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Restorative Justice, Retributive Justice, and the South African Truth and Reconciliation Commission

I

Following its first democratic elections in 1994, the post-apartheid state established in 1995 the Truth and Reconciliation Commission (TRC), as part of its response to the injustices of the apartheid past and their ongoing effect on the present.¹ One of the main ways the TRC was theorized at the time was as falling under the paradigm of “restorative justice,” which was opposed to “retributive justice,” which was associated with Nuremberg-style prosecutions of wrongdoers.² Arguments for restorative justice often appeal to the idea that it is concerned with superior moral values to those that retributivism

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1. Other responses include the land reparations process (which was entirely separated from the TRC), the policy of so-called Black Economic Empowerment (BEE), and affirmative action. There have been criticisms of all these strategies: the land reparations process allows only claims dating from after the 1913 land act which took most of the land away from black people, and its implementation has been very slow; BEE has been perceived as only making a very few black people very rich, while increasing the cost of doing business. See Daryl Glaser, “Should an Egalitarian Support Black Economic Empowerment?” *Politikon* 34 (2007): 105–23; Don Lindsay, “BEE Reform: The Case for an Institutional Perspective,” *New South African Review* 2 (October 2011). However, the TRC should still be seen in light of the fact that it was not supposed to be the only strategy for dealing with the past.

2. Desmond Tutu, *No Future without Forgiveness* (London: Random House, 1999); Charles Villa-Vincencio and Wilhelm Verwoerd, eds., *Looking Back Reaching Forward* (Cape Town: University of Cape Town Press, 2000).

responds to,³ and this was true of some arguments made in defense of the TRC process.⁴ An example of this approach to restorative justice is provided by John Braithwaite, who argues that it promotes “healing rather than hurting, moral learning, community participation and community caring, respectful dialogue, forgiveness, responsibility, apology and making amends,”⁵ and, more recently, that its central value is “citizen empowerment.”⁶ He also criticizes the values that, in his view, retributivism is concerned with, saying that “retribution is in the same category as greed or gluttony; biologically they once helped us to flourish, but today they are corrosive of human health and relationships.”⁷ This kind of defense was provided for the TRC by its chair, Archbishop Emeritus Desmond Tutu, who argues that “justice, restorative justice, is being served when efforts are being made to work for healing, for forgiveness and for reconciliation.”⁸ One aim of this article is to question the idea that the TRC exemplified a version of restorative justice that is opposed to retributive justice. I argue that although the TRC did not involve criminal prosecutions and the sanctions with which these are associated, it can be seen as responding to the moral concerns underlying retributivism. The second aim of this article is to use this discussion to inform the dispute between restorative and retributive justice, and to question the extent to which they are alternative, competing paradigms of justice. I defend the moral concerns underlying retributivism, but argue that there are models of restorative justice which can take these concerns into account, and that retributive concerns can sometimes be served by restorative processes.⁹

3. John Braithwaite, “Restorative Justice: Assessing Optimistic and Pessimistic Accounts,” *Crime and Justice* 25 (1999): 1–127, at pp. 6, 7; John Braithwaite, “Principles of Restorative Justice,” in *Restorative Justice and Criminal Justice: Competing or Reconcilable Paradigms?* ed. Andrew von Hirsch, Julian V. Roberts, and Anthony Bottoms (Oxford: Hart, 2003), p. 5; Albert W. Dzur and Alan Wertheimer, “Forgiveness and Public Deliberation: The Practice of Restorative Justice,” *Criminal Justice Ethics* 21 (2002): 3–20, at p. 5; Lucia Zedner, “Reparation and Retribution: Are They Reconcilable?” *The Modern Law Review* 57 (1994): 228–50, at pp. 230–33.

4. Tutu, *No Future without Forgiveness*, pp. 51–52.

5. Braithwaite, “Restorative Justice,” p. 6. See also Tutu, *No Future without Forgiveness*, p. 51.

6. Braithwaite, “Principles of Restorative Justice,” p. 5.

7. Braithwaite, “Restorative Justice,” p. 7.

8. Tutu, *No Future without Forgiveness*, p. 52.

9. The TRC could also be evaluated in the framework of transitional justice. However, discussions of this are often concerned with behavioral and political questions (such as

The TRC was a process instituted by an act of parliament,¹⁰ as mandated by the interim constitution of 1993, within the constraints set by the political negotiations that followed the unbanning of the African National Congress (ANC) and other organizations in 1990.¹¹ Most notably, amnesty for the outgoing regime was guaranteed as a condition of their participation in the negotiated transition, which placed constraints on what kind of process could be introduced. On the other hand, since the TRC was mandated by the interim constitution, it was established by a state with a parliament and rule of law, which means that responding to atrocity and criminality was not simply optional. The TRC process had a determined duration, and had four main features: three specialized committees and a mandate to produce a report. The Victims' Committee provided forums in which victims of atrocities could talk about what had been done to them. The significant feature of these forums was that, unlike in an ordinary court process, victims were not present as witnesses, to be cross-examined in an adversarial process designed to establish the guilt of the accused, but rather they were present in their own rights, speaking about what had happened to them, in a supportive environment. The Amnesty Committee considered applications by perpetrators of "politically motivated" crimes, who could be granted amnesty from liability to criminal prosecution. There were various constraints on the actions for which amnesty could be applied: for example, they had to be judged to have been carried out in the service of a political objective, and to have taken place within a specified period of time: from 1960 to 1993. Perpetrators did not have to show remorse, but they did have to be judged to have made a full and complete disclosure. An important feature of the South African solution was the fact that amnesties were granted individually, and only after a

why political actors choose as they do) and legal problems. My concern is with the moral justification of the TRC, in particular, with looking at this in light of the paradigms appealed to in order to justify it at the time, and with using this to inform our understanding of the debate between restorative and retributive justice in a nontransitional context. For a discussion of transitional justice, see John Elster, "Coming to Terms with the Past: A Framework for the Study of Justice in the Transition to Democracy," *European Journal of Sociology* 39 (1998): 7–48.

10. The Promotion of National Unity and Reconciliation Act, No. 34 of 1995, available on the TRC website: <<http://www.justice.gov.za/trc/>>.

11. The negotiations involved a number of political parties, but chiefly the ANC and the apartheid ruling party, the National Party (NP).

public disclosure in an open hearing, the details of which were published. Victims could oppose amnesty applications, and victims or their representatives could question the amnesty applicants. Both the Victims' Committee and the Amnesty Committee also investigated and corroborated claims. The TRC moved around the country for two years, so both victim and perpetrators forums were held many times, in different places.¹² The third feature of the TRC was a Reparations Committee which looked into what reparations should be paid by perpetrators and beneficiaries, and what could be given to victims to meet the needs caused by the wrongs they had suffered and to "restore their dignity."¹³ While the TRC itself made amnesty decisions, it did not implement reparations; rather, the Reparations Committee had the power only to make recommendations to the government (some of which the government subsequently rejected). The fourth feature of the TRC was its report: it was tasked with publishing a detailed report about the victims and amnesty applicants, but one that also included an account of the circumstances and society in which atrocities were carried out. As I will argue, these four features should be seen in conjunction with one another. For example, the moral justification of the amnesty provisions should not be looked at in isolation, but rather in light of the role of the Victims' Committee, the Reparations Committee, and the report.

Many criticisms have been made of the TRC, of which I mention a few. It has been argued that it legitimated apartheid law, since the actions about which victims could speak and for which perpetrators could apply for amnesty were limited to those which were crimes under apartheid law.¹⁴ Apartheid itself was not the focus of the amnesty process, but rather extreme acts that were illegal even by the standards of the brutal and unjust apartheid regime. And the daily abuses, sufferings, and rights violations that were part of apartheid were not regarded as qualifying anyone as a victim. Another serious criticism was that by treating all

12. Around 2,000 victims spoke to the committee; the committee also took written statements (21,297 in total). Around 7,000 perpetrators applied for amnesty. Villa-Vincencio and Verwoerd, *Looking Back Reaching Forward*, p. 20; Alex Boraine, *A Country Unmasked* (Cape Town: Oxford University Press, 2000), p. 114.

