

Transitional Justice, Retributive Justice and Accountability for Wrongdoing

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Abstract

This paper provides a comparative analysis of retributive and transitional justice. At the core of both retributive and transitional justice is a concern with responding in a fitting manner to wrongdoing. I assume that any fitting response or action must recognize the basic, irrevocable, and equal dignity of all individuals, and that one kind of fitting response to wrongdoing involves holding perpetrators accountable for their wrongdoing. After outlining these shared commitments, I then go on to articulate the ways in which retributive and transitional justice differ.

According to retributive justice, a fitting way to hold perpetrators of wrongdoing accountable is to make them pay for their actions. Philosophical theories of retributive justice explain why justice requires punishment, and why punishment is not merely revenge. Jean Hampton, for example, argues that punishment restores the moral equality between victim and perpetrator. Such theories generally assume that justice must be commensurate with the wrong an individual committed, and as such is not related to the characteristics of the individual, her relationship with others, or the location or timing of the wrongdoing. Thus whether an individual is rich or poor or whether a murder was committed in Chicago or Mexico City is morally irrelevant for determining the nature or extent of the punishment a murderer should receive. Furthermore, it is considered appropriate for the state to respond to wrongdoing and inflict punishment because it is democratically authorized to enforce communal norms. These ideas make sense, I argue, in the circumstances of justice characterizing stable, just democratic societies.

Transitional justice challenges these basic convictions about the nature of accountability in the aftermath of wrongdoing. The circumstances of transitional justice, which characterize societies in transition from conflict or repression to democracy, raise profound challenges to the authority of the state to deal with past wrongdoing. The appropriateness of punishment is also in doubt, given the collective and political character of wrongdoing and presence of pervasive structural injustice. In this context, processes of holding perpetrators accountable should be oriented towards the establishment of a general basic structure of relationships of equality, not just relationships of equality between perpetrator and victim. It is also oriented towards the establishment of the standing of the state to deal with wrongdoing.

Introduction

It is widely recognized that communities should respond to wrongdoing. One standard response, commonly taken to satisfy the demands of justice, is the trial, conviction, and legal punishment of perpetrators. Legal punishment involves the intentional infliction of something burdensome by the state, which communicates condemnation of a criminal action. However, legal punishment is fraught politically and morally in paradigm transitional contexts. Transitional contexts refer to societies emerging from an extended period of conflict and/or repression and engaging in the process of democratization. South Africa following the end of apartheid, Guatemala after its extended civil war, and Egypt in the aftermath of the toppling of Hosni Mubarak are a few of the paradigm examples of societies in transition.

Punishment in the context of a transition is often difficult, given that those responsible for wrongdoing may still wield influence and threaten a transition if prosecuted; evidence may have been destroyed by state agents prior to a transition which diminishes the likelihood of a successful prosecution; and the number of potential cases to pursue overwhelms the capacity of criminal justice systems. The difficulties surrounding punishment have led many transitional societies to adopt alternative processes for dealing with past wrongs (e.g., truth commissions, reparations and/or programs of lustration). However, the moral status of alternative practices, and in particular whether they satisfy the demands of justice, is the subject of ongoing dispute. According to theories of retributive justice, perpetrators of wrongdoing deserve to be punished. Insofar as this is what justice demands alternatives that do not entail the imposition of punishment seem to be merely second-best alternatives, necessary to adopt in transitional contexts because of the pragmatic obstacles to successful conviction and punishment.

I argue in this paper that it is a mistake to use the standards of retributive justice to evaluate the justice of responses to wrongdoing, including punishment, in transitional contexts. Establishing the justice of any response to wrongdoing is always a context-dependent exercise. The case for punishment offered by theories of retributive justice is compelling in the circumstances of justice characterizing reasonably just and stable democracies. However, the circumstances of justice that typify such societies are importantly different from the circumstances that typify transitional communities. In the circumstances of transition, the rationale for punishment offered by theories of retributive justice is not persuasive. Punishment may be just in such contexts, but it will not be just for the reasons retributive theories offer. Nor is it obvious that punishment is the only response that will satisfy what justice demands in terms of how perpetrators of wrongdoing should be held accountable for their actions.

