

Another King of Justice: Transitional Justice as Recognition

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Another Kind of Justice: Transitional Justice as Recognition

Frank Haldemann[†]

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Introduction: What Kind of Justice?

Some wrongs fundamentally challenge our capacity to both understand and judge. This is certainly true of the most extreme and radical

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forms of evil witnessed in the twentieth and twenty-first centuries—mass killings, systematic rapes, tortures, and so much more than anybody should be expected to witness. In the face of atrocities so outrageous in nature and scope, no response can ever be adequate. “All we know,” writes Hannah Arendt, “is that we can neither punish nor forgive such offenses and that they therefore transcend the realm of human affairs and the potentialities of human power, both of which they radically destroy wherever they make their appearance.”¹ Yet, some nations are seeking to come to terms with and to move beyond an immediate past saturated with unspeakable cruelty.² With the violence ended, these societies are facing the daunting task of restoring decency and trust in a human landscape disfigured by degradation and loss.³ In an effort to replace violence with dialogue and terror with respect, these societies must struggle over how to rebuild a social fabric after neighbors have turned against neighbors, friends against friends, communities against communities.⁴

At any such time of massive transformation, one question takes on renewed urgency: how should societies deal with their evil pasts? In addressing this crucial and highly topical issue, the contemporary debate has focused on “transitional justice”—a term increasingly employed to describe the process by which societies confront legacies of widespread or systematic human rights abuses as they move from repression or civil war to a more just, democratic, or peaceful order.⁵ Transitional justice, in the broad sense of the term, refers to some forms of justice on which countries undergoing intense political change may rely.⁶ It is justice informed by prior injustice and infused with transformative dimensions—justice caught between the past and the future, between backward-looking and forward-

1. HANNAH ARENDT, *THE HUMAN CONDITION* 241 (2d ed. 1998); see also MARTHA MINOW, *BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE* 5 (1998) (emphasizing “the incompleteness and inescapable inadequacy of each possible response to collective atrocities”).

2. Harvey M. Weinstein & Eric Stover, *Introduction: Conflict, Justice and Reclamation*, in *MY NEIGHBOR, MY ENEMY: JUSTICE AND COMMUNITY IN THE AFTERMATH OF MASS ATROCITY* 1, 1 (Eric Stover & Harvey M. Weinstein eds., 2004).

3. See *id.* at 1-2.

4. See *id.*

5. Transitional justice as a field of academic and policy interest has grown tremendously over the last fifteen years or so. Classic conceptualizations include, to name just a few, *TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES* (Neil J. Kritz ed., 1995); *TRANSITIONAL JUSTICE AND THE RULE OF LAW IN NEW DEMOCRACIES* (A. James McAdams ed., 1997). See also *DILEMMAS OF RECONCILIATION: CASES AND CONCEPTS* (Carol A.L. Prager & Trudy Govier eds., 2003); JON ELSTER, *CLOSING THE BOOKS: TRANSITIONAL JUSTICE IN HISTORICAL PERSPECTIVE* (2004); RAMA MANI, *BEYOND RETRIBUTION: SEEKING JUSTICE IN THE SHADOW OF WAR* (2002); MINOW, *supra* note 1; STEVEN R. RATNER & JASON S. ABRAMS, *ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY* (2d ed. 2001); RUTI G. TEITEL, *TRANSITIONAL JUSTICE* (2000); *TRUTH V. JUSTICE: THE MORALITY OF TRUTH COMMISSIONS* (Robert I. Rotberg & Dennis Thompson eds., 2000).

6. See TEITEL, *supra* note 5, at 223 (noting various “legal measures pursued in periods of political transition” and maintaining that they “are emblematic of normative change”).

looking.⁷

With this definition, however, it is still not clear what justice in transition might mean, or what the hope for justice should lead us to want in periods of radical political change. The concept of justice, after all, can be used in evaluating many different things and its aspirations are rendered more difficult in the contexts of unstable governance, security, and economic institutions. What should be deemed just and fair as a state undergoes a major political transformation?

Typically, debates on these issues are framed in terms of an opposition: retributive justice versus restorative justice. The opposition looks like a stalemate, as each approach seems to exclude the other. Retributive justice, on the one hand, is commonly linked to the belief that punishment—the deliberate imposition of suffering and harm—is justified insofar as it fits the wrongness of an act and the agent's responsibility for the act.⁸ Restorative justice, on the other hand, calls for repair instead of punishment and for healing rather than inflicting further retributive suffering.⁹ Restorative justice is often praised as an interpersonal, community-oriented way to resolve conflicts, seeking to restore the dignity of both victim and offender by reintegrating them into respectful and healthy communities.¹⁰

Such a paradigm of restorative justice, which comports closely with a notion of reconciliation and social harmony, has prominently featured in the work of South Africa's Truth and Reconciliation Commission (TRC)—the prime example of a commission with the power to grant amnesty to perpetrators on the condition that they fully disclose the fate of those who they killed or abducted.¹¹ Archbishop Desmond Tutu, the 1994 recipient of the Nobel Peace Prize, explains the TRC's commitment to restorative justice in these terms:

We contend that there is another kind of justice, restorative justice, which was characteristic of traditional African jurisprudence. Here the central concern is not retribution or punishment. In the spirit of *ubuntu*, the central concern is the healing of breaches, the redressing of imbalances, the restoration of broken relationships, a seeking to rehabilitate both the victim and the perpetrator, who should be given the opportunity to be reintegrated into the community he [or she] has injured by his [or her] offense.¹²

7. See *id.* at 223–25.

8. See, e.g., MANI, *supra* note 5, at 33–36; Juan E. Méndez, *In Defense of Transitional Justice*, in TRANSITIONAL JUSTICE AND THE RULE OF LAW IN NEW DEMOCRACIES, *supra* note 5, at 1, 6.

9. See generally RESTORATIVE JUSTICE: INTERNATIONAL PERSPECTIVES (Burt Galaway & Joe Hudson eds., 1996); George Pavlich, *Towards an Ethics of Restorative Justice*, in RESTORATIVE JUSTICE AND THE LAW 1 (Lode Walgrave ed., 2002); Lode Walgrave, *Imposing Restoration Instead of Inflicting Pain: Reflections on the Judicial Reaction to Crime*, in RESTORATIVE JUSTICE & CRIMINAL JUSTICE 61 (Andrew von Hirsch et al. eds., 2003).

10. Cf. Walgrave, *supra* note 9, at 67 (“The priority given to restoration focuses on social life rather than an abstract moral or legal system of any kind.”).

11. See Robert I. Rotberg, *Truth Commissions and the Provision of Truth, Justice, and Reconciliation*, in TRUTH V. JUSTICE: THE MORALITY OF TRUTH COMMISSIONS, *supra* note 5, at 1, 6.

12. DESMOND MPIOLO TUTU, NO FUTURE WITHOUT FORGIVENESS 54–55 (1999).

Interestingly, Tutu traces the notion of restorative justice to the “African value” of *ubuntu*, literally “I am human because I belong.”¹³ *Ubuntu*, a term from the Nguni group of languages, refers to a specific *Weltanschauung*, or world-view, based on the ideals of harmony, friendliness, and community.¹⁴ The implication seems to be that there is a different kind of justice, distinct from retribution or punishment, which requires a commitment to repair broken relationships, to heal the wounds of victims and offenders alike, and to restore the health and well-being of their communities. For Tutu, this alternative vision of justice provides a moral foundation for a Truth and Reconciliation Commission of the kind adopted by South Africa.¹⁵

Whatever one might think of the conceptual coherence of Tutu’s model of restorative justice, rooted as it is in such lofty ideals as forgiveness and social harmony, the idea of an alternative vision of justice with a more human face is intriguing. Crime, after all, is not primarily an offense against some abstract notion of the “state,” or against some impersonal set of rules, it is the wrongful violation of a person by another person. Our concern, then, should not be so much with making the offender suffer as with restoring human relations and affirming the victim’s status as a moral being of equal worth.

Building on this basic intuition, this article undertakes to further consider the idea of a “different kind of justice,” one that is less vindictive and state-centered and is more caring and responsive to human suffering. In doing so, it relies on the concept of justice as recognition—the kind of justice that is involved in giving due recognition to the pain and humiliation experienced by victims of collective violence. Recognition here is essentially individual-centered. Unlike restorative approaches to justice, which emphasize the restoration of communal bonds, recognition focuses primarily on the individual’s sense of injustice and threatened self-respect, drawing a clear line between such matters of justice and other moral concerns (including democracy, peace, or reconciliation). This focus may enable us to gain a deeper understanding of the moral dilemmas and needs arising in the aftermath of genocide or barbarous civil wars. Rather than confining the debate on transitional justice to the simplistic either/or choice of “retribution versus restoration,” this approach makes room for a broader, more critical, and sensitive outlook by asking how injustice looks to the victims.

This article draws from some recent works that represent a turn in political and legal philosophy from an exclusive concern with just distribution of social goods to accounts of “negative morality.”¹⁶ In other words, these works expound a view that sees the primary task of moral and politi-

13. See *id.* at 31.

14. See *id.*

15. See *id.*; see also 1 TRUTH & RECONCILIATION COMM’N, TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA REPORT ch. 5, ¶ 55(a) (1998) (“[T]he tendency to equate justice with retribution must be challenged and the concept of restorative justice considered as an alternative.”), available at <http://www.doj.gov.za/trc/report/>.

16. See generally Jonathan Allen, *The Place of Negative Morality in Political Theory*, 29 POL. THEORY 337 (2001).

cal theory as *negative*—as an effort “to shape and constrain normative reflection and the construction of social ideals through an analysis of evils, injuries, and experiences of vulnerability.”¹⁷ Closely allied to this approach is an explicit attempt to identify and respond to the distinctive perspective that *victims* of social evils have on society. Taking into account the point of view of those who are on the receiving end of such evils does not mean accepting their point of view at face value; it does mean, however, that as a matter of moral and political urgency one should examine the victims’ claims and ask whether they have *reasons* for feeling the way they do.¹⁸ As Judith Shklar writes, with respect to the sense of injustice: “No theory of either justice or injustice can be complete if it does not take account of the subjective sense of injustice and the sentiments that make us cry out for revenge.”¹⁹

With this general idea in mind, this article proposes to construe transitional justice as a moral project of recognition that puts victims’ negative experiences of domination, cruelty, suffering, and so forth at its center. Recognition, as understood here, is a matter of appropriately responding to and acting in light of what we know or perceive of victims of past wrongs. It involves extending to victims the concern and respect due to them in virtue of what they have suffered and of what they are—wounded others in our society. If, as commonly thought, justice is a matter of giving what is due, then this kind of recognition can quite easily be understood as an elaboration of that maxim, for it responds to the *injustice* of being denied the rights, the consideration, and the concern that it is appropriate for a person to enjoy.

Recognition, so understood, manifests itself at different levels. Certainly it requires the just redistribution of resources and rights. This, however, is not the whole story. This article suggests that transitional politics of recognition must reach beyond distributive systems of goods in the society to investigate the full dimension of injustice and the sense of victimization it arouses. The salient point is that we cannot measure the harm of social and political evils simply by considering the tangible deprivation of social goods (liberty, opportunity, income, etc.). Evildoing, such as torture or rape, does not only cause the victim physical suffering, but it betokens a profound lack of concern—a kind of *symbolic* devaluation that is not reducible to the absence of goods.²⁰ From this perspective, “it is not only unjust to deprive people of their social rights but it is also unjust to make them feel the fury and resentment of being humiliated.”²¹ This article interprets this symbolic dimension to be a core concern of recognition.

Six additional points need to be made. First, as already alluded to, the proposed model of recognition is consistent with a commitment to individ-

17. *Id.* at 341.

18. See generally JUDITH N. SHKLAR, *THE FACES OF INJUSTICE* (1990) [hereinafter *THE FACES OF INJUSTICE*].

19. *Id.* at 49.

20. See *id.*

21. *Id.*

ualism. Here, the ultimate units of concern are human beings, or individuals, rather than political, cultural, or religious communities.

Second, the status of “ultimate unit of concern” specifically attaches to individual victims of collective evils. Assuming a perspective that values individuals and the reality of their individual experiences of suffering and harm, this article endorses a rather broad notion of victimhood comprising three groups: those who suffer direct injury or violence (primary victims), those family members and friends who grieve the injuries or loss of a loved one (secondary victims), and individual members of a specific community affected by structural violence and systemic injustice (tertiary victims).²²

Third, in analyzing the dynamics of large-scale evil, we may distinguish between two levels at which the proposed concept of recognition operates. While the first level focuses on individuals and their personal responsibility (interpersonal recognition),²³ the second level concerns the distinctively collective nature of “macro” instances of evil (collective recognition).²⁴ Far from being at odds with one another, these two levels are complementary, or so this article shall argue.

Fourth, in building the discourse of recognition around a dual framework of the kind just mentioned, this article suggests that extraordinary evil—such as genocide and ethnic cleansing—is individual and collective at once. Although extraordinary evil is composed of individual acts and responsibilities, it goes beyond “ordinary crimes” (assault, murder, rape, and so on) by virtue of its inherently societal, macro-level, and systemic dimension.²⁵

22. This view of victimhood is fairly standard in the transitional justice literature. See, e.g., TRUDY GOVIER, *TAKING WRONGS SERIOUSLY: ACKNOWLEDGEMENT, RECONCILIATION, AND THE POLITICS OF SUSTAINABLE PEACE* 30 (2006). Furthermore, the suggested notion of victimhood is largely consistent with the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power which defines victims of crimes as “persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights.” G.A. Res. 40/34, ¶ 1, U.N. Doc. A/Res/40/34/Annex (Nov. 29, 1985) [hereinafter Declaration of Basic Principles of Justice]. This Declaration further specifies that the term “victim” may also include “immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.” *Id.* ¶ 2.

23. Because of its “individualizing” perspective, this mode of recognition applies essentially to the categories of primary and secondary victims. Structural or systemic injustice and its tertiary victims are, by contrast, primary objects of what I call “collective recognition.”

24. To dispel any misunderstanding, it is important to note here that these two modes of recognition, “interpersonal recognition” and “collective recognition,” are both *collective* in the sense that they involve obligations of political institutions such as the state or the government. The distinction here is not so much one of “individual versus political morality,” but one of “individual versus collective responsibility.” Although interpersonal recognition is expressive of, and rooted in, a fundamentally individualizing view of wrongdoers and their deeds, collective (or group-based) recognition focuses on the inherently collective—“de-individuated”—nature of widespread evil. I have been unable to design a more suitable terminology.

25. For a critical account of the relation between “extraordinary evil” and “ordinary crime,” see Miriam J. Aukerman, *Extraordinary Evil, Ordinary Crime: A Framework for Understanding Transitional Justice*, 15 HARV. HUM. RTS. J. 39 (2002). The discussion here

Fifth, in theorizing recognition, this article assumes an understanding of law and politics that is secular and performative rather than religious and sentiment-based. Consequently, the success of the project of recognition does not depend on emotional or internal states such as repentance or remorse, but rather on compliance with externals or formalistic rituals.

Sixth, and finally, this article is not concerned with the concept of law in periods of dramatic change.²⁶ Rather, this article strives to offer a moral argument about justice and recognition that may serve as a vehicle for critical reflection on the law's use in the normative construction of new political regimes.

The main argument of this article is simple to state: one misses an important part of the story in the context of collective and systematic wrongs if one fails to see the significance of moral recognition for the victims of those wrongs. Part I of this article opens the discussion by calling attention to two recent philosophical works that make the negative experiences of marginalized and victimized groups their central concern: Axel Honneth's *The Struggle for Recognition* and Avishai Margalit's *The Decent Society*. These works, this article argues, offer a mode of thinking about recognition that is both "realistic" and sensitive to the experience of human suffering, and thus may serve as a good starting point for further critical investigation.

Part II elaborates a phenomenology of recognition in general terms as an additional step towards understanding what recognition might mean and why it might be important for the victims of terrible human rights abuses. Part II also suggests that we think of recognition quite generally in terms of what Thomas Nagel, in his now classic article *War and Massacre*, referred to as "the maintenance of a direct interpersonal response to the people one deals with."²⁷ The claim is that this formulation grounds an interpersonal account of recognition that belongs in the lexicon of societal responses to mass violence. Central, here, is the idea (common to restorative justice models) that criminal behavior is first and foremost a conflict between individuals rather than a violation of the state.

Part III provides an entrance into a *political* concept of recognition that accommodates this view of crime as a primarily interpersonal matter. Moving from the private into the public realm, this article proposes a model of triadic interaction (somehow akin to the process of a trial or a truth commission) in which the state, as a third party, plays a crucial role in granting public recognition to those who have been wronged.

Part IV extends the argument by considering the distinctive nature of *collective* evil and its impact on individual victims. As this article argues at

cannot elaborate a theoretical framework suited to a deeper understanding of the distinctive nature and practices of collective evil-doing. For a detailed and penetrating treatment of this matter, see ARNE JOHAN VETLESEN, *EVIL AND HUMAN AGENCY: UNDERSTANDING COLLECTIVE EVILDOING* (2005).

26. I have touched upon this question elsewhere. See Frank Haldemann, *Gustav Radbruch vs. Hans Kelsen: A Debate on Nazi Law*, 18 *RATIO JURIS* 162 (2005).

27. Thomas Nagel, *War and Massacre*, 1 *PHIL. & PUB. AFF.* 123, 136 (1972).

length, the inherently collective nature of the crimes under consideration demands some kind of collective or group-based recognition intended to serve as a complement to interpersonal accounts. Finally, the article concludes by identifying some moral values or concerns other than recognition that may inform the pursuit of transitional justice. Here, the underlying assumption is that we should think of transitional justice in terms of moral conflicts and attempts to achieve acceptable compromises.

I. Humiliation, Decency, and Recognition

For the most part, moral philosophers and political theorists have tended to focus on positive ethical concepts such as “good,” “right,” “duty,” “virtue,” “excellence,” “freedom,” and “justice.”²⁸ There is usually little interest in exploring the significance of “negative” moral concepts and experiences—*injury, domination, cruelty, suffering, humiliation, violence, vices, and so forth.*²⁹ A common assumption is that one may regard these negative emotions simply as the absence of the positive, as an abnormality that independent positive principles are designed to control or eliminate.

In recent times, however, thinkers who can properly be described as philosophers of negative morality have questioned this conventional account.³⁰ Most prominent, here, is the later work of Judith Shklar. According to Shklar, the most persuasive justification of liberalism begins with a fundamental evil in human experience, a *summum malum*, which all of us fear and would avoid if we could—cruelty.³¹ What characterizes this outlook, termed by Shklar as “[t]he liberalism of fear,” is that it sees the main concern of (liberal) politics as negative, as a commitment to the eradication or minimization of cruelty.³² Shklar’s strategy consists, not in championing positive ideals such as equality or justice, but rather in “putting cruelty first.”³³ Negative morality, then, becomes the touchstone of political philosophy. In this view, the primary goal of politics is to give a voice to the victimized and marginalized, to see and respond to their experiences of suffering and cruelty, and to curb vices and combat evils.

There may be good reasons for placing phenomena and concepts of injury, cruelty, injustice, and suffering at the start of a moral and political philosophy. The picture of political life seems incomplete without a closer analysis of practices conducive to disrespect, degradation, humiliation and so on. By paying attention to these types of human threats, we might gain a better understanding of positive values and dispositions such as virtue, respect, honor, loyalty, or justice. Nevertheless, the central moral reason to analyze these practices is that there is a fundamental difference between promoting good and eliminating evil. The moral reason for that is simple:

28. Allen, *supra* note 16, at 339.

29. *See id.*

30. For an important reflection on negative morality see *id.* at 337–40.

31. *See* JUDITH N. SHKLAR, *POLITICAL THOUGHT & POLITICAL THINKERS* 10–11 (Stanley Hoffmann ed., 1998).

32. *Id.* at 9.

33. *Id.* at 11.

"It is much more urgent to remove painful evils than to create enjoyable benefits."³⁴ This is easily seen with regard to societies seeking recovery from political evil. When it comes to such societies, the priority is to put an end to, and mark a break with, the legacy of the past.

In what follows, this article calls attention to two works, each of which (this article suggests) provides us with a persuasive account of how social ideals can be constructed from negative experiences of vulnerability—Axel Honneth's *The Struggle for Recognition* and Avishai Margalit's *The Decent Society*. Both works represent a "realistic," non-utopian political outlook capable of seeing and responding to the sense of disrespect, suffering, and cruelty that victims of atrocity and repression experience. These two books, although not addressing the topic of transitional justice directly, suggest ways of gaining a better moral understanding of how people's sense of humiliation and need for recognition matter in times of radical political change.³⁵ This is not to say that these works can provide ultimate answers or solutions to the complex social phenomena in question. Rather, these works sketch out a helpful framework for further exploration and critical discussion.

A. Honneth's Struggle for Recognition

In his work *The Struggle for Recognition*, first published in German in 1992, Honneth provides an account of social conflicts that emphasizes the human need for relations of mutual recognition (*Anerkennung*) as a precondition for achieving a distinctively human sense of self-realization.³⁶ Rather than situating his project within the framework of a "Hobbesian-Machiavellian" conception of society as an egoistic struggle for self-preservation, Honneth is inspired by Hegel and Georg Herbert Mead to stress the importance of social interaction to the development and maintenance of a

34. AVISHAI MARGALIT, *THE DECENT SOCIETY* 4 (Naomi Goldblum trans., 1996).

35. See generally AXEL HONNETH, *THE STRUGGLE FOR RECOGNITION: THE MORAL GRAMMAR OF SOCIAL CONFLICTS* (Joel Anderson trans., Polity Press 1995) (1992); MARGALIT, *supra* note 34.