13. The Promotion of National Unity and Reconciliation Act, No. 34 of 1995.

14. See Emilios Christodoulidis and Scott Veitch, "Reconciliation as Surrender: Configurations of Responsibility and Memory," in *Justice and Reconciliation in Post-Apartheid South Africa*, ed. Francois du Bois and Antje du Bois-Pedain (Cambridge: Cambridge University Press, 2008), p. 15.

perpetrators in the same way, the process appeared to equate violence carried out in opposition to an unjust and oppressive state (after, arguably, all peaceful methods had been exhausted) with violence carried out in the service of perpetuating an unjust state. The TRC failed to get any apartheid leaders to take responsibility for apartheid. Victims were routinely asked if they forgave, which, arguably, put them under unfair pressure. In terms of reparations, at the time of the process, victims walked away with nothing (while perpetrators of horrific crimes could appear before the TRC and be immediately granted amnesty), and had to wait for the long process of the TRC report being concluded and recommendations being made to parliament. And then, when the TRC did put its recommendations to parliament, parliament dramatically reduced the amount that victims would be paid. The Reparations Committee also made a number of recommendations for payments to be made by perpetrators and beneficiaries (both individuals and organizations such as big businesses), including a one-off “apartheid tax,” wealth taxes, levies, donations, and retrospective surcharges on corporate profits.¹⁵ Parliament rejected all of these recommendations. In addition, there have been problems with the way *prosecutions* have subsequently been handled by the government. This is not a part of the process, and not under the TRC’s control, but may be argued to retrospectively affect some of the justifications made for the process. It was essential to the amnesty process that anyone who did not apply for amnesty, or whose application was turned down, could be prosecuted. Yet since the end of the process the government has not pursued this.¹⁶

Some of these criticisms concern the moral and political justification of the process, some concern details of its implementation, and some concern the government’s subsequent actions. My concern here is with the overall moral justification of the process. There are three standard views of this: (1) that it was morally problematic, because not prosecuting perpetrators of atrocity meant that justice was compromised; (2) that while justice was compromised, this was an acceptable compromise; and (3) that justice was not compromised, because although the process

15. See Jaco Barnard-Naude, “For Justice and Reconciliation to Come: The TRC Archive, Big Business and the Demand for Material Reparations,” in du Bois and du Bois-Pedain, *Justice and Reconciliation in Post-Apartheid South Africa*, p. 176.

16. See Volker Nerlich, “The Contribution of Criminal Justice,” in du Bois and du Bois-Pedain, *Justice and Reconciliation in Post-Apartheid South Africa*.

was not concerned with retribution, it gave expression to restorative justice. All three standard views agree in thinking that the process overrode the requirements of retributive justice. The first view sees this as undermining its moral legitimacy.¹⁷ The second view sees overriding justice as a morally acceptable cost of uncovering the truth and of promoting important social goods, most obviously, the peaceful transition to democracy.¹⁸ The third view agrees that retributive justice was not served, but argues that this does not mean that justice was neglected; this is argued by appealing to an alternative conception of justice that the TRC was said to exemplify. I propose an alternative, and argue that the TRC did not fail to respect the moral concerns underlying retributive justice. I suggest that viewing it in this way enables us to respond to some of the criticisms, and might have enabled the TRC to avoid some of the problems it encountered.

A number of factors support the idea that, in the South African context, overriding justice in order to promote overall welfare was a reasonable compromise. There was the great social good of the peaceful transition, combined with the difficulties there would have been with prosecutions. Leaving aside the legal questions of retroactive justice, practical difficulties included the lack of cooperation from the police and (at least for a while) judges supportive of the old regime; the threat of destabilization from the old-order security forces; the expense of prosecutions; the difficulty of obtaining evidence in many cases and the nature of the chain of command, which, it is argued, would have made it difficult to secure convictions.¹⁹ There was unquestionably some compromise involved: the agreement that there would be amnesties was a political compromise secured in the negotiation period. However, this was not the end of the story: the details of the way the TRC was

17. See, e.g., Darrel Moellendorf, "Amnesty, Truth, and Justice: AZAPO," *South African Journal on Human Rights* 13 (1997): 283–91; Stuart Wilson, "The Myth of Restorative Justice: Truth, Reconciliation and the Ethics of Amnesty," *South African Journal of Human Rights* 17 (2001). This was the reason that the Biko family took the TRC to the constitutional court.

18. E.g., Patrick Lenta, "Transitional Justice and the Truth and Reconciliation Commission," *Theoria: Journal of Political and Social Theory* 96 (2000): 52–73. This justification is questioned in Moellendorf, "Amnesty, Truth, and Justice: AZAPO." There was of course a political compromise; whether this was a morally acceptable compromise is a further question.

19. This is argued by du Bois-Pedain. See Antje du Bois-Pedain, *Transitional Amnesty in South Africa* (Cambridge: Cambridge University Press, 2007), ch. 7.

structured were not determined then, and there was room for creative moral solutions within the limits set by the political compromise.²⁰

A worry about seeing the TRC as a compromise with justice is that this might suggest that the process itself further wronged the very victims it was supposed to be vindicating by sacrificing the upholding of their rights for the promotion of overall welfare.²¹ Perhaps partly for this reason, the TRC was prominently defended not as a compromise with justice, but as giving expression to a kind of justice different from *retributive* justice called *restorative* justice. Tutu argued that restorative justice is a part of the traditional African conception of justice based on the value of *ubuntu*.²² *Ubuntu* is a Zulu word meaning roughly “human-ness,” which is understood in terms of its use in the expression “umuntu ngumuntu ngabantu,” which is translated as “a person is a person through other persons.” *Ubuntu* is argued to have both ontological and moral significance in African thought, in the way that persons are understood as interdependent.²³ Tutu says of restorative justice: “the central concern is not retribution or punishment but, in the spirit of ubuntu, the healing of breaches, the redressing of imbalances, the restoration of

20. That there would be some kind of amnesty provision was agreed to during the negotiations, but the detailed design of the TRC was a result of a wide consultation process, involving academics, politicians, and human rights lawyers from South Africa and from other countries that had been through political transitions; in addition, parties, organizations, and individuals had the opportunity to input into the design. Boraine, *A Country Unmasked*, pp. 47, 48. In presenting the TRC legislation, the minister presented its aim as “to facilitate the healing of our deeply divided society on a morally acceptable basis.” Quoted in *ibid.*, p. 71. For a defense of the TRC as an innovative moral solution, see Barbara Herman, “Contingency at Ground Level,” in *Moral Universalism and Pluralism*, ed. Henry Richardson and Melissa Williams, NOMOS 49 (New York: NYU Press, 2008).

21. See Herman, “Contingency at Ground Level.”

22. Tutu, *No Future without Forgiveness*, pp. 34–36, 51–52. Braithwaite argues that while the conceptualization and use of restorative justice in modern Western justice systems is a relatively recent phenomenon, it plays a central role in many non-Western and most premodern societies: Braithwaite, “Restorative Justice.” Daly questions this: Kathleen Daly, “Restorative Justice: The Real Story,” *Punishment and Society* 4 (2002): 55–79. Bottoms argues that premodern societies are more varied than restorative justice advocates present them as being: Anthony Bottoms, “Some Sociological Reflections on Restorative Justice,” in Von Hirsch, Roberts, and Bottoms, *Restorative Justice and Criminal Justice*, p. 91.

23. It has been argued that throughout sub-Saharan Africa this view of persons results in a different system of values to that typical in the developed West, and some argue that it is the basis for a distinct moral theory, based on the values of harmony and solidarity. Thad Metz, “Toward an African Moral Theory,” *Journal of Political Philosophy* 15 (2007): 321–41; Tutu, *No Future without Forgiveness*.

broken relationships."²⁴ Here we see the appeal to a different value than that retributivism is supposed to be concerned with, as well as the idea (perhaps only implicit in these quotes, but certainly argued by Tutu)²⁵ that this is a superior value.

While, as we will see, there is no clear and uncontested definition of restorative justice, what are called restorative processes often include face-to-face meetings between victims and perpetrators, where the aim is to repair the harms or wrongs done to the victim and to promote reconciliation and understanding between the parties rather than to punish perpetrators.²⁶ There are obvious reasons why the TRC seemed to exemplify restorative justice more than retributive justice: having amnesties rather than Nuremberg-style prosecutions, giving a central role to victims (including reparations), and of course the idea that the process was supposed to promote reconciliation. The rhetoric surrounding the TRC also had a strong emphasis on forgiveness, and this was often situated in the context of Christianity, not least due to the emphasis of Tutu as chair. However, as I argue below, there are questions about how restorative the TRC actually was. This is complicated by the extent of disagreement about how to understand restorative justice, and whether and how it is in tension with retributive justice.²⁷ There are nonretributive justifications of punishment, and, I argue, there are ways other than punishment of responding to the moral concerns underlying retributivism. I argue that the TRC did not exemplify a model of restorative justice that is in tension with the moral concerns underlying retributivism.

II

The debate between restorative and retributive justice is messy. There is no uncontroversial, agreed-on account of either, even among proponents, and some of what appears as a disagreement between the positions is a function of answering different questions, rather than of giving

24. Tutu, *No Future without Forgiveness*, p. 51.

25. Ibid.

26. For an overview of restorative processes, see Kathleen Daly and Russ Immarigeon, "The Past, Present, and Future of Restorative Justice: Some Critical Reflections," *Contemporary Justice Review* 1 (1998): 21–45.