There are three sections to this paper. In the first section, I provide an overview of the standard, retributive account of the justice of punishment. I emphasize the reasons given for why punishment is controversial and in need of justification, and on the contextual circumstances of justice implicitly or

explicitly assumed to make punishment controversial in these ways. The second section then argues that the contextual circumstances assumed to hold in the standard retributive account of punishment do not obtain in paradigm transitional contexts. I lay out four alternative circumstances that characterize transitional societies, and the implications of these circumstances for the plausibility of the standard retributive justification of punishment. In short, the retributive rationale for punishment is not compelling in the circumstances of a transition. This is not to suggest that punishment is not justified in transitional contexts. Rather, the rationale for the justifiability of punishment will need to be different, given the variations in the context in which it is being implemented. The third and final section articulates desiderata for an adequate theory of punishment for transitional contexts. These desiderata suggest that responses other than punishment may be not only justifiable but also better suited as ways to hold perpetrators accountable for wrongdoing in the circumstances of transitions.

Standard Account of Punishment

Retributive theories of punishment answer the question: why is punishment by the state just? Principles of justice articulate especially demanding deontological constraints on action.¹ I take deontological constraints to specify in part what is needed to recognize the basic, irrevocable, and equal dignity of individuals. Such constraints ground claims that individuals have on other individuals, institutions, or agents, claims that give rise to obligations or duties of justice of such individuals, institutions, or agents. Such duties are legally and socially enforceable by society. In this section, I lay out four basic assumptions of theoretical accounts of retributive justice, before going on to explain why punishment is morally controversial given these assumptions and how theories of retributive justice respond.

Accounts of retributive justice that explain why punishment is just assume that there is nothing especially suspect or problematic about either criminal law or the state. That is, criminal law is as it should be; that is, the sorts of behavior that should be criminalized are criminalized. Criminal behavior is wrongful behavior. Behavior proscribed in the criminal law roughly captures or coheres with the public's views about what sorts of behavior are wrong and what sorts of wrongs should be prohibited by the state.

¹ For a similar conceptualization of the demandingness constraint shared by principles of justice see Mathias Risse, *Global Justice* (Princeton, NJ: Princeton University Press, 2012). He writes, "It is commonly agreed, though, that obligations of justice are not the only sorts of moral obligation, and that among moral obligations, obligations of justice are especially stringent" (p. 5). For the articulation of the other dimensions of principles of justice I am grateful to Linda Radzik for discussions of this issue.

Citizens are—and are generally recognized to be—equals. That is, they enjoy an equal status in the political community, and this is reflected in the criminal law. Theorists thus assume what I will call *limited structural injustice*. Limited structural injustice reflects the recognition by theorists of the possibility of the existence of structural injustice even in reasonably just states. However, the overall institutional system is such that it does not undermine or threaten the legitimacy of the institutional order.

The state is also taken to have political authority. The state, in other words, has the right to govern, setting norms for interaction and enforcing those norms. The state maintains its authority by respecting the limits on what it is authorized to do.² Theories of retributive justice thus typically assume the condition of what I will call *narrow uncertainty about authority*. Particular questions may arise in practice as to the authority of a particular government official, given for instance his or her complicity in wrongdoing. Or there may arise cases in which the relative authority of different branches of government to deal with a particular issue or question arises. However, the basic authority of the state to set out norms governing conduct and enforce those norms is not in dispute, and the limits on the state's authority are generally respected.

The state in which punishment is being considered is also taken to be relatively stable. The condition of what I call *minimal existential uncertainty* obtains. That is, there is a clear political trajectory for a given political community, one in which the basic institutional structure is maintained and continues to structure the community.