36. See generally HONNETH, *supra* note 35. For an excellent discussion of Honneth's account see *id.* at x–xxi (translator Joel Anderson outlines Honneth's philosophy). See also PAUL RICOEUR, *THE COURSE OF RECOGNITION* 186–246 (David Pellauer trans., Harvard Univ. Press 2005) (2004); Jonathan Allen, *Decency and the Struggle for Recognition*, 24 *SOC. THEORY & PRAC.* 449 (1998). Nancy Fraser has questioned the validity of Honneth's account, contending that it is not a super-category called "recognition," but the "norm of participatory parity" that should be the guiding notion of a critical theory of society. Nancy Fraser, *Recognition Without Ethics?* 18 *THEORY, CULTURE & SOC'Y* 21, 27 (2001). This deontological norm refers to the material and cultural conditions necessary for all members of society to participate on a par with others in social life; it requires sufficient material goods ("redistribution") and "institutionalized patterns of cultural value" ("recognition") as two mutually irreducible dimensions of social participation. *Id.* Although I have much sympathy with Fraser's notion of social parity, which alerts us to how to social justice is entwined with both economic and cultural conditions, Fraser's conception lacks an adequate account of moral or criminal injury—adequate to the task of coming to terms with victims of mass atrocities and their experiences of extreme humiliation and disrespect. Unfortunately, there is not an opportunity here to pursue this argument.

person's sense of self-trust and self-worth.³⁷ Drawing on Mead's social psychology and his notion of the "I," Honneth argues that it is only intersubjectively—through experiencing recognition from others—that we can have any sense of self at all.³⁸ For Honneth, one's need to relate to oneself as a responsible, socially-valued agent depends crucially on the presence of self-confidence, self-respect, and self-esteem.³⁹ Each of these affectively laden self-conceptions—or, to use Hegelian language, "practical relations-to-self" (*praktische Selbstbeziehungen*)—involves the experience of being granted recognition from others.⁴⁰ Honneth, in a recent paper, neatly summarizes this point when he writes:

To this extent every human subject is dependent, in an elementary way, on a context of social forms of interaction that are regulated by normative principles of mutual recognition; and the absence of such recognition relations will be followed by experience of disrespect or humiliation that cannot be without damaging consequences for the single individual's identity formation.⁴¹

As this passage makes clear, a distinctive element of Honneth's approach is the importance it attributes to the investigation of negative experiences such as disrespect or humiliation.⁴² Central to Honneth's "social theory with normative content" is his interpretation of social struggles as motivated by the experience of being denied the conditions necessary for identity-formation (which Honneth refers to as "disrespect").⁴³ The "grammar" of such struggles is "moral" inasmuch as they are driven by the normative ideal of a society in which patterns of recognition would allow individuals to develop and maintain a human sense of self.⁴⁴ As Paul Ricoeur notes, however, "negative sentiments give flesh and blood to the struggle for recognition."⁴⁵ The sense of indignation and outrage that the rejection of (morally-motivated) claims to recognition generates provides a "moral" basis for social resistance and revolt.⁴⁶ In this way, Honneth argues that negative experiences of disrespect can, but do not inevitably have to, "become the motivational impetus for [the] struggle for recognition."⁴⁷

For Honneth, however, there is another reason—apart from the idea of an emancipatory potential in social life—why paying attention to negative experiences and concepts is important.⁴⁸ He suggests that it is valuable to

37. See HONNETH, *supra* note 35, at 11-91.

38. See *id.* at 71-91.

39. See *id.* at 76.

40. See *id.*; Axel Honneth, *Recognition and Justice: Outline of a Plural Theory of Justice*, 47 ACTA SOCIOLOGICA 351, 354 (2004) [hereinafter *Recognition and Justice*].

41. *Recognition and Justice*, *supra* note 40, at 354.

42. *Id.*

43. See *id.* at 352-54.

44. *Id.* at 356.

45. RICOEUR, *supra* note 36, at 188.

46. HONNETH, *supra* note 35, at 138; RICOEUR, *supra* note 36, at 187-88.

47. HONNETH, *supra* note 35, at 138.

48. See *id.* at 143-79.

investigate phenomena of disrespect and injury because this demonstrates the moral significance of various forms of social interaction relevant to the issue of recognition.⁴⁹ To sum up very roughly, Honneth argues that moral injury, unlike misfortune, always involves an experience of denial of recognition.⁵⁰ A physical injury, for instance, becomes a moral injury only if it is accompanied by forms of disrespect or humiliation that deny recognition. Moral attitudes, then, are inherently connected with positive ideals of recognition.⁵¹ Therefore, one can conclude that there are as many forms of recognition as there are corresponding forms of moral injury.⁵²

From here, Honneth sets out to identify three levels or stages of relation-to-self relevant to the issue of recognition. The first, and most elementary, is self-confidence, or literally “trust in oneself” (*Selbstvertrauen*).⁵³ This mode of practically relating to oneself is, according to Honneth’s theory of recognition, vital for becoming a fully autonomous and individuated person.⁵⁴ Drawing on the object-relation theory, particularly as elaborated by the psychoanalyst Donald Winnicott, Honneth argues that the formation and maintenance of self-trust are dependent on intimate relationships—child-parent relationships as well as adult relationships of love and friendship—in which human beings acquire the capacity to express their needs as their own without fear.⁵⁵ This sense of self-trust, facilitated by the sure love of others and the emotional support it fosters, is shattered in the most harmful way by extreme experiences of physical violence, such as rape or torture, which—beyond the raw bodily pain—cause a loss of self-confidence and trust in the world.⁵⁶

Self-respect (*Selbstachtung*) is the second form of practical relation-to-self that Honneth considers essential for self-realization.⁵⁷ Here, Honneth has in mind, not so much the experience of having a good opinion of oneself, but rather one’s sense of being a “morally responsible” agent capable of acting autonomously based on reason.⁵⁸ This notion has a strong Kantian ring to it: because dignity is something that all persons—as ends in themselves—have in common, each person is to be recognized as an equal citizen capable of making autonomous decisions.⁵⁹ As Honneth argues, there is a close link between having self-respect and being a bearer of legal rights.⁶⁰ By according rights to all human beings equally, a just legal framework protects individuals from exclusion from the category of “legal

49. See *id.* at 160–79.

50. See Axel Honneth, *Recognition and Moral Obligation*, 64 *Soc. Res.* 16, 27 (1997) [hereinafter *Recognition and Moral Obligation*].

51. See *id.*

52. See *id.*

53. HONNETH, *supra* note 35, at xiii.

54. *Id.* at 174.

55. See *id.* at 98–107.

56. See *id.* at 131–39.

57. *Id.* at xiv, 173–74.

58. *Id.* at 120–21.

59. *Id.* at xiv–xv.

60. See *id.* at 107–21.

persons," that is, of morally responsible agents.⁶¹ This form of legal recognition (that supports self-respect) has undergone significant changes over time.⁶² Although the struggle for civil and political rights dates from the 18th and 19th centuries respectively, social rights emerged in the 20th century from an understanding that certain basic conditions of social and economic welfare are required for human beings to exercise their capacity for collective or personal self-determination.⁶³ Referring to this gradual expansion of human rights, Honneth notes that legal recognition "means more today than it possibly could have at the start of the evolution of modern law."⁶⁴

Finally, a third attitude toward oneself that is thought to be crucial for identity-formation is self-esteem (*Selbstschätzung*).⁶⁵ Unlike self-respect, which is a matter of viewing oneself as bearer of equal rights, self-esteem involves resources for thinking about one's way of life as something that is meaningful and significant.⁶⁶ As Honneth suggests, the sense of being socially worthwhile can be seriously damaged if a socio-cultural environment is openly hostile to considering one's lifestyle as a valuable contribution to the common good.⁶⁷ Because of their demoralizing effect on a person's sense of having valuable capacities, systematic patterns of exclusion and denigration undermine the social conditions for developing self-esteem and pose a threat to the real opportunity for self-realization.⁶⁸ For Honneth, "solidarity" is the form of recognition that is committed to protecting individuals against such threats of disrespect.⁶⁹ Solidarity, he claims, provides the basis for a cultural climate in which every member of society can build a sense of self-esteem by contributing to some shared concern, interest, or value.⁷⁰ From this perspective, a good society is one in which "every subject is free from being collectively denigrated, so that one is given the chance to experience oneself to be recognized, in light of one's own accomplishments and abilities, as valuable for society."⁷¹

These tripartite distinctions between modes of recognition (love, rights, and solidarity) and types of practical relation-to-self (self-confidence, self-respect, and self-esteem) provide a basis for what Honneth calls "a formal conception of ethical life" (*formales Konzept von Sittlichkeit*)—a normative ideal of society where social actors can establish relations of mutual recognition as social prerequisites for individual self-realization.⁷²

61. *Id.* at 80; see *Recognition and Justice*, *supra* note 40, at 359.

62. HONNETH, *supra* note 35, at 114-15.

63. *Id.* at 116.

64. *Id.* at 117.

65. *Id.* at xiv.

66. *Id.* at xvi.

67. *Id.* at 134.

68. *Id.*

69. *Id.* at 128-30.

70. *Id.*

71. *Id.* at 130.

72. *Id.* at 172-75. Honneth's conception of ethical is "formal" in that it "encompasses the qualitative conditions for self-realization that, insofar as they form general prerequisites for the personal integrity of subjects, can be abstracted from the plurality

It thereby opens up the theoretical space for social critique and collective action aimed at ending patterns of disrespect.⁷³ For Honneth, such struggles for recognition are at the heart of social justice in the fullest sense.⁷⁴ He argues for an alternative model of justice, firmly grounded in these three central patterns of recognition.⁷⁵ On Honneth's understanding, the justice of a society depends on "the degree of its ability to secure conditions of mutual recognition in which personal identity formation, and hence individual self-realization, can proceed sufficiently well."⁷⁶ By defining the conditions of a just society through principles that secure the social conditions of mutual recognition, this conception of justice shifts away from "liberal" conceptions of justice, like Rawls', that typically rely on an individualistic understanding of rights and autonomy.⁷⁷

B. Margalit's Decent Society

The main thesis of Avishai Margalit's book, *The Decent Society*, is disarmingly simple: a good society is a decent society, and a society that is decent is "one whose institutions do not humiliate people."⁷⁸ Margalit's political philosophy focuses on a specific kind of injury, which he terms "humiliation."⁷⁹ But this term, of course, stands in need of further clarification. What is it that makes us feel humiliated? When do we have reasons for considering something humiliating?

For Margalit, humiliation is an injury to self-respect—"respect a human being deserves for the very fact of being human."⁸⁰ Margalit is concerned with a normative rather than a psychological sense of humiliation.⁸¹ People may feel humiliated without sound reasons or have sound reasons for feeling humiliated without actually feeling humiliated. For a person to be humiliated in a normative sense, however, there must be a sound reason for that person to think his or her self-respect injured.⁸²

of all particular forms of life." *Id.* at 175. Honneth claims that the three patterns of recognition constituted by love, rights, and solidarity are "defined in a sufficiently abstract, formal manner to avoid raising the suspicion that they embody particular visions of the good life." *Id.* at 174.

73. *Id.* at 175-79.

74. *Id.*

75. *Id.* at 174.

76. *Recognition and Justice*, *supra* note 40, at 354.

77. For a conception of autonomy articulated in terms of a theory of mutual recognition, see Joel Anderson & Axel Honneth, *Autonomy, Vulnerability, Recognition, and Justice*, in *AUTONOMY AND THE CHALLENGES TO LIBERALISM: NEW ESSAYS* 127 (John Christman & Joel Anderson eds., 2005).

78. MARGALIT, *supra* note 34, at 1. For insightful and critical discussions, see Allen, *supra* note 16; Frederic Schick, *On Humiliation*, 64 SOC. RES. 131 (1997).

79. MARGALIT, *supra* note 34, at 9.

80. *Id.* at 19. Some critics have raised doubts whether it makes sense to think of humiliation in terms of the reduction, diminution, or impairment of *self-respect*, rather than *respect*. See Anthony Quinton, *Humiliation*, 64 SOC. RES. 77, 95-97 (1997) (arguing that the essence of humiliation is not the injury to self-respect but the failure to give people the respect that is their due).

81. MARGALIT, *supra* note 34, at 9.

82. For a good illustration of this aspect of Margalit's work, see Allen, *supra* note 16, at 354.

According to Margalit, the sense of humiliation is normatively justified when one is treated as subhuman, rejected from the human commonwealth, or deprived of one's basic sense of self-control (three senses of humiliation which are related rather than separate).⁸³ Humiliation, so defined, involves rejecting human beings as full-fledged humans—treating them as if they were inferior beings, objects, beasts, or children who will never grow up.⁸⁴

Margalit's concept of humiliation cannot function without some notion of human dignity.⁸⁵ "Humiliation," he writes, "is a concept based on contrast, and the opposite of humiliation is the concept of respect for humans."⁸⁶ But what are the grounds of human dignity and non-humiliation? Although Margalit does not dismiss positive accounts of respect, he relies on a negative and skeptical justification for human dignity based simply on the idea that preventing cruelty, including humiliation, is "the paradigm example of moral behavior" which requires no additional justification.⁸⁷

As Margalit stresses, a decent society is not reducible to a Rawlsian type of just society.⁸⁸ Although a Rawlsian just society is a decent society "in spirit" (where self-respect is the primary good), it is not necessarily a decent society "according to the letter."⁸⁹ As Margalit notes, in some cases the distribution of goods may be just and efficient, yet still inhumane and humiliating in the way in which it occurs: "We might, for instance, see people distributing food to famine victims in Ethiopia throw the food out of the truck as if the recipients were dogs, while still making sure that all the recipients get their just portion in an efficient manner."⁹⁰ According to Margalit, this behavior illustrates

an old fear that justice may lack compassion and might even be an expression of vindictiveness. There is a suspicion that the just society may become mired in rigid calculations of what is just, which may replace gentleness and human consideration in simple human relations. The requirement that a just society should also be a decent one means that it is not enough for goods to be distributed justly and efficiently—the style of their distribution must also be taken into account.⁹¹

At this point, one should briefly mention three issues that Margalit discusses in *The Decent Society*: citizenship, bureaucracy, and punish-

83. MARGALIT, *supra* note 34, at 108–29.

84. *Id.* at 89, 121.

85. *Id.* at 51–53.

86. *Id.* at 149.

87. *Id.* at 88.

88. *See id.* at 281.

89. *See generally* JOHN RAWLS, *A THEORY OF JUSTICE* (rev. ed. 1999). Rawls defines self-respect (or, interchangeably for him, self-esteem) as having two aspects: first, a person's sense of his own worth, the belief that "the conception of his good, his plan of life, is worth carrying out;" and second, "a confidence in one's ability, so far as it is within one's power, to fulfill one's intentions." *Id.* at 386.

90. MARGALIT, *supra* note 34, at 280.

91. *Id.* at 280–81.

ment.⁹² Margalit claims that a decent, non-humiliating society does not injure what he calls the “civic honor” of its citizens.⁹³ In such a society, there are no second-class citizens.⁹⁴ “[S]econd-class citizenship involves not only depriving people of essential resources and being unwilling to share authority but also the idea that second-class citizens are not in essence whole human beings”⁹⁵ One form of second-class citizenship is the denial of full citizenship rights to someone who is in fact a citizen.⁹⁶ As for bureaucracy, Margalit says it creates potential new ways of treating human beings as nonhuman.⁹⁷ One way of expressing this modern, “bureaucratic,” type of humiliation is through the idea of turning human beings into faceless, anonymous numbers.⁹⁸ This occurs, for instance, “when the only identity traits recognized by the society’s institutions for an individual or a group are the numerical tags.”⁹⁹ “Punishment,” finally, “is the litmus test of the decent society.”¹⁰⁰ As Margalit suggests, the question we need to ask is whether it is possible to think about punishment without any inherent association with humiliation.¹⁰¹ In other words: how can we “transform the idea of the disgrace inherent in punishment into a concept involving only the loss of social honor without personal humiliation as well[?]”¹⁰² For Margalit, there is only one conceptual answer to this problem: a decent society cares about the dignity of the inmates of its prisons.¹⁰³

C. Unpacking the Concepts: Four Lines of Argument

Having given a broad (and admittedly cursory) overview of Axel Honneth’s and Avishai Margalit’s theories of social criticism, the question is now why and how these works may be relevant to normative reflection on “transitional justice.” First, to lay some groundwork for the development of my argument, it is important to call attention to the following four aspects emerging from a critical reading of *The Struggle for Recognition* and *The Decent Society*.¹⁰⁴

The first aspect is the emphasis these works place on “negative morality” by building normative reflection through an explicit analysis of nega-

92. See *id.* at 150–61, 212–21, 262–70.

93. *Id.* at 151.

94. *Id.*

95. *Id.* at 152.

96. *Id.*

97. *Id.* at 215.

98. *Id.*

99. *Id.* at 220.

100. *Id.* at 262. For Margalit, punishment is an important test case for a decent society because it provides so many opportunities for humiliation. See *id.* at 262–63. Punishment, however, may also be important as a response to the humiliating aspects of wrongdoing. For an insightful discussion of this issue, see Arthur Ripstein, *Responses to Humiliation*, 64 SOC. RES. 90, 95–97 (1997).

101. MARGALIT, *supra* note 34, at 262–63.

102. *Id.* at 269.

103. *Id.* at 262.

104. HONNETH, *supra* note 35; MARGALIT, *supra* note 34.

tive moral concepts such as injustice, evil, vice, cruelty, humiliation, and so forth.¹⁰⁵ This "realistic" approach to morality, sensitive to people's everyday experiences of injury or humiliation, is a powerful and relevant one, particularly in the context of reckoning with past wrongs. Indeed, one can specify the very notion of "transitional justice" negatively, as primarily concerned with the eradication or minimization of intolerable (radical) social evils perpetrated on a massive scale. If we think of the most extreme and radical forms of evil—genocides, massacres, mass rape, and death camps—as efforts to undermine the very idea of shared humanity (the foundation of morality itself), then it seems adequate to put negative phenomena at the start of our moral reflection. Without this change in perspective, we might miss the "negative essence" of those nightmarish episodes from which transitional societies try to recover. Traumatic history involves a deep sense of injustice, suffering, loss, disrespect, and humiliation; we must start from here, rather than operating in an abstract space filled with positive principles. What does it mean to feel humiliated, abandoned, betrayed, lost? By paying attention to these basic moral emotions, rather than ignoring them, we might gain a deeper understanding of positive notions of dignity, integrity, respect, and so on. More importantly, however, a focus on negative morality might allow us to avoid distorted moral priorities. As Margalit noted, there is asymmetry between eradicating evil and promoting good.¹⁰⁶ Creating positive wellbeing is desirable. Stopping cruelty and humiliation is imperative.

The second aspect concerns the view that people's self-identity and self-respect necessarily depend on the sustaining attitudes of others.¹⁰⁷ As both Honneth and Margalit suggest, we do not establish a sense of self in isolation but in interaction with other people: it is with, and through, others that we can maintain sense of who we are and what we do.¹⁰⁸ Human beings need the validation or approval of others and are riddled with anxiety if they do not receive it. One's attitude towards oneself, then, is vulnerable to disruptions in one's relationships with others.¹⁰⁹ Thus, practices and institutions that express attitudes of denial and obliviousness threaten our sense of self-worth. Although it might be psychologically possible to maintain a sense of self-worth in the face of external depreciation and humiliation, for most of us it is difficult to do so. Even if some people might be able to shield themselves from such negative attitudes, the costs

105. See HONNETH, *supra* note 35, at 131-39, 160-79; MARGALIT, *supra* note 34, at 9-27, 89-114.

106. See MARGALIT, *supra* note 34, at 9-27, 89-114.

107. See HONNETH, *supra* note 35, at 92-130, 138; MARGALIT, *supra* note 34, at 124.

108. See HONNETH, *supra* note 35, at 92-130, 138; MARGALIT, *supra* note 34, at 124.

109. Charles Taylor, another prominent contemporary theorist of recognition, makes this point eloquently when he writes,

The thesis is that our identity is partly shaped by recognition or its absence, often by the misrecognition of others, and so a person or group of people can suffer real damage, real distortion, if the people or society around them mirror back to them a confining or demeaning or contemptible picture of themselves.

Charles Taylor, *The Politics of Recognition*, in *MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION* 25, 25 (Amy Gutmann ed., 1994).

associated with these efforts to preserve a sense of self-respect are likely to be significant. Furthermore, this immediately prompts the question of whether imposing such a burden would be just and fair.