27. See Von Hirsch, Roberts, and Bottoms, *Restorative Justice and Criminal Justice*.

competing answers to the same question. Retributivism is centrally an answer to the question “what justifies punishment?”; restorative justice can be seen as concerned with answering a different question, “what values should we be most concerned with promoting when responding to wrongdoing?” This means that some of the debate may be at cross-purposes. Proponents of restorative justice have different strategies for arguing for it, which correlate with different conceptions of what it is. One strategy is to argue that there is something morally problematic or mistaken about retributivism.²⁸ Alternatively, the moral concerns underlying retributivism could be accepted, but it could be argued that there are other, more important moral concerns to consider when dealing with the aftermath of wrongdoing. Yet again, restorative processes could be argued for by accepting the moral concerns underlying retributivism, and arguing that restorative processes, at least sometimes, give a better response to them than traditional court processes. Against the first and second strategies, I argue that retributivism responds to important moral concerns, and that neglecting these will lead to problematic versions of restorative justice. However, as the possibility of the third strategy shows, this does not entail that retributive and restorative justice need be seen only as competing paradigms.

Retributivism is an account of the justification of imposing hard treatment on a wrongdoer in response to her wrongdoing and is distinguished by three central, intimately related features. First, the justification of punishment is seen as intrinsic, rather than as the promotion of some separate good.²⁹ Second, the justification of punishment is essentially bound up with desert: the idea that it is what the wrongdoer has culpably done that makes punishment appropriate. Third, it is

28. They may argue that the idea that the wrongdoer intrinsically deserves to suffer is an expression of a morally problematic, cruel emotional response, not something that is rationally and morally justified. See, e.g., Braithwaite, “Restorative Justice,” p. 7. For responses to these ideas, see Jeffrie G. Murphy and Jean Hampton, *Forgiveness and Mercy* (Cambridge: Cambridge University Press, 1988); Michael Moore, *Placing Blame: A Theory of Criminal Law* (Oxford: Clarendon Press, 1997).

29. See Antony Duff, *Trials and Punishment* (Cambridge: Cambridge University Press, 1986), p. 195; Thad Metz, “Censure Theory and Intuitions about Punishment,” *Law and Philosophy* 19 (2000): 491–512; Moore, *Placing Blame*; Jeffrie G. Murphy, “Legal Moralism and Retribution Revisited,” *American Philosophical Association Presidential Address, The Proceedings and Addresses of the American Philosophical Association* 80 (November 2006); John Tasioulas, “Justice and Punishment,” in *The Routledge Companion to Ethics*, ed. John Skorupski (London: Routledge, 2010).

intrinsic to the justification of punishment that it is appropriate to impose it on the guilty, and only on the guilty.

The idea that punishment is justified intrinsically can be understood by contrasting it with a purely instrumental view, according to which imposing hard treatment is justified only if it will bring about some separate good, such as the maintenance of security, the deterrence of crime, or the reform of the wrongdoer.³⁰ Pure instrumentalist justifications of punishment think that the fact that punishment involves imposing hard treatment on someone always counts against it, and, therefore, that to justify punishment there must be some benefits produced by it which outweigh the badness of the hard treatment for the wrongdoer. In contrast, retributivists think that hard treatment itself is intrinsically appropriate; it is not a disvalue that needs to be counterbalanced by other benefits.

The problem with instrumentalist justifications of imposing hard treatment is that they provide no reason intrinsic to the justification of why we should not punish the innocent, of why punishment must be proportionate, and of what limits must be placed on what can be done to a person in punishing her.³¹ If the justification for hard treatment is promoting social goals such as deterring crime or changing offenders' characters, we will be justified in inflicting what seem like disproportionately harsh punishments if it turns out that these will promote these

30. There are of course a variety of possible combinations of intrinsic and instrumental views. A true mixed view of the justification of punishment would need to think that both wrongdoing and the promotion of some other good are needed to justify imposing hard treatment on someone. Such a view is easily confused with those retributive views which think that wrongdoing alone makes hard treatment appropriate, but that other moral concerns and goods should also be considered in designing criminal justice systems, or could outweigh the reasons provided by wrongdoing. A mixed view can also be confused with those instrumentalist views that provide instrumental reasons for punishing within constraints argued for by retributivists. To avoid these complications, I explain the core of the retributivist view by contrasting it with a pure instrumental view. For discussion of mixed justifications, see Moore, *Placing Blame*.

31. This point is made by many retributivists. See, e.g., Moore, *Placing Blame*, p. 97. Of course, the instrumentalist can argue that welfare is more likely to be promoted overall if only the guilty are punished. The worry about this is that, even if it can be shown to be plausible (a complex case, which will involve empirical considerations), it does not seem to give *the right account* of why we should not punish the innocent: the idea that we should not punish the innocent seems to be a basic moral claim which does not depend on whether it turns out that punishing the innocent does not deter crime as well as an alternative system.

goals. Retributivists argue that it is only by bringing in an intrinsic link between punishment and desert that we have a clear way to limit what it is fair to do to someone in response to her wrongdoing, and therefore for punishment to be just. The retributivist view is that *because* it is what the wrongdoer has culpably done that makes punishment appropriate, the guilty (and only the guilty) deserve to be punished, and the deserved punishment should be proportionate to the severity of the offense.

It is important to note that viewing hard treatment as an intrinsically appropriate response to wrongdoing is not to say that this is the *only* thing that needs to be considered in designing a criminal justice system, nor that it overrides all other moral concerns.³² For example, to say that rehabilitation does not provide the basic justification for imposing hard treatment on wrongdoers is not to deny that rehabilitation is an important good to be promoted.³³ The central retributivist idea is that wrongdoing is necessary to justify punishment, and that, given wrongdoing, no further reason is required; this is not to say that the reason for punishing provided by wrongdoing cannot be defeated or overridden by other concerns.

Thinking that hard treatment is an intrinsically appropriate response to wrongdoing need not be regarded by the retributivist as explanatory bedrock. It might be that we can give an edifying circular explanation of the appropriateness of condemning wrongdoing by showing how it fits into a system of other values and moral notions.³⁴ For example, the

32. Retributivism fits naturally in a pluralist moral theory that acknowledges more than one value to which we need to respond. In contrast, in their defense of "republicanism" and rejection of retributivism, Braithwaite and Pettit argue for their theory partly on the basis that it gives a comprehensive theory of criminal justice, rather than simply a theory of punishment. John Braithwaite and Philip Pettit, *Not Just Deserts* (Oxford: Clarendon Press, 1992). As I understand it, retributivism is specifically a theory of the justification of *punishment*, which therefore allows other values and goods to come into consideration in the design and justification of the criminal justice system as a whole (for example, in thinking about the extent of police powers). Retributivism has less global aspirations than their republican system, and does not attempt to justify all aspects of the system under one value.

33. Arguably, failing to see rehabilitation as an independent goal, rather than as supposedly part of the justification of imposing hard treatment, may lead to less focus on what might be done to bring it about.

34. See Duff, *Trials and Punishment*, pp. 42, 44; John Tasioulas, "Punishment and Repentance," *Philosophy* 81 (2006): 279–322. Retributivists argue that their theory respects wrongdoers as responsible moral agents, because implicit in *blaming* is a recognition of wrongdoers' moral status as *responsible agents*. In contrast, the deterrence-consequentialist view treats wrongdoers merely as a means to the promotion of social

appropriateness of condemning wrongdoing may be part of how we make sense of the appropriateness of praise and gratitude. Another strategy is to try to convince the opponent that they in fact share the intuition that wrongdoers deserve suffering. This is the focus of Michael Moore's influential and prominent account, according to which the fundamental retributivist idea is that wrongdoers deserve suffering, and that we ought to punish people to ensure they get what they deserve.³⁵ An alternative retributivist strategy is to explain the idea that hard treatment is an intrinsically appropriate response to wrongdoing by appealing to other, more fundamental moral concerns. For example, broadly Kantian views such as those of Jean Hampton and Thad Metz argue that the requirement to punish is based on respecting the intrinsic value of human agents.³⁶ Despite not making the idea that wrongdoers deserve suffering the basic explanatory notion, this kind of explanatory strategy is still retributivist, if the aim is to explain why grasping what wrongdoing is is grasping that it makes the imposition of hard treatment appropriate, rather than showing that condemning wrongdoing promotes some separate good. Different accounts of this correlate with different versions of retributivism;³⁷ I mention two possibilities here.

Censure retributivism, an increasingly influential account, holds that the justifying point of punishment is to express or communicate the censure or condemnation that fits the offense.³⁸ This is a version of

welfare, and the rehabilitationist treats them as patients to be managed. See Herbert Morris, "Persons and Punishment," in *Punishment and Rehabilitation*, ed. Jeffrie G. Murphy (Belmont, Calif.: Wadsworth, 1985); Moore, *Placing Blame*, p. 87.