Against this background punishment is morally controversial because of a possible tension between the intentional infliction of something burdensome on citizens and the respect owed to all citizens. Punishment characteristically includes the loss of liberty. One worry is that such a loss of liberty renders a citizen unequal in terms of the standing she enjoys within the state; the question arises, “how is punishment consistent with, or even expressive of, the respect that citizens owe to each other?”³ A more general utilitarian worry is that the infliction of something unpleasant serves no purpose, and so causes needless suffering.

Theories of punishment respond to both kinds of worries, establishing how someone becomes liable to the infliction of something burdensome by committing a crime, why this imposition is compatible with equal citizenship, and what moral purpose punishment serves.⁴ In particular, theories of negative retributivism explain how individuals become liable to punishment and its compatibility with

² Theories of punishment do not always make explicit the normative view of the criminal law that is endorsed or the nature and limits of the authority of the state. On this point see Anthony Duff, “Legal Punishment,” *Stanford Encyclopedia of Philosophy* (<http://plato.stanford.edu/entries/legal-punishment/>).

³ Ibid.

⁴ Ibid.

equal citizenship. Such theories establish the moral permissibility of punishment; it is something that states may permissibly do. Theories of positive retributivism explain why there are good moral reasons to inflict punishment on those who are so eligible. In particular, such accounts provide a rationale for instituting a system of criminal law, where the rationale is based fundamentally on the claims that it is important for the state to give people what they deserve and that this is what punishment for perpetrators does. “‘Positive’ retributivism is typically expressed in the language of penal desert...penal desert constitutes not just a necessary, but an in principle sufficient reason for punishment.”⁵

To illustrate how a set of circumstances of justice affects the justification of principles of retributive justice, consider the theory of retributive justice developed by Jean Hampton.⁶ My aim in discussing Hampton is not to challenge her defense of the core positive retributive intuition; to the contrary, against the background context that is implicitly assumed, Hampton’s defense of the basic principle of retributive justice is quite compelling.

At their most general level, theories of retributive justice offer an account of what constitutes the just treatment of a perpetrator of wrongdoing. In particular, retributive theories explain why justice demands that perpetrators of wrongdoing suffer, characteristically via punishment. All wrongful actions involve the violation of a moral standard for conduct, and often that violation results in wrongful harm to an individual. However, according to Hampton, only a specific category of wrongful action deserves a retributive response. Some wrongful actions insult a victim’s dignity and inflict moral injury on victims by damaging his or her ability to realize her value and have that value acknowledged.⁷

To explain the moral injury inflicted by some kinds of wrongdoing, Hampton first assumes a Kantian theory of moral worth, according to which all individuals have equal moral value by virtue of our humanity. This value is not something that other individuals can alter through their actions. However, all individuals are vulnerable to being diminished. Human behavior is communicative and can express views about the value of others.⁸ Some wrongful conduct communicates a message about the value of the victim, a message that is “‘read off of’” the action.⁹ In particular, in committing some wrongs a

⁵ Ibid.

⁶ Jean Hampton, "Correcting Harms Versus Righting Wrongs: The Goal of Retribution," *UCLA Law Review* 39 (1992): 1659-1702.

⁷ Ibid., 1666 and 1679.

⁸ Ibid., 1670.

⁹ Ibid., 1674. In Hampton’s view the message implicit in an action is objective; it is not a function or product of the psychological responses of a victim to certain treatment. Individuals with a distorted sense of self-worth (undervalued or exaggerated) may not be bothered by objectively injurious actions or be bothered by actions that are not in fact injurious.

perpetrator falsely declares that he is superior to the victim in value and is permitted to treat the victim in the manner constitutive of the wrong done; the victim is entitled to no better treatment. An individual is diminished if she is the target of behavior or treatment that falsely communicates her relative inferiority. Illustrating with the example of rape, Hampton writes, “The action--in both its commission and in its results--representing the rapist as master and the victim as inferior object...accounts for its being wrongful.”¹⁰