This brings me to the third aspect of Margalit's and Honneth's work: the claim that moral cruelty—the infliction of emotional or psychological scars—can constitute a serious injury, sometimes equitable to physical cruelty.¹¹⁰ As Margalit explains, human beings are creatures that “live in symbols,” and humiliation—as mental cruelty—is a distinctively human form of injury.¹¹¹ Although physical cruelty is what people generally fear most, “scars of humiliation”¹¹² may heal more slowly than physical scars: such deep emotional wounds, inflicted by all sorts of insulting and disrespectful conduct, may “keep bleeding long after the painful physical injuries have crusted over.”¹¹³ The trauma of humiliation, like a covered stain, can have long-lasting effects and leave invisible scars and wounds behind, beyond the mere physical pain once experienced. Margalit's account of a decent society has the merit of making such psychological injuries, particularly in their institutional manifestation, a central and distinctive concern of political ethics.¹¹⁴ It shows that the non-humiliating, decent society is a political ideal in its own right, one that is not reducible to a Rawlsian model of distributive justice.¹¹⁵

The fourth and last aspect concerns the human need for recognition, and the moral significance and nature of this notion.¹¹⁶ Although both Margalit and Honneth seem to agree that human beings need some kind of positive recognition by others, and that people can justifiably be said to suffer moral injury from refusals to grant such recognition, Honneth is much more explicit on this point.¹¹⁷ In an article written in 1997, Honneth argues that Margalit's social ideal of non-humiliation and decency commits him to something like a theory of recognition: “[A] decent society would be a society whose institutional practices and measures respect all the subjects affected in the sense that each can see him- or herself recognized as a member of the human community.”¹¹⁸ In this view, a treatment is disrespectful or humiliating because it conveys a refusal to recognize someone's dignity and status as a human being of equal worth.¹¹⁹ Humiliation, as Honneth defines it, is a matter of being denied a certain status in communion with others.¹²⁰ It evokes painful feelings of being ignored, of not being taken seriously, of being denied a voice or being refused an ear,

110. See HONNETH, *supra* note 35, at 135–39; MARGALIT, *supra* note 34, at 84–88.

111. See MARGALIT, *supra* note 34, at 166, 89–112.

112. *Id.* at 87.

113. AVISHAI MARGALIT, *THE ETHICS OF MEMORY* 120 (2002) [hereinafter *THE ETHICS OF MEMORY*].

114. See MARGALIT, *supra* note 34, at 189–270.

115. See *id.* at 271–91.

116. HONNETH, *supra* note 35, at 143; see MARGALIT, *supra* note 34, at 119–26.

117. HONNETH, *supra* note 35, at 143–44; see MARGALIT, *supra* note 34, at 124.

118. *Recognition and Moral Obligation*, *supra* note 50, at 18.

119. See *id.*; see also MARGALIT, *supra* note 34, at 89–112.

120. See HONNETH, *supra* note 35, at 131–39; *Recognition and Moral Obligation*, *supra* note 50, at 18.

of being cut out of the conversation with your fellows.¹²¹ When a person is denied the possibility of ever being recognized as a valuable contributor to some shared project, and when that person is treated as though his presence counts for nothing, it is natural for him to experience a serious lack of respect or decency.¹²² In this sense, “non-humiliation” involves being granted recognition by others whom one also recognizes.¹²³

These four aspects drawn from Margalit’s and Honneth’s work prepare some groundwork for supporting the basic claim of this article: that recognition, as a principled commitment to the reduction of humiliation and moral cruelty, is a central factor in restoring a minimally decent order in the aftermath of mass atrocity. Societies emerging from such traumatic episodes face situations of extreme complexity, replete with moral possibilities and dangers.¹²⁴ One obvious danger is that the perspective of the victimized, their sense of injustice or humiliation, may be ignored or not appropriately taken into account.¹²⁵ Another danger is the tendency to humiliate the people designated as perpetrators by—among other things—treating them as mere categories or negative stereotypes.¹²⁶ Societies resurfacing from an evil past have a special vulnerability to a certain kind of symbolic depreciation—submitting people to the pain of being ignored, of not counting, of being treated as if central features of one’s very existence *need not be taken into account*.¹²⁷ In what follows, this article takes a closer look at this phenomenon referred to here, in preliminary formulation, as misrecognition.

II. A Phenomenology of Recognition

A. Misrecognizing the Victims

One central element in serious wrongdoing, and what makes it disrespectful or humiliating, is symbolic devaluation: the wrongdoer’s actions not only cause the victim physical suffering or material loss, but also betoken an absence of respect and manifest a profound lack of concern.¹²⁸

121. See HONNETH, *supra* note 35, at 131–39.

122. See *Recognition and Moral Obligation*, *supra* note 50, at 23–24.

123. See *id.* at 27.

124. See generally PRISCILLA B. HAYNER, *UNSPEAKABLE TRUTHS* (2002) (discussing transitions in societies recovering from human rights abuses and atrocities); Angela Hegarty, *Truth, Law and Official Denial: The Case of Bloody Sunday*, in *TRUTH COMMISSIONS AND COURTS: THE TENSION BETWEEN CRIMINAL JUSTICE AND THE SEARCH FOR TRUTH* 199, 206–08 (William A. Schabas & Shane Darcy eds., 2004) (exploring accountability and truth in the context of Bloody Sunday).

125. See Avishai Margalit, *Decent Equality and Freedom: A Postscript*, 64 *SOC. RES.* 147, 149–53 (1997) [hereinafter *Decent Equality and Freedom*].

126. See Jodi Halpern & Harvey M. Weinstein, *Empathy and Rehumanization After Mass Violence*, in *MY NEIGHBOR, MY ENEMY: JUSTICE AND COMMUNITY IN THE AFTERMATH OF MASS ATROCITY*, *supra* note 2, at 303.

127. See *Decent Equality and Freedom*, *supra* note 125, at 148 (“[I]nequality symbolically expresses an attitude of downgrading—the view that the other is inferior in the social hierarchy.”).

128. See Jean Hampton, *Forgiveness, Resentment and Hatred*, in *FORGIVENESS AND MERCY* 35, 44 (Jeffrie G. Murphy & Jean Hampton eds., 1988).

Appealing to Jean Hampton's view, we may characterize such wrongful actions as conveying a message of moral insignificance; the victims are treated as if they simply do not matter, as if they need not be taken into account.¹²⁹ These actions, in turn, involve a certain form of mistreatment that we may refer to as "misrecognition" (or non-recognition)—a specific attitude of treating others as inferior, minor, negligible, or simply invisible; possibly inflicting psychic injuries and, ultimately, damaging the sense of basic self-respect on which healthy human agency depends.¹³⁰

Still, this is not the whole of it. When collective evils occur and mass violence or totalitarian terror tears apart whole social fabrics, those wronged suffer an additional injustice of misrecognition—they are ignored, silenced, smothered, and suppressed from the public eye.¹³¹ By silencing the victims, their personal and social grievances have no reality. Thus, one's suffering is reduced to a clandestine experience—overlooked and forgotten.¹³² This sort of treatment adds insult to injury, and one can describe its devastating effects as "the wounds of silence."¹³³

But misrecognition, as a matter of treating victims as though they are not what they actually *are*, may even occur in the *aftermath* of mass atrocity. This is the crucial issue for transitional justice. In periods of transition, marked by radical transformations of the surrounding societies, there is always a strong impulse to put the past aside and move on. Yet, failing to recognize past wrongs exacerbates the trauma.¹³⁴ It couples the pain of those experiences with the disbelief of the wider community. In cases of outright denial or partial acknowledgement, the initial wound of insult and humiliation develops into "a second wound of silence"—a deep sense of hurt stemming from the feeling that "people condone the wrongs and do not care about the baneful results."¹³⁵ While the wounds of humiliation and pain are still bleeding, insult is added to injury by the denial of recognition.

This is not merely a psychological or factual observation; it also lays a moral claim. Due recognition is something we owe the victims of injustice, and when it is lacking the victims have *moral* reasons for feeling insulted or humiliated. The best way of construing this claim is to advance a negative justification for recognition based on Margalit's argument that the preven-

129. See *id.* at 60.

130. See Trudy Govier, *What is Acknowledgment and Why is it Important?*, in *DILEMMAS OF RECONCILIATION: CASES AND CONCEPTS*, *supra* note 5, at 65, 82–83 [hereinafter *What is Acknowledgement*].

131. See J.M. Bernstein, *Suffering Injustice: Misrecognition as Moral Injury in Critical Theory*, 13 *INT'L J. PHIL. STUD.* 303, 311 (2005).

132. See Martha Minow, *The Hope for Healing: What Can Truth Commissions Do?*, in *TRUTH V. JUSTICE: THE MORALITY OF TRUTH COMMISSIONS*, *supra* note 5, at 235, 244 ("The clandestine nature of torture and abuse by repressive governments or insurgent groups compounds the physical pain with the disbelief by the community, and at times by the victims themselves.") [hereinafter *Hope for Healing*].

133. See *What is Acknowledgement*, *supra* note 130, at 83.

134. See *Hope for Healing*, *supra* note 132, at 242 (referring to Judith Herman's theory of trauma and recovery).

135. *What is Acknowledgement*, *supra* note 130, at 85.

tion of cruelty, including mental cruelty, is at the very heart of morality. As Margalit holds, human beings are susceptible to symbolic suffering that involves no physical pain, and yet there is nothing metaphorical about the mental pain that certain acts of symbolic meaning can inflict.¹³⁶ Clearly symbolic devaluation is present in the type of misrecognition described above. When recognition is withheld, victims of injustice are subjected to the symbolic injury of being ignored—of being rendered passive, powerless, voiceless, or simply invisible in matters that deeply affect them as human beings.¹³⁷ This is a distinctive way of mistreating people, and if the essence of morality is the aim of eliminating suffering,¹³⁸ then this treatment is also morally relevant.

The question, then, is what misrecognition could mean in the present context. If we see the primary task of morality as negative, as a principled commitment to minimizing the impact of cruelty on individual lives, then we may first approach the problem negatively—that is, by identifying the sorts of treatment that undermine or deny recognition rather than promote it. Focusing on “negative morality” may put us in a better position to explain what recognition is and why it is important for the victims of wrongdoing for, as Margalit notes, it is often easier to “recognize what is wrong with something without having a clear idea, or any idea at all, about what is right with it.”¹³⁹

We might begin our exploration or “mapping” of recognition by contrasting it with denial. As individuals and groups, we are often unwilling to acknowledge our errors, shortcomings, and failings.¹⁴⁰ There are many ways of denying or deceiving ourselves about what we would prefer to forget, or continue to ignore.¹⁴¹ Self-deceptive mechanisms of many kinds enable people to avoid focusing on the events, or at least on the shameful features of events. Similarly, societies can be said to “live in denial” when their institutions, or those who run and support these institutions, are engaged in misrepresenting or concealing unwelcome truths about past wrongs. A consequence of this kind of collective denial is, so to speak, the suppression of the victims’ point of view from the public record. It transmits a message that, in the society’s scheme of things, those wounded physically or spiritually count for nothing; that their experiences of unbearable deep suffering and dread have no public significance; that their voices of despair and anger have no worth and will not be heard. As Harry Frankfurt explains, this way of treating people is disrespectful and may trigger painful feelings of resentment:

136. See *Decent Equality and Freedom*, *supra* note 125, at 148.

137. See Bernstein, *supra* note 131, at 311.

138. See *id.* at 304 (“Philosophy is the discursive expression of the forms of wrong of needless human suffering in the midst of the continuing requirement for an acknowledgement of unpreventable suffering.”).

139. THE ETHICS OF MEMORY, *supra* note 113, at 113.

140. See *id.* at 130.

141. See *What is Acknowledgement*, *supra* note 130, at 72–77 (discussing denial and ignorance generally).

People who resent disrespectful treatment do so because, by its very nature, it conveys a refusal to acknowledge the truth about them. Failing to respect someone is a matter of ignoring the relevance of some aspect of his nature or of his situation. The lack of respect consists in the circumstance that some important fact about the person is not properly attended to or is not taken appropriately into account. In other words, the person is dealt with as though he is not what he actually is. The implications of significant features of his life are overlooked or denied. Pertinent aspects of how things are with him are treated as though they had no reality. It is as though, in denying suitable respect, his very existence is reduced.¹⁴²

Crucial here is the idea that people are treated disrespectfully when significant elements of their lives are not properly attended to or not appropriately taken into account.¹⁴³ This way of looking at the matter helps explain what it means for people to be denied recognition. What makes treatment disrespectful, in Harry Frankfurt's view, is that it deprives people of the attention, consideration, or concern to which they are entitled by virtue of what they are or of what they have done.¹⁴⁴ Therefore, lack of respect exists if the realities of a person's condition, her or his own interests and needs, are simply ignored or overlooked. This way of treating people denies them the basic recognition of who they are and of who they have been, also known as misrecognition or non-recognition.

It is easy to avoid seeing or paying attention to those one does not wish to see. Most pertinently for the present topic, it is easy to overlook the victims of collective cruelty, especially if we have shared some responsibility for what they experienced. Overlooking the individual victims means, here, dealing with them as though they are not what they actually *are*—human beings who have suffered severe violence and persecution and carry unhealed wounds. It is a matter of intentionally failing to respond to these people's real or presumed interests and needs. One can see this as a fundamental assault upon the victims' personal reality, locking them into a distorted and false mode of being.¹⁴⁵

Misrecognition may take various forms, some more subtle than others. All forms, however, have much to do with the phenomenon that Axel Honneth describes as "social invisibility."¹⁴⁶ "Social invisibility" refers to "a form of being made invisible, of being made to disappear, that evidently involves not a *physical* non-presence, but rather non-existence in a social sense."¹⁴⁷ What makes people socially invisible, on this account, is the experience of being "looked through" by others, powerfully described, as Honneth notes, in Ralph Ellison's *Invisible Man*.¹⁴⁸ Social invisibility, as Honneth understands it, brings together cognition and evaluation—it is a

142. Harry Frankfurt, *Equality and Respect*, 64 SOC. RES. 3, 12 (1997).

143. *See id.*

144. *See id.*

145. *See* Taylor, *supra* note 109, at 25 (describing what is referred to here as misrecognition or non-recognition).

146. Axel Honneth, *Invisibility: On the Epistemology of 'Recognition'*, PROC. OF THE ARISTOTELIAN SOC'Y 111, 111 (Supp. LXXV 2002) [hereinafter *Invisibility*].

147. *Id.*

148. *Id.* at 113-14.

matter of both seeing who someone is and of *negating* what we see, of *not* letting that knowledge matter to our conduct in one way or another.¹⁴⁹ Honneth suggests that we think of Ellison's *Invisible Man*; he is a real "flesh and blood" man, visible to the physical eye, but he is "invisible" to the "inner eye" of those who look through him unrelentingly.¹⁵⁰ What is expressed as overlooking the presence of the other is not the failure to accurately perceive people as who they really are, but rather the motivational readiness to treat the other in a way that denies her or him "the status of a full partner in social interaction."¹⁵¹

But what, exactly, does it mean to see "through" the victimized? Perhaps a helpful way of approaching this question is through the concept of normality—seeing something as usual, typical, or expected, and not demanding special attention. Within this perspective, to see "through" the victims of injustice is to see as "normal" what was done to them. Reduced to the normal, their suffering is made to look "little" or even banal, rendering it invisible.¹⁵² What characterizes this way of treating the victims is the failure to face and address them as individuals, which one might describe as bureaucratic.¹⁵³ As Margalit notes, the term "bureaucracy" is conceptually linked with a lack of personal attitude; bureaucratic systems are "based on impersonal relations, and so they are indifferent to individuals and their suffering and remote from their individuality and uniqueness."¹⁵⁴ There is, in other words, a tendency in bureaucracies to depersonalize people, to treat them—so to speak—as numbers or application forms. According to Margalit, this attitude of seeing "through" people is "humiliating in its very essence."¹⁵⁵

More should be said about this distinctive way of misrecognizing the victims, namely about its symbolic character. Only by directing our attention to negative symbolism can we gain a more detailed view of misrecognition and its impact on victims' lives. "Negative symbolism" refers to acts or gestures that express an attitude of downgrading or degrading: projecting an image of the other as inferior, excluded, wholly other, unworthy of respect and consideration, or simply invisible. Needless to say, there are many ways of imposing a depreciatory image upon people and some of them may be less unacceptable than others. Still, when applied to the victims of horrific wrongdoing, this sort of negative symbolism risks being as devastating as the original wrong itself.

One can feel symbolic devaluation, in the sense that is pertinent here, in a variety of ways. At the core, however, symbolic devaluation is intimately tied up with what African American political thinker W.E.B. Du Bois describes as "this sense of always looking at one's self through the

149. *Id.*

150. *Id.* at 111; see RALPH ELLISON, *INVISIBLE MAN* xxix (2d ed., Vintage International 1995) (1952).

151. Fraser, *supra* note 36, at 27.

152. See MARGALIT, *supra* note 34, at 89-118.

153. See *id.*

154. *Id.* at 215.

155. *Id.*

eyes of others, of measuring one's soul by the tape of a world that looks on in amused contempt and pity."¹⁵⁶ To be regarded with "amused contempt" means, among other things, to be ridiculed and dismissed—the victimized person is subjected to risible treatment.¹⁵⁷ A much less overt form of symbolic devaluation is pity.¹⁵⁸ In speaking of pity, and distinguishing it from compassion, Margalit holds that it expresses a sense of superiority ("It happened to you, but it can't happen to me") and triggers helplessness and vulnerability, which gives its recipients a sound basis for feeling humiliated.¹⁵⁹ Thus, pity is associated with the attitude of almsgivers: the sort of condescending behavior accorded to those begging for charity.¹⁶⁰ To be pitied, then, is to be deprived of respect—to be seen as less than fully adult or human.¹⁶¹ That is why we (as individuals and as an organized society) should not pity the victimized but ensure, as far as we can, that they enjoy an institutional basis for self-respect.

B. Elements of Recognition

Having set out a phenomenology of misrecognition in general terms, we now continue our investigation by exploring recognition as a positive concept. In relating the preceding analysis to a discourse of recognition, we shall concentrate on what turned out to be a central element in misrecognition—invisibility. As we have seen, there are various ways of "looking through" those shattered by serious forms of collective violence, but now we look at the reverse side of the phenomenon. What is it to render "visible" the victimized? How can a society achieve this "visibility"?

Honneth suggests an initial response to this issue. In his view, our identity as full and "visible" members in social life depends crucially on the presence of "positive forms of expression" that involve something "added" to mere perception—an attitude of both seeing who someone is and of *affirming* what we see, of taking notice of something or someone in a positive sense (for example, stopping and saying hello rather than walking by in anonymity).¹⁶² In this way, social visibility comes to be bound up with forms of direct and interpersonal communication that are grounded in and expressive of the approval or validation of others. Perhaps Thomas Nagel best captures this idea with what he once called, in another context, "the maintenance of a direct interpersonal response to the people

156. Steven Lukes, *Humiliation and the Politics of Identity*, 64 *SOC. RES.* 36, 46 (1997) (quoting W.E.B. DUBOIS, *THE SOULS OF BLACK FOLK* 2 (Dover 1994) (1903)).

157. Take, for example, the incident of "the laughing UN judges" which became front-page news in Rwanda. This incident occurred on October 31, 2001, when three judges at the International Tribunal in Arusha suddenly burst out laughing during the cross-examination of a Tutsi rape victim. See Ann McFerran, *Violated and Isolated*, *THE SUNDAY TIMES MAG.* (London), Apr. 4, 2004, at 1.

158. See MARGALIT, *supra* note 34, at 233–34.

159. *Id.*

160. See *id.* at 233–35.

161. See *id.*

162. See HONNETH, *supra* note 35.

one deals with.”¹⁶³

This article extends this line of questioning by applying it to the specific context of transitional justice and victims’ demands for recognition. To recognize the victims is to manifest an affirmative attitude to them, directly and specifically, in response to their *special* situation. Put more simply—and to borrow Nagel’s phrase—it is to provide them with a “direct interpersonal response.”¹⁶⁴ This provides a working definition of “recognition” that will help identify the issues that need to be addressed. The underlying assumption here is roughly that to do something horrible to someone puts you in special relation to him and therefore requires a response that can be offered to that person as a subject and received by him as a true response to his personal needs and claims.¹⁶⁵ As such, three points are in order.

First, recognition requires a proper *response* to serious wrongdoing (the criterion of responsiveness).¹⁶⁶ Responding to something means, in the first instance, manifesting our awareness of some antecedent state of affairs. It entails *acknowledging* the truth about some aspects of the world—articulating to ourselves and to others what we *know*. Thus, to recognize my wrongdoing, and to respond to it, is to face up to what I have done and address the factors or motives that let me commit the wrong. I admit and avow my past wrongdoing and take responsibility for it. I acknowledge as mine that harmful action and choose words to describe it adequately. Crucial here is the communicative nature of the process of responding. By retelling the wrong and admitting to the knowledge of it, I manifest a certain attitude towards the person who suffered because of me: your pain and suffering is real and I accept responsibility for it. This acknowledgment brings us to a central element of what is involved in responding: the adoption of stance that grants recognition to another person’s reality. In other words, it is a matter of opening one’s mind towards the other’s experience, and seeing the world from his or her particular perspective. As a response to serious wrongdoing, it is simply not good enough to say, “Yes, I did all these things to you and so what?” Rather, it is necessary to seek the perspective of the victimized other, to see the experience through his eyes by asking “What is it to him?” The basic idea is that of “putting myself in his shoes,” and it is this placement of myself in a position similar to that of my victim that enables me to say things like “Yes, what I did was wrong, and it should never have happened.”¹⁶⁷ For this to occur, I must be prepared not only to recognize the suffering and pain of those whom I wronged but, above all, to *listen* to their voices of despair and indignation, carefully and seriously.

163. THOMAS NAGEL, MORTAL QUESTIONS 67 (1979).

164. *Id.*

165. *See id.* at 68.

166. *See* HONNETH, *supra* note 35, at 131–39.

