

REASON, PEACE, TRANSITIONAL JUSTICE, AND PUNISHMENT

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Abstract

Moving from repression or tyranny toward the rule of law and reason is fraught with difficulties. One question of transitional justice is whether those responsible for the horrors of the previous régime should be punished or whether those involved in the transition should travel a path toward forgiveness and unity. Within this article, it is urged that in the (re-)establishment of the rule of reason among all involved there is a commitment to peace as opposed to force. This commitment marks retribution and utilitarian punishment as incoherent and normatively indefensible. Resorting to punishment is the abandonment of reason, not its reinstatement. Indeed, the point can be generalized. Punishment, as resorting to force, is a move away from establishing or sustaining a framework of justification and its commitment to peace.

Opportunities to move from a period of repression or tyranny within which persons have been tortured, murdered or “disappeared” to the restoration of the rule of law and reason are fraught with difficulties. These are occasions of transitional justice. At such moments, all concerned face the question of whether those responsible for the horrors of the previous régime should be punished or whether a path toward forgiveness and unity should be taken without punishment, perhaps in combination with restitution or the work of a truth commission to assign blame without the anticipation of prosecution. Transitional justice always involves the return to the rule of reason. Also it requires setting the record straight. But does it require giving the guilty their due through punishment? Are these cases in which reason calls for force; are these cases in which we must revert to force to defend and make safe the rule of reason (see, for example, Mendez, 1997)?

Cases of transitional justice thus raise particularly well the question of the justifiability of punishment, and they are often approached in terms of the social good to be gained by punishing or not. The present discussion examines such cases not from the standpoint of the social welfare to be gained or lost in punishment, but from the larger question of the coherence of appealing to reason to justify punishment. What is sought in transitional justice is a rule of reason mediated through institutions and practices for exchanging accounts for presumed offenses (and for prospective undertakings), practices

and institutions in the very presence of which there is a mutual grant of recognition of the ethical standing or inherent normative significance among all parties to the accounts (Blatz, 1998).¹ This discussion urges that in the attempt to establish the rule of reason there is a commitment to peace as opposed to force, and that this commitment marks retribution and utilitarian punishment as incoherent and normatively indefensible. Resorting to punishment marks the abandonment of reason, not its reinstatement as a pre-condition of justice understood as the impartial rule of reason.

This line of thought raises the further, general question of whether punishment of the sorts discussed is ever justified. I argue that it is not, that we are always in a condition of seeking to sustain and so to (re-) establish the rule of reason, as we are in cases of transitional justice. And thus punishment is *never justified*. Punishment, as resorting to force, is a move away from the framework of justification and its commitment to peace. While we might justify limiting our use of force so as to not destroy the rule of reason, we cannot justify the use of force in the name of reason. We cannot justify punishment understood in familiar retributivist and consequentialist ways. The use of force to protect self and society is understandable or explainable, but even this is not something we can *justify*. If so, force finds a place only outside of justification and ethics. We must recast our understanding of how we do and should respond to harm. Punishment is not justifiable as a lesser evil. It lies beyond the domain of peace where alone justification is possible. This is the larger point of the discussion to follow.

What is Sought in Transitional Justice?

Judith Lewis Herman raises some of the issues before us in a review article addressing three books on transitional justice. Speaking of the case of South Africa she says the following.

First and foremost, most victims [of a repressive régime] want decisive action taken to ensure their protection and safety. They also want reasonable assurances that the offender will no longer be permitted to abuse other people or to profit from his crimes. In addition, they often want some material restitution for the harm done to them. But beyond these concrete and practical measures, what victims most commonly seek is vindication. They want public acknowledgement that what happened to them was wrong. They want the burden of shame lifted from their shoulders and placed where it belongs. They want the offender exposed, so that he loses the cover of secrecy or status of legitimacy that enabled him to get away with his crimes in the first place. They want recognition for their own endurance and dignity. They want an apology (Herman, 2000, 48).

It is *not* that the victims by and large want revenge or a reversion to the kind of police state necessary to bring all of the offenders to punishment.

While punishment of former political leaders does create a symbolic break with the past regime, it does nothing to promote any positive vision of social reconstruction. *It does nothing directly to restore the dignity of victims or to address the deeper corruption of relationships that permeates the society* (Herman, 2000, 49, my emphasis).

Vindication occurs when legitimacy passes from the offender to the victim, and shame passes from the victim to the offender. When in the eyes of the world, it is the victim, not the offender, who holds her head high. This finally is the victim's most enduring triumph (Herman, 2000, 51).

How are we "to address the deeper corruption of relationships that permeates the society"? What might be involved if we "restore the dignity of victims" and pass legitimacy from "the offender to the victim," and pass back shame in return. In the relevant situations, the personhood of the victim has been denied or not even considered. The will of the perpetrator was deliberately put in a place of dominance over that of the victim, or the victim's will was completely disregarded or not regarded at all, not even noticed as counting, as having any ethical significance. The victim was made a faceless other. And thus the undertakings of the offender left no space for the agency of the victim (see Blatz, 1998, 26).

This erasure or disappearance of the victim might take any of three forms worth comment here.² On the one hand the victim might have been made into an object whose responses to mistreatment were no more than the responses of a nonhuman animal undergoing vivisection for the amusement of those at an 18th century lawn party. Here there is no place for the victim to act, to even cry out as a moral or legal agent, for the victim is left no voice as one with any standing or with any claim upon the offender. And thus the perpetrator's objectifying regard has robbed the victim of all space in which to protest, to demand correction, to call for accountability, to assert wrongdoing. The victim is thus rendered unable to stake a claim upon a place in a commons of ethical agency shared by inherently important beings interacting through reasons (see Blatz, 1998, 26). As P. F. Strawson (1974, 9) puts the point,

If your attitude towards someone is wholly objective, then though you may fight him, even negotiate with him, you cannot reason with him. You can at most pretend to quarrel, or to reason, with him.

There is a second relevant form that disregard of the victim might take. Instead of being entirely objectified, it might have been that the victim was regarded as a thinking, suffering being, but as one to whom the other extends no empathy, no recognition as important in her- or himself. The victim is afforded no place in which to exchange moral or legal accounts or to exchange views articulating what is permitted or not in the circumstances shared by the wrongdoer and the victim; indeed, what is precluded in such

cases is a place for articulating what the circumstances of one's interaction or meeting amount to. Gerald Postema (1995, 83) speaks of this as the regard given a *strategically rational agent*:

Viewed as a strategically rational agent, one is regarded as an intelligent and rational parameter of the practical world of other agents; but one is not regarded as a participant along with others in that practical world. Interacting with a world of strategically rational agents may require a greater degree of strategic sophistication than interacting with brute nature, but it calls for no change of moral perspective. For one makes no claims against strategically rational agents and one cannot regard oneself as a source or ground of any such claims. One can recognize hurt and loss, and threats of them, but not wrongs done to one. Resentment—anger and protest against the message of contempt toward one that is implicit in the wrong one suffers—is unavailable to a strategically rational agent, for resentment rests on the judgment that others must respect one's status in a common moral world.

A third form of victimization is that in which the offender ethically “sees” the victim, even recognizes the suffering and the appropriateness of the victim's claims for relief, but dismisses these as either impossible to redress or else not of overriding significance in the circumstances of the present moment, or in the present frame of policy making. Thus we might speak of regarding the victim as a *refugee*, someone who has standing, but the significance of whose standing is seen as justifiably undercut or diminished to the point of silencing the victim's voice or denying the victim ethical accountability for his or her suffering. The victim is regarded as one whose voice should be heard only at the ideal limit of ethical concern; one whose inclusion in the articulation of what is permitted and what is not, and one whose particular claims for assistance are above and beyond the call of duty, if at all justifiable. Thus the refugee is not objectified, and not even seen as merely a strategically rational prop on the stage of the perpetrator's undertakings. Still, there is a victimization that robs the agent of agency by excluding the victim from the map of inter-personal reasoning involved in articulating and putting into practice both the good and the right. The mothers of the disappeared in Argentina, at the beginnings of their protests, perhaps were treated as refugees of the change in political régimes. Declarations of martial law suspend normal due process and thereby create large numbers of political refugees in the name of order and stability. Long standing policies of neglect confirm millions as economic refugees in stable countries by claiming fiscal exigency as the reason for their neglect. Perhaps “well-meaning,” powerful, white South Africans saw those living in shanty towns in this light, just as the homeless and poor are often seen in this light in affluent capitalist countries.