35. Moore, *Placing Blame*.

36. See the chapters by Jean Hampton in Murphy and Hampton, *Forgiveness and Mercy*. See also Metz, "Censure Theory and Intuitions about Punishment." On the basis of respecting individual moral agents, he argues that condemning wrongdoing is necessary to stand up for justice, affirm the value of victims, and treat offenders as responsible.

37. For a survey of some possible retributivist views, see John Cottingham, "Varieties of Retributivism," *Philosophical Quarterly* 29 (1979): 238–46.

38. See Metz, "Censure Theory and Intuitions about Punishment"; Tasioulas, "Punishment and Repentance." Metz argues that the aim of punishment is to express rather than to communicate censure, because communication is too dependent on the recipient understanding the message. In response to this, it might be argued that the message expressed by punishment must be understood by the society in which it is expressed, even if not by the wrongdoer. In addition, it seems plausible that a censure retributivist must think that the hard treatment imposed on the wrongdoer must be such that it is at least *possible* that it could be understood by him as censure.

retributivism because the account sees hard treatment as an intrinsically appropriate response to wrongdoing, which is justified because it is deserved.³⁹ The point is not that we should promote the existence of a lot of condemnation of wrongdoing (which we could perhaps achieve by increasing wrongdoing), but that wrongdoers deserve appropriate and proportional condemnation for their offenses. It follows from the idea of *justified censure* that censure can be directed only at those who are guilty of wrongdoing, must be proportionate to the wrong's seriousness, and can only be directed at morally responsible agents.⁴⁰ This is why it matters that we impose roughly equal burdens in relation to similar offenses: it is through the imposition of these burdens that we condemn the offense.

Another version of retributivism is Arthur Ripstein's Kantian view, according to which punishment is required to uphold the law—to ensure that it is effective—and it does this both through prospectively guiding conduct (deterrence) and through retrospectively undermining actions that break the law.⁴¹ On Ripstein's account, our moral obligations to respect rational nature ground an obligation to form a state in which public law enables and defends each individual's innate right to freedom. This generates an obligation for the state to undermine actions that break the law: this is part of what it is for there to be law.⁴² And it

39. Tasioulas, "Punishment and Repentance," p. 285. While Moore argues that an apparently similar view, which he calls denunciation, is not retributivist, it seems to me that he does not have the same view in mind. What he calls a denunciation account sees the justification of punishment as denouncing wrongdoing to promote social cohesion. Moore, *Placing Blame*.

40. See Tasioulas, "Punishment and Repentance," p. 284. As Von Hirsh and Ashworth put it, "One is entitled to condemn only when one has reason to believe the conduct to be wrong—and then only to the degree of its wrongfulness." Andrew von Hirsch and Andrew Ashworth, "Not Not Just Deserts: A Response to Braithwaite and Pettit," *Oxford Journal of Legal Studies* 12 (1992): 83–98.

41. Ripstein argues that, in Kant's account, deterrence is not an independent value which provides a separate justification for punishment, but rather that deterrence and retribution mutually require each other. Arthur Ripstein, *Force and Freedom* (Cambridge, Mass.: Harvard University Press, 2009), p. 323. This questions the common idea that the opposition between retributivism and instrumentalist justifications of punishment is best characterized by a concern with "backward-looking" and "forward-looking" considerations, respectively.

42. Punishment so understood, like the institution of private property on Kant's account, cannot exist in the state of nature (a prestate condition in which we do not have public law).

entitles the state to hold those who break the law individually accountable for this: the law is founded on recognizing their standing as free agents, and therefore must treat them as such. The idea is not that punishment is justified by promoting law-abidingness, but that an intrinsic part of what it is for there to be laws is that breaches of law are to be punished. Ripstein argues that punishment *is* the supremacy of law: “for public law to be effective in space and time is for it to provide assurance to all by creating an incentive to compliance by announcing in advance that attempts to violate it will fail.”⁴³ The view is retributivist because it justifies punishment intrinsically: it is what the criminal has done that makes it appropriate to punish him. Breaking the law makes you appropriately liable to be punished, and generates a duty for the state to punish you.

For censure theory, the basic idea is not the intrinsic good of wrongdoers suffering, but the intrinsic appropriateness of wrongdoers being condemned for their wrongdoing, together with the idea that, typically, only hard treatment adequately conveys the censure which the wrongdoing warrants or which the wrongdoer deserves.⁴⁴ On Ripstein’s Kantian view, the state’s obligation to punish derives not from a general obligation to condemn wrongdoing (as in censure theory), or from an obligation to distribute suffering in relation to the deservingness to suffer, but from an obligation, which only the state can have, to defend public law.

My concern here is not to adjudicate between these accounts, but it is worth noting that their different explanations of the appropriateness of wrongdoing give them different resources in some respects. For example, for Moore’s view and censure retributivism, state punishment is not different in kind from the kinds of punishment that are possible in interpersonal relationships (sulking, being angry, cutting someone off).

43. Ripstein, *Force and Freedom*, p. 302.

44. Tasioulas, for example, appeals to “the sheer inadequacy of a purely symbolic mode of censure as a response to such grave wrong-doing as murder, rape and grievous assault.” Tasioulas, “Justice and Punishment,” p. 5. Against Braithwaite and Pettit, it is important to note that appealing to the effectiveness or appropriateness of one means of condemning wrongdoing over another is not to collapse the account into an instrumentalist justification. Braithwaite and Pettit, *Not Just Deserts*, p. 48. To say that buying someone a bottle of wine is a more effective and appropriate way of expressing gratitude for help they gave you than chanting to yourself how grateful you are is not to say that we should express gratitude only because it promotes some future good, such as supererogatory behavior.

Rather, the point of state punishment is to organize condemnation of wrongdoing, or giving wrongdoers the suffering they deserve, in a way that is efficient and effective, ensures due process, and keeps it from getting out of control and becoming revenge.⁴⁵ Without this we would be less likely to punish fairly or reliably. However, it may be argued that there are differences between the justification of state punishment and interpersonal punishment. Two possible differences are that first, we do not think the state must condemn *all* moral wrongdoing, and not even always the worst wrongdoing;⁴⁶ and second, some argue that the state has stronger grounds for punishing than individuals do, including, arguably, an obligation to punish. According to Moore, the reason the state should not punish all moral wrongs, but only those which are illegal, is given by the separate, extrinsic good of the rule of law, and by weighing the cost of punishing all moral wrongs against other goods.⁴⁷ On Ripstein's account, in contrast, it is intrinsic to the justification of state punishment that it is appropriate specifically for illegal behavior, and not just for any wrongdoing. Even if we agree that it is good if happiness and suffering are distributed in relation to the worthiness or deservingness of happiness and suffering, it does not follow that bringing this about is the role of the state. On this view, an attempt to condemn moral wrongdoing in general, or to distribute suffering in relation to desert, would be an unjustified interference by the state in individuals' moral lives, and not something the state has an entitlement, much less an obligation, to promote. Defending public law, in contrast, is a specific obligation of the state. Not only do these accounts have some different resources for the justification of state punishment, they illustrate the possibility that there may be different ways of respecting the moral grounds underlying retributivism.

The complex debate about the justification of punishment becomes still more complicated when retributivism is contrasted with restorative

45. See Jeffrie G. Murphy, *Getting Even: Forgiveness and Its Limits* (Oxford: Oxford University Press, 2003); Moore, *Placing Blame*, pp. 186–87.

46. For example, we do not think that the state should condemn infidelity, betrayal, lying, and so on between private individuals, even in cases where we might judge this to be a worse wrong than, say, a minor case of shoplifting. If the justifying ground of punishment is to condemn wrongdoing, it is not clear why this wrongdoing should not be condemned.

47. Moore, *Placing Blame*, p. 186. Moore argues that all wrongdoing creates a reason to create institutions designed to impose proportionate suffering in response to it. *Ibid.*, pp. 186–87.

justice, not least because of the lack of an agreed-on account of what restorative justice is, even among proponents. There is dispute about whether restorative justice should be defined in terms of an opposition to retributivism and to punishment,⁴⁸ in terms of certain kinds of processes,⁴⁹ in terms of the values to which it responds (such as caring and harmony),⁵⁰ or in terms of its effects (such as, supposedly, healing and reconciliation). Restorative processes frequently (although not necessarily always) involve nonadversarial face-to-face meetings between perpetrators and victims. These meetings often aim to incorporate some aspects of what they call informal justice by giving a more prominent role to laypeople than does the traditional criminal justice system.⁵¹ Restorative processes are often an alternative to or diversion from the criminal justice process, and avoiding incarceration as an outcome is one motivation for this diversion. The aims of restorative processes include repairing the wrong or harm done to the victim and reconciling relationships.⁵²

One strategy for arguing for restorative justice is to reject the concerns retributivism is based on. The intuition that wrongdoers deserve to suffer and the idea that we ought to punish to ensure that wrongdoers get the suffering they deserve are often rejected by proponents of restorative

48. Braithwaite, "Principles of Restorative Justice"; Zedner, "Reparation and Retribution."

49. A commonly cited definition is that "restorative justice is a process whereby all the parties with a stake in a particular offense come together to resolve collectively how to deal with the aftermath of the offense and its implications for the future." Marshall, quoted in Braithwaite, "Restorative Justice," p. 5. The UN Handbook on restorative justice defines it as "any process in which the victims and the offender, and, where appropriate, any other individuals or community members affected by the crime participate together actively in the resolution of matters arising from the crime, generally with the help of a facilitator." United Nations, *Handbook on Restorative Justice Programs* (New York: United Nations, 2006), p. 6.