167. *See* NAGEL, *supra* note 163, at 126 (arguing that “the general form of moral reasoning is to put yourself in other people’s shoes”).

Second, the kind of recognition that is an adequate response to crime should come from the offender and be presented *directly* to the victim (the criterion of directness).¹⁶⁸ Although others might criticize the offender for what he did or might provide material help or sympathetic support to the victim, only the offender himself can accept or assume responsibility by admitting that there is no way of justifying to the victim what was done to him. Furthermore, the wrongdoer must offer recognition to the victim specifically, rather than just to the world at large. To explain why this might be so, we begin by observing that hostility or aggression involves a direct and straightforward relation with the particular person at whom it is directed.¹⁶⁹ The act of violence is aimed specifically against that person, rather than against another, and manifests a direct attitude towards *him* as the target of the hostility.¹⁷⁰ Thus, the transgressor stands in direct moral relation to the person wronged, and that relation involves a moral debt owed by the transgressor to that person. Because of this direct connection between wrongdoer and the wronged, any response to wrongdoing risks being irrelevant or insufficient if it fails to speak and give special attention to the one who has been injured. Thus, if recognition is to occur, the culpable offender's reaction has to be such that it can be offered to the victim and received by him as a direct response to his specific situation and needs. In this sense, it is the moral responsibility of the offender to take concrete and immediate action that can address the damage done to the victim in a *direct* way.

Third, the perpetrator's response should take the form of an *interpersonal* reaction that the wrongdoer offers to the victim as a response to the wrongdoer's special relation to him or her (the criterion of personal interaction).¹⁷¹ As Thomas Nagel argues, "to treat someone else horribly puts you in a special relation to him, which may have to be defended in terms of other features of your relation to him."¹⁷² What underlies this argument is the idea that a crime or offence is an injury done to an individual human being, rather than just to someone (i.e. a member, among countless others, of a certain class of people) or something (i.e. an institution or public role).¹⁷³ The point is that hostility or aggression is primarily a conflict between persons. The aggressor's attack is addressed to a particular person and, as a result, it establishes a kind of I-You relation. For example, through my hostile behavior, which aims to threaten your personal reality, *I* put myself in a special relation to *you*. Therefore, one can construe the discourse of recognition as essentially involving some sort of dialogical encounter between the offender and the offended. To raise the jeopardized relationship to the level of true dialogue, the offender must engage in a process of addressing and facing the victim as the particular *person* at

168. *See id.* at 67–68.

169. *See id.* at 66–68.

170. *See id.*

171. *See id.*

172. *Id.* at 68.

173. *Id.* at 66–68.

whom the initial wrong was directed. One might think here of recognition as a form of personal confrontation: the perpetrator is required to come forward and explain his actions to the victim who, in turn, may confront him directly and explicitly. Perhaps, this kind of exchange reveals itself most clearly in face-to-face interaction. We might indeed say, with reference to Emmanuel Lévinas, that the very sense of moral responsibility, in its original form of response and recognition, manifests itself most urgently in the encounter with "the face of the other" (*le visage d'autrui*).¹⁷⁴

In the light of this analysis, recognition is best described as a verbal act in which the speaker expresses that he morally regrets doing what he did. In recognizing his wrongdoing, the offender takes the victim's side, accepts responsibility, and admits the absence of good reasons for his harmful acts.¹⁷⁵ Understood this way, the act of recognition bears some resemblance to an offer of apology. Saying "I apologize" in the context of wrongdoing implies recognition of the injury and thereby of the moral status of the injured. Although sincere expressions of sorrow and regret are commonly viewed as vital to an apology that one individual offers to another, these and other subjective elements are not part of the model of recognition proposed here. Rather, the model of recognition proposed here involves the performance of a behavior that can be reasonably interpreted as expressing moral regret, regardless of whether the actor is really motivated by sentiments of guilt, remorse, or shame. Therefore, it is not necessary for the offender to be emotionally engaged to complete the process. Although it might be better (for the victims and for the goal of reconciliation) if the offender is sincerely repentant, the mere doing of certain "performative" acts or rituals brings about recognition.¹⁷⁶

III. Interpersonal Recognition in the Public Sphere

A. A Process of Triadic Interaction

So far, the focus has been on individual acts of recognition (one human being to another), which typically involve local, face-to-face relations. Thus, the account of recognition I have given appears to be a form of

174. See EMMANUEL LÉVINAS, *TOTALITY AND INFINITY: AN ESSAY ON EXTERIORITY* (Alphonso Lingis trans., 1969).

175. Following an idea expressed by Thomas Nagel, we might say that this process depends not on compassion, guilt, or any other interpersonal sentiment, but on the human capacity to imagine what the world looks like from another's point of view. See THOMAS NAGEL, *THE POSSIBILITY OF ALTRUISM* 82-84 (1970). The basic form that this takes is the argument, "How would you like it if someone did that to you?" Applied to the context of serious wrongdoing, this argument appeals to a hypothetical judgment, which reveals an *objective* element in the concern we feel for ourselves: you would not only dislike it if someone treated you like that, but you would resent it. See *id.* It is this imaginative effort to put yourself in the other person's shoes that enables you to admit that what you did was not justified in any sense that admits generalization; that you had no reason to act as you did. See *id.*

176. This account is closely related to Christopher Bennett's concept of "ritual apology." See Christopher Bennett, *Taking the Sincerity Out of Saying Sorry: Restorative Justice as Ritual*, 23 J. APPLIED PHIL. 127, 133 (2006).

“thick” or micro-level morality, suited solely to personal relations between individuals, or perhaps small communities. This immediately prompts questions concerning the application of recognition to the public realm. How well does the account perform on the macro-level? Can it be transposed to more global relations within and among political communities, which are often mediated by proxy? These concerns are nowhere better placed than in the context of collective offenses carried out for political purposes and perpetrated by state agents or representatives of political groups.

As a tentative effort to address this issue, one must reiterate the simple observation that crime is primarily an interpersonal matter. Doing terrible things to someone—such as torturing or killing—puts you in a direct relation to that particular *person*: these things happen to *him* as a result of what you do. The same seems true at the level of public crimes. After all, such crimes are committed by *individuals* (rather than by “faceless” institutions), whatever their specific role in political, economical, or military institutions. To be sure, it is always easy to cloak oneself in the responsibility of one’s office by saying that one was only following orders or doing one’s job. But, this does not seem right. Although the impersonal character of public action may, at times, license some outcome-centered methods that would not be permissible for individuals, there is no such thing as “a moral cushion that insulates whatever else is done officially from moral reproach.”¹⁷⁷ In short, not everything that produces desirable results at a larger scale is permitted.¹⁷⁸ There are basic moral constraints to what individuals may do in the conduct of their office, some of which are already present at the level of individual morality (including prohibitions against torture and deliberate killing).¹⁷⁹ This means, among other things, that one cannot neatly divide issues of moral wrongdoing into spheres of the private and personal, the political and public.¹⁸⁰

All of this, if true, suggests that there is something in the interpersonal account of recognition I have offered which may belong in the lexicon of societal responses to mass violence. That, of course, raises the question of how such an account could be integrated into a system of public activities and institutions. To begin this discussion, assume that for *official* recognition to occur, a society emerging from a repressive or strife-ridden past should provide a safe, rule-governed space within which particular victims can present their grievances, express a sense of injustice to some effect, and “point a finger”—so to speak—at the offending parties or states of affairs. Such a society should create public forums structured in ways to enable the aggrieved party not only to “tell her own story” in the presence of respectful listeners, but also to confront the offender and engage him in serious discourse about what he has done (or not done) and said (or not said). What is of crucial structural importance here is the intervention of a

177. NAGEL, *supra* note 163, at 90.

178. *See id.*

179. *See id.*

180. *See id.*

third party, namely the state as the representative of society. It is through such third-party intervention that the relatively private, dyadic offender-offended relation is transformed into a public event, now subject to the censure of the wider community.¹⁸¹ Apart from expanding the universe of discourse, this procedure allows for a kind of collective monitoring or surveillance and serves to publicly recall and reaffirm the collective's moral position whose integrity has been tested and challenged by the transgression.¹⁸²

To elaborate, the process proposed here is, roughly, a process of triadic interaction in which the state or "collective other" emerges as a kind of moral stand-in, or authority figure, whose role consists of initiating and monitoring the appropriate behavioral procedures that are conducive to recognizing the victim's moral injuries. This process would involve some formalized ritual devised in a way that expresses publicly the offender's recognition of the wrong she has done. As such, it requires the offender's compliance with external, but not internal commitment. This is to say that the offender is asked to perform certain rituals (for instance, making an apology, making amends etc.) where sincerity may be uncertain or doubtful but that, *qua* performance, send a message to the victim acknowledging her loss and reaffirming her dignity. What becomes of paramount importance in this context is the presence of the third parties as authoritative spokespersons for the collectivity. Their presence allows for a kind of officially validated testimony and serves to demonstrate the community's solidarity with the victim.

To reconstruct the details of the process, let us bring into sharper focus the distinctive roles of the three parties involved—victim, perpetrator, and the state—and the nature of the relationships between them.¹⁸³

In a scheme of the kind envisioned here, the *victim* emerges as an active participant in shaping the discourse of recognition, rather than a passive auditor or observer.¹⁸⁴ That is to say that the victim comes to assume the role of a primary stakeholder—actively and directly involved in the ensuing exchange.¹⁸⁵ The point of the process consists precisely in giving voice to the aggrieved party by authorizing him, at specified stages, to expose the details of the perpetrator's actions and bring his experience of injustice out into the open.¹⁸⁶ The victim will have a chance to explain how the crime affected him, speaking in tones that are not the neutral

181. See NICHOLAS TAVUCHIS, *MEA CULPA: A SOCIOLOGY OF APOLOGY AND RECONCILIATION* 48, 54 (1991).

182. See *id.* at 54-55.

183. Nicholas Tavuchis' account of collective apology as a process of triadic interaction has influenced the model of recognition discussed in this article. See *id.* at 55-64. The formulations in R. A. DUFF's communicative theory of punishment and the ritualistic view of restorative justice as elaborated by Christopher Bennett have also influence this article. See R. A. DUFF, *PUNISHMENT, COMMUNICATION, AND COMMUNITY* 79-82 (2001); Bennett, *supra* note 176, at 132-33.

184. See Bennett, *supra* note 176, at 127.

185. See *id.*

186. See *id.*

tones of bare description, but tones that communicate to the perpetrator his righteous hurt and anger.¹⁸⁷ Thus, through the victim's own account of the injury, the aggressor will be vividly confronted with the harm he has done.¹⁸⁸ Yet, for this confrontation to be possible, the injured party must be *empowered* to speak out and to bring the offender to face the wrong he has done. Empowerment of this sort will depend on the intervention of committed and authoritative third parties (here, the state and its institutions), capable and willing to grant power to the victim—power to reclaim his story and his dignity as a crucial step towards overcoming the offender's unjustified dominance.

In this interactive context, the *perpetrator* plays a major role in what is essentially a process of being confronted with, and having to respond appropriately to, her own wrongdoing.¹⁸⁹ The process requires some formalized ritual undertaken by the perpetrator, a ritual of a kind that expresses to those concerned her full recognition of the wrong she has done.¹⁹⁰ In undergoing this ritual, the perpetrator is asked to "make up" to the victim for what she did to him by performing certain actions—such as making public statements of guilt or responsibility and offering reparation—whose significance resides precisely in their meaning as forceful expressions of recognition.¹⁹¹ Central to this process is a formality that leaves open the question of sincerity. That is, the process is of a kind that deals with the perpetrator only "externally," without inquiring into her emotional engagements.¹⁹² What matters, in other words, is that the perpetrator performs the appropriate behavior (by doing what she would do if she were genuinely repentant), regardless of her motivation for doing so.¹⁹³ In addition, it is worth noting that this process must be burdensome for the perpetrator—by making demands on her liberty, money, time, or energy—if it is to communicate a suitably weighty and forceful kind of recognition.¹⁹⁴

Lastly, what invests the process with public meaning is the intervention of *third parties* whose functions are defined and circumscribed by the goals and interests of the state as a legal embodiment of the political com-

187. DUFF, *supra* note 183, at 93.

188. *See id.*

189. The term "perpetrator" is used rather narrowly here to refer to those who are involved in carrying out, directing, or closely assisting particular acts of violence. In this usage, the role of "perpetrators" is different from that of "bystanders" and "backers" of a regime (e.g., the broader, mainly white, population that supported and voted for South Africa's apartheid regime), whatever their moral failings and responsibilities. This distinction is not only terminological; it is an integral part of the proposed models of recognition. While "interpersonal recognition" is a matter of addressing specific perpetrators, "collective recognition" shifts the focus to society as a whole and to those who, actively or passively, supported and made possible the societal context in which violent acts were undertaken. For an insightful discussion of the levels of perpetration, see GOVIER, *supra* note 22, at 31–36 (arguing for a broader notion of perpetration).

190. *See* Bennett, *supra* note 176, at 127.

191. DUFF, *supra* note 183, at 98.

192. *See* Bennett, *supra* note 176, at 132.

193. *See id.*

194. *See* DUFF, *supra* note 183, at 98–99.

munity. Such intervention introduces new elements into the offender-offended relationship by adding the authoritative voice of the law. Specifically, it involves a communal, authoritative condemnation of the offender's crime that serves to recall and reaffirm the victim's moral and civic worth.¹⁹⁵ In requiring the offender to take part in the public ritual, the third-party authority expresses the community's opprobrium and demonstrates solidarity with the victim.¹⁹⁶ The authority makes a judgment, on behalf of the society-at-large, that the action was wrong and that the offender should feel sorry for it.¹⁹⁷ It vindicates the victim, asserting that the state is not indifferent to her plight.¹⁹⁸ All this, clearly, is a demonstration of public commitment to the victim's dignity as an equal member in a human community.¹⁹⁹

Before we proceed, let me pause to emphasize some of the main ideas that underlie this process. First, the concept of recognition presented here is "vindicatory" rather than "vindictive;" it is a matter of "putting right what is wrong" rather than of seeking revenge.²⁰⁰ Second, the communicative process can be understood as conveying a moral message connected with validating the victim of wrongdoing.²⁰¹ Third, the community owes it to the victim, as a matter of social solidarity, not only to recognize the seriousness of the wrong done but also to expose the offender to censorial or contemptuous judgment.²⁰² Fourth, the process must be burdensome for the offender, not just for its own sake, but as a way of giving forceful expression to the recognition of his wrongdoing (undertaking a task that imposes little or no burden on him may not be adequate to the seriousness of the wrong done).²⁰³ Fifth, a formalistic, act-based process does not make repentance or remorse a part of recognition (although it allows for such positive emotional shifts).²⁰⁴

In this context, recognition operates at various levels. It manifests itself, for instance, at the level of justice as redistribution—justice primarily committed to redistributing money or land in the form of reparations. Moreover, it is closely allied to the requirements of legal justice. The rule of law and the principle of equality before the law secure a kind of public recognition for victims—recognition as equal right-bearers, who are able to

195. See *id.* at 80.

196. See *id.* at 72.

197. See Bennett, *supra* note 176, at 134-35.

198. *Id.* at 135.

199. See DUFF, *supra* note 183, at 72.

200. On the distinction between vindication and vindictiveness, see TRUDY GOVIER, *FORGIVENESS AND REVENGE* 19-22 (2002) [hereinafter *FORGIVENESS AND REVENGE*]. See also J. R. LUCAS, *RESPONSIBILITY* 92-93 (1993).

201. See Jonathan Allen, *Balancing Justice and Social Unity: Political Theory and the Idea of a Truth and Reconciliation Commission*, 49 U. TORONTO L.J. 315, 332 (1999) [hereinafter *Balancing Justice*].

202. See TAVUCHIS, *supra* note 181, at 113.

203. See DUFF, *supra* note 183, at 17.

204. See Bennett, *supra* note 176, at 132.

make claims.²⁰⁵ But recognition, as interpreted here, demands something more than mere legal justice—a somewhat symbolic acknowledgement that expresses a sense of concern for the victim as an individual with a concrete experience of suffering and harm.²⁰⁶ Rather recognition requires acknowledging the *specific* truth about victims, addressing and facing them as concrete others.²⁰⁷ Recognition is realized by looking at the victims' life stories and grievances separately and individually, rather than by simply recognizing them as abstract bearers of rights.²⁰⁸ From this perspective, justice as recognition employs a much richer version of each victim's point of view than do ordinary, abstract models of justice grounded in the requirements of juridical rationality, impersonality, fairness, and so on. It is with this in mind that I speak here of recognition as "another kind of justice."²⁰⁹

B. Trials versus Truth Commissions?

The process, as described above, appears to have some kinship with that of an ordinary criminal trial. Most obviously, a criminal trial involves censorial judgment about responsibility and guilt (which may or may not open the accused to punishment).²¹⁰ That is, it calls a citizen to answer a charge of wrongdoing, and in doing so, it provides for a *formal* response to crime, administered through an institutionalized system of proceedings and convictions rather than a purely informal process.²¹¹ Such a process is coercive in that it forces the offender to hear—even if he will not listen to—an interpretation of his conduct as a public wrong and, once the charge is proven against him, to be censured by a formal conviction.²¹² It thus makes clear, as R. A. Duff puts it, that "the wrong done to the individual victim is also a wrong against the community, which shares that wrong and whose values have been flouted."²¹³ This suggests that criminal courts can play a crucial role in showing that society-at-large recognizes and takes seriously the victim's condition *as* a victim.

205. For a helpful discussion of the relation between recognition and legal justice, see *Balancing Justice*, *supra* note 201, at 328–32.

206. *See id.* at 331.

207. *See id.*

208. *See id.*

209. The treatment of recognition here is inspired by a wonderfully perceptive article written by Judith Shklar, in which she argues that normal legal justice—as rule-bound, abstract justice—is frequently an inadequate way of recognizing victims and their personal sense of outrage. *See generally* THE FACES OF INJUSTICE, *supra* note 18. For a somewhat similar account of justice as recognition, see *Balancing Justice*, *supra* note 201, at 328–32; André du Toit, *The Moral Foundations of the South Africa TRC: Truth as Acknowledgment and Justice as Recognition*, in TRUTH V. JUSTICE: THE MORALITY OF TRUTH COMMISSIONS, *supra* note 5, at 122, 135–39.

210. *See* Eric Blumenson, *The Challenge of a Global Standard of Justice: Peace, Pluralism, and Punishment at the International Criminal Court*, 44 COLUM. J. TRANSNAT'L L. 801, 864 (2006).

211. *See* DUFF, *supra* note 183, at 72.

212. *See id.* at 72–73.

213. *Id.* at 114.

Nonetheless, this still leaves open the role of the victim in criminal prosecution. The victim's personal involvement is, as suggested above, an aim internal to recognition. If this is so, then we need to take a closer look at the victim's place in the criminal justice system. The issue is an important one, considering that criminal trials are often criticized as unresponsive to the victims' needs.²¹⁴ There is, I think, considerable force to this critique of our existing criminal justice systems. After all, criminal trials are primarily aimed at the determination of guilt or innocence, with the focus on the accused. What underlies the process is a conception of crime as a public matter and of the state as representing or replacing the victim.²¹⁵ In this scheme of things, the victim is left to play the role of an outsider or, at best, of a minor player. Hence the claim, famously made by Nils Christie and other advocates of restorative justice, that in modern criminal systems the victim has become "a sort of a double loser"—"first, vis-à-vis the offender, but secondly and often in a more crippling manner by being denied rights to full participation in what might have been one of the more important ritual encounters in life."²¹⁶ This is what Martha Minow has in mind when she writes:

Trials focus on perpetrators, not victims. They consult victims only to illustrate the fact or scope of the defendants' guilt. Victims are not there for public acknowledgement or even to tell, fully, their own stories. Trials interrupt and truncate victim testimony with direct and cross examination and conceptions of relevance framed by the elements of the charges. Judges and juries listen to victims with skepticism tied to the presumption of defendants' innocence.²¹⁷

Even so, none of this precludes the notion that current criminal procedures could be reformed to be more responsive to the victims' needs for involvement and input into the decision-making process. Perhaps the belief that trial procedure is by its very nature incapable of giving a voice to the victim reflects just a failure of imagination. In this regard, it is important to acknowledge the revival of interest in victims of crime from the 1960s onward.²¹⁸ Under the influence of what one may fairly describe as a victims' movement, most criminal justice systems in Western countries have been reformed to ameliorate the victims' plight and provide victims with various rights.²¹⁹ Remarkably, there has been a strong trend toward

214. See, e.g., Ric Simmons, *Private Criminal Justice*, 42 WAKE FOREST L. REV. 911, 913 (2007) ("[I]t is becoming increasingly clear that the public criminal justice system is inadequate on two counts: first, it makes almost no attempt to rehabilitate and reintegrate the perpetrators of crime; and second, it does not satisfy the needs of crime victims.").

215. See Mark S. Umbreit et al., *Restorative Justice: An Empirically Grounded Movement Facing Many Opportunities and Pitfalls*, 8 CARDOZO J. CONFLICT RESOL. 511, 514 (2007).

216. Nils Christie, *Conflicts as Property*, 17 BRIT. J. CRIMINOLOGY 1, 3 (1977).

217. *Hope for Healing*, *supra* note 132, at 238.

218. See Sue Anna Moss Cellini, *The Proposed Victims' Rights Amendment to the Constitution of the United States: Opening the Door of the Criminal Justice System to the Victim*, 14 ARIZ. J. INT'L & COMP. L. 839, 852-53 (1997).