What then is required if we are to ‘restore the dignity of victims’ and pass legitimacy from “the offender to the victim” and shame in return? At the very least the perpetrator must seek to transform her or his relation to the victim so as to take

responsibility for deferring to the victim in a way that opens a place of agency for that individual (see Blatz, 1998; Postema, 1995; and Strawson, 1974). It is not enough that now the offender agrees to not interfere with the victim. That might, at best, leave the victim a *refugee*. Nor is it enough to now merely defer to the will of the victim in so far as their chosen paths might conflict. Giving in or letting the victim have his or her way is still within the realm of Postema's regard of a *strategically rational agent*. It is not as though the wrongdoer has merely interfered with the victim, ignoring the victim's will and choice, and now all that is needed is for that perpetrator to stand clear by seeing the victim as an agent and then turning aside any interference she or he, the offender, might introduce into the life of the victim in the future. Nor is it enough to cease the objectification of the victim and allow the victim to speak claims and to make calls for accountability. Indeed it is not even enough to enter into accountability relationships with the victim allowing for expression of claims and then following this with some platitudinous reply. The danger here is again that of treating the victim as a refugee, as one whose claims can be said to have some legitimacy in an ideal world but not really here and now, the way, for example, executive officers in business firms and nonprofits such as universities so often treat their workers in the pro forma "consultations" they afford them. A good deal more is called for if we are to move from the modes of interaction of an oppressive régime toward a more just arrangement restoring the dignity of the victim and exchanging legitimacy for shame.

The call is for the (re-) establishment of shared reason as both a guide and a form or expression of the interactions between people, interactions including the victim and the perpetrator. And in particular it is a call to the (re-) establishment of morality or law or an open economics as an ethical framework for dealing with each other. What is really wanted, apparently, is for the offender to know the victim as an agent whose agency and agency space this perpetrator has violated. The need is for the wrongdoer to know the harm, the horror of the victim and the disruption in the aftermath that has been wrought in the victim's life. However, the point is not to have the offender suffer as the victim did. It is rather for this offender to open her- or himself to empathy or sympathy with the suffering of the victim, allowing her or him to know the subjective side of the victim's life as victim at the hands of the wrongdoer. The aim is that this knowledge will inform the future of their interactions, and enable the perpetrator to recognize the victim as an agent with standing and accordingly to move into an exchange of reasons as justifications constraining their present and future entanglements with each other. The need is for the offender to take responsibility for knowing the victim as that individual is now, and for dealing with *that* person through reason and the constraint of mutually salient justifications for present and future acts. (See Postema, 1995, on the mutual salience of justifying reasons as this is constitutive in the practice of public reason and Pettit, 1996, on the common salience of rules as these are constitutive of the publicity of reasons.)

Thus what is needed is a reconstitution of the victim's agency in light of that victim's treatment. This is what would *vindicate* the victim, showing that person to have

a legitimate claim against the perpetrator and opening that wrongdoer to accountability for that claim. This is what would begin to restore the victim to a new life and new agency, a new life and agency sharing space afforded by the recognition of the wrongdoer. And, this would be the beginning of the (re-) *establishment* of reason as the mode of ordering and guiding the shared life of the victim and the wrongdoer.

The call is minimally to (re-) establish reason as a way of framing and constraining interactions with the victim. However, the victim's suffering must not be treated as complete and past, as something to redress and move beyond. Rather, the idea is to (re-) establish the rule of reason as a normal framework of the offender and the victim moving into and through the future together, with their reason informed by an awareness of and an understanding of the subjective impact of the offender's treatment of the victim, and informed by an awareness of the victim's and the offender's becoming anew through a different treatment of the victim, and through a different response of the victim to the perpetrator. The call is for the creation of a relationship in which the wrongdoer and the victim become their future together, thinking and acting with a mutual recognition and respect or concern of some ethical sort; an interest in each the other's becoming, because of their relationship, a more self-sufficient agent, integrated with the agency of the person who has offended. This would be a relationship uniting the two lives into a single web of constructed connections internal to the agency and identity of each. The victim wants to be seen and treated as one to whom the offender is accountable and in whose life that offender is participating. However, this participation must re-establish the agency of the victim and renew an agency space in which the wrongdoer is an actor harmonizing with and yet constrained by (because accountable in the face of) the undertakings of the victim. The perpetrator has destroyed agency and agency space, and this cannot be rebuilt by merely a response to the destruction alone, isolated from the ongoing life of the victim as that life is informed or distorted by that victimization. The horror of the past régime lies in the loss of agency, the loss of being someone in the world, and the only way of dealing with this is to build back that presence in the world including the victim along with the wrongdoer (or to build it anew). These are the ingredients of the minimal call for transitional justice.

Of course this (re-) construction of a shared normative world is a work site strewn with challenges and hazards and we would do well to take note of some of these before going any further. Having done so we can then relate this sharing of agency space to the justifiability of punishment in the context of transitional justice.

Challenge 1: Perhaps the first thing to note is that there is not just a single style that the construction might express. The accountability pattern will vary depending upon what sort of *ethical concern* is the presumed vehicle of engagement between victim and other. Thus if they meet on moral ground where presumably there would be a regard for the flourishing of self- and other as autonomous agents living in a socially harmonious milieu of such agents, then the accountability relation would be informal, the shared work of the articulation of norms would be the work of each individual, and the paradigmatic

structure of contact would be personal face-to-face situations in which accounts (interpretations of actions and opportunities, the giving of excuses and justifications, or the registration of complaints) are negotiated. Of course, moral accountability extends beyond personal contacts and encounters, and the scope of this transpersonal agency space requires that what we construct is: either the readiness actually to hold oneself accountable to *virtually* any and all moral agents, and a disposition to reflect this readiness in the epistemic standards and the substance of the outcomes of our practical reasoning, *or else*, we must construct an ideal totality of accountability relations constraining individual practical reasoning by hypothetical contractual or communicative ethical reasoning procedures.³

If we meet on the ethical ground of the law, through a concern that self and other be treated by and through institutional authorities acting impartially and equitably in adjudicating their disputes, then the scope of accountability relations will be more limited, specifically by jurisdictional considerations, and the shape or paradigmatic structure these relations take will be determined by the system of law, its courts and other institutions which incorporate the agents in question. Or, if the regard presumably shared in the context at issue is that of prudential or economic concern for self, then the venue, extent, and structure of accountability contacts will vary with the sorts of markets in which one is operating and the sorts of norms and attendant accountability frames, economic, moral or legal which recognize and regulate the interactions within those markets. Or, finally if the arena of accountability is the pursuit of some aesthetically pleasing, balanced, harmonious, beautiful, or else creative choreography of our lives, then the modes of accountability (the scope and forms of engagement with others in our dance and the forms of address between us and critics), as well as the concerns of encounters of accountability (the stakes of these encounters) will be different yet again.

Thus, as I speak of (re-) constructing the victim's agency through (re-) establishing accountability relationships wherein the victim and others mutually weave the web of their future (and past) through reasoning about what happened (as well as about what transpires in the future) and its defensibility or justifiability, I mean to encompass very different (and evolving) media, structures or forms of encounter, very different (and evolving) scopes of interest for such encounters, and, very different (and evolving) constructions of what is at stake in the accountability. All of these aspects, the differing forms, scopes, and stakes of accountability, comprise differing concerns with which we might engage others.

Challenge 2: The second point really runs with the first. The sundry venues and forms of accountability vary not only with the sort of ethical concern coloring the encounter, but they also will vary depending upon the degree of involvement or, so to speak, the quality of *the peace or accord* we might reach with another. Thus, we might arrive at *only a mutual restraint from interference or a mere toleration among the parties*. Such a grade of involvement would reflect the fact that the parties recognize each other as having the appropriate kind of standing (legal, moral, or economic) and thus

the appropriate normative authority to assert a defensible claim for certain modes of non-interference.