Though victims are not in fact less valuable than perpetrators and do not lose value through such treatment, they can be injured by such wrongdoing in two ways. First, such treatment damages the acknowledgement of a victim’s value. The act of wrongdoing itself failed to acknowledge the victim’s value. Moreover, that failure by the perpetrator makes a victim vulnerable to similar treatment by others and potentially reinforces an incorrect understanding of an individual’s value among others, including the victim. Second, wrongdoing impairs a victim’s ability to realize her value. Having a certain value generates entitlements to make claims on others, including claims to be treated in particular ways. To be intentionally treated in a way that violates these claims, often by being subject to certain harm, is to deny an individual’s ability to have her value respected through the actions of others. In Hampton’s words, “harms anger us not merely because they cause suffering we have to see in others, but also because we see their inflictions as *violative of the victim's entitlements given her value*.”¹¹

In Hampton’s view, justice demands that this false claim expressed in wrongdoing be countered and that the moral equality of perpetrator and victim be reasserted. More specifically, to repair the injury involved in wrongdoing it is necessary to annul the act of diminishment. Annulling the act and asserting the moral truth cannot be accomplished through words alone.

Verbally asserting or communicating the worth of the victim is insufficient because the evidence of the inferiority of the victim is still out there; the action did not simply assert the superiority of the victim and relative diminishment of the victim, but tried to achieve that diminishment.¹² To annul wrongdoing the social world must be “remade” such that the situation the wrongdoing tried to create with his or her action is repudiated.

Retribution, or retributive suffering, remakes the social world, according to Hampton, by denying the claimed superiority of the perpetrator and repairing the damage to the acknowledgement of a victim’s value and ability to realize her value.¹³ Suffering repudiates the superiority of the perpetrator by defeating him or her. The intentional infliction of suffering involves a form of mastery over another

¹⁰ Ibid., 1684.

¹¹ Ibid., 1678.

¹² Ibid., 1687.

¹³ Ibid., 1686.

individual. By being put in a position where he cannot do what he wishes, the perpetrator experiences the state of no longer being a master of another. This directly counters the wrongdoing in the same language as the wrong itself. By punishing the perpetrator on behalf of the victim the state affirms the victim's importance, acknowledging her value and affirming the central importance of having her claims on others respected. Given the overarching objective of punishment, the amount of punishment to be inflicted must be proportional to the suffering needed to repudiate the message of superiority implicit in the action thereby reestablishing the equality of the victim.

Hampton establishes why it is appropriate for the state to inflict such suffering and what such suffering by the state represents. The state is assumed in such contexts to be the moral representative of our values. As Hampton writes:

“some crimes are so serious that we cannot imagine any person or institution sufficing as an adequate agent other than the state. As Hegel appreciated, the modern state is the citizenry's moral representative; in the face of pluralism and religious controversy, it is the only institutional voice of the community's shared moral values. Serious crimes represent serious attacks on those moral views, and in particular, on the conception of worth animating those views, and thus the state is the only institution that can speak and act on behalf of the community against the diminishment accomplished by the crime.”¹⁴

The suffering inflicted via punishment emphatically denies the permissibility of violating the norms for treatment defining this general context. In addition, the state is supposed to be impartial with respect to the victim and perpetrator. Because of this neutrality, the state can focus on what is morally relevant in determining how the perpetrator should be treated given his action and basic humanity, and similarly what is needed to reaffirm the victim's value.

A fourth assumption implicit in Hampton's analysis, which is worth highlighting, concerns the kind of wrongdoing to which retributive responses provide an answer. Wrongdoing is presumed to be largely *individual and personal*. Wrongdoing is not political; it is not committed with the sanction of the state, formally or informally, and is not committed in order to further political ends or objectives. Rather, individual reasons and objectives motivate criminal action. Moreover, wrongdoing occurs against a background of broad compliance with the criminal law; it is the structurally condemned exception and not the rule.¹⁵ In these circumstances the moral equality of the victim is generally affirmed and respected. Wrongdoing is the exception and not the rule. Wrongdoing thus represents an isolated action by an

¹⁴ Ibid., 1694.