219. These victim-friendly reforms reflect the standards codified by international instruments. See Declaration of Basic Principles of Justice, *supra* note 22, ¶ 6(b) (requir-

the integration of victims in all stages that impact the outcome of the case— notwithstanding charging, dismissal of charges, plea-bargaining, or sentencing.²²⁰ These types of victim-friendly initiatives mark an effort to allow victims to advance their point of view more fully and to convey the narrative of their experience. In such a way, these initiatives can lead to the victims' recognition and restoration.²²¹ Empowering victims to have a say at various decision-making stages not only gives them a sense of control, but also acknowledges the moral status of victims as equal citizens and the legitimacy of their feelings of resentment and anger.²²²

More to the point, trials hold potential for overcoming the objective situations of dominance and powerlessness that crime—violent crime at least—causes.²²³ As already noted more generally, some forms of criminality not only inflict pain but also degrade or demean those who have been wronged.²²⁴ When one person is seriously wronged, she loses control over her life to somebody else's violence and contempt, and she is *disempowered*—rendered helpless and passive—in matters of vital importance to her.²²⁵ The humiliation of this disempowerment, blatantly forced upon the subject, lies "in the total subjugation to the pointless whims of the subordinator's will."²²⁶ Hence, it is important to create a public space in which individual victims can assume a position of security and power

ing that "the views and concerns of victims . . . be presented and considered at appropriate stages of the proceedings"); Eur. Consult. Ass., *Recommendation of the Comm. of Ministers on the Position of the Victim in the Framework of Criminal Law and Procedure*, Doc. No. R (85) 11 (1985); EUR. FORUM FOR VICTIM SERVS., *STATEMENT OF VICTIMS' RIGHTS IN THE PROCESS OF CRIMINAL JUSTICE* (1996). Moreover, it is important to note that the Statute for the International Criminal Court (ICC) contains many provisions that allow victims to participate in the administration of justice in a variety of ways. See, e.g., Sam Garkawe, *Victims and the International Criminal Court: Three Major Issues*, 3 INT'L CRIM. L. REV. 345, 352–53 (2003) (discussing the various victim measures that the ICC adopted). On the rights of crime victims at the international level, see ERIC STOVER, *THE WITNESS: WAR CRIMES AND THE PROMISE OF JUSTICE IN THE HAGUE* 136–41 (2005).

220. See generally Peggy M. Tobolowsky, *Victim Participation in the Criminal Justice Process: Fifteen Years After the President's Task Force on the Victims of Crime*, 25 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 21 (1999) (surveying changes in procedural rights of crime victims).

221. Cf. Michael M. O'Hear, *Plea Bargaining and Victims: From Consultation to Guidelines*, 91 MARQ. L. REV. 323, 326–27 (2007) (describing social science findings about how a person's participation in an official decision affects the person's view of the fairness of the decision in the criminal justice context).

222. At the same time, however, this raises the deep and difficult issue of "making sense" of the conflicts that may arise between the demand for increased victim participation and other claims or requirements (for instance, the right of the defendant to a fair trial). The conclusion discusses the problem of moral conflict and the idea of "principled compromises" further.

223. George P. Fletcher, *The Place of Victims in the Theory of Retribution*, 3 BUFF. CRIM. L. REV. 51, 58 (1999).

224. See HONNETH, *supra* note 35; MARGALIT, *supra* note 34; Stephen P. Garvey, *Punishment as Atonement*, 46 UCLA L. REV. 1801, 1821 (1999).

225. See John Braithwaite, Professor, Austl. Nat'l Univ., Dorothy J. Killam Memorial Lecture at Dalhousie University: Restorative Justice and a Better Future (Oct. 17, 1996), available at <http://iirp.org/library/braithwaite.html> ("[D]isempowerment is part of the indignity of being a victim of crime").

226. *Decent Equality and Freedom*, *supra* note 125, at 158.

while confronting their wrongdoers—a safe, rule-governed space in which wrongs are correctly named and condemned so as to deny the position of dominance or superiority claimed through unwarranted violence.

Trials may provide such a space. The basic notion of equality and impartiality—of treating everybody with the same concern and respect—makes it a priority of criminal conviction to neutralize crime as a source of dominance and restore the equality, balance, or equivalence that has been disturbed by a wrongful act.²²⁷ Moreover, the formalism of due process, which establishes a clear separation of the wrongdoer from the victim through strict rules of procedure, may help to avoid some dimensions of re-victimization—the wounds a crime victim suffers when she is directly exposed to the perpetrator's power to replay his role of torturer, murderer, or rapist.²²⁸ Therefore trials, as opposed to more informal or consensual arrangements, may actually be better suited to restore the victims' sense of power and control, and thus to overcome abusive relationships.

Given all this, the claim, and the hope, is that criminal trials can create a rule-governed space within which a genuine discourse of recognition can take place between the victim, the perpetrator, and society-at-large (represented by the government). This said, it is important to now turn to what is often portrayed as a potential alternative to prosecutions—truth commissions.²²⁹ These institutions, formed in many parts of the world including East Timor, Ghana, Peru, and Sierra Leone, mark an effort between full prosecution, on the one hand, and blanket amnesty, on the other.²³⁰ The chief concern here, is to establish a clear break with the past by “telling the truth”—who did what to whom, and under whose orders.²³¹ There is an

227. See Alice Ristroph, *Desert, Democracy, and Sentencing Reform*, 96 J. CRIM. L. & CRIMINOLOGY 1293, 1299 (2006).

228. As to these risks for victims still vulnerable to some dimensions of perpetrator power, the case of Jeffrey Benzien—a confessed apartheid torturer who was compelled to “demonstrate” his torture techniques during the amnesty hearing before the South African Truth and Reconciliation Commission—seems especially troubling. As Antjie Krog suggests, Benzien actually replayed his role as torturer even while being confronted by his former victims. ANTJIE KROG, *COUNTRY OF MY SKULL: GUILT, SORROW, AND THE LIMITS OF FORGIVENESS IN THE NEW SOUTH AFRICA* 95 (1999). “Within the first minutes,” she writes, “he manages to manipulate most of his victims back into the roles of their previous relationships—where he has the power and they the fragility.” *Id.*; see also MINOW, *supra* note 1, at 130–31.

229. See MINOW, *supra* note 1, at 52–90; Anna Triponel, *Can the Iraqi Special Tribunal Further Reconciliation in Iraq?*, 15 CARDOZO J. INT'L & COMP. L. 277, 309 (2007) (“Truth commissions have indeed been used by several countries to deal with past governments' gross violations of human rights either as an alternative or as a complement to criminal trials.”).

230. See Erin Daly, *Transformative Justice: Charting a Path to Reconciliation*, 12 INT'L LEGAL PERSP. 73, 76–77 (2002) (“Because truth commissions eschew both criminal prosecution on the one hand and blanket amnesty on the other, they are often referred to as a ‘middle path’ or ‘third course’ or ‘golden mean.’”); Jeremy Sarkin & Erin Daly, *Too Many Questions, Too Few Answers: Reconciliation in Transitional Societies*, 35 COLUM. HUM. RTS. L. REV. 661, 662–63 (2004) (listing countries that have established truth and reconciliation commissions).

231. Brandon Hamber, *Rights and Reasons: Challenges for Truth Recovery in South Africa and Northern Ireland*, 26 FORDHAM INT'L L.J. 1074, 1080 (2003).

underlying assumption that societies emerging from atrocity will be able to distance themselves, and thus recover their integrity, only if the facts of the past are made plain.²³² At the same time, however, there is a strong sense that criminal trials would be equally threatening to the institutionalization and consolidation of new democracies.²³³

South Africa's Truth and Reconciliation Commission (TRC), launched in 1995 by a democratic legislative act (the Promotion of National Unity and Reconciliation Act), is the most expansive and elaborate truth commission to date.²³⁴ As an innovative and ambitious effort to combine the disclosure of factual findings, the quest for "dialogical" truth through open hearings and public testimony, and the provision of amnesty to perpetrators who testify fully about their politically motivated crimes; the TRC process represents an important precedent for future commissions.²³⁵ One of the most distinctive elements of the South African TRC, in comparison to prosecutions and previous truth commissions, was the emphasis on victim testimony, offered publicly to the commissioners and the nation as a whole. The TRC heard more than 22,000 victim statements and held some 160 victims' hearings (including 1200 of the victims and their families), which were widely publicized through extensive media coverage.²³⁶ The TRC thus provided a public forum for victims to share their experiences of injustice and have the public acknowledge them officially.²³⁷ With the aim of placing the victims at the center of its work, the TRC adopted a new repertoire of norms and practices by which to honor the dignity of former victims of oppression. This repertoire included a commitment to allow survivors to fully tell their own story without interruption; the creation of an informal, compassionate setting, marked by the presence of sympathetic witnesses; the performance of acts and rituals of symbolic acknowledgement (such as the ritual of commissioners rising when victims entered to give testimony); and the provision of assistance to victim-witnesses before and after their testimony.²³⁸ Moreover, victims had a right to confront their perpetrators, thereby emphasizing the personal damage suffered at their hands.²³⁹

232. See TUTU, *supra* note 12, at 50-51; Dana Michael Hollywood, *The Search for Post-Conflict Justice in Iraq: A Comparative Study of Transitional Justice Mechanisms and Their Applicability to Post-Saddam Iraq*, 33 BROOK. J. INT'L L. 59, 76 (2007).

233. See TUTU, *supra* note 12, at 21-24; Darryl Robinson, *Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court*, 14 EUR. J. INT'L L. 481, 495 (2003).

234. See MINOW, *supra* note 1, at 53; TUTU, *supra* note 12, at 49-50; Marianne Guela, Note, *South Africa's Truth and Reconciliation Commission as an Alternative Means of Addressing Transitional Government Conflicts in a Divided Society*, 18 B.U. INT'L L.J. 57, 64 (2000).

235. See Guela, *supra* note 234, at 66.

236. Erin Daly, *Reparations in South Africa: A Cautionary Tale*, 33 U. MEM. L. REV. 367, 374 (2003); Suzanne Daley, *South African Panel's Report Arrives in Swirl of Bitterness*, N.Y. TIMES, Oct. 30, 1998, at A1.

237. See Eric K. Yamamoto, *Race Apologies*, 1 J. GENDER RACE & JUST. 47, 55 (1997).

238. See MINOW, *supra* note 1, at 60-61, 71-72.

239. See Rachel King, *Restorative Justice: How Law Schools Can Help Heal Their Communities*, 34 FORDHAM URB. L.J. 1285, 1292 (2007).

It remains to be seen how these activities relate to the idea of recognition as conceived of here. The TRC process, with its victim-centered public hearings, certainly represents a promising effort to publicly acknowledge the victims' moral injuries and painful stories—an effort to do justice to the public experience of those whose very being had been so deeply violated.²⁴⁰ In this sense, the value of the process lies precisely in its capacity to give recognition to the victims and their pain, while also affirming a position of collective solidarity with them.²⁴¹ The kind of public recognition involved here constitutes what we might term “symbolic action;” it marks, symbolically, a break with the past and the establishment of a new moral framework in which victims can receive validation of their humanity and acknowledgement of the utter wrongness of its violation.²⁴² True, this is a purely symbolic function, but it is an essential one nonetheless. As we saw, the trauma of humiliation can constitute a serious injury, sometimes on par with physical cruelty—and if this is so, then we should make it a central concern of our reflections on transitional justice.

The TRC, then, embodied a public commitment to recognizing the moral agency of those previously excluded, by encouraging victims to tell their stories to someone who listened seriously and validated them with official acknowledgement.²⁴³ This is a form of recognition that, symbolically, seeks to reverse the imposition of victimhood and to re-equilibrate the perceived power between perpetrator and victim.²⁴⁴ In this connection, the gathering of testimony from survivors, including forgotten survivors in forgotten places, had a central significance in the TRC process.²⁴⁵ Crucial, here, was an effort to “render vivid and palpable the human faces of suffering, and survival”—to enable individual victims to articulate the lived, emotional meanings of their traumatic experiences.²⁴⁶

These features of the TRC—especially the focus on victims and their “narrative truths”—can be related in a very direct way to the model of recognition presented in this article. As noted, the point of the TRC endeavor consists precisely of giving voice to the survivors by providing them with a public forum to bring their experiences of injustice out into the open.²⁴⁷ From this perspective, the difference between trials and truth commissions appears to be only one of degree and emphasis rather than in kind. Although the TRC may have a particular merit in emphasizing the irreducibly subjective and emotive dimension of the experience of being

240. See Blumenson, *supra* note 210, at 865–66.

241. See *id.*

242. For an illuminating discussion of the role of symbolic action in marking a new moral order, see Rajeev Bhargava, *Restoring Decency to Barbaric Societies*, in *TRUTH V. JUSTICE: THE MORALITY OF TRUTH COMMISSIONS*, *supra* note 5, at 45, 57.

243. See Blumenson, *supra* note 210, at 866.

244. See Jaime Malamud Goti, *Equality, Punishment, and Self-Respect*, 5 *BUFF. CRIM. L. REV.* 497, 497–99 (2002).

245. See *Balancing Justice*, *supra* note 201, at 331.

246. MINOW, *supra* note 1, at 84.

247. See Raquel Aldana, *A Victim-Centered Reflection on Truth Commissions and Prosecutions as a Response to Mass Atrocities*, 5 *J. HUM. RTS.* 107, 108 (2006).

victimized, trials seem better suited to at least partially balance moral accounts and give forceful expression to the community's opprobrium.²⁴⁸ But, beyond these differences, both institutions provide potentially powerful ways of bringing *recognition* to the experiences of survivors of atrocity and to their families. Fundamentally, they share an effort to acknowledge and condemn horrors and can, therefore, have distinctive and mutually complementary roles in shaping a discourse of recognition after atrocity. Accordingly, one should not be too quick to accept the either/or simplification of "truth v. justice."²⁴⁹

It remains an open question, however, whether a truth commission like the South African TRC creates a level of accountability appropriate to victims and their need for recognition. Do such institutions provide a suitable framework for calling those who committed abuses to explain? If, as noted earlier, recognition is closely tied with a process of bringing offenders to confront the nature of their actions, then the issue is a crucial one. So how much accountability was there in the TRC process? Certainly, the South African truth commission represents an innovative effort to combine individual grants for amnesty with mechanisms of truth-seeking and accountability.²⁵⁰ Unlike self-amnesties, which are often enacted by outgoing regimes to wipe out the offenses entirely, the amnesty process employed by the TRC was *not* a blanket grant or expression of unconditional impunity.²⁵¹ Rather, it made amnesty—the exemption from criminal and civil liability—conditional on full disclosure of the offenders' crimes.²⁵² In this process, amnesty was only available to individuals who personally applied for it and who testified fully about the facts of misdeeds that could fairly be characterized as serving political ends.²⁵³ Thus, those seeking amnesty were required to identify themselves individually and to give detailed information relating to specific human rights violations. In

248. Cf. MINOW, *supra* note 1, at 58 ("Prosecution may be essential as well for the healing of social wounds caused by serious violations, on the theory that a society cannot forgive what it cannot punish.").

249. See *id.* at 87–90.

250. See HAYNER, *supra* note 124, at 98–99; Sam Garkawe, *The South African Truth and Reconciliation Commission: A Suitable Model to Enhance the Role and Rights of the Victims of Gross Violations of Human Rights?*, 27 MELB. U. L. REV. 334, 353 (2003).

251. In July 1995, the South African Parliament passed the Promotion of National Unity and Reconciliation Act 34 of 1995, which linked the granting of amnesty to a truth seeking process. Promotion of National Unity and Reconciliation Act 34 of 1995 s. 3(1)(h) [hereinafter Reconciliation Act], available at <http://www.doj.gov.za/trc/legal/act9534.htm>.

252. South Africa's Interim Constitution, which applied from 1994 to 1997, stated in its "postamble" that "amnesty shall be granted in respect to acts, omissions and offenses associated with political objectives and committed in the course of the conflicts of the past." S. AFR. (Interim) CONST. 1993 ch. 16, available at <http://www.servat.unibe.ch/icl/sf10000.html>. Only later, under the Reconciliation Act, was the granting of amnesty linked with the creation of a national truth commission empowered to grant amnesty "to persons who make full disclosure of all the relevant facts relating to acts associated with a political objective committed in the course of the conflicts." Reconciliation Act, pmbl.

253. The Reconciliation Act gave the Committee on Amnesty [CA] the power to grant individualized amnesty to those who made "a full disclosure" of their past crimes and showed the crimes to be "politically motivated." See *id.* ss. 20(1)(b); 20(1)(c).

addition, many amnesty applicants had to testify in public, under close questioning of the Amnesty Committee members and, in most instances, the victims and their families.²⁵⁴

Therefore, we may say that appearing before the TRC was somehow burdensome or even painful for the applicants. The experience of making detailed disclosures of the most brutal and horrific crimes in the glare of nationwide publicity is one that few perpetrators likely wanted to endure.²⁵⁵ In this sense, we may think of the TRC process as a “disruption of the freedom to pursue the satisfaction of one’s desires.”²⁵⁶ Some have also argued that the process of seeking amnesty resulted in forms of communal and private shaming, turning the former perpetrators into “new victims”—shunned by spouses, families, and friends.²⁵⁷ More importantly, the truth commission mobilized public opprobrium and demonstrated solidarity with the victims by reasserting the moral baseline to define the community’s responsibilities and values.²⁵⁸ In this light, the TRC endeavor can be qualified as a process of punitive communication, intended to be painful or burdensome not for its own sake but to convey a moral message—a message aimed at expressing the community’s refusal to tolerate the bad example established by the crime.

The argument up to this point is that the South African amnesty process furthered some form of accountability, at least in a “weak” sense. The more difficult issue, however, is whether the degree of accountability achieved was enough to express a suitably weighty and forceful kind of recognition. After all, the trade of truth for amnesty produced exemption from punishment and civil liability, letting torturers and state-sponsored killers get off “scot-free.”²⁵⁹ Perhaps the greatest moral objection placed on amnesties lies in the suspicion that the victims’ need for recognition is sacrificed—at least partially—for the sake of promoting other social goods such as social unity or reconciliation. If there is no punishment for the most egregious crimes, does society fail to fully respect the victims—particularly their sense of dignity and self-respect? Truth-telling, however crucial, may simply be insufficient.²⁶⁰ Some harms, it seems, go so deep that something more is owed to the victim—something that will recognize and

254. Section 19(4) of the Reconciliation Act empowered the CA to require applicants to attend a public hearing. See *id.* s. 19(4).

255. See *Balancing Justice*, *supra* note 201, at 328.

256. *Id.* at 327 (quoting Jean Hampton).

257. See Dumisa B. Ntsebeza, *The Uses of Truth Commissions: Lessons for the World*, in *TRUTH V. JUSTICE: THE MORALITY OF TRUTH COMMISSIONS*, *supra* note 5, at 158, 164. This is not the place to discuss in detail the argument that the TRC process resulted in public and private shaming. Still, it is important to note that the insistence on informal sanctions of ostracism, disapproval, and disadvantage seems at odds with the ideal of the rule of law—as opposed to private vengeance and vigilante justice—and sits uncomfortably with the TRC’s discourse of forgiveness and reconciliation.

258. See TUTU, *supra* note 12, at 30–32.

259. When granted, amnesty meant not only that the applicants could not be prosecuted for their crimes, but also that they were legally freed from the threat of a civil suits for damages. See Reconciliation Act, ss. 20(7)–(9).

260. See Aldana, *supra* note 247, at 297.

address the seriousness of the wrong that he or she suffered.²⁶¹ To think that the torturer or mass murderer could simply testify and then return to normal life would minimize and trivialize the victim's trauma and loss of trust in moral social order.²⁶² What we owe the victim, we may argue, is truthful testimony *plus* some further and separate measures—measures that exclude the offender from participation in the ordinary life of the community (e.g., imprisonment) or that are burdensome in other ways (e.g., restitution, fines, compulsory community services), independently of their censorial meaning.

This argument suggests that we should pursue punishment not primarily in search of deterrence or moral improvement, but rather as a way of validating and vindicating the victim of wrongdoing.²⁶³ The purpose of punishment, so understood, is to correct the perpetrator's implied message that it is fine for his victim to be treated in this way.²⁶⁴ After wrongdoing, the truth of the victim's value must be publicly reasserted, and punishment is an especially powerful way of communicating that reassertion. In the absence of punitive actions, the response to crime risks appearing superficial or meaningless.²⁶⁵ This is what Jaime Malamud Goti has in mind when he writes: "[o]nly public admission by authoritative institutions that we were wronged will legitimize us in our own eyes, and punishment of the violators of our rights is the clearest and strongest statement to that effect."²⁶⁶ From this perspective, closing down the pursuit of justice through criminal and civil action seems a very high price to ask victims to pay. Consequently, South Africa's truth commission, like any other process that sacrifices the rights of victims to receive their due, carries a heavy moral burden.²⁶⁷ As Raquel Aldana remarks, the trade of truth for

261. See DUFF, *supra* note 183, at 94–96.

262. See NAGEL, *supra* note 163, at 67–68.

263. Clearly, this point raises the question of whether, and how, punishment can be morally justified. These are deep waters into which this article will delve no further except to suggest that an alternative conception of retributivism—*distinct* from hard-line versions of the *lex talionis*—may provide a plausible justification for punishing state criminals. This version of retributivism makes the interests and needs of victims its central concern, while at the same time focusing on moral communication. By this account, punishment should be a communicative enterprise that seeks to send a moral message to the offender and society-at-large—for example, the message that it is not alright to kill or rape. Dreadful forms of punishment—like torturing torturers or killing killers—are, then, unjustifiable because they are not conducive to moral reasoning. See, e.g., M. Margaret Falls, *Retribution, Reciprocity, and Respect for Persons*, 6 LAW & PHIL. 25, 50 (1987) (declaring that “the moral accountability theory demonstrates . . . that torturing torturers and killing killers is poor retributive justice”). Moreover, the justification of punishment should focus on the victim and her dignity rather than on the perpetrator breaching the law; it should be directed at reaffirming the victim's worth and lost self-respect. For such an argument, see Goti, *supra* note 244, at 497.

