

Chapter 8

Political Reconciliation, Punishment, and Grudge Informers

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Abstract In this paper I focus on a fundamental legal dilemma that the legacy of systematic injustice characteristically creates following periods of civil conflict and repressive rule. In the aftermath of injustice there is often a strong urge to punish those who committed morally egregious acts of injustice, but it is challenging to find legal grounds for such punishment. To explain this dilemma I summarize the case of the grudge informer. I then survey the different justifications for punishment found in the literature, concentrating on the idea that it is important to (re-)build a just order and sense of justice within transitional communities. To provide resources for understanding what constitutes a just order and for evaluating punishment's contribution to this order, I articulate a conception of just political relationships, which are realized in a just order. I then return to the case of the grudge informer and explain how punishment may facilitate the creation of a just order by fostering some of the social and moral conditions that underpin it.

8.1 Introduction

Dealing with a legacy of injustice following periods of war or repression and at the same time attempting to transition to peace raises complicated moral questions for transitional societies. In this paper I focus on a fundamental legal dilemma that the legacy of systematic injustice characteristically creates following periods of civil conflict and repressive rule.

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Law represents a distinctive form of social ordering whereby officials govern conduct on the basis of rules. As Lon Fuller (1964) argues, this kind of social order is possible only when there is mutual respect for the requirements of the rule of law on the part of citizens and officials. For their part, officials must pass rules that are capable of figuring in the practical deliberation of citizens. This entails that laws must be, for example, prospective, possible to obey, non-contradictory, and general. These conditions ensure that citizens can take legal rules into consideration when deliberating about how to act. For law to govern it must furthermore be the case that officials in practice enforce declared rules. Insofar as officials respect these requirements, citizens are treated as agents; officials respond to their conduct on the basis of a standard that citizens are aware of and have a genuine opportunity to obey.

The dilemma is this: within transitional communities, in the aftermath of injustice there is often a strong conviction that individuals who committed morally egregious acts of injustice should be punished. However, there must be good grounds for punishment and it is difficult in transitional contexts to identify such grounds. In particular, it is difficult to demonstrate that such punishment is consistent with core principles of the rule of law, especially the requirement that laws be prospective. If such punishment violates principles of the rule of law it is difficult to establish that such violations are permissible, given that the rule of law is precisely what transitional communities are trying to establish and/or strengthen.

In the first section I summarize the case of the grudge informer, which was made famous by legal scholar Lon Fuller and which vividly illustrates the central legal dilemma just described. After presenting the dilemma I survey the different justifications for punishment found in the literature. I focus in particular on appeals to the importance of (re-)building a just order and sense of justice within transitional communities. My discussion highlights the general theoretical questions that remain unanswered by, but that are central to the success of, this idea. In particular, it remains unclear what constitutes a just order and whether punishment, especially if retroactive, contributes to its achievement. To provide resources for addressing these issues, in the second section I summarize the conception of just relationships that I have developed in prior work on political reconciliation. The third section then returns to the case of the grudge informer and explains how punishment may facilitate the creation of a just order, and what dimensions of that order punishment is in a position to affect.

8.2 Legal Dilemmas in Transitional Contexts

The term “grudge informers” refers to individuals who, during periods of conflict or repression, report personal enemies to authorities in order to get rid of them. Some German grudge informers from the Nazi period were prosecuted following World War II and became the subject of intense legal debate. One particular grudge informer, cited by Fuller, was a woman who alerted authorities to negative

remarks about Hitler and the Nazi party that her husband, a German soldier, had made to her in their home during his visit in 1944. She reportedly noted to authorities that “a man who would say a thing like that does not deserve to live” (Fuller 1958, 653). The grudge informer was allegedly having an affair at the time her husband returned home and was motivated by a desire to free herself from him. Two statutes had been passed by the Nazis in 1934 and 1938 that prohibited any public comments against government leaders, the Nazi party, or government policies that would undermine the military defense of the German people or the government. Her husband was convicted by a military tribunal and sentenced to death. After the trial he was imprisoned and later sent to the front line. In 1949, following the war, the wife was charged by a West German court with illegally depriving her husband of his liberty. This was a criminal offense under the German Code of 1871, which remained in effect during the Nazi period. In her defense, the wife argued that she had acted legally and in accordance with the law and so could not justifiably be punished.