¹⁵ A few exceptions to this general picture may exist in a given community. For example, in the United States purchasing alcohol while underage is criminal behavior that is the norm rather than the exception.

individual in violation of the entitlement of the victim. Inflicting suffering on the perpetrator by the state addresses the source of the violation of the victim's entitlements.

Circumstances of Transitional Justice

Hampton's justification of the core retributive claim is plausible in a particular set of circumstances, namely, those defining reasonably just, stable democracies outlined in the previous section: *limited and localized structural injustice*, *minimal existential uncertainty*, *limited uncertainty about authority*, and *individual and personal wrongdoing*. In this section I describe a different set of circumstances of justice, circumstances characterizing societies in transition. My aim is to show how the persuasiveness of Hampton's explanation diminishes when the background circumstances are altered. Importantly for my purposes, the persuasiveness diminishes when the background circumstances of transitional justice are introduced. My discussion highlights the need to develop an alternative explanation of the justice of punishment in transitional contexts.

No community perfectly satisfies the demands of justice, and so every community is transitional in the sense of continually striving to better fulfill the demands of justice. However, the injustice with which communities must deal varies. *Pervasive Structural Injustice* has two important characteristics. First, structural injustice is so severe and prevalent that it undermines the legitimacy of the institutional order. Institutional structures, and not just infractions of legal norms, can be considered criminal. Second, efforts to enact reform or change within the existing legal order have a low probability of success.

Collective and Political Wrongdoing occurs when wrongdoing becomes commonplace and is no longer exceptional. Wrongdoing has become normalized. Wrongdoing is collective in the sense it is committed by groups and often is targeted against groups. It is political in two senses. First, wrongs are done for the sake of fulfilling and achieving political objectives. Second, wrongdoing is committed by agents of the state, by individuals acting with the authorization of the state, or by groups contesting the authority of the state. One consequence of the political character of wrongdoing is that what should be criminalized is not criminalized, formally or informally, by the state. Wrongdoing thus does not involve the violation of a generally recognized demand of equality, but takes place in a context in which the moral standing of (some) citizens is challenged.

The third circumstance characteristic of transitional societies is *moderately severe existential uncertainty*. This refers to the fact that the political future of a community can be or become deeply unclear. In such a context, the larger narrative into which a given event figures is indeterminate at the moment the event occurs. It is not obvious whether an election is the ushering in of a new era of political

decision-making or is anomaly. Cooperative interaction leading to a temporary pause in fighting is often fragile, and is vulnerable to being disrupted. The data on transitions to democracy reinforce the reasonableness of such narrative uncertainty. Transitions to democracy often fail; successful transitions are the exception and not the rule. Thus, the likelihood of actually achieving the consolidation of democratic institutions is low. Citizens and policy experts often also share the subjective skepticism about the likelihood of success for a transition.

Finally, any use of coercive power by the state raises questions of authority, questions, that is, about the standing of the state. Given the moral equality of all persons, it is not obvious why one individual has the right to compel another individual to act in certain ways and respond coercively if not obeyed. In contexts of *fundamental uncertainty about authority* the standing of the state to punish is especially fraught. The state is characteristically implicated in the wrongdoing to which individuals are being called to account. Moreover, the institutional framework of the government is by definition in flux, with democratic norms and processes in the process of being consolidated but not yet actually in place. Thus, standard accounts of the nature of democratic authority cannot be applied directly to such contexts.

In circumstances of pervasive structural injustice and collective, political wrongdoing, there is no prior baseline of equal standing among all citizens, which the infliction of punishment threatens to disrupt. The rights and liberties enjoyed by citizens vary. Thus, punishment occurs in a context in which some citizens or group of citizens have a lower recognized standing or status in the political community than others. Insofar as punishment is *prima facie* morally controversial and the liability of perpetrators of wrongdoing to punishment is in doubt, then, it is not for the same reason offered in stable democratic contexts. That is, the question is not how punishment is compatible with recognizing the equal status of all in a community, and the respect owed to all citizens by the state given our moral equality. In transitional contexts there is no prior situation of equality or equal respect that could be threatened. Indeed, it is precisely a context of equal respect that is in need of cultivation.