But this sort of peace between the parties will not go further to involve any empathic connections to or respect for the other's undertakings. With such *empathy and respect*, the parties would consider it appropriate to extend positive support for another agent's undertaking. The support might itself take various specific forms showing the different kinds of empathy and respect due to different specific modes and frequencies of interaction between the victim and others, the perpetrator included, (as well as different cultural settings). One way to limn the general features of different forms of support attendant upon empathy and respect is in terms of the range of issues for which the parties are accountable to each other. This range would go from including the apparent failure to contribute to a society's stability and security, to the apparent failure to contribute to public institutions which enable and empower agents in their undertakings (institutions such as markets, public systems of information collection and storage, and communication systems), to accountability for the apparent failure to provide special support services appropriate to collaborative undertakings or the care and development of the beneficiary of the support.

A still further, deeper grade of engagement would be found in the parties coming to have *sympathy with* each other's progress in their personal undertakings, and in the parties coming to *accept* each other's undertakings as legitimate for that other agent. Thus the third degree of peace between the parties would involve them in sympathy and acceptance, but not identity with the values and priorities of the victim and the other. Transitional justice might strive to achieve not only a smoldering peace of tolerance, or one of public spiritedness in the recognition of the victim being a beneficiary of various public goods, but even a personal sympathy (short of identity) with the victim's specific undertakings.

Finally, there is a fourth grade of engagement transitional justice might strive for between the victim and the wrongdoer (or still other agents, institutions, and living collective practices). This would take the form of an *identity* in which the wrongdoer takes the victim's account, and undertaking, as well as that victim's attendant ethical stand as not just legitimate for her or him, but also as, in kind, legitimate for the life of the wrongdoer; a story and an undertaking the wrongdoer can support in *solidarity*. Thus transitional justice might seek to not only unite the victim and perpetrator in public reasoning in the moral, legal or economic sphere where this leads to mere tolerance, or shared public spiritedness, or even personal sympathy. It might also take on the ambitious project of uniting them in a bond of real understanding and ethical agreement, a peace of identity with each other's undertakings and ethical views, in general, and in their shared life experiences. Nelson Mandela spoke in hope of this sort of unity of solidarity immediately after his release from political imprisonment, and it is this unity that perhaps Desmond Tutu (1999) has in mind as the ultimate aim of transitional justice.

Thus the (re-) establishment of a rule of reason will yield accountability relationships found in varying venues and structures of accounts, and as well, a relationship seeking and involving a deeper or more shallow degree of engagement or peace with the other. Normatively, what degree of engagement is sought will vary depending upon a number of factors, for example, the gravity and scope of the challenges now facing the society and its members, the socio-political background circumstances of accountability, the cultural entrenchment of some of the occasions for accountability (that is, for example, the degree to which hatreds and disregard between victim and others is a part of cultural identity or is preserved by cultural tradition), and the personal capacities for change of those involved. Abstracting from any of these complexities of the accountability context is an invitation to failure in attempting to reach a new accord in the (re-) establishment of the rule of reason.

Challenge 3: A third pitfall comes into view as soon as we think about understanding the pain and other harms inflicted upon the victim. There is an immediate danger of objectifying that harm and of objectifying the victim in the bargain. As I mentioned in passing it is the subjective experience of the victim the perpetrator must appreciate. In order to see why, I need to invoke a perhaps unfamiliar notion of subjective experience. This is the view articulated by Henri Bergson. Bergson (1961; 1960) spoke of subjective experience as a kind of flow of awareness which we live through unreflectively (that is, not discursively, rather than thoughtlessly), as we are absorbed in an undertaking. Although this sort of experience is recoverable to consciousness and is not inarticulate, it cannot be captured in a discursive characterization of what we are aware of. Such a characterization would be distorting or inadequate on a number of counts. It would tend to place the events we experience in a series of moments discrete and separable from each other, that is, in a kind of spatialized time, as opposed to a seamless flow in which the past is articulated with the future as the experience unfolds. Subjective experience understood in this way is illustrated in Bergson's apt example, that of our listening to music, caught up in a symphony or a concerto enjoying the whole unfolding as a whole, as opposed to experiencing the music as a concatenation of single notes and phrases. The experience is one in duration (*duree*), is fluid, emergent, and whole. Further, its significance is highly contextualized, attentive to the moment and to the internal connections of its unfolding directions. It is not as though we are aware of nothing. Rather what we are aware of is part and parcel of the flow of events emerging with our actions as we live through this experience. Thus, the experience is not beyond articulation. But what would be adequate to it are terms and concepts that are apt to the contextuality and historicity of the whole unfolding experience. We cannot describe the component significance of a phrase in some concerto as that phrase forms part of the whole, as played in a certain performance and as heard by a certain individual. The phrase is not without inherent significance in the whole as it is heard. But that significance is not open to being analyzed independently of the whole,

characterized in terms for fixed kinds, grasped in static moments, isolated by abstraction from the other terms characterizing the flow of events. As Bergson (1961, 20) said:

But it [metaphysics and in particular the study of the mental] is strictly itself only when it goes beyond the concept, or at least when it frees itself of the inflexible and ready-made concepts and creates others very different from those we usually handle, I mean flexible, mobile, almost fluid representations, always ready to mould themselves on the fleeting forms of intuition.

Thus subjective experience is that which we live through absorbed in its flow, and the significance of which we attend to in a way best expressed in the jumble of a stream of consciousness flowing within the banks of operating but not necessarily dominant concerns, aims, cares, and priorities. It links in one river of continuity what we would otherwise call past, present and future (compare, Bradley, 1962a, 185 and ff., and Bradley 1962b, 173 and ff). Such experience then brings the significance of the source of any such moment into what becomes of that source. That is, the first moment and its significance color the last and its significance, and conversely. And finally, no attempt to reconstruct that experience as a series of discrete and separable moments, with independent meanings would be adequate. It would only fail to capture the continuity of the impact of “earlier” moments on “later,” of later on earlier, of separated moments on the whole and the whole on the parts. Subjective experience differs from what Bergson (1960) calls reflective experience where we *can* express specifically and precisely what happened, or what we are aware of, using general terms suitable to many occasions and thus sensitive to none. Subjective experience is not reflective experience in which events have a date, a beginning and a terminus, cleanly separated from the rest of our dynamic living.

And what is the point of all of this for present concerns, the significance for (re-) establishing reason as a medium of interaction between the perpetrator and the victim? The point is simply that the harm, the pain suffered by the victim, and then the source of the (re-) established relation between the victim and the wrongdoer in reason must be understood in terms of the victim’s subjective experience, not her or his reflective experience. The pain of the torture, the empathic anguish and emptiness over the loss of a loved one, the fear and terror of having no voice, no personhood, having lost it to the perpetrator in the objectifying, or strategic or refugee appropriate regard and treatment, continues on after the release, after the truth commission report is published, even after trials and incarcerations or other punishments—if there are any. And it is that pain and harm that must be considered and responded to by the wrongdoer through the medium of reasoned interactions. Indeed, not only is it the subjective experience of the victim that is clearly relevant, but it is really what the victim makes of that experience (both privately and publicly) as he or she lives on through the duration of that experience. That is what is relevant here. Thus, for example, as Franco forced Spaniards to relive the history of

the Civil War as the state wrote it, freezing time and taking control of the character of the past, while economically and politically oppressing the Republican losers he treble violated victims (see Rigby, 2001, 42-49).

To talk of some *past* pain or harm is totally inappropriate to the task before those who would ensure transitional justice through restoring dignity and legitimacy to the victim. Indeed to speak of past harms or pains and setting these right, seems obscene, itself a form of objectifying or regarding the victim strategically or as a refugee. The harm lies not within the victim's *past* as though that has nothing to do with the present. We live dynamically, though our talk and thought is too often a public declaration and so static. It is the subjective experience of the victim, seen as in Bergson's (1961; 1960) notion of duration that is relevant. Patricia Molloy (1999, 215) makes a related point in speaking of empathy:

Impartial reason therefore needs empathy as a base for moral reflection and moral judgment. For '[e]mpathy not only enables people to discern situations that call for a moral response, but also it is needed to identify morally significant considerations.' This, says Meyers, is relatively straightforward. One must be able to identify opportunities in order to act morally. And the spotting of such opportunities 'requires grasping what other people are going through.'