German courts as well as legal scholars have advanced a range of arguments justifying the punishment of grudge informers like the wife described above (Fuller 1958; Hart 1957; Dyzenhaus 2008). Here are five different kinds of justification that have been presented to support the conviction of the particular grudge informer Fuller considers:

- **Justification 1: *Retroactive invalidation of Nazi statutes*** This argument does not challenge the validity of Nazi statutes at the time of her actions to which the grudge informer appealed in her defense. However, it claims that the laws that justified the informer’s action should be rendered invalid retroactively, either via court judgment or legislation. This would undermine the legal basis of the grudge informer’s defense and open the door to punishing her for a despicably immoral act. The grudge informer could be legally charged with illegally depriving her husband of his liberty by reporting him to authorities and securing his imprisonment.
- **Justification 2: *Improper use of valid Nazi statutes by grudge informer*** This argument, like the first, assumes that the Nazi statutes to which the grudge informer appealed constituted valid law. However, it raises objections to the grudge informer’s reliance on these statutes. In particular, it was not legally obligatory for the grudge informer to report her husband to authorities. Furthermore, the statutes only sanctioned public remarks; on no interpretation of “public” would the remarks made among spouses in the privacy of their own home be included. The grudge informer illegally deprived her husband of his liberty, then, because she reported him to the authorities on personal, not legal, grounds. The grudge informer knew that she could get rid of her husband by reporting his remarks, given that the court-martial took itself to be duty-bound to investigate any reports and that it was widely known that the purpose of the statutes in question was to terrorize the German population into submission. Thus the informer used the courts for criminal ends and was guilty of illegally depriving her husband of his liberty.

- **Justification 3: *Improper interpretation and application of Nazi statutes by courts*** Like justification 2, this argument assumes that the grudge informer was well aware of the probable consequences of reporting her husband to the authorities. However, unlike justification 2, this justification also finds fault with the actions of the court itself. As noted above, the statutes appealed to by the informer in her defense claimed that individuals would be guilty of undermining the effort to defend the German people militarily if they “publicly” tried to crush the morale of the German people. The court erred in finding the husband guilty because his remarks were not public and handed him a disproportionate sentence. These failings by the court were unsurprising because it was widely known that the courts based their judgments not on the law, but in response to administrative pressure to suppress dissenting voices and terrorize the population. The grudge informer knew this as well, and was thus complicit in illegally depriving her husband of his liberty insofar as she used the court’s flawed procedure to rid herself of her husband.
- **Justification 4: *Nazi statutes always invalid*** This argument challenges on natural law grounds the validity of the Nazi statutes to which the grudge informer appealed. According to this argument, those Nazi statutes were never legally valid because they were “contrary to the sound conscience and sense of justice of all decent people” (Dyzenhaus 2008, 1004). Thus those laws are irrelevant in determining whether the grudge informer illegally deprived her husband of his liberty. The relevant law to consider in this case is the provision from 1871.
- **Justification 5: *Symbolic retroactive invalidation of Nazi statutes*** According to this argument, the legal status of the Nazi statutes to which the grudge informer appealed is unclear. The rule of law, or the governance of conduct on the basis of declared rules, declined to such a degree during the Nazi period that it is difficult to speak of *law* during this period. This was reflected in officials’ widespread and systematic use of secret laws, retroactive legislation, and lack of congruence between declared rules and their enforcement. Furthermore, there was an erosion in the commitment to and sense of justice among officials and citizens, as reflected in the principles and statutes characteristic of the Nazi period, including the flawed principles of interpretation noted in justification 3 used by the court martial to convict the husband of the grudge informer. It was impossible for courts to declare invalid all Nazi statutes or completely overhaul the legal system at once; this would have created a radical uncertainty for citizens. However, it was possible to achieve reform piecemeal. Thus, though not obviously legally valid to begin with, the courts should have explicitly declared the Nazi statutes in question invalid retroactively. This would have allowed a clean break from some aspects of the Nazi legal past. Such a declaration would have opened the door to prosecuting the grudge informer for illegally depriving her husband of his liberty.

There are a number of theoretical questions to which these various justifications give rise. One question is a question of law, namely: what was the legal status of the Nazi statutes at issue in the case of the grudge informer? We see among these

justifications fundamental differences in the criteria that need to be satisfied for a statute to be legally valid. In particular, the relevance of morality for questions of legal validity varies.¹ In justification 4 and justification 5 moral considerations, either stemming from precepts of natural law or the internal morality of law, influence the legal status of statutes. By contrast, justifications 1–3 separate questions of legal validity and morality.