Rather, punishment is controversial because individual perpetrators do not violate norms that others were respecting in general. Violations of basic norms of conduct are common and widespread, so that an act of rape is one of many acts of its kind in contexts where sexual violence becomes a tool of warfare. The fact that the actions that are now the subject of punishment were not criminalized formally or in practice and that individual perpetrators are characteristically acting in collaboration with many others, working collectively to achieve a broader political goal challenges the core claim of negative retributivism, namely, that a person who commits a wrong thereby becomes liable to punishment. The moral question becomes: why is it permissible and fair to punish an individual for an action that was not socially and/or legally proscribed at the time it was committed and that was committed (in many cases) by an individual who was following orders issued by a superior?

The rationale for positive desert, for why suffering is what perpetrators of wrongdoing deserve and should be a priority for the state to pursue, is also less persuasive in the circumstances of transition. In short, this is because punishment is not going to be effective in achieving its putative retributive purpose.

Acts of wrongdoing in circumstances of transition are not isolated violations of the entitlements of specific citizens. Rather, individual acts of wrongdoing form part of a broad pattern of action and institutional structures that systematically diminishes the status of certain individuals or groups. Being subjected to ongoing violence, or under the threat of violence given membership in a group, is one important way of undermining the status of individuals in communities. For implicit in violence, especially when widespread and systematic, is the permissibility of treating individuals with contempt and disrespect. Individual acts of wrongdoing thus cumulatively attempt to establish and maintain the relative inferiority of certain members. Moreover, the state is intimately involved in this process of diminishment by committing or condoning acts that have this purpose.

Against this background, addressing the message implicit in an isolated act of wrongdoing will fail to reassert the moral truth about the moral standing of the victim, because it does not address fully the source of the challenge to the victim's status. The diminishment to which individuals or groups are targeted by, for example, violence, is not simply a function of one act of violence committed by a single individual. Rather, it is a function of an act, often committed as part of a broad pattern of treatment towards members of a targeted group, and moreover sanctioned, committed, and/or ordered by government officials. It is this collective and political character of the wrongdoing that leads to the systematic diminishment of individuals. This is most obvious in cases of genocide. Genocide is a collective endeavor, and it is only possible to identify an act as an act of genocide when the actions of many individuals are considered together. Victims are subject to treatment that is taken to be *de facto* permissible. The message implicit in wrongdoing is thus not just that a single individual perpetrator believes that he/she is superior to the victim. It is that this individual, along with many others within the community, hold such a view. Moreover, in cases of collective and political wrongdoing victims are not only subject to harmful and disrespectful treatment, they cannot use official channels to protest since those channels are complicit in the wrongdoing.

The infliction of punishment on a single perpetrator leaves untouched the actions of others or the broader institutional context in which wrongdoing occurred. Unaddressed are the other actions of violence, or the official figures that gave the orders which those inflicting torture or participating in genocide. In a context is one in which there was a systematic and institutionally structured denial of this equality, insofar as there is a message of the equality of the victim implicit in the suffering of punishment, it is not likely to be powerful enough to counter the broader institutional context in which unequal

treatment was and often still is sanctioned and justified.¹⁶ If an individual act of punishment expresses the moral equality of the victim that an individual act of wrongdoing denied, this isolated message, absent other responses or structural change, stands little chance of countering the history of messages of the inequality of victims expressed by the actions of other individuals and the structure of institutions.

Moreover, it is not obvious that the social meaning of punishment is the same in the circumstances of transitional justice than in the circumstances of a just and stable democracy. Given the complicity of the state in wrongdoing, the message of equality at the core of punishment could be seen as insincerely expressed by the state, given its recent history. Criminal trials may become merely the victor's justice rather than attempts at retributive justice. At a minimum, it is not clear that the conventional social meaning that is at the core of Hampton's account of retributive suffering can plausibly be attributed to suffering inflicted by the state in transitional circumstances.