Not just grasping what they are going through, I must add, but what they are going through in the terms they are going through it, and then, in the terms through which they make of it what they make of it—that is what is needed. And that is the occasion and first objective of any encounter of accountability.

Challenge 4: The previous point makes clear a fourth challenge facing those who would restore a rule of reason. This is a point passed over quickly above. The victim must go on and that is what needs to be tended to through (re-) connecting the perpetrator and the victim through reason. The offender needs to go on with the victim, to move forward into a shared future with the victim, so that the victim can make sense of her- or himself as being recognized by the wrongdoer as having standing and as being one to whom the wrongdoer is accountable. What is demanded by the (re-) establishment of the rule of reason is for the wrongdoer to take responsibility for some continued relation between herself or himself and the victim. As well, the offender must take responsibility for the limits he or she has imposed on the victim as these are played out in this ongoing relation; played out through the victim's making of them what he or she does in the face of the inclusion by the offender among those that agent recognizes and marks herself or himself as accountable to. Taking of responsibility is not merely a taking possession of the past, an owning of past wrong; it is more an undertaking of a future now opened out to include the victim (see also Rigby, 2001, on this point). Put another way, the (re-) establishment of reason demands that within the practice of reason the subjective experience of the perpetrator and of the victim will become intertwined and that far come to be characterized as one. The personal experience of perpetrator and victim must take

such a shape that each sees the other as having standing, and each sees herself or himself as forming a future jointly with the other person. Recognition, and the accompanying accountability of each to the other, now link their futures into what will be undeniably one future. Failing to ensure the ongoing character of the connection through reason, the continuation of mutual recognition and accountability, however much or little this translates into the physical paths of these individuals crossing, would be a failure to (re-) establish reason's rule as a response to the harm done. A simple apology or even the carrying out of a state punishment would not be an end to the matter, at least not as a matter of restoring the dignity and legitimacy of the victim. Nor, for that matter as a way of "address[ing] the deeper corruption of relationships that permeates the society."

Challenge 5: A fifth point i573ec -0 12.75 eed A If ii573ee socubjtionve exrmeienceof thTj -1

sorts of dynamics: first, an acceptance of, and a seeing of each other, through the various attitudes which both enliven rules or norms and express a commitment to live by these norms, and secondly, a *sharing* of the enterprise of *jointly, indeed publicly, articulating these norms and applying them in reasoning, assessing and justifying our assessments of each other.*

As Peter Strawson (1974) has argued, personal and sympathetic or vicarious reactive attitudes of resentment and disapproval orient us toward those who have harmed us or others within the orbit of our ethical concern, and, as well, there are reactive attitudes through which we see and respond to the others making demands upon us.

Just as there are personal and vicarious reactive attitudes associated with demands on others for oneself and demands on others for others, so there are self-reactive attitudes associated with demands on oneself for others. And here we have to mention such phenomena as feeling bound or obliged (the “sense of obligation”); feeling compunction; feeling guilty or remorseful or at least responsible; and the more complicated phenomenon of shame (Strawson, 1974, 15).

Without these, in some culturally variable form or another, Strawson (1974, 24) plausibly contends, we would not have human relationships of the sorts in question, namely where we interact and guide or constrain our behavior through the medium of reason: “...in the absence of any forms of these attitudes it is doubtful whether we should have anything that we could find intelligible as a system of human relationships, as human society.”

Many others have given accounts of the shared, public enterprise of articulating and living by norms and reasons for our actions (see, for example, Berger and Luckmann, 1967; Mead, 1962; Pettit, 1996; Singer, 1993; Cavell, 1979; Gauthier, 1985; Habermas, 1991; and Rawls, 1971). One account in particular is worth invoking here as illustrative of the point I am making. Gerald Postema (1995) has argued that public practical reason involves a certain readiness to take as a reason for behaving or for judging, only what would be a reason for all, a reason for me because it is a reason for us. Thus,

Justification of the claims I make on your behavior is not a matter of showing you reasons *you have* for acting in ways which in fact are beneficial to me. They essentially involve *self-justification*. Self-justification depends on one’s ability to see one’s own actions and claims as justified through the eyes of others. If I am to regard my actions or claims as legitimate, I must be able to do so in terms of reasons both I and others can recognize as relevant and persuasive. This entails that I attempt to offer reasons which are neither reasons (just) for you nor (just) for me, but reasons which I (sincerely believe) are reasons *for us*, that is *public reasons* (Postema, 1995, 85).

Now there is much that many would question in the account suggested by Postema, however, for present purposes, the point is a non-controversial one. Whatever sense we

make of it, part of interacting with another through reason as appropriate to ethics involves articulating and using shared norms as providing reasons for and against what we consider or undertake. Thus it is not enough that the perpetrator and the victim are aware of each other through the story of what they have come to mean to each other, and that they recognize each other as having standing in spite of that. Restoring reason also calls for them, minimally, to defer to each other in line with the peace residing in the expectations they jointly articulate. The rule of reason calls for all parties to share as co-participants in the enterprise of articulating and using common norms. These norms must be salient to each of them because they are salient to the other and then to them both. Just what that claim might mean cannot detain us here. But as wanting as it is, the observation has enough clarity to make the point that the victim and the wrongdoer are not just bound together in the lasting impact of their encounter and what each makes of that in her or his own life, but also they are bound together in the shared enterprise of making socially real an operant and ambient normative life involving common standards and limits of justification.⁴

These are then the minimal ambitions of transitional justice, I believe. What is sought is a shared framework of reasons having the six features I have identified: a meeting within a presumed (ethical) concern appropriate to the context of the alleged offense; a minimal and targeted quality of peace or accord between the parties; an attention to the lived experience of the victim and the offender; mutual attention to this experience as it is affected by and affects further experience of the same parties into the future; an understanding of that experience through narrative sufficient to begin to induce similar experiences in the auditor; and—in light of this sharing of the other’s experience and the resulting awareness of the saliencies of a shared future as each would see these, as well as a limited recognition of the other as a repository of normative authority—a shared enterprise of articulating and using reasons in so far as they are reasons for both. That, I contend, is the minimal aim of transitional justice. And now I want to ask whether, so understood, transitional justice might also coherently and justifiably include punishment.

Transitional Justice and Punishment

Everything turns on what is meant by “punishment,” of course. If encounters of alternative dispute resolution, or the conferencing of restorative justice, or state sanctioned banishment, or again encounters through so-called truth commission depositions are counted as punishment, then perhaps transitional justice is compatible with punishment. But none of these concerns me just here. Rather, I am interested in the relation between the minimal aim of transitional justice as above described, and both punishment we might label “strictly retributive” and also punishment we might label “directly ordering.” By “strictly retributive” I mean punishment which a) fixes the

offense in time and space, identifies the act in question, names the dirty deed, thereby taking it out of the flow of the life of the victim and b) then seeks to attach as a matter of desert or expiation of guilt, or righting the balance of ethical forces in society, c) a penalty (within some fixed range of severity) as fitting or fair to the offense, d) as this fit is determined and carried out by an authority—moral, legal, regulatory, and so forth. Punishment we might label “directly ordering” would differ from the strictly retributive in terms of what is sought. Instead of aiming at deserts or expiation or a balance of mysterious ethical forces, directly ordering punishment seeks to rehabilitate the offender by exposure to regimentation, and perhaps labor, within a context of deprivation, *or* seeks to deter others with the threat of deprivation—seeking to use the pain and deprivation of the offender to teach society the meaning or gravity of law or norms, and the awesome order of the collectivity trying (forcibly) to regulate and protect itself. In any of these aims, the thought is that there is the promise of good coming directly from the suggested treatment of a person through the infliction of pain. The idea is not that these results might come from a deep personal engagement with the perpetrator (with or without the victim), an engagement with that wrongdoer as a person: potential, limits, warts and all. Rather the idea is that exposure to pain will itself induce the changes aimed at, and those assigning and administering this pain are mere functionaries in a highly stylized, but not quite scripted show of collective force. The guilty is made to suffer in her or his role as offender (as is the observer, vicariously, in her or his role as potential offender). And by self-reflection or some other punishment induced occurrence, the offender is *made into* a norm conformer.