In some justifications the answer to the question of the legal status of the statutes or actions of the grudge informer settles the question of why punishment is permissible. Justification 4 rejects the claim that the Nazi statutes were ever legally valid, given their substantive content. Justifications 2 and 3 draw attention to the way that individuals may use the law instrumentally to achieve morally reprehensible, indeed criminal, ends. Such manipulation of the law may be punished. However, interestingly, other justifications of punishment do not see the answer to the first theoretical question as implying an answer to the question of what treatment the grudge informer should receive. Implicit in justification 1 is the claim that there are good reasons to punish the grudge informer, regardless of the legal status of the Nazi statutes. Indeed, these reasons are so important they permit the violation of a fundamental principle of the rule of law. Justification 5 suggests that there can be important reasons to treat statutes as legally valid because of a concern for maintaining order, and then retroactively declare them invalid in order to allow for the punishment of individuals who committed morally egregious actions. Here too we see the idea that there are important reasons to punish the grudge informer, even if the legal status of the Nazi statutes and of the actions of the grudge informer is complicated to establish.

Appeals to the importance of punishment, irrespective of the legal status of actions or the requirements of the rule of law, raise the question: why exactly is punishment so important in this case, and other similar cases? The reasons that explain the importance of the punishment of the grudge informer are often not explicitly articulated. One idea we find is that punishment is the lesser of two evils; not punishing this immoral act would be a greater evil than punishing retroactively. Why punishment should be seen as the lesser of two evils is not articulated. However, another idea we do find, most explicitly expressed in justification 5, is that there is a need to reform and overhaul the conception of justice that is ordering transitional communities, and law plays a pivotal role in this process.

It is this second idea and its subsequent implications for the justifiability of punishment that I pursue in the rest of this paper, in part because the notion that there is a need to restore a sense of justice and a just order within transitional communities is widely held in the multidisciplinary literature on transitional justice.

¹ One of the central questions in the philosophy of law concerns the relationship between law and morality. Legal positivists maintain that there is no necessary connection between a rule's morality and its legality; legal status is a separate issue from moral status. By contrast, natural law theorists and advocates of the internal morality of law link the status of a rule as a legal rule with moral criteria.

This literature deals with general questions about how prior injustice should be confronted when societies are in transition from conflict or repression to peace and democracy. As expressed in the literature, there is a fundamental “normative shift” that must take place in transitional communities.² This is a shift in the conception of justice, as reflected in part in legal institutions and practices. Transitional societies thus are in an important sense normatively unstable; what counts as a good moral or legal reason for conduct is in flux and unsettled. When such societies are responding to wrongdoing, the very norms for wrongdoing, as reflected in law and other conventions, are in the process of change.

Interestingly, the particular debate about the punishment of the grudge informer to which legal scholars have devoted extensive attention is rarely referenced in general debates about transitional justice. Thus the case of the grudge informer provides a framework for examining the plausibility of the idea that punishment in fact contributes to the consolidation of a normative shift, and for considering what weight should be given to the presence or absence of available legal grounds for punishment.

To evaluate the claim that punishment is justified because it contributes to this shift the following questions must be answered. The first is: how does punishment facilitate a normative shift within transitional communities? Justifications 1 and 5 suggest that punishment expresses a break with the past, whereby legal statutes and principles are explicitly rejected. One reason for concern about this explanation is that punishment constitutes a rejection of past law only by violating a principle of the rule of law. Such violation seems to bear similarity with strategies used by repressive governments, thus it is unclear what makes punishment different in this case. That is, why does punishment strike a blow for justice when fundamental principles are being violated? Justifications 2 and 3 suggest that punishment may contribute to a shift by highlighting flawed applications of the law and misuses of the law by citizens and officials in the past. Punishment is based on a correct legal decision based on sound legal reasoning in the case at hand. This explanation avoids the problem of the violation of the rule of law. However, it is unclear how or why such correction will have a dramatic impact and facilitate a wholesale normative shift. Courts in many contexts overturn the opinions of lower courts and draw attention to flawed interpretations, yet such actions are rarely taken to constitute a radical repudiation of the past or current order.

A second question this explanation of the significance of punishment raises is the following: is punishment, or the turn to legal mechanisms, the only way for a community to symbolically break with the past? It is important to understand the grounds for taking seriously the justification for punishment of the grudge informer offered by legal theorists not only to assess the soundness of that particular argument, but also because there are a number of alternative ways in which societies may try to respond to the dilemma of law outlined above, not all of which involve punishment. Indeed, legal scholar Ruti Teitel (2000) advocates the use of the limited criminal

²The term “normative shift” comes from Teitel (2000).

sanction, which provides a pragmatic compromise to the rule of law dilemma. With this sanction prosecution processes do not automatically result in full punishment since it deals with the establishment and punishment of wrongdoing separately. In this way transitional punishment can achieve punishment's overarching goals while responding to the dilemmas inherent in transitional contexts. Other scholars have advocated nonpunitive legal responses or nonlegal responses, such as truth commissions, amnesty, or the establishment of memorials. The justification of the punishment of the grudge informer forces us to ask whether this particular way of responding must be the only way in which societies respond to injustice or whether alternative strategies are equally viable. More generally, there are questions about how we delimit the range of possible options that societies may adopt in order to transform the conception of justice and sense of justice within a community, and what factors should influence which option is in fact selected.