264. See Goti, *supra* note 244, at 503–04.

265. See *id.* at 505.

266. *Id.* at 504.

267. See Aldana, *supra* note 247, at 108. For a forceful critique of how the victims' and their relatives' resentment and resistance to forgiveness were treated in the South African context, see THOMAS BRUDHOLM, RESENTMENT'S VIRTUE: JEAN AMÉRY AND THE REFUSAL TO FORGIVE 34 (2008).

amnesty is likely to undermine "the condemnatory message that states must send to perpetrators and the public about the nature of the crimes, thereby disparaging the victims' plight."²⁶⁸

Given the above analysis, one thing seems clear: both trials and truth commissions can afford an institutional framework for giving public recognition to the undeserved suffering of individual victims. In this respect, the difference between trials and commissions appears to be one in intensity and degree, not in kind, but the distinction becomes sharper if we consider the communicative or expressive function of punishment. Truth commissions, on the one hand, may be better suited than trials for granting victims the potentially affirming experience of being heard and believed.²⁶⁹ Trials, on the other hand, appear to be superior to truth commissions for their potential in correcting imbalances, drawing a moral bottom line, and thereby conveying that individuals and their pain do matter.²⁷⁰ Yet, both responses to wrongdoing are not counters but partners to recognition, and as such they are compatible and to some extent overlapping approaches. Exclusionary approaches must therefore be avoided.

IV. Responding to Collective Evil

So far, this article has carved out the meaning of and space for recognition as a public response to *individual* crimes. In doing so, a central assumption has been that the legitimacy of a government depends, in part, on its capacity to protect its citizens against harm. As previously discussed, one way to live up to this ideal of a responsible government is to provide a forum within which wrongs are publicly recognized and transgressors held accountable.²⁷¹ Matters become more complicated, however, when a government resorts to, condones, or permits a large-scale violation of its own citizens' rights to life and liberty. Most obviously, such episodes of mass violence, orchestrated by the central state in a widespread and organized fashion, indicate a fundamental failure on the part of state actors to protect the civil interests of the citizenry. This failure raises the difficult and deep issue of collective responsibility, an issue central to the topic of transitional justice. Here, the state is not, so to speak, the "victim" of a public injury but the victimizer. What is required, in such cases, is a form of morality applicable not only to interpersonal behavior, but also to the acts of political communities or groups. Accordingly, I shall now examine

268. Aldana, *supra* note 247, at 108.

269. See Nancy L. Rosenblum, *Justice and the Experience of Injustice*, in MARTHA MINOW, *BREAKING THE CYCLES OF HATRED: MEMORY, LAW, AND REPAIR*, 77, 94-95 (Nancy L. Rosenblum ed., 2002).

270. See Charles S. Maier, *Doing History, Doing Justice: The Narrative of the Historian and of the Truth Commission*, in *TRUTH V. JUSTICE: THE MORALITY OF TRUTH COMMISSIONS*, *supra* note 5, at 261, 269 (arguing that "only punishment and retribution seem available to at least partially balance moral accounts").

271. See discussion *supra* Part III.B.

whether and how the idea of recognition might be applied to the wrongful actions of collectives.

The significance of this analysis emerges more clearly if we consider the distinctive nature of collective evil and its potential impact on individual victims. Let me begin by emphasizing an essential element of collective, or group-based, wrongdoing—its public character. In instances of “ordinary,” individualized wrongdoing, a private person commits actions forbidden by the law, and the public purpose of legally authorized punishment is to reaffirm the existence of legal order and make clear that the act is unacceptable to the society. Collective wrongdoing is different. If an entire community or group—such as a state or government—plans, permits, or condones acts that are terribly unjust or humiliating, the individual victim is made to look inferior or wanting in the eyes of the *public*: she is publicly told that her life simply does not matter, that her presence counts for nothing in the society’s scheme of things.²⁷² The more overt form of this is political exclusion. To be denied a voice or refused an ear in public policy matters is to be rejected from social life. It means that one is expelled from the class of full members of the community—the victim is rendered voiceless or simply invisible within the public space. As Rajeev Bhargava helpfully suggests, we might view this phenomenon as “a *political* evil, which creates political victims.”²⁷³ He explains its implications as follows:

A person who is robbed on a highway or systematically exploited on agricultural land or in a factory is a victim, but not a political victim. Political victims are those who are threatened, coerced, or killed because of their attempt to define and shape the character of their own society, and to determine the course of what it might become in the future. When political victims suffer violence, they are not merely harmed physically, however. The act of violence transmits an unambiguous, unequivocal message, that their views on the common good—on matters of public significance—do not count, that their side of the argument has no worth and will not be heard, that they will not be recognized as participants in any debate, and, finally, that to negotiate, or even to reach a compromise with them, is worthless. In effect, it signals their disappearance from the public domain.²⁷⁴

These considerations point to the inherently collective, indeed political, dimension of the crimes under consideration. Characteristically, episodes of massive evils, such as massacres and genocide, are rooted in ideology—in some collective conviction, however misguided—about how a society should be shaped or transformed. A purely individual-based approach, focused exclusively on the personal responsibility of individual agents, cannot tell the complex connections among people that make widespread collective violence possible. Rather, it is necessary to think in terms of policies and institutions so as to contextualize the experiences of those who have been brutalized in the larger “system.” The relevant point is that

272. See HONNETH, *supra* note 35, at 131–39.

273. Bhargava, *supra* note 242, at 47.

274. *Id.*

collective wrongdoing, as a social and political fact, represents more than just an aggregation of violent acts. It symbolizes a society's sheer lack of respect and contempt for some individuals or groups of individuals. Consider a policeman or military official whose "job" consists of abducting, torturing, and killing regime opponents as a means of political repression. The evil thus wrought is not the result of "illegal" actions of some rogue private agent, but rather is the product of policies enacted by the government itself. There is a sense, here, that society as a whole is complicit in the crime. One might say that this collective nature of torture and other abuses compounds the pain of these experiences with the approval of the wider political community.

A. Collective Responsibility

It seems, then, that there is a need for *collective* shifts in our thinking about recognition and its role in transitional justice. If, as noted, acts of widespread violence tend to be political in nature, then we may speak of an institution or collective as recognizing past wrongs. The idea, however, of some sort of corporate recognition raises fundamental philosophical issues. If groups are to recognize their wrongdoings, there must some sense in which groups may act and be held responsible for their wrongful actions. But saying that groups as such can intentionally "do" things and hence be blameworthy seems a peculiar way of describing human action. Strictly speaking, only flesh-and-blood individuals "act," and it is difficult to see how the idea of moral agency—and hence responsibility—could be applied to groups as such. After all, only human beings can think about reasons to do something or do otherwise and translate those reasons into choices and then into actions. Yet, this individualistic perspective fails to accord with the fact that we frequently blame corporations, governments, and groups—be it Shell International, the World Bank, the U.S. Government, the Irish Republican Army (IRA), or even the Russian Mafia—for their actions. One can find a recent expression of this moral practice in former President Bill Clinton's remarks in acceptance of the 1996 Human Radiation Final Report, in which he suggested that the U.S. government has a moral responsibility "to keep its word, to tell the truth, and to do the right thing."²⁷⁵ The important claim here is that in practice we are willing to regard a government or state as a kind of moral being and hence blameworthy. This claim points to the fundamental question: How can we make sense of the idea that groups are responsible for their actions?

Larry May has vividly endorsed the idea that groups such as corporations and governments are moral agents and, hence, responsible for their actions.²⁷⁶ Taking an example from Jean Paul Sartre, he suggests that even an unorganized mob—for instance, the mob storming the Bastille during

275. P. E. DIGESER, *POLITICAL FORGIVENESS* 146 (2001) (quoting President William J. Clinton, Acceptance of the Human Radiation Final Report (Oct. 3, 1996)).

276. LARRY MAY, *THE MORALITY OF GROUPS* (1987). For interesting comments on May's account of collective responsibility, see *FORGIVENESS AND REVENGE*, *supra* note 200, at 87.

the French Revolution—can be said to act collectively, because of common interests or a sense of solidarity.²⁷⁷ Here, the relevant actions—storming buildings, overcoming officials, freeing prisoners and so on—are performed by individuals standing in relationship to each other.²⁷⁸ In virtue of those relationships, their actions can be said to characterize the group as a whole.²⁷⁹ No individual could perform these actions alone, just as singing complex choral works (J.S. Bach's cantatas, for instance) is something that an individual could not do alone.²⁸⁰ There is a sense, then, in which such collective actions are distinct from those of unrelated individuals and therefore attributable to a larger group.²⁸¹ This point becomes even more salient in situations in which there is a relatively clear decision-procedure and an identifiable, institutionally established set of purposes. In such cases, one might find plausible arguments to the effect that corporate entities are somehow capable of acting on reasons. Given its internal organization and decision structure, an entity might be said to have corporate interests and goals that stand independent of the personal intentions of its individual members. It is with this in mind that Peter French speaks of certain kinds of groups as "intentional actors in their own right, and . . . thereby full-fledged moral persons."²⁸² According to French, there is such a thing as "corporate intentionality" which constitutes the moral basis for holding groups responsible for what is done or not done.²⁸³

This article shall not discuss these important and complex issues but will only suggest that French's central argument about moral agency and corporate bodies may provide us with a valuable framework for addressing the fundamental philosophical issues at hand. This is especially true of French's notion of conglomerates as distinct from aggregates and individuals. Conglomerations, by French's account, possess an internal decision structure that enables them not only to arrive at decisions, but also to establish the basic policies and goals of an institution.²⁸⁴ As suggested above, such corporations can be described as acting on reasons which, for French, is the requisite characteristic of moral agency. A conglomerate, so defined, is not simply an aggregate or "merely a collection of people."²⁸⁵ French's central claim is precisely that a conglomerate can itself act without all of the members acting—the conglomerate itself can be blamed for an action without necessarily blaming the individual members of the

277. See MAY, *supra* note 276, at 66 (arguing that solidarity and decision practices/procedures are each necessary and together sufficient conditions for group agency).

278. See *id.* at 37.

279. See *id.*

280. The example of a choir is Govier's. See FORGIVENESS AND REVENGE, *supra* note 200, at 87.

281. See *id.* at 88 (arguing that "[t]here are both distributive and collective ways of making sense of attributions of various qualities to groups").

282. See PETER A. FRENCH, COLLECTIVE AND CORPORATE RESPONSIBILITY 47 (1984) [hereinafter FRENCH COLLECTIVE]. For a critical discussion of French's account of corporate responsibility, see DIGESER, *supra* note 275, at 147–58.

283. See FRENCH COLLECTIVE, *supra* note 282, at 44.

284. See *id.* at 13–14.

285. See *id.* at 5.

group.²⁸⁶ In addition, what French calls a conglomerate is not an individual; it does not have a mind, a personality, a conscience, or feelings, in any way a human being does. Therefore, French's conglomerate is far from the metaphysical weirdness of concepts such as a group mind or consciousness.

The assertion that agency, moral responsibility, and acting for a reason are linked together seems plausible—it accords with a shared belief that responsibility involves an obligation to justify or explain one's actions, especially if what one is doing is wrong or harmful. More important, French's discussion of conglomerates helps us make sense of the notion of how groups may act on reasons. Beyond that, it may be relevant to assessing and identifying levels of collective responsibility arising from major social and political evils. Crucially, the idea of a government or state as a conglomerate is consistent with and translatable into what Karl Jaspers famously called "political responsibility"—a kind of communal responsibility without individual blame, deriving chiefly from an individual's citizenship or nationality.²⁸⁷ Arguably, this sort of vicarious responsibility is the price we pay for belonging to a conglomerate, such as a state or nation, irrespective of the blame, if any, attaching to us as individual members. We pay that price, Hannah Arendt suggests, "for the fact that we live our lives not by ourselves but among our fellow men, and that the faculty of action, which, after all, is the political faculty par excellence, can be actualized only in one of the many and manifold forms of human community."²⁸⁸

All this suggests that we can think of collective entities, such as states or governments, as responsible for wrongdoing. One implication of this analysis is that a corporation, to the extent that it is capable of action, can make moral amends and somehow rectify the wrongs done.²⁸⁹ In particular, it can grant appropriate recognition to those wronged through its practices, policies, and acts; acknowledging their loss and reaffirming their intrinsic value as human beings and equal citizens. Undoubtedly, this idea of collective recognition expresses a commitment to treat people with the respect, the consideration, and the concern to which they are entitled by virtue of what they have suffered. The question, then, is not *whether* the victims of collective or institutional wrongs should be recognized in some meaningful manner, but *how*.

B. Individual versus Collective Recognition?

Before pursuing this argument, however, this article lays out a rough account of the relationship between individual and collective recognition. Where a group countenanced or committed atrocities, an individual-based model of recognition, as alluded to earlier, seems frustratingly inadequate

286. See PETER A. FRENCH, *RESPONSIBILITY MATTERS* 138 (1992).

287. See KARL JASPERS, *THE QUESTION OF GERMAN GUILT* 78 (E. B. Ashton trans., 1947).

288. HANNAH ARENDT, *RESPONSIBILITY AND JUDGMENT* 158 (Jerome Kohn ed., 2003).

289. For a discussion of this idea, see LARRY MAY, *CRIMES AGAINST HUMANITY: A NORMATIVE ACCOUNT* 249-53 (2005).

to explain or discern the complex, intrinsically social ways in which such wrongs are felt. In fact, the phenomenon of evil that is not spontaneous and individual but organized and carried out top-down renders the focus on select individuals and the premise of individual responsibility at best problematic. This may prompt us to question, fundamentally, the appropriateness of using an "individualist" model of recognition to deal with conflicts of the past in transitional societies. Is such an account simply irrelevant to evaluating the central issues at hand? Should we assume, in other words, that it has no utility here? I do not think so.

As discussed earlier, in evaluating the victims' experience of severe injury or insult it is important to keep in mind the interpersonal character of wrongdoing. Torture, rape, assault, and murder are, first and foremost, wrongs planned and performed by individuals against other individuals, however complex the circumstances. Victimizer and victims are, after all, real flesh-and-blood human beings, not abstractions called "the state," "the government," or whatever.²⁹⁰ Crimes, in that sense, are rooted in perceptions of inter-personal meaning. As Thomas Nagel explains, to do horrible things to someone puts you in a special—direct and personal—relation to that particular human being.²⁹¹ These things happen to *him* as a result of what *you* do. Viewed through this lens, hostility or aggression is primarily a relation between persons calling for, in Nagel's phrase, "a direct interpersonal response"—a response offered by the aggressor and presented directly to the victim, rather than to the world at large.²⁹² This view points to the moral significance of an interpersonal or *one to one* form of recognition, which may be integrated into a public framework in the ways described above.

As conceived of here, the idea of a one to one form of recognition is intimately linked to that of individual responsibility. Even in instances of egregious systemic violence, human beings have moral choices—for instance, about obedience to orders and passive versus active resistance. An essential part of our moral lives is, precisely, that we can act on reasons and translate those reasons into actions. I can do X or not do X. Addition-

290. This idea is central to models of restorative justice. See, e.g., Marc Forget, *Crime as Interpersonal Conflict: Reconciliation Between Victim and Offender*, in *DILEMMAS OF RECONCILIATION*, *supra* note 5, at 111, 112 (stating that crime is "harm caused to people").

291. See NAGEL, *supra* note 163, at 67–68.

292. *Id.* at 67. This understanding of crime is associated with an "absolutist" view of moral life, as opposed to utilitarian perspectives. See *id.* Moral absolutism, as conceived of here, forbids *doing* certain things to others, such as the deliberate murder of an innocent person or torture, rather than bringing about certain results. See *id.* There are limits to what can be done even in service of some end worth pursuing such as national interest, freedom, democracy, and so on. See *id.* As Nagel argues, compellingly, these moral limits to human action are related to the "possibility of justifying *to the victim* what is being done to him." *Id.* at 67. From the perspective of the individual victim, any justification for what one did seems irrelevant and meaningless unless it is offered to him or her *specifically*, rather than to the world at large. See *id.* This perspective may help us understand how certain requirements are absolute in the sense that they rule out any calculation of what would justify their violation. For an illuminating analysis of these issues, see *id.* at 53–74.

ally, if I fail to do the right thing, I carry the moral burden of explaining myself to those who suffer the consequences as well as to the moral community at large.²⁹³ That is, this article contends, the essence of moral responsibility. To be sure, assigning responsibility to specific individuals is not always an easy task—especially in instances of ideologically thought-out and collectively enacted evil. In modern or post-modern technological society, political evil typically takes the form of an “abstract,” at-long-range and out-of-sight sort of violence, resulting from a complicated and impenetrable division of labor and from the concomitant fragmentation of responsibility among the participants. As Raul Hilberg memorably put it when writing about the Holocaust, “[t]he perpetrator can now kill his victims without touching them, without hearing them, without seeing them.”²⁹⁴ Perhaps, then, the technology and organization of modern wars and massacres is such as to make it impossible to hold individuals morally responsible. Perhaps the kind of destruction at work here is just too anonymous and large-scale for that. This is what Zygmunt Bauman may have in mind when he writes that “responsibility arises out of the proximity to the other.”²⁹⁵ “Proximity,” in his view, “means responsibility and proximity is responsibility.”²⁹⁶ But is it?

In some ways this is a plausible description of how collectively organized perpetrators may feel about themselves and about what they do; but, morally speaking, it is also an improbable one.²⁹⁷ Consider, for example, the case of a pilot dropping bombs on civilians in an enemy village. In this case (as in others), proximity conditions regarding time, space, or relationship are obviously not satisfied. Still, it is difficult to believe that this man can be excused of moral responsibility. It is clear, after all, that by bombing the village *he* deliberately kills and maims innocent people, actions that impose a considerable moral responsibility on *him*. Even if others are also to be blamed for what happens, that does not make *his* responsibility go away. Other cases, however, are more difficult to assess. This is especially true of organizational wrongs committed in a bureaucratic setting. Bureaucratic compartmentalization and division of labor are likely to lead to a situation in which individuals lack the awareness of the role their acts play

293. Of course, the problem is much more complicated than that. In life, there may be situations where one must choose between two courses of action, both of which it would be wrong to undertake. The question of how such moral dilemmas can be faced is one I shall not pursue here. Nor can I address the particular problem of “dirty hands,” which is of great relevance in the context of state-sponsored violence. For an insightful discussion of that problem, see Michael Walzer, *Political Action: The Problem of Dirty Hands*, 2 PHIL. & PUB. AFF. 160 (1973).

294. See RAUL HILBERG, *THE DESTRUCTION OF THE EUROPEAN JEWS* 1187 (1985). For a discussion of the Holocaust as a starting point for moral theory, see VETLESEN, *supra* note 25, at 14–51.

295. ZYGMUNT BAUMAN, *MODERNITY AND THE HOLOCAUST* 184 (1989).

296. *Id.*

297. To be fair, however, we should note that Bauman’s thesis refers to responsibility in a psychological-empirical sense, inspired by Miligram’s experiments. His concern, therefore, is not with trying to elucidate the legal or philosophical meaning of responsibility. VETLESEN, *supra* note 25, at 23–27.

in the larger corporate undertaking. In such cases, individuals may offer the epistemological excuse that they “did not know.” This problem of fragmented knowledge raises the complex and deep issue of establishing a workable account of individual responsibility—an issue that will not be discussed further here; however, a helpful way of approaching the problem may be through a conception of culpable ignorance. The right question, then, is not “did they know?” but “should they have known?”²⁹⁸

But this is not the end of the story. Given the inherently political dimension of the abuses that demand our attention, a model of group recognition not only makes sense in theory, it also responds to many of the practical exigencies of societies seeking to move on after collective violence. An approach that deals with crime as a purely individual-phenomenon can hardly capture the moral complexity of the process by which ordinary people come swept up in the “group-think” of orchestrated evil.²⁹⁹ It cannot tell the complex phenomena of mass atrocities carried out by collectively organized and “deindividuated” perpetrators. Nor can it make sense of the category of bystanders—those individuals who did not actively participate in violence (and thus have no criminal liability), but also did not actively intervene to stop horrors. It seems clear, then, that the inherently collective nature of the crimes under consideration demands some kind of group recognition for change to occur. For the reasons given above, however, interpersonal accounts of recognition also have a role to play in contexts of transitional justice. Both approaches are, therefore, complementary rather than antagonistic. Again, one must avoid an all-or-nothing kind of thinking.