Thus my question is this: can the minimal aim of transitional justice be compatible with “strictly retributive” or “directly ordering” punishment? Might either or both of these be called for as part of the project of (re-) establishing a rule of reason including the victim and offender? And, clearly the answer is no—the idea is a non-starter. The reactivity of strict retributivism, its feature of striking back, as it has been called, and the view’s need to fix the offense in time and in the agency space of the offender, all run against the ontology of becoming—against the relational and constructed nature and purposes of engagement and connectedness in restoring reason. Similarly, the disengaged, causal model of intervention in the case of directly ordering punishments makes these incompatible with the restoration of reason sought in transitional justice.

Finally in both forms of punishment there is the high likelihood, *and the intent*, that the punishments administered will in fact isolate and make less engaged, indeed, reduce the ability to engage, both the offender and the victim. These are the very antithesis of what is sought in transitional justice.

But wait. If transitional justice is really transitional, might society not need to clean the slate, or to ensure the future by punishing some offenders in one of the ways suggested? Might this not be justified in the name of reason, the very thing reason calls for to give itself a future? For example, in Chile where a truth commission report named no offenders and there was a virtually general amnesty for oppressors, might punishment

be required to ensure a better future (see, for example, Benomar, 1995)? I think not. And my reason is not the pragmatic or strategic one that in many such cases the new government includes the offenders from the past as in Chile, or is fragile or even unstable and could not withstand the backlash from the attempt to punish those responsible. [Argentina seems to have been such a case culminating in the pardons given by President Menem in 1990. See for example, Benomar (1995, 39) and Hayner (2002, 161).] Rather my reason for rejecting punishment as the means to support reason is conceptual. I believe the vision of protecting reason (both personal and public reason), by resorting to disengagement and force in the use of punishment, is simply incoherent.

Acting to restore or establish accountability including the other in the practice and in a way engaging both other and victim is really acting to (re-) establish and broaden a practice of giving reasons on behalf of and in defense of one's actions as these are movements within one's life. Thus (re-) establishing reason as I have spoken of it here is the (re-) establishment and perpetuation of the framework of lived rightness and justification. It is this establishment, the socially real or lived influence and connecting force of ethical reasons that we need, not the hypothetical or abstract possibility of it. Thus our commitment to reason is a commitment to an actual order of practiced accountability and engagement with each other through presentations of justifications.

Demands of conscientiousness with respect to that commitment call for us to proceed toward that order in such a way that we do not threaten its realization or resilience. It makes no sense to speak of movement toward the practiced order of reason and justification by turning to force and pain (and away from the practiced order of reason and accord), just so that we might balance the scales, or restore the order of moral or legal forces among agents. Indeed, we could not even be justified in doing so; justified in setting aside those demands of conscientiousness; justified in setting aside the practices of lived justifiability in the form of and in defense of one's interactions with another.

Once we set aside living in the frame of exchanging reasons, we have stepped outside of the framework of justification, outside the law or morality or prudence wherein we had reasons for acting, and we have then entered another realm, that of force in the name of order or the social good. Now, we cannot use reason within the framework of law to justify becoming an outlaw, or to justify acting outside of the reason of law. And we cannot use reason within the frameworks of morality or economics and prudence to justify becoming an immoral or imprudent agent. No more can we meet the obligations of conscientiousness attendant upon engaging in the practice of giving and critiquing justifications of actions, by setting aside these obligations and practices in order to force a change in actions.

Yes, but surely we can use reason to calculate how force might be used to protect or insulate reason and justification? Or so it might be asked. Well, yes, surely. But then we have stepped outside of reason to force and are only availing ourselves of the most instrumental of thoughtful calculations. We do not act in the spirit of reason. We engage only in calculation in the name of force as a personal or societal exercise of power.

Power has its calculative guidance (just as insanity does). But this is a part of control by power, not a part of the life lived in ethics through mutual and common critical reason.

The force of punishment has no place as a supplement to the peace of reason in achieving transitional justice, even if reactive force in the form of strict retribution or directly ordering punishments is needed to protect the individual or the state. There are two orders between which we must choose as we move ahead into transitional justice—reason and peace with self or collective order brought about by choice and commitment to reasoned interactions, *or* a self or collective order brought about by force and deprivation at the expense of a commitment to reasoned interactions. Even though the disjunction is a weak one, that is, even though we can coherently choose both in the name of two *different* undertakings, namely, the ordering of society by public and private reasoning and the protection of society against destabilizing forces, it is still a practical disjunction; that is, we cannot coherently choose both in the name of a single end, or for the purpose of living a single commitment to a single undertaking and to a single manner of ensuring stability. Justification, in the abstract and as lived, resides in the first undertaking, even though we might explain, make plausible, come to understand someone embracing, or even forgive someone embracing the second. Justifying an act, practice, or institution occurs only within the engagement between reason givers and reason assessors or negotiators serving the rule of reason itself.

What systems of punishment such as strict retribution or direct ordering presuppose is that, strictly speaking, neither victim nor offender has a place in that practice to speak and harmonize her own voice (see the related perspective of Charles Barton, 2000, on empowerment and punishment). They are to be objectified by processes of procedural abstraction, and so they are given near scripted parts in the practice, or they are regarded as only strategic interactors, or finally they are regarded as refugees whose reality we cannot and need not engage or even take seriously, unless in an act of supererogation. But, then, these systems of punishment embody the very sorts of victimizing regard we are seeking to leave behind in transitional justice. That is, the challenge of (re-) establishing the order of reason is to (re-) establish a system of ordering society in which both the victim and offender have a space for and expectation of real agency expressing their own personal reasoning and their part in public reasoning. The agency space and expectations assigned them in the above systems of ordering society by punishment affords no place for the expression of personal and public reasoning. And thus, to seek to include such punishment in the restored practices of reasoned engagement in accountability contexts is incoherent. It makes no sense in terms of restoring the rule of reason. To deny this claim is to render reason a calculative tool of force, not one for the mutual examination of ends and the negotiated agreement of means, an examination valorizing and serving the rule of reason itself.

Is Punishment Ever *Justified*?

That said, the question immediately arises as to whether punishment is ever justified, that is punishment in the form of interventions of strict retribution or direct ordering. Surely, outside of moving from repression to participation, surely in contexts where social practice and institutions are relatively more just and stable, we may institute and use such systems of punishment? Merely asking the question answers it, for whatever might be the case at the welcome limit of full participation, complete temperateness, and ongoing stability, (where punishment, by the way, would not be needed), we never arrive, let alone live, at that limit. We are always on the road, always becoming, always in transition in the pursuit of justice through reason, always constructing and thereby constituting justified interactions. The rule of reason is a life's work, and the work of every life where there is a commitment to reason as opposed to force. Punishment has no place *there*.

Objections

There are five objections to consider briefly before closing.

Objection 1: The objection of prior justification urges that in cases of punishment of either of the sorts I have spoken of, there has been an offense and that prior act itself justifies forceful intervention in the form of strict retribution or direct ordering of the offender. Thus even if resorting to force suspends or destroys the framework of justification, still the acts of force in these cases of punishment are justified.

Although it is unclear just what this objection really might amount to, there are three likely readings. First, perhaps the rule of reason is to hold until breached, at which point there are exceptions to justification's presupposing a framework of the rule of reason. We might step outside of such a frame, act as though force demands force in return, as the proper manner of dealing with offenders and keeping order. The acts of offenders thus create exceptions where it is justified to punish, even though punishing takes us beyond the framework of justification. Desert and the righting of wrongs or the punishing of offenses *is justified* in the abstract, even though the actual doing of it is not, even though acts of retribution or direct ordering are steps taken outside of the frame of justification. But this seems incoherent. The abstraction of punishment, if justified, would be so within reason's rule; but the reality of it is not justified because it falls outside of the commitment to reason in our interactions. How can this be? If we commit to following reason in our interactions with others *except when they offend*, then the abstraction of our forceful responses to their offenses is an exception, a matter falling outside of reason and so outside of justification. The abstraction cannot claim justification that is not open to its manifestations in practice. But perhaps this is not what was intended by the objection.

