ibid., 269

¹³⁸ Ibid., 270.

¹³⁹ See Thomas Nagel, *Other Minds* (New York, 1995), 213–214.

primary goal, here, is to avoid humiliation, not to promote positive principles of justice or a particular conception of the good life. This does not mean, however, that societies in transition cannot work for the ideal of justice at the same time as they seek to combat humiliation. It *does* mean that the search for decency constitutes a first necessary step towards moral progress and social justice. When it comes to societies that begin their painful ascent from hell, the aim of transforming an “evil” society into a minimally decent one might be, for some time, the only available moral option. In such situations on the threshold of moral revival, we should more than ever avoid any blinkered moral sentimentalism in the form of a high-minded evocation of moral principles. This is not to say that recovering societies should not reach out for high, nearly “perfect” ethical standards; if nonhumiliation and justice are different but not incompatible goals, strategies for attaining them need not in principle conflict. But, again, restoring self-respect, dignity, and decency in a “bombed and flattened moral landscape” is not only desirable – it is a must.¹⁴⁰

¹⁴⁰ The expression “bombed and flattened moral landscape” is Stuart Hampshire’s. See his work *Innocence and Experience* (Cambridge, 1989), 8, 69. @