C. Towards a Conception of Collective Recognition

In considering what a conception of collective (or group-based) recognition would look like, it may be useful to draw on our discussion of the negative moral concept previously referred to as “misrecognition.” This way of looking at the matter coheres with what is one of the central claims of this article: that by giving attention to negative moral concepts, such as humiliation and disrespect, we may gain a better understanding of the relevant positive values and dispositions. More specifically, it may be helpful to start with some practices that appear to be *institutional* manifestations of misrecognition—institutional in the sense that they refer to the misrecognition of a society’s members by its institutions. As we saw earlier, one way of approaching the concept under scrutiny here is through the phenomenon that Honneth describes as social invisibility—the humiliating experi-

298. For a valuable effort to extend the concept of culpable ignorance to the problem of fragmented knowledge, see generally David Luban et al., *Moral Responsibility in the Age of Bureaucracy*, 90 MICH. L. REV. 2348 (1992).

299. For insightful discussions of the nature of collective evil, see MARK A. DRUMBL, ATROCITY, PUNISHMENT, AND INTERNATIONAL LAW 202 (2007) (observing that mass atrocity is “deeply collective in nature and, what is more, that its collective action surpasses the aggregate of all individual action”); MAY, *supra* note 276, at 246–53 (discussing collective responsibility and collective remedies); VETLESEN, *supra* note 25, at 145–219 (referring to “ethnic cleansing” in Bosnia).

ence of being refused a voice and being denied an ear that signals one's disappearance from the public domain.³⁰⁰ To make people socially invisible means, essentially, to treat them (institutionally) as though they have no reality—as though they are not what they actually are (which, in Frankfurt's usage, is disrespectful).³⁰¹ This occurs, for instance, if an individual's experience of harm and injury is made to look "normal," little, unimportant, or even banal.³⁰² There are many such ways of looking "through" the victimized—some more clear-cut than others. But what seems common to all these downgrading and exclusionary practices is the sheer lack of genuine concern for individuals and their suffering.

In times of political transition, newly democratic regimes can misrecognize the victims of collective wrongdoing in more than one way.³⁰³ Misrecognition is direct when a new regime has an official policy of trying to cover up or deny past wrongs. It is indirect when the regime fails to properly respond to or act in light of the humiliating subordination, rejection, or exclusion inherent in collectively perpetrated wrongs. This is obviously the case if a society and its institutions do nothing in response to the harms suffered. Still, even if society does something in response, it may be inadequate to the task of marking a collective recognition of those who have been wronged. Where a new regime takes some concrete measures to repair the injuries of the past, the adequacy of response will depend a good deal on *how* the response is presented. Some measures of reparation—such as offering money or resources—may be just and efficient, yet still insufficient as a response to the *humiliating* aspects of collective wrongdoing.³⁰⁴ As we saw, symbolic devaluation is an essential part of what it means to be socially silenced and removed from the public domain. Therefore, symbolic gestures, or rituals, are significant as ways of expressing a society's very commitment to include the previously excluded and oppressed as fully recognized members of the polity.

Although these considerations are rather vague, they provide an entrance to a conception of collective recognition. Drawing on the practices of socially induced misrecognition described above, we can identify a set of features that may be associated with the goal of giving public recognition to the victims of collective violence and, thereby, to their moral worth and dignity as fellow citizens. Some of these features also play a role in the interpersonal model of recognition sketched in Part III. This is especially true of what I have called the criteria of responsiveness and directness. As in the interpersonal case, collective recognition requires a proper response to the wrongs done and should, in principle, be presented

300. See HONNETH, *supra* note 35, at 131–39; *Invisibility*, *supra* note 146, at 112.

301. See Frankfurt, *supra* note 142, at 12.

302. See MARGALIT, *supra* note 34, at 101–02.

303. See, e.g., Carlos H. Acuña & Catalina Smulovitz, *Guarding the Guardians in Argentina: Some Lessons About the Risks and Benefits of Empowering the Courts*, in TRANSITIONAL JUSTICE AND THE RULE OF LAW IN NEW DEMOCRACIES, *supra* note 5, at 93, 94.

304. See MARGALIT, *supra* note 34, at 280.

directly to the individual victims.³⁰⁵ But, of course, there are also important structural differences that must be kept in mind. In contrast to unmediated or mediated interpersonal relations of recognition in which the analytical focus is upon interaction between particular wrongdoers and their victims, the kind of discourse of recognition that concerns us shifts the moral burden onto the political community by taking up the perspective of “collective” victims—individuals or groups within the society who were (in effect and by design) persistently or systematically excluded from the rights and benefits of the community.³⁰⁶ It is worth noting, before diving in, five distinctive features that give this form of recognition its particular timbre.

First, revealing the truth about the atrocities of prior regimes—establishing a publicly verifiable record of what occurred and why—is a prerequisite for the kind of collective recognition that this article envisages. Through the construction of collectively shared knowledge regarding the past, the seemingly private experiences of injustice are made “part of the public cognitive scene.”³⁰⁷ As a response to collective wrongdoing, this kind of remembering is primarily concerned with political violence as a “macro-sociological” phenomenon, rather than with specific “micro” incidences of wrongdoing.

Second, a collective recognition, publicly uttered in response to socially organized cruelty, can be performed successfully only by an individual (or several individuals) possessing the authority to speak on behalf of the collectivity. That is to say, it is the speaker’s status as an authorized representative that makes his or her positions and statements official, binding, and collective. Without the appropriate authority, any response to past wrongs amounts to no collective recognition at all because it lacks the moral imprimatur of the group.³⁰⁸

Third, granting recognition to political victims, in Bhargava’s sense,

305. In most cases, collective recognition will take what might be called a *many-to-one* form, consisting of a state or government offering recognition of individual victims and the wrongs they have suffered. See TAVUCHIS, *supra* note 181, at 90–92. In some situations, however, it may be appropriate for a collective or institution to extend a measure of official recognition to the victims as a group (*many-to-many* form). See *id.* at 98–101. Take, for instance, the case of an official memorial dedicated to the victims of a now-discredited regime or “communal reparations” offered to specific groups and communities who have been seriously and unjustly excluded or disadvantaged in order to strengthen their socioeconomic development. *Id.* at 48.

306. See DUFF, *supra* note 183, at 195; TAVUCHIS, *supra* note 181, at 69.

307. LAWRENCE WESCHLER, A MIRACLE, A UNIVERSE: SETTLING ACCOUNTS WITH TORTURERS 4 (1990) (quoting Thomas Nagel).

308. See TAVUCHIS, *supra* note 181, at 100–01. As a public representative, the spokesperson is speaking for the community and, consequently, his or her personal history is not part of the process: he or she may or may not have been directly involved in the harmful acts in question. See *id.* One might wonder, however, whether a spokesperson’s personal involvement in past wrongs can place an important obstacle in the path of collective recognition. In light of prior participation in evil-doing, one’s discourse of recognition may appear questionable, dubious, or disqualified; depriving the discourse of any moral force to which it lays claim.

requires lending them a restored political and juridical standing.³⁰⁹ This involves, in particular, setting the record “straight” on prior false allegations of political criminality and removing the stigma of social defamation.

Fourth, collective recognition is relevant to the wider audience as much as to the wronged persons. As a particular form of social intercourse, it speaks to a society-at-large—its institutional context and history—and entails public representation of the collectivity’s moral position in a broader social web.³¹⁰ Thus, the offering of collective recognition is quintessentially a public event—one that puts things on “record” and cultivates a sense of shared collective interest.

Fifth, and more generally, we are dealing here with a form of moral discourse that bespeaks a collective commitment to correcting past wrongs and ensuring that similar acts will not be repeated in the future. In this sense, it is a transformative project, expressly designed to advance significant changes in social and political behavior—changes that communicate a due recognition of those who have suffered wrongs as fellow citizens. That project requires, most obviously, a serious collective commitment to remedy the kinds of exclusion that previously denied some people the status of full members of the polity. To be sure, promoting democratic consolidation and equitable socioeconomic development is an important part of that societal restructuring which is needed to restore the victims’ sense of reality and place in the polity.

D. Actualizing the Purposes of Collective Recognition

The preceding considerations sharpen the inquiry somewhat but remain fairly abstract. Thus, the ensuing critical question that arises is, what practical measures would constitute appropriate recognition? As a form of moral criticism of public policy, our account would be radically incomplete if it were silent on the ways and means of putting it into practice. With this in mind, let us briefly consider some avenues for actualizing the core purposes of collective recognition.

1. Truth-Telling

To provide recognition of collective evildoing, a society must disclose and publicly disseminate the facts so that the truth may be known and made part of its history.³¹¹ Most obviously, this task involves establishing accurate documentation of who did what to whom and under whose orders. More broadly, for group recognition to occur, a society should aspire to encompass the story of the society or regime as a collective phenomenon, seeking to embed the perpetrators’ crimes within the wider con-

309. See Bhargava, *supra* note 242, at 47; David A. Crocker, *Reckoning With Past Wrongs: A Normative Framework*, in *DILEMMAS OF RECONCILIATION*, *supra* note 5, at 39, 47–51; see also GOVIER, *supra* note 22, at 48–49.

310. Cf. GOVIER, *supra* note 22, at 48; TAVUCHIS, *supra* note 181, at 71 (stating that in the public sphere, sorrow “is overshadowed and subverted by the apparent compulsion to generate unambiguous speech”).

311. See GOVIER, *supra* note 22, at 44.

text of political violence (supported or tolerated by the mass of citizens). However, the aim of truth-telling, as a process of collective history-making, is not simply to investigate the “hard facts” and correct a public record, but to tell an “official story” that delegitimizes an earlier regime or set of societal practices.³¹² To constitute such a story, the events need to be authoritatively established and officially recounted by the *state*, for this is the only way for the society-at-large to show that it acknowledges that something morally unacceptable has been committed by—or in the name of—the collective. This kind of acknowledgement, stamped with the state’s imprimatur, can create a kind of joint understanding that groups or individuals have been significantly wronged at the hands of the community and that we—as members of that community and citizens of the state—are united in caring about them. Thus, disclosure of truth may help to enhance consensus and solidarity in a deeply divided and traumatized society while, at the same time, contributing to the process of social transformation.

This suggests that there is an “official story” to be told, one to be publicly exposed and acknowledged. The question then is, how do we construct an “official story,” an authoritative “meta-narrative,” of an evil past? The state’s establishing of historical truth can take many forms—from textbook revisions, parliamentary inquiries, newly opened government archives to public commemoration in the form of monuments, museums, art projects, and so on. While there are indeed various tools for the construction of new national histories, the most notable one is perhaps the so-called “truth commission.” The truth commission is a temporary official body charged with inquiring into widespread human rights abuses by a prior regime or its opponents, typically completing its work with the submission of a “report”—a written and well-documented record of otherwise disbelieved or forgotten events.³¹³ Far beyond simply gathering the facts, a truth commission can cut through myths, lies, misplaced apologies, and deliberate distortions of the historical record by revealing “a global truth of the broad patterns of the events.”³¹⁴ Additionally, if it is effective and faithful to its task, the truth commission is likely to make “a major contribution in understanding how people and the country as a whole were affected, and what factors contributed to the violence.”³¹⁵

Trials, by contrast, are—first and foremost—designed to investigate the specific acts of accused perpetrators, rather than the greater patterns and multiple sources of mass violence.³¹⁶ Because of this focus on particular individuals and their conduct at a particular moment in time, trials seem at best imperfect means to tell the complexity and depth of large-scale evil as performed by a collective. Yet, the regularized formal procedures of crimi-

312. See MARK OSIEL, *MASS ATROCITY, COLLECTIVE MEMORY AND THE LAW* 273 (1997) (arguing that the state “must tell a story that de-legitimizes the prior regime, the claims made by its leaders and by its contemporary apologists on their behalf”).

313. See GOVIER, *supra* note 22, at 161, 207 (discussing truth commissions); see also Crocker, *supra* note 309, at 46.

314. HAYNER, *supra* note 124, at 85.

315. *Id.*

316. See Crocker, *supra* note 309, at 46–47; *Hope for Healing*, *supra* note 132, at 239.

nal law, or even civil litigation, can establish a measure of historical truth through the collecting and recording of actions and the naming of perpetrators.³¹⁷ Beyond this, they may, as Lawrence Douglas has argued, succeed as an exercise in “didactic legality” by teaching history and shaping collective memory.³¹⁸

Of course, the very idea of an “official,” commissioned truth is deeply offensive to those “postmodernist” theorists who deny the very possibility of any single, integrated discourse about history and politics.³¹⁹ Trying to “synthesize” an encompassing narrative from diverse sources or histories is certainly a dangerous exercise. Written narratives may well degenerate into simple efforts to control history and to privilege the significance of some stories more than others. Yet, as historian Charles Maier contends, a historical public can legitimately ask for a national history—a history that “allows for contending voices, that reveals the aspirations of all actors, the hitherto repressed and the hitherto privileged.”³²⁰ To be sure, such a history is always provisional and remains subject to amendment as new evidence arises, but it should, nonetheless, be authoritative in that it imposes “what for broad (though not all) segments of opinion can be accepted as a plausible narrative.”³²¹

2. *Apologies*

Similar to Nicholas Tavuchis, we might refer to apology as a speech act in which the speaker expresses sorrow and regret to seek forgiveness from the person wronged.³²² On this understanding, a proper and successful apology for wrongdoing requires acknowledgement and full acceptance of responsibility by the wrongdoer.³²³ But it involves more than this. The heart of apology consists of a genuine display of sorrow and contrition for the harm done and an implicit commitment to avoid such wrongs in the future. Moreover, the kind of apology envisaged here provides, or purports to provide, a reason for an emotional shift away from resentment in the direction to forgiveness as a central element in the apologetic process.³²⁴ All this suggests that the sincere expression of regret and remorse is essential to an authentic apology offered by one individual to another.

As conceived of here, apologies apply primarily to the realm of interpersonal relations. “[A]n authentic apology,” writes Tavuchis, “cannot be delegated, consigned, exacted, or assumed by the principals [sic], no less outsiders, without totally altering its meaning and vitiating its moral

317. See OSIEL, *supra* note 312, at 271; see also Maier, *supra* note 270, at 270.

318. See generally LAWRENCE DOUGLAS, *THE MEMORY OF JUDGMENT: MAKING LAW AND HISTORY IN THE TRIALS OF THE HOLOCAUST* (2001) (discussing the trials of the Holocaust as “dramas of didactic legality”).

319. See Crocker, *supra* note 309, at 46 (asking how can there be one truth about the past and how we should understand this in relation to diverse views about the truth).

320. Maier, *supra* note 270, at 274.

321. *Id.* at 275.

322. TAVUCHIS, *supra* note 181, at 23.

323. See *id.* at 18–19.

324. See *id.*

force.”³²⁵ If the emotion of sorrow and remorse is the “engine” of apology, then the intervention of third parties or collective actors seems somewhat antithetical to the apologetic act (which, typically, calls for direct exchanges between the offender and the offended).³²⁶ All of this renders problematic apologies by individuals acting as spokespersons for groups or institutions. Not only does the apology in that case tend to be offered by people who were not themselves involved in the commission of the offenses or who have only remote connections with the perpetrators;³²⁷ it is also quintessentially public—rooted in, and ruled by, a dimension of publicity that produces a discourse of “record.”³²⁸ In contrast to unmediated human relationships, here we find a form of articulation that takes us into a formal, official, and public discursive world in which, it would seem, emotionality is ruled out and reduced to a remote, measured, or disembodied mode of speech.³²⁹

If this is indeed so, does it preclude the effective articulation of collective apologies and regrets? After all, the lack, or relative lack of expression of emotion in the institutional or collective case sits rather uneasily with an account of apology whose “moving force and vital centre” is sorrow.³³⁰ In their recent paper, *The Promise and Pitfalls of Apology*, Trudy Govier and Wilhelm Verwoerd suggest a way around this problem.³³¹ The authors argue that it is by shifting from perpetrator-centered emotion to victim-centered *acknowledgement* that we gain a better understanding of what constitutes a collective or institutional apology.³³² What matters, in their view, is not so much that the apology be expressed through the *emotion* of the spokesperson(s) but that it “acknowledge wrongdoing and thereby also acknowledge the human dignity and legitimate feelings of those wronged.”³³³ This means that collective apologetic speech does not necessarily entail sincere expressions of sorrow and remorse and, except in *pro forma* fashion, need not in order to realize its potential.³³⁴ The point is that a collective *mea culpa*, officially uttered in response to past evil legacies, can have a ritual or formalized character—intended or known to leave the question of sincerity open—and still be meaningful in terms of publicly acknowledging the nature and seriousness of the wrongs done.³³⁵ It is, arguably, this latter function that constitutes the discursive core—the vital center—of collective apology.

325. *Id.* at 49.

326. *See id.*

327. *Id.* at 98.

328. *See id.* at 101.

329. *See id.* at 23.

330. *See id.*

331. *See* Trudy Govier & Wilhelm Verwoerd, *The Promise and Pitfalls of Apology*, 33 J. OF SOC. PHIL. 67 (2002).

332. *See id.* at 74.

333. *Id.*

334. *See id.*

335. *See* DUFF, *supra* note 183, at 94–95 (noting the moral worth of formal or ritual apologies whose sincerity is unknown or doubtful).

3. Reparations

After periods of massive and systematic violence, there is a sense that “sorry is not enough”—that countries and other entities ought to make amends for the most sordid aspects of their past and restore victims of earlier wrongdoing.³³⁶ What, then, can be done in reparation for such historical injustices? Ideally, we can hope to restore the original situation prior to the wrongdoing (*status quo ante culpum*), as if the harm or wrong had never occurred.³³⁷ The good that was lost would then be regained—the victim gets back the exact same thing which was taken, damaged, threatened, or undermined, such as property, health, trust, good reputation, and the like. Other goods, however, such as human life, bodily integrity, self-respect, time, continuity, community, or identity cannot be returned; nor can property if it has been destroyed or sold beyond recall. All that is possible in such cases is some form of recompense that might “make up” for the loss of what cannot be restored.³³⁸ The loss is then counterbalanced with something else that is equivalent in value. The payment of money, for instance, might play such a role in compensating victims or their descendants and successors, and offsetting their losses. Other material or non-material benefits—such as insurance, scholarships, political rehabilitation, public acts of commemoration, letters of apology, proper burials for the victims, affirmative actions, service packages (including medical, educational, legal and housing assistance) etc.—might also be effective in addressing both the wrong of the injustice and any unjust losses resulting from them.

The underlying justification for such reparations is, essentially, justice: the victim who suffers a loss as a result of wrongdoing deserves *just* compensation.³³⁹ It follows, in particular, that compensatory reparations should be in proportion to the harms experienced by the wronged parties, or their descendants and successors.³⁴⁰ But, quite apart from any attempt to compensate past injuries, reparations can have what Joel Feinberg has described, in another context, as “a certain expressive function”—they might express a clear public recognition that injustice did happen, that it should not have happened, and that it must not be forgotten.³⁴¹ The aim of pecuniary compensation, then, is not only to pay victims for financial or material losses, but also to provide symbolic expression of guilt and regret

336. See generally Roy L. Brooks, *The Age of Apology*, in WHEN SORRY ISN'T ENOUGH: THE CONTROVERSY OVER APOLOGIES AND REPARATIONS FOR HUMAN INJUSTICE 3-12 (Roy L. Brooks ed., 1999).

337. See JOEL FEINBERG, *DOING AND DESERVING: ESSAYS IN THE THEORY OF RESPONSIBILITY* 76 (1970) (“Reparation can express sympathy, benevolence, and concern, but, in addition, it is always the acknowledgment of past wrong, a ‘repayment of debt,’ and hence, like an apology, the redressing of moral balance or the restoring of the *status quo ante culpum*.”).

338. See R. A. Duff, *Restorative Punishment and Punitive Restoration*, in RESTORATIVE JUSTICE AND THE LAW, *supra* note 9, at 82, 84-85; see also Brooks, *supra* note 336, at 8-9.

339. See Irwin Cotler, *The Holocaust, Thefticide, and Restitution: A Legal Perspective*, 20 CARDOZO L. REV. 601, 618 (1998).

340. See *id.*

341. FEINBERG, *supra* note 337, at 98.

and to offer an unqualified and unambiguous apology to those who suffered the injustice.³⁴² Jeremy Waldron makes this point when he writes: "Like the gift I buy for someone I have stood up, the payment is a method of putting oneself out, or going out of one's way, to apologize."³⁴³

There is, in this sense, an interwoven relationship between compensation and apology. Without some sort of monetary compensation, any apology for serious wrongdoing risks seeming superficial, half-hearted, or meaningless, and many individuals will be inclined not to take such apologies very seriously. There is, here, the sense that "talk is cheap."³⁴⁴ At the same time, compensation without any corresponding admission of wrongdoing is likely to be dismissed because it falls short of addressing the moral indignation that victims may feel—and have reasons to feel—in response to being wronged. If human suffering is beyond price, then "it's not about the money."³⁴⁵ The inappropriateness of putting value on losses becomes especially pronounced in the context of mass atrocity. As Martha Minow notes, "no market measures exist for the value of living an ordinary life, without nightmares or survivor guilt."³⁴⁶ Money cannot restore lives as they existed before the horrors and humiliations experienced from massive, systematic instances of rape, torture, or murder. Even the suggestion that monetary payments can seal the wounds, make victims whole, or clean the slate seems offensive. That very suggestion fails to acknowledge the enormity of what was done; as a statement of value, it trivializes the harms inflicted on those who have been raped, maimed, or tortured by their fellow citizens.³⁴⁷

No monetary payment—or any other reparative measure for that matter—can ever undo the violence done or erase the victims' grievances. Money cannot make up for the discomfort and degradation victims suffered at the hand of their tormentors. Moreover, commensurate material compensation is rarely practical, especially when the wrongs committed are of such magnitude that they defy computation and comprehension.³⁴⁸ Nonetheless, one should not underestimate the symbolic impact of reparations. Even inadequate monetary payments can speak to the victims and their experience of injustice by validating and showing respect to their narratives of suffering and loss. As efforts to "make up" to the injured for what they have suffered, reparations can make a significant contribution in recognizing the value and moral standing of the victims—as citizens, as human beings, and as victims.³⁴⁹ In the eyes of the victimized, this recognition may be as important as, or more important than, actual material gains. A telling example is the refusal of the Korean "comfort women" to

342. See *id.*

343. Jeremy Waldron, *Superseding Historic Injustice*, 103 *ETHICS* 4, 7 (1992).

344. See John Torpey, *Introduction: Politics and the Past*, in *POLITICS AND THE PAST* 22–23 (John Torpey ed., 2003).

345. See *id.* at 23.

346. MINOW, *supra* note 1, at 104.

347. See *id.*

348. See GOVIER, *supra* note 22, at 179–80.

349. See *id.* (referring to the symbolic dimension of reparations).

accept reparations from Japan's private fund. "To them," explains Elazar Barkan, Japan's limited willingness to admit its guilt "depreciated the economic value of the compensation and made it valueless."³⁵⁰ This example underscores the significance of what we might call *reparatory symbolism* as a necessary additional step toward *acknowledging* wrongdoing, breaking with an atrocity and its legacy, and thus restoring the dignity of the victims as full-fledged, equal citizens.