The second reading of this first objection urges that the *particular behavior* of punishing an offender is outside the framework of justification, even though the framework holds without exception. But this makes it sound as though since reason continues to rule in the absence of being practiced by particular individuals and particular states, we can say that punishment does not subvert or compromise the rule of reason. Those punishing are acting beyond justification, have stepped outside of the frame of reason, but that frame still holds. Putting the matter this way, however much it may save the appearances of the rule of reason in general, goes no way to show the prior justification of punishing and its compatibility with the absence of justifiability of punishment in practice. If the rule of reason is incompatible with the justifiability of punishment in practice, then how can such practice be justified prior to the act? The act of punishment is what we are talking about being justified or not, even though we are talking about it prior to the act and in anticipation of punishment being administered. But perhaps this still is not the way to understand *the prior justification objection*.

The third reading of the objection would seek to split off the requirements of conscientiousness and performance in the service of reason. The exception that offenses create lies not with performance, but with the requirement of conscientiousness. Thus, the objection contends, we can be called upon in the face of certain offenses to continue to use reason to examine the justifiability of our prospective acts, and to justify those acts by the practice or the exchange of reasons and acting so as to advert to the negotiated conclusions of these exchanges of reasons, even though we are not called upon in conscientiousness to perpetuate reason's rule in the manner in which we act. But this seems confused.

How can we sever the demands of performance from those of conscientiousness calling for us to practice the peace of reason whenever we act on the performance demands of reason? How can we live the performance demands of regulating our acts by reasons and their negotiated exchange, and at the same time ignore the conscientiousness demands of acting out these performance demands only in ways expressing the project of the rule of reason? The performance demands of reason always, and generally, require that our justified acts fit a description such that they are constrained according to and because of the direction emerging from the exchange of reasons and the negotiation of accounts. But then, fitting such a general description, in addition to whatever other more particular description they might fit, acts that are justified as fitting performance demands of reason always and generally *will be* manifested in ways fitting the demands of conscientiousness. The demands of performance and conscientiousness cannot be severed in this case. Thus to say that punishment can be justified as a matter of performance, called for in retribution or as a means to directly order the behavior of the offender and others, while it constitutes an acceptable exception to the demands of conscientiousness *is* incoherent. [Compare this with Nagel's (1986, 181-182) account of moral dislocation, or the relationship of the "intentional function" and the "normative function" of ethical thinking in action.] The first objection is unavailing.

Objection 2: The above should allow us to quickly dispense with a second line of objection. It might be said that the departure from the rule of reason in the administration of punishment is an *unintended consequence* we must suffer in the pursuit of the life or the protection of reason. Yes, we must seek to stay within the framework of the rule of reason and doing so involves striving to ensure that others with whom we interact do the same. This itself is just part of conscientiousness with respect to the commitment to living by reason. Regrettably, this sometimes requires that we must intervene forcefully in the lives of others in order to keep all on the proper path. And if we do, perhaps we turn from the path of reason to that of force. However, this is nothing but an unintended consequence of a justified act, one we cannot be held responsible for on the grounds of our deserting the demands of conscientiousness. Contrary to deserting conscientiousness, we are carrying out its demands in holding others to the task of living by reason. Thus we are justified in punishing, but this brings with it an unintended consequence of temporarily leaving reason behind.

There are two things to point out in reply to this objection. First, the demands of conscientiousness simply do not allow us to plead that resorting to force is an *unintended consequence* of a justified pursuit. The demands of conscientiousness here require that we be cognizant of the ways in which our acts might serve to depart from, undermine or subvert reason's rule. That we should proceed in what we take to be a conscientious upholding of reason's rule, only to "discover" what is patent, namely that we have abandoned reason in seeking to uphold it, is disingenuous in the extreme. Are we to say that as we send someone off for an indeterminate sentence or to death, we have no knowledge of the pain we likely are inflicting by force? Is this hidden from us? Do we lack the time or experience needed to get very clear about this? We might challenge our commitment to reason as being too demanding. We might urge that the entanglement of the demands of performance and the demands of conscientiousness as noted above is too much to ask of us poor humans, and thus we are to be excused from lapses from the rule of reason as we punish. But this will not allow us to *justify* punishment in the name of the pursuit of reason's rule and then plead unintended consequences when the incoherence of our actions is pointed out.

Secondly, the objection assumes that sometimes (more and more it seems in the United States) we must resort to punishment to serve the rule of reason. But this seems as disingenuous as claiming to find that turning to force is an unintended consequence of a justifiable act of imposing pain. Here it is seems appropriate to recall something John Stuart Mill (1961) said in the treatise *On Liberty*, as he discussed what we are to do with those who offend against our sensibilities, but not our rights. Should we punish those individuals, as we are to punish those who violate our rights? Mill points out that not only might we make matters worse by punishing (the lesson of the relative failure of so-called negative reinforcement). But in addition, the behavior might reflect the failure of society in the first place. In an oft quoted passage Mill (1961, 560-561) said:

Society has had absolute power over them during all the early portion of their existence; it has had the whole period of childhood and nonage in which to try whether it could make them capable of rational conduct in life. The existing generation is master both of the training and the entire circumstances of the generation to come; it cannot indeed make them perfectly wise and good, because it is itself so lamentably deficient in goodness and wisdom; and its best efforts are not always, in individual cases its most successful ones; but it is perfectly well able to make the rising generation, as a whole, as good as and a little better than, itself. If society lets any considerable number of its members grow up mere children, incapable of being acted on by rational consideration of distinct motives, society has itself to blame for the consequences.

Mill is surely hyperbolic in his assessment of the power society or parents (or any others) might have over the commitments and conduct of the young. Still there is a point well-taken here; namely that we must not foster an atmosphere of violence and force, and then start back in surprise when those most impressionable by our example do not respond to the rudder of reason.

Notice that I am not saying that offenses against sensibilities are to be considered on a par of gravity with those of serious criminal or moral violations of our rights. Rather, the point is that just as with offenses of the former sort we have the whole of childhood and adolescence to nurture non-offending behavior, so too we have the whole of childhood and adolescence, *plus* the structuring of society through our domestic and international allocation of liberties or economic advantages, *plus* the paradigms of restorative justice conferences and other alternative measures of judicial or informal conflict resolution carried out in the name of community, *and* the utility of modern educative, counseling, and chemotherapeutic means of dealing with behavioral disorders in order to nurture autonomous reason-based behavior that no longer violates rights. This is not to say that every possible offense might be averted in this way. But it is to say that the talk of unintended consequences here not only is disingenuous, but also simply unjust and not in the spirit of the rule of reason. [Compare the spirit of this point with the interesting observations of Clarence Darrow (1972) in *Resist Not Evil*.]

Objection 3: But is the talk of *abandoning reason and imposing punishment* by force not misleading? As agents, *do we not accept the imposition of punishment* if we are caught and found deserving? This is claimed by Strawson (1974) and forms the seed of the third objection. After all, if the threat of punishment is something we all buy into in coming to accept an ethic whether law or morality at least, then is it not part of the way of reason in these ethics to be subject to punishment in the breach? There are two issues here. Do we indeed accept punishment in taking part in and endorsing ethics? And second, assuming we do thus accept punishment, does this make it part of the rule of reason? Speaking of the moral case Strawson (1974, 21-22) said:

Indignation, disapprobation, like resentment, tend to inhibit or at least to limit our goodwill towards the object of these attitudes, tend to promote an at least partial and temporary withdrawal of goodwill; they do so in proportion as they are strong; and their strength is in general proportioned to what is felt to be the magnitude of the injury and to the degree to which the agent's will is identified with, or indifferent to, it. ... Just as the other-reactive attitudes are associated with a readiness to acquiesce in the infliction of suffering on an offender, within the 'institution' of punishment, so the self-reactive attitudes are associated with a readiness on the part of the offender to acquiesce in such infliction *without* developing the reactions (e.g. of resentment) which he would normally develop to the infliction of injury upon him; i.e. with a readiness, as we say to accept punishment as 'his due' or as 'just'.