Answering the first and second questions depends in part on answering a third, more fundamental question: How exactly does the prior regime's conception of justice, reflected in law as well as the actions of the grudge informer and/or courts and legal professionals, need to be changed? Before we can explain the urgency of punishing the grudge informer we need to first have a more detailed understanding of the kind of just order, and commitment to that order among citizens and officials, that societies in transition are aspiring to cultivate and, similarly, what the prior conception of injustice was and how that conception was reflected in the legal order. Such understanding will provide a more specific sense of what precisely is missing in transitional contexts, both in terms of the norms and rules that regulate behavior and in the commitments among citizens and officials. In addition, a conception of the kind of just order that societies are striving to build will suggest criteria for evaluating punishment and other kind(s) of responses to wrongdoing.

I suggest that the conception of justice, reflected in a just order, that responses like the retroactive punishment of the grudge informer are designed to achieve can be best understood through the lens of political reconciliation. Political reconciliation broadly refers to the process of repairing political relationships damaged by civil war and repression. A conception of political reconciliation provides an account of how civil war and repression damage political relationships, articulates a view of the characteristics of repaired political relationships, and offers guidelines for assessing the effectiveness of putative processes of political reconciliation. The conception of political reconciliation I summarize in the next section and that is developed in my book *A Moral Theory of Political Reconciliation* (2010) provides important theoretical resources for specifying the just order envisioned by advocates of punishment.

Before turning to political reconciliation, let me offer some initial reflections on why it is plausible to think about justice as instantiated in a just order through political reconciliation. An account of political reconciliation has fundamentally normative dimensions. It does not simply provide a descriptive characterization of interaction during conflict and, conversely, repaired interaction in stable regimes. Rather, it offers a normative analysis, providing insight into normative reasons that make certain relationships morally valuable and assisting in identifying the damage done

to those relationships. This normative dimension is necessary if an account is to speak to the pressing debates about political reconciliation, especially debates about the value of political reconciliation itself. Political reconciliation thus provides an account of the normative dimensions of relationships that are structured by a just order. Furthermore, as I discuss in detail below, a constitutive component of the pursuit of political reconciliation is the establishment or restoration of respect for the rule of law. Reconciliation is fundamentally concerned with law and appreciation of the kind of formal ordering of relationships that a system of law provides, and has substantive implications for the kinds of laws that should regulate relations.

In the next section I spell out the central ways in which political relationships are damaged during conflict and the characteristics of repaired relationships. The third section then describes what processes of political reconciliation must do, given the damage afflicting political relationships and the kind of relationships these processes hope to foster. It is in thinking about what processes of reconciliation must do that we find resources for responding to the general theoretical questions raised by the central justification for punishment of the grudge informer. Thus, after providing an overview of the conception of political reconciliation with which I am working, I return to the question of the grounds for taking seriously the justifications for punishment offered above and of the basis on which we can delimit justifiable versus unjustifiable sacrifices of rule of law principles, articulating the answers that the account of political reconciliation would suggest.

8.3 Political Reconciliation

At the core of my account is a realistically ideal conception of political relationships. My conception is realistic insofar as it does not depend on exceptional virtue, or selflessness, or solidarity among citizens or officials. It is ideal insofar as it characterizes a way of ordering political relations that is absent, remaining an aspiration, in transitional contexts. The realistic ideal serves two purposes. It enriches our understanding of the moral significance of the characteristic interaction among citizens and officials during conflict and repression, and in particular what dimensions of interaction are appropriately regarded as being of moral concern. Conversely, it provides a framework for understanding the characteristics and moral value of repaired political relationships.

In my view, at the most general level political relationships should be premised on reciprocity and respect for moral agency. Reciprocity captures the idea that the bindingness and justifiability of the claims we make on others to treat us in certain ways is grounded in a willingness to recognize and respect the claims that others make on us. Relationships premised on reciprocity reflect a mutual willingness to satisfy the terms of the relationship and recognition that one is answerable to the other party in a relationship for one's actions. Moral agency denotes the idea that citizens and officials have the capacity to be self-directed in their lives, that is, are capable of formulating and pursuing their own purposes, and are appropriately

held accountable for their actions. Reciprocity and respect for agency are realized in political relationships, I argue, when such relationships are characterized by mutual respect for the rule of law, mutual reasonable trust and trust-responsiveness, and the mutual enjoyment of central relational capabilities.