50. See Zedner, who argues that "in place of meeting pain with the infliction of further pain, a truly reparative system would seek the holistic restoration of the community." Zedner, "Reparation and Retribution," p. 233. See Braithwaite and Pettit, *Not Just Deserts*; Tutu, *No Future without Forgiveness*.

51. See Daly, "Restorative Justice."

52. Von Hirsch, Ashworth, and Shearing argue that restorative justice has multiple and unclear goals, unspecified means and modalities. Andrew von Hirsch, Andrew Ashworth, and Clifford Shearing, "Specifying Aims and Limits for Restorative Justice: A 'Making Amends' Model?" in Von Hirsch, Roberts, and Bottoms, *Restorative Justice and Criminal Justice*, p. 22.

justice.⁵³ However, I have argued that the retributivist thought that punishment is justified because deserved need not be based on this intuition. The alternative versions of retributivism I have looked at are based on important moral concerns which are less likely to be rejected by proponents of restorative justice: condemning wrongdoing and defending and enabling public law. Further, I argue that some apparent differences between retributive and restorative justice are misleading, and that the versions of restorative justice which are most clearly opposed to retributivism face serious problems.

Restorative justice is sometimes thought of as an alternative to punishing.⁵⁴ However, while restorative processes typically provide an alternative to *incarceration*, they may involve other forms of sanction, such as the imposition of community service, and they may require the perpetrator to take some steps to make up to the victim the wrong or harm caused. These sanctions can be seen as hard treatment, and can be imposed with the aim of censuring wrongdoing. Some proponents of restorative justice processes in fact argue for them on the grounds that they are an effective way of shaming the wrongdoer and enabling the community to condemn wrongdoing.⁵⁵ If restorative processes are justified as effective ways of condemning wrongdoing, then they are not opposed to the moral concerns underlying censure retributivism. On the other hand, if restorative processes justify sanctions by their role in promoting some separate good (such as remorse or victim-satisfaction), they will be subject to the objections to purely instrumentalist justifications of punishment (that sanctions can be imposed which seem disproportionate and unfair if they will promote the relevant good), and this problem may be exacerbated by the potential for abuse in allowing sanctions to be imposed by lay participants.⁵⁶

53. Braithwaite, "Restorative Justice"; Braithwaite and Pettit, *Not Just Deserts*.

54. Zedner, "Reparation and Retribution," p. 233; Dzur and Wertheimer, "Forgiveness and Public Deliberation," p. 5; Randy E. Barnett, "Restitution: A New Paradigm on Criminal Justice," *Ethics* 87 (1977): 279–301; United Nations, *Handbook on Restorative Justice Programs*, p. 61.

55. See Braithwaite, "Restorative Justice," p. 30; Charles Barton, "Theories of Restorative Justice," *Australian Journal of Professional and Applied Ethics* 2 (2000): 61; Barnett, "Restitution," p. 9; United Nations, *Handbook on Restorative Justice Programs*, p. 61.

56. In light of Ripstein's Kantian account, aiming to promote remorse as an outcome might be argued to be an unjustified intrusion of the state into individuals' moral lives. It may be desirable if perpetrators are remorseful (and if we have processes that allow the

Restorative justice is often motivated by a critique of current criminal justice systems and prison conditions, as well as concerns with social justice, such as relations between crime and poverty.⁵⁷ However, this critique does not address the question with which retributivism, as a moral justification of the imposition of hard treatment, is concerned, and these concerns can be recognized as important considerations for a retributivist. Criticizing prison conditions, or even rejecting incarceration as a justified form of hard treatment, is not the same as rejecting the idea that hard treatment is an intrinsically appropriate response to criminal wrongdoing.

While restorative processes are nonadversarial, the idea that this involves a contrast with a retributivist-oriented traditional criminal justice system may be misleading.⁵⁸ Restorative processes are typically used only when there is a noncontroversial admission of guilt on the part of the wrongdoer; they are typically not used to establish guilt. Therefore, as Daly points out, they occur in a different part of the process than that in which the adversarial part of traditional criminal justice court cases occurs. In addition to showing that the nonadversarial nature of restorative process may not constitute a clear contrast, this also casts doubt on the idea that restorative processes could replace the current criminal justice system. Restorative justice processes typically occur with the prosecution in the courts as a backup, and often depend on the existence of this backup.⁵⁹ This was true of the TRC processes, which dealt with perpetrators prepared to admit what they had done, and where perpetrators had the threat that if they did not disclose the full truth about crimes to the TRC, they might later be prosecuted.

Restorative processes aim to give a more central role to victims than is traditionally the case in criminal justice proceedings. This issue is

possibility of remorse), but attempting to get us to have desirable moral beliefs is not, on this account, the role of the state. On the other hand, both Moore's retributivism and some censure theorists allow a role for remorse in their accounts.

57. See Daly and Immarigeon, "The Past, Present, and Future of Restorative Justice"; Zedner, "Reparation and Retribution," p. 230.

58. Further, some critics argue that the nonadversarial nature of the confrontation between victim and offender can be romanticized, can put victims under unfair pressure to forgive, and can even result in further victimization. For an account of this argument with respect to the TRC, see Wilson, "The Myth of Restorative Justice."

59. See Braithwaite, "Restorative Justice," p. 26.

complex because there are many different ways in which victims can be incorporated into justice processes, not all of which are connected to understanding and reconciliation. For example, letting victim-impact statements play a role in sentencing can lead to harsher sentencing. Respecting victims is put forward by some as part of the justification of retributivism, by those who argue that defending victims requires condemning the ways they have been treated and upholding the law.⁶⁰ However, a distinctly restorative way in which victims may be incorporated into justice processes is when such processes aim to meet the needs the wrongdoing has created in the victims.⁶¹ There are different possible versions of this. One possibility would be to make *perpetrators* do something to meet the needs created in the wrongdoer, and another version would be to set up processes in which the state does this. I argue that both are problematic.

The first version, while it may not involve incarceration, can still be seen as placing a sanction or burden on the perpetrator.⁶² Further, it may involve placing burdens that are unjust: if what matters is that victims are treated equally in how they are compensated,⁶³ then it does not matter whether this is roughly equal in cost to perpetrators. Offenders are very differently placed to meet victims' needs and to make up for the harm that they have caused, so prioritizing the perpetrator's restoring what she has taken or broken will place much greater burdens on poor perpetrators. An alternative version of needs-oriented restorative processes could be that, rather than making the perpetrator make up to the victim the harm suffered, this could be done by the state. Such a view also faces problems. One problem is that if the ground of the obligation to respond to wrongdoing is that wrongdoing creates needs and needs must be met, it is not clear why the fact that the needs were created by

60. Hampton, for example, defends retributive justice in terms of the idea that retribution corrects the wrongdoer's message that the victim of a particular violation was not worthy of basic human respect. She argues that, through retribution, the community reasserts the truth of a victim's value. See the chapters by Hampton in Murphy and Hampton, *Forgiveness and Mercy*.

61. See Barnett, "Restitution."

62. See Von Hirsch, Ashworth, and Shearing, "Specifying Aims and Limits for Restorative Justice," p. 26.

63. See Barnett, "Restitution."

wrongdoing gives them priority over any other needs that exist.⁶⁴ Argument is needed for the idea that it is just for the state to redistribute property to meet the needs of unlucky victims of crime. And argument is needed about why the needs wrongdoing creates in victims are more important than other important moral concerns, such as condemning wrongdoing, denouncing injustice, and defending the law. In a society in which we respond to breaches of the law only by attempting to give back to those who have lost what they have lost, it is not clear that the laws are actually in force.