So if Strawson is right, then not only is it the case that when we accept morality we accept the rationality of punishment, but we also accept it as due to ourselves, when justly imposed upon us. Thus the imposition of punishment is merely part of the system of reason giving and justification that constitutes morality (if not also law). All parties know this and accept it is as part of the psychological conditions underlying the communicative framework of practical reasoning.

The objection here suggests that not only do moral (and perhaps legal) agents accept the institution of punishment and its imposition, but more seriously, it is a normal part of having a framework of reasons and justification where people might not participate fully and where their offenses might stir resentment in others who are participating fully. Perhaps this is the best we poor humans can do or can be expected or asked to do?

As to the claim that moral (and perhaps legal) agents do accept the imposition of force in order to maintain an order of reason and the practice of justification, I must say both that I doubt this is true as a matter of fact, and that it is irrelevant if it is true. There are parents, employers, and courts where the attempt is made to return people to reason through some means other than those of strict retributivism and direct ordering. For example, some courts through community service sentencing, or through restorative justice conferencing, or other devices make appeals to the reason of offenders and seek to bring them into the exchange of accounts with the victims of their offenses. The extent to which this sort of approach might be useful in an otherwise free and open society, justly administered, is of course an open question. But to say that as part of coming to the communicative context of morality, or as part of our becoming law abiding, we accept the imposition of force as a consequence of offending, is surely in fact false.

Suppose, however, that this is the way of it. Suppose that in becoming moral or becoming law abiding we accept the appropriateness of the imposition of pain as punishment and, in these moments, the abandonment of reason in favor of force. Does that mean that this is the best we can do? Or is this a defensible way to think about the rule of reason—as taking us only so far before we can go no further and strike back, only

to return to reason's sway when the offending moment and our impassioned response have passed? Strawson (1974) might very well have given a picture of morality (and by extension of law), in so far as these are suited to a certain psychology and an agonistic view of ethics as needed to deal with struggles between humans in conflict. However, this is not the only sort of ethic. We might imagine alternatively a mythos of peace, as opposed to a mythos of violence (see Whitmer, 1997, on *The Violence Mythos* and Ruddick, 1995, on the politics of peace). *We might imagine a set of reactive attitudes within this mythos of peace according to which the natural response to a perceived offense is to seek some way to repair the breach of reason by asking for an account.* At least this might be the first response before the victim or the victim's representative might decide that the offender *rejects* the rule of reason and thus perhaps must be protected against. Here is not the place to decide between two such ethics, those based in conflict and those based in cooperation and peace. But it is important to take note of two points. First, my argument has sought to show that the ethic of peace is the direction in which a coherent commitment to reason takes us. And, for those who would travel by reason, the ethics of force is a wayward path. Thus, second, if I am right the actual or imagined acceptance of punishment is irrelevant to the argument.

Objection 4: Turning toward the future, we should consider the *objection from the dangers of depravity.* The idea is this. There are those who have shown themselves dangerous by violating the rights of others either harming them or condoning this harm. And in various ways these people remain a threat. Is it not incumbent upon us to punish these depraved persons and so protect against the threats they pose? To be sure these individuals might be willing to join in a cessation of hostilities and might seem ready to move toward the rule of reason. Still, the fact is that they have shown themselves psychologically ready to inflict or acquiesce in harm, or else their examples suggest that evil can be practiced with impunity. Thus the presence of these persons is worrisome. It might destabilize the end of hostilities and any new régime. Perhaps, then, amnesty or other pardons for these persons would seem foolish or morally weak. And the dangers they pose might seem to call for strictly retributive or directly ordering punishment.

Thus, for example, in the personal history of some we might see crimes against humanity and seek military tribunals or other courts to adjudge these matters and to meet out punishment accordingly. Or, collaborative behavior for example on the part of workers in the bureaucracy, the infrastructure, or the industrial sector of a country unjustly occupied, might be interpreted as criminal or as blameworthy and so deserving of punishment, even if it does not rise to the level of violent crime. Perhaps the very fact that persons have fought viciously in armies opposing the present powers marks them as posing a threat either in the resentment they evoke or in the dispositions they seem to have, and thus they seem the fit object of punishment? And then, punishment perhaps would be thought justified in the name of sustaining the cessation of hostilities, something which, in turn, is required for the peace or accord expressed in the rule of reason? How are we to respond to this line of objection?

The reply to all of these cases is clear and familiar. None of these punishments could serve the project of the rule of reason, as understood here. Remember, punishment freezes persons (both the punished and the victim) in some selected moments of their past. And this shuts them away from the possibility of being open to others and available to them as they jointly develop and become their future. The offender is left simply the one who has committed this or that violation, rather than the one who recognizes and is ready to move forward together with victims, into a shared future.

Contrary to isolating others, sharing space as ethical agents presupposes a certain degree of openness toward and acceptance of each other. All agents must stand ready to invest in others a degree of value, trust, and (a defeasible) authority of judgment concerning what is ethically defensible. This is part of what is involved in approaching other agents within some standpoint of ethical concern and from within some intended degree of accord or peace between agents. Unless agents are open to each other and ready to make those investments as they seek to interweave the personal significance of their circumstances with that felt by other agents in the joint articulation of a common future, the rule of reason is not possible. We will not share the future by all conforming to the same abstract normative rules based in classifications that mark as good or bad, right or wrong, various aspects of the situations we encounter. That is not the rule of reason but the rule of convention, and indeed, the rule of some party's particular conventions. The rule of reason involves those living it to respond creatively to present circumstances, weaving past ethical stances, present ethical insights and personal investments of value in the options before them together with what others ethically make of their present circumstances, all in the pursuit of a shared, harmonious, and co-articulated path of becoming. Here conceptualizations of normative significance will emerge from the mutual recognition and interactions of those granting each other standing. How could the wayward agent, set over against others and frozen in place by punishment, gain entry into this dynamic of ethical becoming where agents draw the ethical justification of action from contextualized, mutual creations of caring and conciliation? The very process of assigning and carrying out punishment seems contrary to that dynamic.

Whatever function is served by war crime tribunals trying persons for crimes against humanity, for example, these trials are not a part of seeking accord within the rule of reason as sketched above. The dangers of depravity, if they are to be met as part of the rule of reason, instead call for the inclusion of all parties and for the (re-)establishment of the exchange of accounts in a context of mutual grants of recognition establishing ethical standing and then a defeasible authority of ethical judgment. Making the investment expressed in these grants is risky, no doubt. But the alternative is continuing to function within the illusion of an incoherence. [Michael Ignatieff (2004, 167) seems to fall under the shadow of that incoherence when he urges that part of the point of ethics is to consider and calculate how using force might be a lesser evil in prosecuting our national

version of living in the peace of reason. I would urge instead that this calculation marks the abandonment of reason, not the conjuring of a justification for the use of force.]

Objection 5: The previous response raises one more objection. Is it not the case that implicit in my account there is a blind commitment to reason which is no more supportable than is the harm from various punitive measures we might use? Am I not endorsing reason without regard to the many normative constraints upon its use and operation? And might not one of these constraints call for using punishment in order to preserve order? No, I think not.

As to whether I am arguing from the standpoint of a blind commitment to reason unconstrained by any normative principles I can say only a little here. Of course there are principles of reason we must hew to (see, for example, Blatz, 1997). These include a principle of consistency, one of not begging the question, one of achieving a coherence of thought issuing in the most pragmatically satisfying and explanatorily powerful set of beliefs and decisions available, and a principle of impartiality that I would argue emerges from these first three. In addition there are principles of integrity, and of respect (including a requirement of epistemic charity) that our reasoning needs to express in private and in public. Perhaps there are other more substantive principles such as the claim that the rule of reason must serve free or autonomous action in some sense. Out of the conjunction of these principles with beliefs about the way these principles could work in our world, could come a set of middle level norms and policies, codified law, regulations, personal agreements and all the other various array of institutions and practices humans have devised through which to reason together in living. Of course there is much more to say about the rule of reason and the communicative and narrative conditions of its public or private lives. However, that is all a story for another place. And none of that story will change what I have argued here. Of necessity, there is a certain limited commitment to the rule of reason in this discussion. But that does not obscure from view some entryway for the claim that reason requires or even is compatible with resorting to force in order to preserve its place in our life together. The peace of reason and the struggle of force are incompatible. Mixing these in views of calculated and efficacious punishment will render reason's rule incoherent.