As noted in the introduction, law represents a distinctive form of social ordering whereby officials govern conduct on the basis of rules by satisfying the requirements of the rule of law. Insofar as officials respect these requirements citizens are treated as agents; officials respond to their conduct on the basis of a standard that citizens are aware of and have a genuine opportunity to obey. Governance by law also depends on the actions of citizens. In particular, for law to be a form of social order that governs conduct citizens must on the whole obey the law. Widespread disobedience on the part of citizens renders futile the actions of officials; the rules that officials pass will not in any meaningful sense govern conduct. When law governs conduct, political relationships express to some degree reciprocity and respect for agency. Relationships express reciprocity because the social order of law is possible only when there is reciprocal and systematic fulfillment of the requirements of the rule of law on the part of citizens and officials. Relationships express respect for agency because law, and governance by law, is a social order that makes possible self-directed action and interaction. Law provides a framework for interaction in which our expectations of how others will behave are based on what law permits and prohibits and, furthermore, that these expectations are satisfied in practice. This allows individuals to formulate plans and actions to realize their goals on the basis of reliable and stable assumptions about others. Furthermore, law treats individuals as agents by holding them accountable to a standard of conduct that they are in a real position to satisfy.

Important as law is in structuring action and interaction among citizens and officials, it is not the only way in which reciprocity and respect for agency are realized in political relationships. Equally significant is the default attitude that citizens and officials take toward others. Political relationships premised on reciprocity and respect for agency are characterized by a default attitude of trust and trust-responsiveness on the part of citizens and officials. In other words, citizens and officials presume that others are competent, that is, they are able to fulfill their role-related responsibilities and that they lack ill will, and so are willing to engage in cooperative action with others. When they trust, citizens and officials also expect that fellow citizens and officials will prove trust-responsive, or will give significant weight to the fact that they are being relied on by others when determining what to do. Similarly, in relationships citizens and officials are willing not only to trust but also to prove trust-responsive when trust is placed in them. When reasonable, default trust and trust-responsiveness can express reciprocity and respect for agency. They express reciprocity insofar as individuals take a presumptive view of others that they desire others to take of themselves. Insofar as they respond to the trust placed in them by others, they expect others will respond to their trust. Default trust and trust-responsiveness express respect for agency because they acknowledge that others are agents. A precondition for being competent in the manner trust presumes is the capacity for agency. Responding to the trust of others is one way to acknowledge

that such others have the standing as agents to make demands on us, and are not simply objects to be treated in whatever manner we desire.

The concept of capability refers to the genuine opportunity, or effective freedom, that individuals have to achieve valuable doings and beings (Sen 2000; Nussbaum 2001). Capabilities are a function of both what an individual has (e.g., her internal resources such as talents and skills, and external resources such as income and family support) and what an individual can do with what she has (e.g., given laws, social norms, and the physical infrastructure within a community). As a form of positive freedom, capabilities provide information about the extent to which an individual is able to exercise her agency, determining the goals she will pursue and the kind of interaction she will have with others. In the context of political relationships, certain fundamental relational capabilities, or capabilities necessarily achieved in relationships with others, are of special concern. These include being recognized as a member of the community; being respected; and participating in the economic, political, and social life of the community. All of these relational capabilities are impacted by a general capability to avoid poverty. The key insight of the capability framework is that the exercise of agency and the enjoyment of central relational capabilities depends on what an individual has as well as the general context in which an individual acts. Thus the framework focuses attention on the importance of the character of the general social context and the distribution of resources among individuals within a community.

In addition to specifying the defining characteristics of political relationships premised on reciprocity and respect for agency, the realistic ideal for political relationships articulated above provides resources for understanding why and how patterns of interaction during civil conflict and repression undermine defining features of a just order. In particular, as justification 5 in the previous section correctly highlighted, transitional societies characteristically emerge from a period in which there is a steady erosion of the rule of law. The congruence between official action and declared rules frequently breaks down. Official conduct may not be not guided by what declared rules prohibit or permit, and official response to the conduct of citizens may not be based on whether citizens have violated declared rules. For example, torture, though legally proscribed, may become common. In some contexts, disregard of declared rules by citizens may be widespread. Declared rules may become increasingly unclear, so vague and broad as to provide little practical guidance in terms of the conduct being prohibited. The impact of the erosion of the rule of law is that citizens act in an increasingly uncertain environment, unclear as to what official treatment their actions are likely to receive. Insofar as they can form reasonable expectations about how officials will respond, the basis of these expectations is non-legal, stemming from widely known practices instead of what declared rules prohibit or allow. In either case, the kind of exercise of agency that law helps to make possible breaks down.