Finally, Hampton's explanation of why the state should punish is also unconvincing in transitional contexts. The reason why the state is especially effective in achieving punishment's purpose in stable democratic contexts cannot be offered in transitional contexts. In circumstances of structural injustice and political wrongdoing, the state is *not* the moral exemplar of a community's values. Rather, in a number of ways it is the exemplar of values in need of repudiation. Moreover, since the state is implicated in wrongdoing, it is not morally impartial and so not necessarily in the best position to ensure the appropriate punishment is given. More fundamentally, the basic standing of the state to inflict punishment is in need of justification. Given the complicity of the state in wrongdoing and the pervasive structural injustice in the background of such wrongdoing, the basic authority of the state to order citizens to act in certain ways and to punish infractions of norms for behavior is in doubt.

Lastly, the very norms that have been violated, the violation of which is the subject of punishment, are often not norms that the state recognized and enforced. A basic principle of the rule of law is that individuals be punished for actions that were criminal at the time they were committed. However, that norm seems to be violated in many cases where punishment is inflicted in transitional contexts, for the actions that become the subject of punishment were not proscribed formally or informally in practice that the time they were committed. For example, torture may have been ordered or encouraged by officials. The state acts outside the scope of any authority it may have, insofar as the state must violate this norm to inflict punishment.

Responding to Wrongdoing in Transitional Contexts

¹⁶ Pablo de Greiff, "Theorizing Transitional Justice" in Rosemary Nagy, Jon Elster and Melissa Williams (eds.), *NOMOS LI: Transitional Justice* (New York: New York University Press, 2012), 31-77.

Punishment may be justified in transitional contexts. Perpetrators of wrongdoing may become liable to punishment through their actions, there may be an important moral purpose facilitated by the state through punishment, and the state may have or acquire both the standing to mete out punishment and the characteristics that would make it an especially effective agent in achieving punishment's purpose. However, I claimed in the previous section, the arguments for these conclusions will be fundamentally different in transitional contexts. The explanation for why an individual is liable to punishment cannot simply demonstrate how punishment is compatible with the respect owed to individuals. The rationale for why punishment should be pursued cannot be based on an account of the social function of punishment appropriate for contexts in which structural injustice is limited and criminal wrongdoing is isolated. And the account of the standing and efficacy of the state to inflict punishment cannot presuppose that the state is legitimate. So what should an account of punishment in transitional contexts look like? I want to end by summarizing the desiderata for an adequate theory of punishment in such contexts. Such a theory would establish the justice of punishment in transitional contexts.

The first task for a theory of punishment in the circumstances of transition is to explain how perpetrators of wrongdoing become liable to punishment. This explanation must confront directly the question of the legal status of the wrongdoing subject to punishment at the time the wrong was committed. It cannot be assumed that the actions subject to punishment were criminalized formally by declared rules and/or were proscribed by customary practice. Many candidate wrongs for punishment during a transition were not. Pursuing punishment of actions that were legally sanctioned at the time they were committed violates a basic principle of the rule of law. Thus, the explanation of the eligibility of a perpetrator to punishment must account for the permissibility of pursuing punishment despite the violation of this tenet or explain how this tenet is not violated. Discussions in the legal philosophy literature of the permissibility of punishing so-called grudge informers provide resources for dealing with this issue.¹⁷ Grudge informers refer to individuals who report personal enemies to authorities during periods of conflict and/or repression in order to get rid of them. Some grudge informers from Nazi Germany were put on trial following the end of World War II. Philosophical discussions of the justification for the punishment of such informers directly grappled with the question of whether

¹⁷ See Dyzenhaus, D, "The Grudge Informer Case Revisited," *New York University Law Review* 83 (2008): 1000-1034; Fuller, L., "Positivism and Fidelity to Law: A Reply to Professor Hart," *Harvard Law Review* 71(4) (1958): 630-672; Hart, H.L.A., "Positivism and the Separation of Law and Morals," *Harvard Law Review* 71(4) (1958): 593-629.

punishment was permissible, given that such informers were acting within the legal framework at the time they reported their personal enemies.