Conclusion

This discussion urges serious attention to the minimum sought in transitional justice. It urges that this minimum rules out punishment in the form of strict retribution and direct ordering. It leaves us with the charge of moving forward from repression to participation; forward from limited, biased, ill-informed calculation, or from an all but scripted (and thus pseudo-) participation in establishing and maintaining order by appeal to reasons, to a robust or thick sense of participation in establishing order by reasoning, both personal and public. The discussion seeks to move us toward a form of participation

involving shared articulation, negotiation, and agreement on normative matters, all expressing a freely chosen commitment to reasoned action.

Having said this, the question naturally arises as to whether any country has ever succeeded in achieving transitional justice or other conflict resolution in a form that exemplifies the concern for recognition, accountability, and participatory personal and public reason described here? Are there any poster children for the view of transitional justice offered above? Perhaps the closest case is found in South Africa where the post-de Klerk leadership under Nelson Mandela instituted a Truth and Reconciliation Commission (TRC). As a result of a political compromise in connection with the establishment of a new constitution, amnesty was to be granted for offenses committed in the name of the political struggle. This grant was at work in a TRC sub-committee which had the power of issuing amnesty in exchange for testimony recounting past involvement in the brutality and oppression of the apartheid order (see Hayner, 2002, 41-42). The commission chair, Archbishop Desmond Tutu (1999), proceeded with a vision of forgiveness and reconciliation. The commission's efforts were aided by the work of various civil society and faith-based groups (see Rigby, 2001, 140-141). And while reconciliation perhaps will not be achieved fully until after the continuing problems of restitution or economic compensation are worked through, for example in land reform, still the aims of Tutu seem compatible with those of transitional justice as analyzed here (see Rigby, 2001, 142-143.) Van der Merwe and Johnson (1997) argue that the work of the TRC and local groups provided the basis for negotiation as the dominant mode of interaction between the opposing factions of government. This *suggests* the beginnings of the modes of recognition, accountability and mutually reasoned governmental co-participation I call for in transitional justice. At the same time, van der Merwe and Johnson see the political and social challenge facing South Africa in terms of restitution. As they speak of it, this is more than economic restitution and includes a punitive aspect as well as one of compensation and forgiveness (see van der Merwe and Johnson, 1997). Of course I would disagree over this notion of restitution as including punishment. Nevertheless, these authors point out that the trend toward recognizing ethnicity as a source of social cohesion and mutual respect (though it contains obvious dangers as well) seems a further hopeful sign that South Africa could in time come closer to approximating the aims of transitional justice for which I have argued.

Again, this is not to say that the case of South Africa realistically represents transitional justice as I understand it. However, this is not the point. The idea is not to discover or even imagine a form of transitional justice in which the past is put to rest by the attitudes and actions of those involved. Rather the idea is that the perpetrators would come to appreciate the impact their oppression has had on the victims and together they would find a way to integrate that past peacefully into the joint undertaking of a future together. With the emphasis put in this way, even a case such as that of Mozambique could serve to express a degree of transitional justice as described here. In Mozambique a two decade civil war set the international high water mark for horrific violence. Two

factions split families, villages, and the country at large. It is reported that so many were involved in the violence that after the 1992 peace accord, there was an individual and collective will only for what was called reconciliation, meaning a determination to set aside all conflicts of the past and to refrain from discussing them. There was a little known general amnesty passed, however that was beside the point. Since almost all were involved and all had suffered, there was no where to begin or end recriminations. Tacit agreement among government officials combined with village spiritual healings of individuals allowed, as much as possible, for things to move forward toward an approximation of normalcy (see Hayner, 2002, 186-195).

Let's look at our past, said Cardoso [a media editor], but let's not do it by way of a commission telling us there is only one truth. 'History is too complex; you can't deep-freeze it. And if you started digging, where would you stop? Who's clean here? It's a quagmire. Everyone was involved in some way, including many, many in the international community' (Hayner, 2002 195).

Thus, South Africa is one expression of the spirit of transitional justice, a case where reconciliation through recognition and accountability were very deliberate and the circumstances for forgiveness were purposely pursued. Other expressions of that spirit were very different, for example as in Mozambique where only a tacit agreement to set aside the past for now and to proceed with it only as an atmosphere of mutually acknowledged loss and pain was sufficient to start the healing process. But in neither of these cases nor in any other case is there more than some form of partial expression of what I have understood as transitional justice. It is a project the various possible undertakings of which might take many forms, not an accomplishment that might seem to be structured in only one way.

This aim might be seen as no more than a benign fantasy; it might seem an aspiration so far from the realm of real politics and so far out of the reach of even interested individuals that its pursuit will seem to lack all urgency significant enough to challenge established thinking. But the alternative is the mischievous reality of the present in emerging participatory states, in the evolution of powerful but only partially participatory states, in the struggles for a just personal life in the best-intentioned, well-founded personal relationships. The present reality is mischievous because it is so harmful to so many persons made objects, made strategic rational agents, or made refugees, and so helpful to those made mere functionaries of an objectifying system of interacting agents; it is so harmful to the very rule of reason itself.

Transitional justice calls for a dynamic theory of justification suited to an ontology of becoming. (For hints at such an ontology, see Bergson, 1960; Deleuze, 1988; Grosz, 1999; and Ricoeur, 1992.) The systems of punishment in question call for a system of statics in justification suited to an ontology of being. But in that way, they and their underlying view of what is distort our actual situation of agency and order, subverting

reason and turning it to the service of power. Established powers will probably cling to the latter and seem to lean toward control measures conceptually compatible with these concerns, measures such as strict retribution and direct ordering (compare, for example, Mark Findlay, 2000, 195). Indeed, discernible current social, economic and political frames, and their supporting mythos of violence do lean that way.

Which of these systems of order and agency *should* we choose? This is really the question of how might we support the choice between reason and force. Is this a question of justification, in contrast with a calculation of what serves power? Or is it a question of the explanation of what is most likely or useful for humans to adopt as a way of ordering their lives together? Or is the commitment to either force or reason prior to both justification and explanation? Though I have my views on these matters, they are questions for another place. However, they are not questions for another time. Together, the issue of transitional justice and that of the harm done to the rule of reason by strict retribution and direct ordering (as well as the personal harms done by present-day punishment systems) call for our immediate consideration of that choice of commitments.

Notes

1. This leaves to the side the question of forgiveness, a question that often seems to arise with the possibility of establishing a mutual recognition as having standing, and accountability as appropriate to that standing (see Arendt 1958). There is no space to systematically address that question here.
2. These three sorts of disregard are meant to allow for many specific variations in the attitudes and aberrations of recognition that characterize victimizations. And, they are not meant to be easily and cleanly separated out into three fully distinct and exclusive forms of disregard. Instances of them merge and diverge with and from each other in the messy circumstances of our life together. Also, each of these three can be approached psychologically as ways in which the victim is traumatized so that without the advent of accountability of perpetrator to victim there is no possibility of resolution of this trauma, and thus these forms of disregard can induce post traumatic stress disorder with its attendant alienation, lowering of self regard and the rest (see Whitmer, 1997 and Herman 1992).
3. I say “virtually” because although the extent of recognition of the other and the readiness to hold oneself accountable to the other is, within morality, in principle universal, still, in practice, we divide up the work of managing accounts so that not everyone is considered accountable to just anyone for every action or way of their being. My children are not accountable to you for doing their homework, though they are to me and differently, to their teachers, for example. Further, on the possibility of an idealized ethical space of the sorts imagined, see Rawls (1971), and Habermas (1991), respectively.
4. This is a point that we might agree to whether we are contractualists, subjectivists, objectivists and so on. For the significance of speaking of operant norms here, see Singer (1993).

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