Additionally, the erosion of the rule of law is of special concern in the context of a discussion about the establishment of a just order because the form of order that law provides acts as an important constraint on the pursuit of injustice. Governance by law produces a transparency in official policy and action. Thus law makes denial

about the injustice of policies being pursued more difficult and opens up a community to critical scrutiny by its members and others. In practice, this constrains the pursuit of unjust practices and policies by officials.

The erosion of the rule of law diminishes the capability of individuals to participate in the social, economic, and political life of a community. The violence constitutive of conflict and repression further undermines the exercise of their agency. Violence plays a central role in terrorizing a population into submission, a frequent goal of either a campaign of repression or of various parties to a conflict. Such violence is frequently extralegal in character, not officially sanctioned, and indeed often prohibited by declared rules. Violence constrains the capability of individuals to be respected, be recognized as a member of a community, and participate in the life of a community. As a consequence of being a victim of violence, individuals may refuse to engage in the life of a community so as to avoid becoming a victim again in the future. Violence may lead to a rift in relationships, especially if being a victim of violence is grounds for social stigmatization and ostracization. Members of a targeted group may constrain their actions and withdraw into their private life, understanding that they suffer from the threat of violence. Finally, violence affects the general social and material infrastructure of a community. Buildings, including hospitals and schools, are destroyed. Professionals in business, medicine, and education may emigrate. The ability of a community to tend to the educational, material, and health needs of its members subsequently diminishes. In some contexts group identity can exacerbate the vulnerability of individuals to forms of capability diminishment. When violence is driven by identity cleavages, then having a certain identity can make one vulnerable to certain forms of violence. Insofar as membership is tied to a specific ethnic or religious identity, this can undermine the capability of members of a different ethnic or religious group to be recognized and respected as members of the community. Finally, being a member of a marginalized group or community may limit an individual's ability to participate in the economic, political, and social life of a community insofar as social norms or laws informally or formally discourage interaction.

Unsurprisingly, the erosion of the rule of law and violence characteristic of conflict and repression are important sources of the breakdown of trust among citizens and officials, and, equally importantly, the conditions that make trust and trust-responsiveness reasonable. Indeed, deep and pervasive distrust, often reasonable, is a feature of transitional communities. Given an environment in which declared rules provide little guidance as to the actual conduct of other officials and citizens, and given the violence and wrongdoing that conflict and repression leave in their wake, it is foreseeable that citizens and officials presume that others are neither willing nor capable of fulfilling their role-related responsibilities and, moreover, will not prove responsive if trust is placed in them.

From the perspective of political reconciliation, the central task in rebuilding the kind of political relationships characteristic of a just political order is to promote reciprocity and respect for agency by cultivating respect for the rule of law and the kind of order law provides; default attitudes of trust and trust-responsiveness as well as the conditions that make such default attitudes reasonable; and central relational

capabilities. Importantly, the framework of political reconciliation highlights that each of these characteristics depends on the presence of certain social and moral conditions. I concentrate on these conditions in the next section because they provide the key to understanding how and why to respond to the dilemma of legality that the case of the grudge informer highlights.

8.4 Responding to Legal Dilemmas

In Sect. 8.1 I discussed a set of theoretical questions to which justifications of the punishment of the grudge informer following World War II give rise. In this section I return to these questions, highlighting how the framework of reconciliation presented above provides resources for answering them, and so for understanding why punishment may be justified in transitional contexts and what alternative kinds of responses may be justifiable as well.

The first question evoked by the case of the grudge informer concerned the legal status of the statutes to which the grudge informer appealed in her defense, as well as the status of the Nazi legal system more broadly. Based on the conception of the rule of law at the heart of my account of political reconciliation, Justification 5, i.e. the symbolic retroactive invalidation of Nazi statutes, most accurately articulates the appropriate view to take with respect to these issues. Because of systematic violations of the principles of the rule of law by government officials, including requirements that laws be prospective, clear, and enforced in practice, law was systematically undermined throughout the period of Nazi rule. This makes unclear the legal status of statutes such as the one appealed to by the grudge informer. The particular case of the grudge informer also highlights flaws in the application of laws specifically by courts.