As previously mentioned, restorative justice is defended by the desirability of promoting such values as reconciliation and understanding. However, simply appealing to such values does not, in itself, determine what kind of process will promote them, and leaves open whether punishment can and should play a role in this.⁶⁵ It is conceivable that many victims desire punishment before thinking about reconciliation. Further, healing, forgiveness, and reconciliation may be important values without being part of justice,⁶⁶ and it does not follow from their importance that it is the role of the state to promote them. It may be that focus on these values leads to neglecting other important moral requirements, such as condemning wrongdoing and defending public law. Finally, it is questionable whether it is fair to require victims to pursue the mending of relationships with those who have wronged them, and whether it really makes sense to talk of “repairing relationships” in the context of being wronged by a stranger. It is argued that talk of bringing together all those with a “stake” in an offense is based on the model of a conflicted relationship in need of mediation, rather than on a crime as a

64. Consider a case in which my car has been stolen, but I can afford to buy another one, while you have not had a car stolen since you cannot afford to own a car. It looks like your need is greater than mine, so if our concern is just with meeting needs, we should just look at the distribution of welfare.

65. Duff argues that “restoration is not only compatible with retribution, it *requires* retribution, in that the kind of restoration that crime makes necessary can be brought about only through retributive punishment.” Antony Duff, “Restoration and Retribution,” in Von Hirsch, Roberts, and Bottoms, *Restorative Justice and Criminal Justice*.

66. Some critics think that restorative justice is not a distinct form of *justice* at all, but simply the prioritizing of other values that are also important, such as meeting needs and promoting harmony. For example, Tasioulas suggests that it is “something akin to repentance based mercy.” John Tasioulas, “Repentance and the Liberal State,” *Ohio State Journal of Criminal Law* (2007): 518.

wrong to a victim, and this seems more appropriate to, for example, divorce mediation than to responding to serious wrongdoing such as rape or murder.⁶⁷

Proponents of restorative justice sometimes stress the role of what they call informal justice in restorative processes,⁶⁸ and some restorative processes give more of a role to laypeople than the traditional criminal justice system does,⁶⁹ and related accounts appeal to the family and family relations as a fundamental model.⁷⁰ While much can be said about the alienating and bureaucratic nature of the state and the criminal justice system,⁷¹ there is great danger in romanticizing the roles of laypeople, families, and communities. According to many accounts of justice, it is crucial that state officials serving in an official capacity act on behalf of all of us, and *not* their personal interests, families, and communities: this is an important requirement of justice.⁷² Proponents of restorative justice sometimes object that the criminal law wrongly takes crimes away from their victims by prosecuting them as public wrongs. However, it is arguable that condemning wrongdoing, defending victims, and upholding the law are public concerns. On Ripstein's Kantian account, for example, it is crucial that crimes *are* offenses against public law, and this is why, although a private individual can choose not to stand on her rights in pursuing a claim to civil compensation, the state is obliged to uphold the law by pursuing punishment for crimes.

67. See Wilson, "The Myth of Restorative Justice," pp. 552–53.

68. Informal justice "may include qualities such as being disconnected from state power, nonbureaucratic, decentralized, and having flexible (or unwritten) substantive and procedural rules." Richard Abel, introduction to *The Politics of Informal Justice*, ed. Richard Abel (New York: Academic Press, 1996), p. 4. See also Bottoms, "Some Sociological Reflections on Restorative Justice," p. 104.

69. See Daly, "Restorative Justice." There are many different kinds of processes which are alternatives to the traditional criminal justice system. Some, such as alternative dispute resolution, may involve participants with some formal training; others, such as community conferences, may involve a combination of trained participants and entirely lay participants, such as family members.

70. Roger T. Ames, *Confucian Role Ethics* (Honolulu: University of Hawai'i Press, 2011); Metz, "Toward an African Moral Theory."

71. See Braithwaite, "Restorative Justice," pp. 47–48.

72. This is particularly clear on Ripstein's Kantian account, but the other retributivist views also limit its reach to lawbreakers, and require legislated frameworks to determine and maintain due process.

III

I have argued that retributivism responds to important moral concerns, and not, as Braithwaite suggests, corrosive remnants of outdated survival instincts.⁷³ Further, I have suggested that the conflicts between restorative and retributive justice are not always clear, and that restorative processes cannot be defended simply by the ideal of promoting alternative values. However, this leaves the possibility that restorative processes may be a way of responding to the moral concerns underlying retributivism. I argue that the TRC can illustrate this. To start with, it should be noted that there are a number of respects in which the TRC was not a typical restorative process. While restorative processes do not issue in punishments, neither do they typically involve amnesties, if amnesty is understood, as it was in the context of the TRC, as lifting the ordinary liability to criminal prosecution. Understood in this way, the very idea of an amnesty is something that makes sense only within the context of the ordinary, punishment-oriented criminal justice system.⁷⁴ Restorative processes often aim at securing an expression of remorse from perpetrators, and may involve reparations to be paid by perpetrators; the TRC required neither of these from amnesty applicants. And while there was a possibility of a one-to-one meeting between perpetrators and victims, this was not a necessary feature of either the amnesty process or the victims' hearings, while it is one of the central features of many restorative justice processes.⁷⁵ Further, I now argue that the features of the TRC which were apparently restorative can be seen as responding to the moral requirements with which at least some versions of retributivism are concerned: to condemn wrongdoing and uphold the rule of law.

73. Braithwaite, "Restorative Justice," p. 7.

74. Similarly, mercy is clearly not a way of punishing, yet it is arguable that mercy makes sense only within the context of retributivism: it is only in the context of punishment which is deserved for wrongdoing that we can make sense of the idea of punishing less than is deserved, on compassionate grounds. See John Tasioulas, "Mercy," *Proceedings of the Aristotelian Society* 103 (2003): 101–32. Note that the TRC's amnesty provisions should not be seen as a way of being merciful, since mercy is not just any kind of leniency in punishing, but rather leniency in punishing on grounds of compassion for the wrongdoer.

75. For a further discussion of ways in which the TRC did not exemplify standard restorative processes, see du Bois-Pedain, *Transitional Amnesty in South Africa*, p. 284.

I noted above that viewing the justification of imposing hard treatment as intrinsic need not mean thinking that the appropriateness of imposing hard treatment is explanatory bedrock; this means that it does not rule out the possibility of other ways of responding to what grounds the obligation. Barbara Herman suggests a way of looking at the TRC that does not see it as a trade-off or compromise with justice, but rather as a nonstandard way, justified by the specific circumstances of transition, of respecting the ground of obligation underlying the ordinary requirements of justice.⁷⁶ The idea is something like this: what we think of as a principle or right that must always be respected may not be the deepest level of moral obligation, but rather an expression of the standard way in which a deeper ground of obligation must be honored.⁷⁷ She argues that in unusual circumstances, such as political transitions, it may be that the best way of honoring the value which grounds a standard right or principle, such as the idea that criminal offenders should be prosecuted, is not the standard way.⁷⁸ This suggestion can be defended by arguing that the TRC did not compromise retributive justice if it was the best way, in the circumstances, of respecting the ground of the obligation to punish.

According to Ripstein's Kantian view, punishment is the defense of public law. On this account, there are moral problems with the justification of punishing after a transition from a nonlegitimate state to a legitimate one, particularly when the transition is from a state that, like the apartheid state, was not a minimally legitimate state.⁷⁹ Retroactive

76. Herman, "Contingency at Ground Level."

77. *Ibid.*, pp. 29, 32.

78. The argument is not merely pragmatic. As Herman argues, while a Kantian cannot simply appeal to the expediency of a chosen course of action in terms of the promotion of overall welfare, we must pay attention to how the practical details of the situations in which we find ourselves constrain the ways in which we are best able to express respect for relevant values. *Ibid.*, pp. 19–21.

79. It was, arguably, in Kant's terms, a state of barbarism, which is worse than a state of nature: in a state of nature, we lack the minimally rightful relations to one another that civil law ensures. In a state of barbarism, we have a powerful force using might to enforce wrongful relations. A difference may be made when a legitimate state is taken over, and then in some sense restored. For example, Ripstein argues that we could justify prosecuting Nazis under the laws of the Weimar republic, but it is hard to see a parallel with this in the South African case. Ripstein, *Force and Freedom*, chap. 11. For discussion of the point with relation to the Nazi regime, see Helga Varden, "Kant and Lying to the Murderer at the Door . . . One More Time: Kant's Legal Philosophy and Lies to Murderers and Nazis," *Journal of Social Philosophy* 41 (2010): 403–21.

justice of course involves legal difficulties, but here the concern is with the moral justification of state punishment. The problem is that punishing is a defense of public law, which involves a legitimate authority imposing a sanction that it announced in advance would be imposed. When the previous state was not legitimate, and the sanctions were not announced in advance, it is not clear that punishment can be said to be playing the role of defending public law. At the same time, the very values that ground the requirement to punish give reasons to legitimate the new order by responding to atrocity. Public law defends the value of all individuals; establishing a legitimate order requires responding to the fact that this value has been seriously disrespected. Here Ripstein's Kantian account and censure-theory retributivism come very close together, since both give reasons to think that we need to publicly acknowledge and condemn wrongdoing. In addition, this kind of transition creates a need for a process to deal with political opponents of the previous regime whose actions were criminalized by it, without simply releasing all criminals currently arrested. The TRC process provided a formalized way of undoing criminal sentences (and the liability to be prosecuted) while at the same time recognizing and condemning the wrongdoing.