One question that discussions of the case of grudge informers raise, but do not directly take up, is whether and in what way the fact that individuals were acting for personal and not political reasons impacts their liability to punishment. In South Africa following the end of apartheid and transition to democracy, only individuals who were acting for political reasons were permitted to apply for amnesty as part of the Truth and Reconciliation Commission proceedings. Individuals who committed acts of killing, abduction, torture and severe ill treatment who were not acting for such reasons remained liable to punishment. Thus, we find differences in treatment of those who did wrong following the end of Nazi Germany and the end of apartheid, based on whether political objectives or personal objectives were being pursued. One philosophical question this variation raises is the moral salience of the political dimensions of action for determining how perpetrators of wrongdoing should be treated following the end of conflict and repression. A related issue concerns the fact that wrongdoing is often collective, committed by groups and targeting groups. A fundamental issue raised by this collective character concerns the fairness of prosecuting an individual for a crime for which he or she was jointly responsible.

After addressing the liability of a perpetrator to punishment, a theory of punishment in the circumstances of transition must explain why punishment is an important objective for the state to pursue. Here it will be critical to understand the social function of punishment in such circumstances. As the discussion of Hampton's account of retributivism highlighted, this social function will not be the same as in stable democratic contexts. What an isolated instance of wrongdoing does during conflict and repression is not just assert a false claim that is otherwise accepted. It reinforces a false claim that is widely accepted and institutionally endorsed. An account of the social good facilitated by punishment must begin from this understanding of wrongdoing and then make the case that punishment is fitting and effective as a way to respond to wrongdoing of this kind. My discussion of Hampton demonstrated that there are compelling reasons to think that punishment is not sufficient to counter a message of inequality implicit in wrongdoing, nor is it addressed in a context in which that message is broadly accepted. Thus, considered in isolation, punishment cannot be defended in the way that retributive theories such as Hampton's do. Perhaps punishment is still a fitting response,

Finally, in explaining what important moral good is facilitated by punishment, a theory of punishment in transitions must make the case that the state is an effective agent to facilitate this good. The efficacy of the state in achieving punishment's purpose becomes an issue because the state is implicated in past wrongdoing. Thus, the state is not a neutral or impartial party to wrongdoing that occurred and has not symbolized and institutionally endorsed values underpinning a just and legitimate institutional order. This alters the social meaning that actions of the state can have. Moreover, it severely

challenges the authority of the state to deal with past wrongs. Part of what a theory of punishment must explain is how the state has or can acquire the authority to deal with past wrongs.

These desiderata suggest that the case for the justifiability of punishment in the circumstances of transition will not be easy to satisfy. Indeed, the case for punishment in circumstances of transitions may turn out to be conditional in the sense that the justifiability of punishment in any particular transitional context depends on what actions or reforms the transitional government is (or is not) taking. For example, given the collective character of wrongdoing, the appropriateness or fittingness of punishing an individual may be influenced by how other individuals complicit in the wrongs done are treated. To the extent that others are held accountable, this may enhance the fairness of punishing any given individual. Or the efficacy of punishment in achieving its particular social function may be enhanced by other way(s) that the state deals with past wrongs. Insofar as the trial and punishment of perpetrators is not an isolated response, but part of a broader program for dealing with extant structural injustice and past wrongs, the sincerity of the message being communicated by the state through punishment or the state's purpose in punishment may be enhanced.

Alternatively, the desiderata for an adequate theory of punishment in transitions may more radically suggest that punishment is not the appropriate way to hold perpetrators accountable for past wrongs in transitional contexts. It may be the case that the turn to other kinds of responses to wrongdoing, such as policies of lustration or truth commissions, reflects not just the constraints imposed by transitional circumstances. Such responses may in fact be better suited to dealing with wrongs that have a collective and political character and are being dealt with by a state whose authority must be (re-) established. A theory of transitional justice that articulates the basic principles to be satisfied by responses to wrongdoing will provide resources for understanding whether this is the case.