As was noted earlier, the legal status of the Nazi statutes to which the grudge informer appealed does not settle the question of how she, and others in a similar situation, should be treated. Indeed, as the range of justifications surveyed in the first section demonstrate, there are different explanations that may be given as to why it is appropriate to respond to the immoral actions of citizens with legal punishment and how much weight should be given to the legal status of particular statutes. One explanation I concentrated on in particular is the idea that punishment is important because of its role in consolidating a normative shift in the conception of justice endorsed by and reflected in the practices of a community. There are, I suggested, three questions about this idea that remain in need of answer. The first concerns the grounds for granting that punishment will in fact consolidate a normative shift. The second focuses on whether punishment is unique in fostering a normative shift. Both of these questions, I suggested, could be answered only if we understood more clearly in what the normative shift consists, and in particular the kind of order that punishment seeks to cultivate. In the previous section I summarized part of the conception of political reconciliation I develop in previous work, which fleshes out central dimensions of political relationships structured by a just legal order.

I now want to show how this conception helps us understand the role of punishment and other responses in cultivating the normative conditions that underpin that order.

It is important to be able to evaluate whether punishment can plausibly be claimed to break with the past and consolidate a new order. The key to such an evaluation is an appreciation for the conditions that underpin political relationships and a political order premised on mutual respect for the rule of law, trust, and relational capabilities. One especially important condition in the current context is a general respect for the values that underpin these relationships and this order, namely, reciprocity and respect for agency. However, as each of the justifications for punishment implicitly acknowledges, there was an erosion of the concern for promoting the agency of citizens during the Nazi period, either through the erosion of respect for the requirements of the rule of law or through the content and substance of the laws that were passed. An erosion of such concern is common during conflict and repression.³ For a new conception of justice to animate the legal order and political relationships structured by that order, the absence of reciprocity and respect for agency in political interaction and the legal order that structures that interaction must be acknowledged. It must also be recognized that this absence is morally troubling. In many cases, such acknowledgment requires the overcoming or countering of common forms of denial. There may be denial about the moral significance of certain wrongful actions, stemming from indifference toward members of the targeted group; rationalizations for the necessity of certain actions; or a rejection of the thought that wrongful actions implicate one personally. Appreciating why respect for agency and reciprocity matter in political relationships and acknowledging their absence will motivate citizens and officials to promote and realize these values in interaction.

In addition to a general respect for the values of reciprocity and respect for agency, there are specific conditions that underpin the rule of law, trust, and capabilities. For purposes of responding to the dilemmas of legality, the social and moral conditions underpinning the rule of law are especially pertinent. As Fuller recognized, for mutual respect for the requirements of the rule of law to be sustained, citizens must have faith in the law and officials must have legal decency and exercise good judgment.⁴ Faith in law refers to a confidence that citizens must have that officials are in fact respecting the requirements of the rule of law. There are two general reasons why such faith matters. First, the willingness of citizens to fulfill the expectations of officials, namely, that they will obey laws and so govern their conduct on the basis of legal rules, is affected by the actions of officials. Citizens' willingness to constrain their conduct by law will diminish insofar as they lose faith in law, taking it to be futile to follow legal rules because officials fail to take into account whether citizens followed declared rules when responding to their conduct or becoming unwilling to utilize legal procedures because they are not followed by officials. Second, faith matters because the agency of citizens is inhibited if

³On this point see Murphy (2010), especially chapter 1.

⁴An extensive discussion of the social conditions of law is in Murphy (2010) chapter 6.

there is not some faith in law. If citizens need to constantly monitor the actions of officials because they cannot presume that officials are acting in accordance with proscribed procedures, then this will undermine their ability to pursue their goals and objectives on the basis of the expectations that the framework of law sets forth.

Officials must exercise legal decency and good judgment if the rule of law is to be maintained. The various rule-of-law requirements for officials cannot all be maximally respected, and so judgment is required to determine how best to satisfy the requirements of the rule of law such that self-directed action and interaction is facilitated. In Fuller's words (1964, 45–46), a utopia "of legality cannot be viewed as a situation in which each desideratum of the law's special morality is realized to perfection. There is no special quality – and certainly no peculiar defect – of the internal morality of law. In very human pursuit we shall always encounter the problem of balance." In addition, to maintain the fundamental purpose of law it may at times be necessary for officials to violate one of the general requirements. To illustrate, Fuller describes a situation in which the legal requirements for marriage include a special stamp being placed on a marriage certificate by the celebrant of the ceremony. The requisite stamp was not obtainable when the statute went into effect because of problems with the printing press producing the stamp. A retroactive statute would certify the marriages of those who, by the terms of the previous statute, were void. This illustrates the fact that "situations can arise in which granting retroactive effect to legal rules not only becomes tolerable, but may actually be essential to advance the cause of legality" (Fuller 1964, 53). Thus there is judgment inherently involved in determining whether a violation of a principle of the rule of law is inimical to or supportive of law's overall function. Legal decency can influence whether such judgment is used for good or ill, or in support of law or to undermine law. Furthermore, law constrains the exercise of political power; officials are not free to wield power in whatever would be the most efficient or effective manner to achieve their goals, control citizens, or eliminate rivals. Decency is also needed by officials to ensure that they are willing to abide by the constraints and processes law sets and so that they are committed to formulating rules that facilitate the capabilities of citizens and the exercise of agency more generally.