The principle of having amnesties was a political compromise agreed to in the negotiation period, and having amnesties meant that the TRC process was not oriented toward imposing hard treatment on wrongdoers. However, I argue that the way amnesties were used can be defended within a retributivist framework concerned with condemning wrongdoing and upholding public law. The amnesty provisions were sometimes talked about in terms of a trade-off between justice and truth.⁸⁰ On this view, the idea is that justice was held, in the circumstances, to be less important than truth, and that the amnesties provided a way of bringing out the truth about what had happened that would not have been possible had there been prosecutions. It seems plausible that the state would not have been able to prosecute the seven thousand perpetrators who came forward, and many of these provided evidence that would have been difficult to uncover, about crimes that had no other witnesses. However, this use of the amnesty provisions need not be seen as straightforwardly a *trade-off* with justice, because if the process really was

80. Tutu, *No Future without Forgiveness*.

necessary to uncover the truth, then it was also necessary for a public condemnation of it. The point here is not simply that more people were drawn into the amnesty process than would have been prosecuted. Rather, the idea is that the process was a necessary part of creating a public record and of condemning atrocity. If, in the circumstances, the details about atrocity can be uncovered only by *not* imposing hard treatment, then not imposing hard treatment is necessary to condemn wrongdoing, even if this means that the wrongdoers do not get the full censure their acts deserve.⁸¹ There were cases in which people had disappeared and no one knew what had happened to them except the perpetrators. During apartheid, many white South Africans had shut their eyes to the details of the brutality carried out in the name of the system most of them supported. In these circumstances, finding out what had happened and making public the details of atrocities were important parts of the official recognition of what had happened, the public condemnation of it, and the creation of an official record.

In addition to the role they played in uncovering the truth, a further point about the amnesty provisions concerns the allocation of responsibility. This is a central concern of retributivism, bound up with the fact that all versions of retributivism see a deserved response to what the wrongdoer has culpably done as the basis for punishment. After the transition from apartheid, there was reason to think it would have been difficult to pin criminal liability to those at the top of the system, and in fact it was only the apartheid "foot soldiers" who made amnesty applications, not apartheid's leaders. Where political opponents were murdered, the command from the top was given in ways which can be argued to be ambiguous, such as the instruction to "permanently remove someone from society," where it seems clear that everyone in the chain knew what was meant, but legal guilt might have been hard to establish conclusively for those at the top of the chain.⁸² In addition,

81. The special circumstances of political transition are important for this part of the argument, since giving amnesty for disclosure could not be an ongoing feature of a workable normal criminal justice system.

82. See du Bois-Pedain, "Communicating Criminal and Political Responsibility in the TRC Process," in du Bois and du Bois-Pedain, *Justice and Reconciliation in Post-Apartheid South Africa*, for a detailed discussion. She argues that "De Klerk . . . is probably right in claiming that no court of law could ever ascribe to him criminal responsibility for illegal acts committed by members of the security police during his presidency" (p. 65).

criminal prosecutions would have left out the many complicit supporters of apartheid, in whose name wrongs were carried out. Apartheid was supported by most of the white electorate. As du Bois-Pedain argues, politically motivated acts may have been done in the name of many who approved of them, many who turned a blind eye, many who colluded, and many who benefited from them; further, the system may have depended on this.⁸³ Not only does this make it difficult to single out perpetrators, but it also suggests that using criminal proceedings to condemn only particular individuals who carried out the orders, without any repercussions for the many complicit citizens whose support was essential to the system, and under circumstances in which it is very difficult to pin responsibility to leaders, may allocate responsibility in ways which are not reasonably in line with considerations of desert. The idea is not simply that because the state could not prosecute everyone, it would have been unjust to prosecute a few (the criminal justice system never succeeds in prosecuting all offenders), but that it matters, and matters in terms of the central justification of retributivism, if prosecutions are carried out in ways which are very out of line with considerations of responsibility. In such circumstances, we will not be condemning wrongdoing appropriately and proportionately. Although perpetrators were not punished, the public and individual nature of the amnesties meant that the process upheld the idea of individual accountability: individuals were called on to give an account of what they had done, which would be placed on a public record.⁸⁴

The moral role of the amnesty provisions must also be seen in light of the fact that the TRC did not *just* give amnesties. The TRC was mandated to write a public report, to “establish as complete a picture as possible of gross human rights violations that occurred during the conflicts of the past,”⁸⁵ and this included “accountability findings” with respect to both individuals and organizations. Because the TRC process

83. Du Bois-Pedain, “Communicating Criminal and Political Responsibility,” p. 63. See Christodoulidis and Veitch, “Reconciliation as Surrender,” p. 14; Pumla Gobodo-Madikizela, “Radical Forgiveness: Transforming Traumatic Memory beyond Hannah Arendt,” in du Bois and du Bois-Pedain, *Justice and Reconciliation in Post-Apartheid South Africa*, pp. 37–61, at p. 39.

84. As du Bois-Pedain points out, while, in an ordinary trial, the accused has the right to remain silent, the TRC amnesty proceedings required active “account giving.” Du Bois-Pedain, *Transitional Amnesty in South Africa*, p. 258.

85. Quoted in Boraine, *A Country Unmasked*, p. 48.

was not about establishing the legal guilt of individual applicants, its allocation of responsibility and its condemnation were not *limited* to those who came before it as amnesty applicants, and meant that it could in fact have a wider condemnation of wrongdoing than a process which had been oriented only to specific prosecutions would have had. The TRC report made formal declarations of responsibility, which included assigning responsibility to, for example, former President P. W. Botha, to the apartheid state, and to nonstate bodies.⁸⁶ A declaration of condemnation in a public document may not have the weight that hard treatment has, but that it had some weight can be seen in the number of parties and individuals who attempted to stop the publication of details concerning them.⁸⁷

In addition to not punishing, the most obvious ways in which the TRC seemed to exemplify restorative justice was with the victims' forums, which enabled victims to speak about what had been done to them in a nonadversarial, supportive environment, and the Reparations Committee, which was supposedly concerned with meeting the needs created in victims. However, it is arguable that these did not exemplify a model of restorative justice that is in tension with the moral concerns underlying retributivism: we can see the other aspects of the process as ways of responding to the requirement to condemn wrongdoing and of upholding victims' value and honor, in light of the fact that amnesty meant that perpetrators would not be punished. As mentioned above, retributivists have argued that upholding the value of victims by officially and publicly condemning the wrongs done to them is a part of punishment.⁸⁸ During apartheid, the reality of victims' suffering was officially denied, and white South Africans were oblivious (willfully or otherwise) to the suffering caused in their name. The process of allowing victims to talk about what had happened to them, and recording this in official documents, was an important counter to this previous denial.

As we have seen, some versions of restorative justice stress meeting the needs wrongdoing creates in victims: the TRC reparations were

86. There are questions about what the TRC actually did with this capacity, and the extent to which it seemed to equate violence on both sides of conflict, treating violent acts carried out in opposition to an unjust state as morally equivalent to those carried out in the perpetuation of injustice.

87. See du Bois-Pedain, "Communicating Criminal and Political Responsibility," p. 74.

88. Murphy and Hampton, *Forgiveness and Mercy*.

sometimes spoken of in this light, and this was linked to restorative justice.⁸⁹ A problem with this description, however, is that the victims were paid a standardized amount, which was *not* determined by the specific needs created by the specific wrongs they had suffered. Indeed, in relation to most of the atrocities the TRC heard about, no financial payment could rectify them, and it may be insulting to suggest that it could. And the TRC process allowed for paying reparations only to those victims who came before it, leaving out millions of victims of apartheid. The process never had a chance of meeting the needs created by apartheid, nor of meeting the specific needs created in the victims of atrocity. More promising, in my view, is seeing the reparations paid as part of the TRC process as playing a symbolic role: as part of the process of condemning wrongdoing. Reparations can serve to meet needs, but they can also serve to express a public message, to say, for example, “we acknowledge that you should not have been treated like this, and we condemn the widespread and systematic failures involved in letting it happen.”⁹⁰

In my view, there would have been clear advantages to seeing the reparations in this way, rather than talking about them in light of meeting victims’ needs. First, the resentment caused by the inadequacy of the payment in light of actually meeting needs might have been reduced. Instead of focusing simply on the issue of the monetary amounts, the payments could have been more explicitly seen as part of the South African public’s recognizing and condemning of the wrongs done in its name. Second, there might have been more pressure on the government to acknowledge the importance of other steps to rectify the social injustice created by apartheid. And third, the proposals the TRC made to the government for a one-off apartheid “tax,” as well as the proposals for reparations from big business, might have been better received.