4. Positive Symbolism

Collective evildoing usually comes in the form of what shall be referred to here as "negative symbolism": maligning, disparaging, or ridiculing some social actors by means of the authoritative representational and communicative practices of a society. This phenomenon occurs when a society, through its institutions, establishes and promotes symbols—including icons, images, names, narratives, and events—that are implicitly or explicitly directed against some of its members. This kind of mistreatment, rooted in symbolic perceptions, can take (and has taken) many forms—ranging from demeaning stereotypical depictions in public discourse, to harassment and disparagement in all spheres of everyday life. Yet, what seems common to all of them is the fact that the targeted individuals are turned into—in Margalit's words—"second class-citizens on a symbolic level," which is profoundly humiliating and incompatible with the very idea of a decent society.³⁵¹

The "remedy," so to speak, for this form of negative symbolism is symbolic restructuring of some sort. This restructuring involves, quintessentially, transforming the societal patterns of representation in ways that mark the point of revaluing previously despised and maligned individuals or groups. The task, then, is to mobilize a society's symbolic resources to recognize and positively valorize those who were subject to pervasive devaluation and disparagement. From this perspective, positive symbolism—as a matter of recreating the criminal past through symbols of public rituals—is a central feature of collective recognition.³⁵² Public culture—including monuments, reanimated sites and spaces, museum narratives, contemporary fine art, plays, poems, theatricals, documentaries, and so on—can play a crucial role in shaping as well as reflecting symbolic change. For example, memorial culture in South Africa since apartheid is instructive of the significance placed on monuments and public artworks as means of rendering new meaning to memories of atrocities. The transformation of Robben Island into an icon of resistance and liberation; the Museum in Cape Town's Six District, a place where the diversity of communities was rich

350. ELAZAR BARKAN, *THE GUILT OF NATIONS: RESTITUTION AND NEGOTIATING HISTORICAL INJUSTICES* 352 (2000).

351. MARGALIT, *supra* note 34, at 158.

352. My account has something in common with Nancy Fraser's conception of symbolic change as a remedy for symbolic injustice, rooted in social patterns of representation, interpretation, and communication. See NANCY FRASER, *JUSTICE INTERRUPTUS: CRITICAL REFLECTIONS ON THE "POSTSOCIALIST" CONDITION* 11, 14-16 (2002).

before the forced removals; the apartheid museum outside Johannesburg; the Hector Pieterse memorial in Soweto; the “Women’s Goal” which forms part of the larger “Constitutional Hill” project; all of these are forms of public spectacle that enable the symbolic construction and reinterpretation of history as a matter of collective recognition.³⁵³ Another strategy for reinterpreting the past through symbolic action is the “reconfiguring” of public space by raising or tearing down particular statues in particular places and by renaming streets and buildings.³⁵⁴ In addition, education—through textbooks, community programs, research projects, exhibitions for adults and children, fellowships, and so on—offers means of embodying new histories in public spheres.

Beyond that, symbols of public or collective ritual are also important at an institutional level. A central feature of societal-level atrocities is the loss of trust in the state and its institutions. The mobilization of adequate official symbols—such as emblems, remembrance days, formal addresses to the parliament, political speeches, gestures by political figures etc.—may help to overcome feelings of distrust and to regain confidence in the state.³⁵⁵ But positive symbolism, as understood here, involves more than that. It requires, ideally, that a society’s governing laws and practices speak to the victims in a language that they can understand as expressing real respect for them and their righteous sense of injustice.³⁵⁶

It is worth noting here the potential tension between positive symbolism and bureaucracy. Although some amount of bureaucracy may be inevitable in the smooth running of public institutions, and especially so in transitional settings, there is an inherent risk of turning the victims of past wrongs into “numbers,” “application forms,” or something of that nature which, as Margalit reminds us, is humiliating in its very essence.³⁵⁷ Offering money or services in a bureaucratic (mechanistic) manner may be just and efficient, yet can still be deeply humiliating.³⁵⁸ This demonstrates the significance of symbolic and communicative nuances (such as wording, tone, demeanor, physical posture, etc.) as sensitive indicators of changing attitudes and perceptions. To put it another way, what matters is not only the “language” used to address the victims but also the “tones” and “accents” in which the language is spoken.

Although one could elaborate on many other aspects—including the role of lustrations and institutional reforms as avenues for providing collec-

353. For an informative discussion of the memorial culture in South Africa since apartheid, see ANNIE E. COOMBES, *HISTORY AFTER APARTHEID: VISUAL CULTURE AND PUBLIC MEMORY IN A DEMOCRATIC SOUTH AFRICA* (2003).

354. See KATHERINE VERDERY, *THE POLITICAL LIVES OF DEAD BODIES: REBURIAL AND POST-SOCIALIST CHANGE* 39–40 (1999) (discussing the idea of “reconfiguring” space and time).

355. See Rosenblum, *supra* note 269, at 99 (discussing efforts to produce a national narrative intended to shape public consciousness).

356. See DUFF, *supra* note 183, at 188–93 (emphasizing the role of law as a communicative enterprise).

357. See MARGALIT, *supra* note 34, at 212–21 (discussing the humiliating aspects of bureaucracy).

358. See *id.*

tive recognition—this abbreviated inventory must be brought to a close. However, our account does not end here. There is a further issue still before us—that of understanding conflicts between the proposed model of recognition and other moral claims or requirements.

In Lieu of a Conclusion: Recognition and Moral Conflict

This article has presented a model of recognition whose core notion is that of giving voice to victims of large-scale evil, of addressing not only the demand for formal, rule-bound justice but also the sense of injustice. A fuller treatment of the subject, which this article cannot offer, would give a much richer account of how such recognition can be achieved in the aftermath of mass atrocity. In particular, it would discuss the potential role of international institutions in providing recognition of the pain of victims.³⁵⁹ Further, it would address troubling issues of whether and to what extent present institutions can properly recognize wrongs of a distant past. Further still, it would clear some space for culturally rooted responses (such as the South African concept of *ubuntu*³⁶⁰ or Rwanda's *Gacaca Courts*³⁶¹) as tools for catalyzing social change and shaping discourses of recognition. However, in spite of the limitations of this article, it has hopefully painted a picture of recognition and its moral significance for victims that the thoughtful reader will find persuasive, or at least worthy of critical engagement.

At this stage, it would be very tempting, and perhaps comforting, to end our account on an overly optimistic note, suggesting that there is a point of view—recognition—from which we are amenable to the discovery of the “right answers” to the problems of transitional justice. But, it would also be misleadingly simplistic. Given the way the world is, it seems naïve to suppose that there is a clear-cut solution to every moral problem we face in our personal and public lives. Our moral experience bears witness to the fact that moral claims or requirements can conflict and so draw us in irreconcilable ways; that the world we inhabit can confront us with situations in which there is no way of avoiding moral loss, of unsettling the conflict. But, as Isaiah Berlin has compellingly argued,

it is better to face this intellectually uncomfortable fact than to ignore it, or automatically attribute it to some deficiency on our part which could be eliminated by an increase in skill or knowledge; or, what is worse still, suppress one of the competing values altogether by pretending that it is identical with its rival—and so end by distorting it.³⁶²

This is particularly true with regard to the complex and deep issues of transitional justice. In times of radical political change, societies face a

359. For insightful and critical discussions of the role of international war tribunals in ensuring that victims are treated with dignity, see STOVER, *supra* note 219.

360. See TUTU, *supra* note 12, at 31.

361. See DRUMBL, *supra* note 299, at 12.

362. Steven Lukes, *Making Sense of Moral Conflict*, in LIBERALISM AND THE MORAL LIFE 128, 134 (Nancy L. Rosenblum ed., 1989) (quoting Isaiah Berlin).

plurality of conflicting ends, goals, interests, or (more vaguely still) “values”—including justice, truth, national unity, peace, the common good, or the interests of democracy. This is not to suggest, however, that the moral concerns of transitional justice can be reduced to something like a common denominator called “recognition” (however broadly defined). Rather, we should think of transitional justice in terms of conflicts—conflicts between two or more apparently incommensurable types of values—and attempts to achieve what Jonathan Allen has called “principled compromises.”³⁶³ The key idea here, is that

we should first ascertain whether every aspect of a value is threatened in a conflict and whether the values in question may be related in some way. If they are, or if aspects of both values may continue to be respected despite the conflict, then it may be the case that a *principled* compromise, rather than an unprincipled compromise, or the sacrifice of one value to another is possible.³⁶⁴

On this assumption, we should avoid treating every case of conflict between values as an all-or nothing affair—involving the sacrifice of one value for another—and think about ways in which a genuine *balance* between the values at stake can be achieved.

Accordingly, this article assumes that recognition, as presented here, is not the only moral consideration that should guide societal responses to mass atrocity. Despite the great significance we attribute to a full accounting of the suffering and loss of victims, a relentless pursuit of recognition may put in jeopardy other important goods—such as promoting peace, stability, or the rule of law. In other words, in certain situations, it may make perfect sense not to pursue recognition fully to secure other competing values that, on occasion, are morally relevant. What may be needed, then, is a compromise, but not of the “shabby” sort; rather of the sort that provides some protection for the victimized against powerful conceptions of a general social benefit. If we value individuals and their individual experiences of harm and injury, then governments should not be able to easily justify obstructing or curtailing the pursuit of recognition on the basis of some consequential concerns (including social stability and the prevention of future injustices).³⁶⁵

What follows identifies some moral values other than recognition that should be taken into account when reckoning with past wrongs and offers a rough account of how these values may run into conflict with the pro-

363. *Balancing Justice*, *supra* note 201 *passim*.

364. *Id.* at 325.

365. One may perhaps even go further and argue that recognition, as conceived of here, enjoys two kinds of priority: *first*, the burden of justification lies with those who would seek to abridge or forestall the pursuit of recognition and *second*, some threshold of recognition is an indispensable condition for restoring a minimally decent order in the aftermath of mass violence. This suggestion, of course, needs much more development; but the basic moral point here is that victims as victims—not their oppressors or society-at-large—“have first claim upon the attention and the resources of succor.” Nigel Biggar, *Making Peace or Doing Justice: Must We Choose?*, in *BURYING THE PAST: MAKING PEACE AND DOING JUSTICE AFTER CIVIL CONFLICT* 13 (Nigel Biggar ed., 2003).

posed model of (victim-centered) recognition. Figuring out precisely what values one should consider and how these values are interrelated would require an in-depth analysis of the aims and objectives of transitional justice, a task this article cannot pursue. In light of these limitations, the ensuing discussion can provide no more than a "road map," a general framework for further exploration.

Giving recognition to the victims of collective evildoing may conflict with the wider societal needs for formal justice and *the rule of law*. As commonly understood, the requirement of "the rule of law calls for administration by a formal system itself committed to fairness and opportunities for individuals to be heard both in accusation and in defense."³⁶⁶ In other words, it aims at resolving questions of guilt in a procedurally fair manner, according to the "same rules and commands that govern all of us."³⁶⁷ Consequently, protections afforded to defendants against unfounded accusations—including the presumption of innocence and the rights to introduce evidence, to be heard in public, to call and confront witnesses, to have counsel of choice, and to be informed of the nature of the charge—have a central place in the legal system. The overarching consideration here is the integrity of the legal system as a matter for the broader society (as well as for the defendant): reintroducing rule-bound, sober authority into a terrain fraught with lawlessness and desires for revenge. However, formal justice of this sort, cool and cognitive, may fail to properly *recognize* the injured and their experience of uncomprehending suffering. Indeed, the almost exclusive focus on perpetrators and legal standards governing the burden of proof is very likely to miss the "micro-picture" of the victims and their felt experience of injustice. All of these notions demonstrate the appropriateness of permitting, to some extent, victim-impact statements or other measures aimed to grant victims a greater voice and make the process less intimidating to them. Clearly, if we take the idea of principled compromises seriously, then the appropriate content and extent of such victim-oriented reforms will crucially depend on how they can be reconciled with principles of fairness, neutrality, and predictability.

As we have just seen, the rule of law ensures that those suspected of crimes are treated fairly and thus guards against overly hasty findings or assumptions of guilt. In that sense, the rule of law embodies *recognition* of the equal dignity of all citizens. This, however, is not the end of the story of the moral significance of recognition for potential perpetrators. In trying to discern a notion of recognition that is broader and more general than simply the rule of law, it may be helpful to consider what Hegel criticizes as "abstract thinking": seeing "nothing in a murderer except the abstract fact that he is a murderer, and to annul all other human essence in him with this simple quality."³⁶⁸ It is, indeed, tempting to regard the agents of terrible deeds as purely and simply evil, morally "rotten," and

366. MINOW, *supra* note 1, at 25.

367. *Id.* at 26.

368. ROBERT R. WILLIAMS, *HEGEL'S ETHICS OF RECOGNITION* 172 (1997) (quoting Hegel).

devoid of any capacity for positive change. Similarly, after episodes of mass atrocity, there is a strong impulse to brand an entire nation or group as totally savage, primitive, cruel, fanatical, incorrigibly evil, and so on. Such abstract thinking, however, is not just shallow and superficial, it also denies the very possibility of moral transformation. If we owe each other respect and decent treatment, then this way of "writing off" human individuals or groups is unacceptable.³⁶⁹ "Even the worst criminals," writes Avishai Margalit, "are worthy of basic human respect because of the possibility that they may radically reevaluate their past lives and, if they are given the opportunity, may live the rest of their lives in a worthy manner."³⁷⁰ The challenge, then, is to recognize the perpetrator as an individual, a human being, in all his or her complexity—to particularize, individualize, and indeed humanize, rather than generalizing and stereotyping, and ultimately dehumanizing.³⁷¹

A fuller discussion of the proposed model of recognition would also consider its relationship to *reconciliation*. In political life, the word "reconciliation" is often used quite loosely and can give rise to various claims regarding the meaning of that concept as well as the processes and conditions that may lead to its achievement. At its simplest, however, political reconciliation refers to overcoming conflict and bringing former enemies into a state of peace.³⁷² There is a sense, then, in which reconciliation can conflict directly with the notion of recognizing victims of crime: where reconciliation entails a settlement of the past such that its effects will not haunt the present and future, recognition involves making future claims based on past wrongs. This would seem to suggest that too much or the wrong kind of recognition might disturb or impede reconciliation. The kind of recognition envisaged here, however, may blend into the notion of political reconciliation. Very broadly, getting "over" the past may require

369. This argument parallels, and draws on, Trudy Govier's vivid and strong defense of the possibility of moral transformation. See *FORGIVENESS AND REVENGE*, *supra* note 200, at 119–40.

370. MARGALIT, *supra* note 34, at 70.

371. See generally Halpern & Weinstein, *supra* note 126. In pursuing this line of thought further, it may be useful to think of recognition as involving something like a *communicative* process in which criminals are treated and addressed as responsible and full, if imperfect, members of the political community—or, as R. A. Duff puts it, "as citizens who are bound by the normative demands of the community's public values, who must thus be called to account and censured for their breaches of those values, but also as citizens whose . . . autonomy, freedom, and privacy must be respected." DUFF, *supra* note 183, at 113.

372. On this basic account, political reconciliation can mean a variety of things, depending on how the term "peace" is defined and limited. If we favor a "thin" conception of reconciliation, it may mean no more than non-violent coexistence. But, to some, this is asking for too little. In David Crocker's view, for instance, the core notion of reconciliation is that of bringing former enemies "to hear each other out, to enter into a give and take about matters of public policy, to build on areas of common interests, and to forge principled compromises with which all can live." Crocker, *supra* note 309, at 54–55. Others, like Archbishop Desmond Tutu, paint a decidedly more ambitious picture, suggesting that efforts to achieve reconciliation should be about our highest aspirations for mutual healing, harmony, and positive fellow-feeling. See TUTU, *supra* note 12, at 31–32.

having one's experiences of injustice addressed and recognized. Although a government may find it easy to simply ignore or dismiss such claims of recognition, doing so appears at odds with a certain idea of reconciliation as a process in which victims and transgressors can begin to trust and work with another. Forgotten or ignored claims may be dormant, but "dormancy is not the same as reconciliation."³⁷³ Consequently, an argument could be made that meeting some minimal level of recognition—which may involve a publicly verifiable account of what happened and who was responsible—is a necessary condition for engaging in political reconciliation.

Needless to say, all of these assumptions invite further clarification. At this point, however, it is important to briefly turn to another concept, that of political *forgiveness*, and explore the ways in which it may conflict with, or conform to, the model of recognition offered here. In so doing, I want to rely on the theoretic framework Peter Digeser develops in his important book *Political Forgiveness*.³⁷⁴ Unlike interpersonal, sentiment-based versions of forgiveness, Digeser's account of forgiveness is tightly connected to a vision of politics that focuses on individual or collective *actions*, rather than on people's emotions or motivations.³⁷⁵ As envisioned here, political forgiveness is an illocutionary act—not an expression of feeling—that entails clearing a moral debt that is owed. In placing more emphasis on the self-disclosure aspects of action than the presence or removal of certain sentiments, this conception of forgiveness rests on premises similar to those at work in the formalistic, ritualistic vision of recognition defended throughout this article. Like Digeser, I believe that politics should be more about appropriate political conduct than about appropriate particular feelings; and like him, I tend to reject a sentiment-based politics—a particular form of politics as soul-craft or demanding certain feelings—as "deeply intrusive" and "potentially tyrannical."³⁷⁶ This said, difficulties arise when considering the relationship between political forgiveness and recognition. From a certain perspective, the choice between forgiveness and recognition looks like a choice between irreconcilable values, an all-or-nothing affair: while recognition is something that is *owed* to victims of crime, forgiveness *releases* what is owed. But this seems to overstate the conflict. As Digeser suggests, forgiving is not the same as forgetting; the former requires publicly "recalling and understanding the past," whereas the latter "lets go [of] the past with little attempt to understand it."³⁷⁷ Thus, according to Digeser, a shared and publicly verifiable account of the wrong or debt (of who owes what to whom) is a necessary condition

373. DIGESER, *supra* note 275, at 73.

374. *See id.*

375. *See id.*

376. *Id.* at 18. This does not mean that legitimate feelings (of distress, discomfort, etc.) produced by human *action*, or omission, should be excluded from moral consideration; rather it is quite the contrary. It does mean, however, that the deepest aspects of people's attitudes and convictions—their "inner citadels of soul"—are not the proper concern of an acceptably liberal state. DUFF, *supra* note 183, at 125 (quoting J.R. Lucas).

377. DIGESER, *supra* note 275, at 56.

for political forgiveness.³⁷⁸ To be sure, arriving at this kind of understanding is also an essential component of the account of recognition here; thinking of political forgiveness in these terms may, therefore, significantly relax the tension between forgiveness and a politics of recognition.

This completes the discussion of the larger meaning and conceptual underpinnings of the demands of recognition made by the victims of mass atrocity. This article has argued that giving public recognition to the injured and their sense of injustice should be one of the central concerns of “transitional justice” as a kind of discourse that has introduced a novel attitude into politics—an attitude that may serve as grounds for hope of moral and political progress, however fragile, reversible, and vulnerable. Though less exhilarating than Kant’s promise of perpetual peace,³⁷⁹ the very idea of transitional justice rests on the recognition that human history can be an occasion not only for despair and regression but also for hope and reform; and that there is, after all, the possibility for human development in the direction of greater harmony and decency. It should be noted, however, that nothing rules out, indeed much favors, the misuse of the concept in public policy. In the modern “age of terrorism,” marked as it is by the events of September 11 and their aftermath, the temptation of ruthlessness is overwhelming, and the language of (infinite?) justice—or recognition, for that matter—may easily serve as a cover for the expedient choice of deliberate abuse or suspension of rights. But that is a different story.

378. *See id.*

379. IMMANUEL KANT, *Perpetual Peace: A Philosophical Sketch*, in KANT’S POLITICAL WRITINGS 93–130 (Hans Reiss ed. & H. B. Nisbet trans., 1996).