Legal decency and good judgment on the part of officials and faith in law on the part of citizens are characteristically absent in transitional contexts. The erosion of the rule of law itself systematically points to the absence of legal decency on the part of government officials. The justifications for punishment also vividly illustrate an absence of faith in law on the part of citizens. Citizens living in a context where actions like those of the grudge informer are possible recognize that any procedural guarantees of the rights of citizens will not be respected in practice. Furthermore, they recognize that laws will not be applied or interpreted in a manner that is congruent with the declared rules and, moreover, that the purpose of rules is often to terrorize a population into submission instead of to create a framework for sound and stable interaction. This is part of what enables law to be used successfully as an instrument to achieve criminal ends.

Punishment of individuals like the grudge informer can contribute to the development of a just order, I want to suggest, because of how such punishment generates a recognition of the degeneration of law and of respect for agency, and the subsequent moral flaws plaguing interaction. As the various justifications for the punishment of the grudge informer highlight, the punishment of individuals who engaged in actions that were common and formally or informally sanctioned is unnerving. It demonstrates that individuals cannot be complacent regarding the permissibility of what they do because the society in which they live permits or even encourages such actions. It also communicates that actions that were sanctioned in the past, formally or informally, should not have been tolerated and will not in fact be tolerated in the future.

In my view, whether such unnerving punishment will cultivate legal decency on the part of officials and faith in law on the part of citizens importantly depends on the rationale for punishment offered by courts and on that rationale being communicated to the public generally. Framing the justification for punishment in terms of the correction of the misuse of law on the part of citizens or officials in the past, as justification 2 (improper use of valid Nazi statutes by grudge informer) and justification 3 (improper interpretation and application of Nazi statutes by courts) do, may focus attention on the particular errors of particular individuals. It may even highlight that these particular errors were common. However, because of the continuity that remains with laws and procedures from the past, it does not powerfully communicate that there were pervasive problems in law stemming from widespread violations of the rule of law on the part of officials, or systematic absence of legal decency and good judgment, which in turn produced an erosion of faith in law as a system of government that facilitates self-directed interaction on the part of citizens.

By contrast, the retroactive repudiation of central statutes has a greater possibility of focusing attention on systematic problems in law and the erosion of the social conditions that are needed to maintain law. Retroactive legislation communicates a repudiation of statutes in the past, and so a repudiation of particular injustices it sanctioned. When coupled with an explanation that the legal status of these statutes themselves is unclear because of the pervasive violation of requirements of the rule of law, retroactive legislation draws attention to broader deteriorations stemming from systematic actions on the part of officials and of citizens who took advantage of officials' abuse. The dramatic character of retroactive punishment can generate reflection on the part of officials to the extent that their actions and practices are being rejected. It can also give citizens some hope for the possibility of future faith in law, insofar as it suggests the beginning of a new era and a new way of ordering relations. Retroactive punishment does involve a violation of a central principle of the rule of law. However, as we noted above, maintaining law as a form of social ordering that facilitates agency and self-directed interaction may require the periodic violation of one of the rule of law requirements. Any single violation of a principle of the rule of law is not necessarily inimical to law's purpose. Distinguishing this violation from violations inimical to the legal order depends on the purpose underpinning this violation. Inasmuch as punishment in this case is designed to facilitate

agency by highlighting the absence of important conditions required for its possibility, such a violation may be defensible. The sincerity of this purpose will be demonstrated or undermined by the additional actions governments take, or fail to take, in transforming the conception of justice that structures the community.

Finally, the justification for punishment in cases like the grudge informer provides insight into the other kinds of practices or responses to wrongdoing that may also contribute to the cultivation of a just order. Practices that draw attention to the absence of the social conditions required for relationships premised on reciprocity and respect for agency to flourish, and help a community acknowledge the detrimental consequences that this breakdown has all have the potential to contribute to the normative shift and establish the just order that societies in transition have as one of their central goals.

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