Symbolic reparations might also have served to acknowledge a further legal and moral problem created by the circumstance of transition: the impossibility of victims suing for what they lost under a different legal system. In ordinary criminal law, the state imposes punishment on

89. Tutu, *No Future without Forgiveness*.

90. The TRC report also recommended a number of symbolic gestures, such as museums and monuments, meant to be, again, a part of the public condemnation of wrongdoing and affirmation of the truth about the victims.

wrongdoers, but does not give back to victims what has been taken from them. Public law defends the rights of people to sue for damages when they have been wrongfully harmed, rather than pursuing these damages on behalf of individuals. While the state does not make up to victims what they have lost, it provides the framework in which victims can choose to sue for what they have lost. This is an important part of defending victims' entitlements. But in the case of the apartheid transition this possibility did not exist. There is no law under which black South Africans could pursue justified grievances against years of wrongful impoverishment. Symbolic reparations could have played a role in acknowledging this.

Moral (as opposed to merely pragmatic) defenses of the amnesty process at the time appealed to the idea that a nonretributive response was better than punishing because of the supposed moral superiority of forgiveness and reconciliation over revenge. We have seen reason to think that this defense was confused. The amnesty process was not typical of restorative justice processes. Insistence that victims reconcile with wrongdoers is questionable. No evidence was given to support thinking that amnesties would promote forgiveness; forgiveness cannot be granted by a public, official process; and revenge is not the only alternative to forgiveness and reconciliation, since punishment is not revenge. It may be that by stressing the confused justification, the amnesty process was less effective at condemning wrongdoing than it could have been. Du Bois-Pedain argues that the Amnesty Committee positively avoided engaging applicants with the morality of their actions, and that this undermined its functioning as an accountability process.⁹¹ If the amnesty process had been linked more explicitly to the process of condemning wrongdoing than to the idea of forgiveness, perhaps this unfortunate effect could have been avoided.⁹² Similarly, the rhetoric that presented forgiveness and revenge as the two options facing the country—and saw the TRC as exemplifying the former—may have led

91. Du Bois-Pedain, *Transitional Amnesty in South Africa*, p. 271.

92. Du Bois-Pedain argues that "the moral gap which this creates was entirely avoidable. The TRC Act did not preclude the Committee from making a moral as well as a legal evaluation. That the Committee opted for a morally neutralised interpretation of the political offence requirement need not have prevented it from, in appropriate cases, combining the finding that applicants qualified for amnesty with a message of strong moral disapproval of their conduct." *Ibid.*, p. 272.

to the aim of the victims' forums not always being clear, and to questionable practices, such as routinely asking victims whether they forgave. If the process had been seen as aimed at condemning wrongdoing through upholding the value of victims, rather than as justified because it promoted forgiveness and harmony, this might have been avoided.

I have suggested that the TRC need not be seen as having overridden or neglected the moral demands retributivism is concerned with, such as the requirement to condemn wrongdoing and uphold public law. My argument does not imply that there was no compromise or loss involved in the process. The complex circumstances meant that the usual means of condemning wrongdoing could not function, which in turn meant that wrongdoers did not get the full censure their wrongdoing deserved. My argument does not deny this; rather, it suggests that, in these circumstances, this process resulted in our being able to legitimize the new order by creating a public record of past atrocity, to condemn wrongdoing, to stand up for justice, to uphold the value and honor of victims, and to treat wrongdoers as responsible, all in a way better than attempting to prosecute some perpetrators in the courts would have. The TRC can be viewed as an innovative response to a situation in which condemning wrongdoing and defending the legal order were important, but almost impossible to achieve by means of normal legal procedures.

IV

In conclusion, I suggest that drawing on this discussion of the TRC can inform the way we think about the relation between retributive and restorative justice in a nontransitional context. I have argued that restorative processes can provide alternative ways of responding to some of the values with which retributivists are concerned. Even if we think that condemning wrongdoing is important, and that imposing hard treatment is the only fully adequate way of condemning wrongdoing, punishment is not always possible. There may be different kinds of reasons for this. In the case of the TRC, some of the reasons I have discussed include that amnesties were agreed on in the negotiations; that amnesties were in some cases necessary to expose the details of particular perpetrators' wrongdoing, and therefore were the condition of condemning it at all; and that the circumstances of transition create problems with punishing offenses carried out under a different order. But

another kind of reason why punishment might be impossible is that many available punishments might be morally impermissible. Retributivists often appeal to the Kantian idea of respect for the dignity and humanity of persons, arguing that punishing wrongdoers is necessary to respect the dignity both of victims and of wrongdoers. If the moral concerns underlying the requirement to impose hard treatment are the value and dignity of persons, clearly we cannot punish in ways that do not respect the value and dignity of persons.⁹³ This is why retributivists do not standardly think that torturers should be tortured and rapists raped, and why a retributivist need not accept the death penalty. But it is arguable that many current incarceration practices do treat wrongdoers in ways which are incompatible with respecting their dignity. If this is true, then our current system of punishing is straightforwardly impermissible for a Kantian retributivist, which means that we need alternative ways of responding to wrongdoing.

In addition, the TRC case highlights two possible further problems with the way systems of retributive justice can be implemented: the allocation of responsibility, and the extent to which victims have a realistic chance of suing for their losses. I suggested that one reason for thinking that the TRC was able to condemn wrongdoing more effectively than prosecutions of a few individuals would have is the idea that the latter would not have been compatible with identifying, let alone allocating responsibility in a reasonable way, given the difficulty in prosecuting leaders and complicit beneficiaries. It is of course not possible for any state to pursue all criminals, and it cannot be an objection to the legitimacy of a criminal justice system that it does not, but it does matter morally, and on retributive grounds, if it turns out that a state systematically prosecutes and punishes some criminals rather than others in ways which are strongly out of line with considerations of desert. For example, if white-collar criminals are enormously less likely to be punished than blue-collar criminals, or if people of some races are very disproportionately likely to be subject to criminal punishment, this is problematic, on retributivist grounds, and may give us reason for considering alternative processes. Second, I argued with respect to the TRC

93. This is also why retributivism is perfectly consistent with a radical critique of the current prison system, and why retributivists need not be in favor of increasingly harsher sentences.

that the restorative emphasis on repairing harm could be justified by a recognition of the fact that wrongdoing was not being properly condemned in the normal way, and by a recognition of a failing in the law: there was no legal way for black South Africans to pursue legitimate grievances for wrongful impoverishment. If one of the essential functions of the law is to defend people's entitlements to pursue damages for wrongful harms, it matters when the law is not able to do this. While we say that victims can pursue their entitlements in civil proceedings, we need to pay attention to the extent to which this is not true in practice, and to which this might create grounds for paying more attention to the needs of victims in responding to wrongdoing.

Arguments about the TRC concern the unusual circumstances of political transition. But the rising prison population in the developed West, and the details of prison conditions, and the facts about how crimes get prosecuted might be taken to suggest a moral crisis in the way we respond to wrongdoing that is independent of the special circumstances of transition. On the one hand, not condemning wrongdoing and defending the law involves a serious moral failing, and may even undermine the legitimacy of the state; but on the other hand, it is arguable that at least some of our current means of condemning wrongdoing are morally impermissible. The South African state currently fails badly on both counts: its mechanisms for investigating crime and bringing criminals to justice are weak and have not been prioritized, resulting in a serious failure to condemn wrongdoing and a dereliction of the duties of the state. At the same time, the frustration of judges working in a system that fails to bring many criminals to justice, combined with an increasingly punitive public mood in response to crime, results in very high sentences for those unlucky criminals who *are* caught and who may be sentenced disproportionately and punished in morally impermissible ways. Lack of clarity surrounding the aims of restorative justice can exacerbate both problems. On the one hand, thinking that our primary aim in responding to wrongdoing is to meet needs or promote forgiveness can result in a failure to take seriously the need to condemn wrongdoing and uphold the law. On the other hand, failing to be clear about the moral grounds justifying punishment leads to punishments that should be recognized to be morally impermissible.

I have argued that there is a way of seeing the moral justification of the TRC that is different from the three standard views I started with,

because it does not see the TRC as overriding or neglecting the values underlying retributive justice. At least some of the ways in which the TRC used restorative processes can be seen as ways of responding to the moral concerns underlying the requirement to punish. The appalling conditions within prisons and the rising prison population may be argued to show that we have a similar need for innovations in moral thinking in nontransitional responses to wrongdoing, and that finding an alternative which does not compromise the need to condemn wrongdoing is a matter of urgency. I have argued that learning from the TRC could help us to do this.