

A Just Culture: restoring justice towards a culture of human rights

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Abstract

This thesis seeks to investigate the possibility that the binary opposition between retributive and restorative forms of justice that structures the discourse on justice is unhelpful and unnecessary, particularly for societies seeking to extricate themselves from violent conflict and towards building peace and democracy. I shall argue for the importance of considering restorative justice as conceptually and historically prior to the *possibility* of retributive justice rather than the negation of one or the other, as well as advocate the potentially greater transformative power of the values of restorative justice which may provide a constructive alternative to retributive justice in the context of post-conflict peacebuilding.

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Introduction

In this study I shall investigate the possibility that the binary opposition between retributive and restorative forms of justice that structures the discourse on justice is unhelpful and unnecessary, particularly for societies seeking to extricate themselves from violent conflict and towards building peace and democracy. I shall argue for the importance of considering restorative justice as conceptually and historically prior to the *possibility* of retributive justice rather than the negation of one or the other, as well as advocate the potentially greater transformative power of the values of restorative justice which may provide a constructive alternative to retributive justice in the context of post-conflict peacebuilding.

Theoretically restorative justice is often poised against a retributive model of justice. In his book *Changing Lenses*, Howard Zehr (1990) approaches this seeming binary with an appeal for a 'change of lenses' and a 'new paradigm' for our perception of justice. Within retributive justice, guilt is the central theme that drives the process of law (Zehr, 1990: 66), and its focus lies squarely with the individual. The centrality of guilt causes the actual outcome of justice to be of little consequence within a particular case. Rather, the main issue is whether or not guilt has been accurately determined in accordance with the rule of law. If so, justice is assumed to have been achieved. The orientation of guilt is in the past and directed towards the offender, and the victim is given little attention. Here Zehr draws attention to the key players in this framework: 'Retributive justice defines the *state* as victim, defines wrongful behaviour as violation of rules, and sees the relationship between victim and offender as irrelevant' (1990: 184, emphasis added).

On the other hand, a restorative model of justice does not seek the *procedure* of determining guilt, but rather the *goal* of reconciliation. It seeks to restore community where community has been fractured. With reconciliation as its goal, its focus is directed at all the parties involved: the victim, the perpetrator, and the community. As Zehr states, 'a restorative lens identifies *people* as victims and recognizes the centrality of the interpersonal dimensions.... Crime is a violation of people and relationships' (1990:184, emphasis added). In this way, justice is believed to be achieved *through* the reconciliation of the victim with the perpetrator and the *restoration* of the community in which the original act of violence occurred. Zehr

(1990:197) emphatically states restorative justice's goal: 'Making right is central to justice. Making right is not a marginal, optional activity. It is an obligation.' Thus restorative justice orients itself towards the *reconciliation* of relationships that have been injured, thereby *restoring* justice between an offender and victim. John W. de Gruchy has united the terms 'reconciliation' and 'restorative justice' and states that 'restorative justice is the *point* of reconciliation' (2002: 210, emphasis added).

These two models of justice are usually presented in binary terms as mutually exclusive, leaving one with a choice between justice (retributive justice) or reconciliation (restorative justice). One such example of this debate surrounds South Africa's Truth and Reconciliation Commission (TRC), established as a transitional institution to bear South Africa through its dealings with the past of apartheid and its progress into a future of democracy. It sought reconciliation as the highest priority in a large-scale project of nation-building that saw a retributive form of justice as potentially injurious to the establishment of democracy and the restoration of communality. In the process it was accused of sacrificing justice for the sake of reconciliation.

In many ways the debate that grew out of the TRC was characteristic of what occurs in emerging democracies with the establishment of a judicial system and the negotiation of individual rights. This transition is a foundational moment for a community in which it temporarily suspends the ideals it espouses (justice) in order to restore communality. It is also a moment in which law must be created upon the establishment of true justice. Law always exists as a response to a call for justice. In the case of transitional societies the call for the application of the law at the founding moment, a call made by those who favor a retributive understanding of justice, presupposes the existence of a (collective) subject on behalf of whose call for justice the law responds. This is arguably a problematic assumption since it cannot be maintained with respect to post-conflict societies that such a legislative subject exists.

In this thesis I would like to reveal this assumption through a deconstruction of the binary sustained by it. Such an analysis will demonstrate that the subject, for whom the law exists, can only be established (or *restored*) through the values and acts of reconciliation espoused by restorative justice, and that the latter (restorative justice) is conceptually prior to the former (law).

This research begins with an historic analysis of the rise of retribution as justice, with reference to Friedrich Nietzsche's *The Genealogy of Morals* (1913),

tracing theories of justice as retribution up to contemporary theorists such as John Rawls. In order to pursue the deconstruction of the retributive/restorative debate, and more specifically of the relationship between justice and law, I shall make use of Jacques Derrida's '*Force of Law: The "Mystical Foundation of Authority"*' (1992) in which he argues that justice and law are indeed separate entities. Law functions in a society, he argues, because it has *authority* and not because it is just. The Law is established to *protect* justice. The just act, then, is not necessarily one that re-enacts the law (although it may coincide with that) but *one that seeks to remain faithful to justice as that which precedes and enables law*.

In the second chapter I shall explore an ontological discussion of justice, having established its separation from law in the first chapter. The second chapter looks at several prominent philosophers' understanding of not only justice but of an ethic of responsibility, from Søren Kierkegaard's 'debt of love' to Simone Weil's 'justice as compassion'. This chapter will hope to establish a conceptual foundation from which to approach the values espoused by restorative justice laid forth in the final chapter.

The context of the third and final chapter is South Africa during and after its transition to democracy, and takes on what is hoped to be the thesis' practical application. It shall briefly discuss South Africa's emergence from apartheid and its use of the Truth and Reconciliation Commission as an institute for dealing with an unjust past as well as laying the foundation for a just future. Within the context of the Truth Commission restorative justice is brought to the fore in the discussion of justice in a peacebuilding context. Here its values are presented as well as the cultural context that its values appealed to.

The conceptions firstly of justice as anterior to law, secondly of justice as an responsibility towards another, and finally of restorative justice as foundational to restoring the communal subject of justice, have radical implications for the way in which we approach justice in a post-conflict society, implications that ask both practical and theoretical questions. The goal of this study is to provide a conceptual framework within which such questions can be posed and addressed.

Chapter I

Retribution, Law, and Violence

For the law, having a shadow of the good things to come, and not the very image of the things, can never with these same sacrifices, which they offer continually year by year, make those who approach perfect.¹

Hebrews 10:1

1.1. Introduction

The immediate goal of this mini-thesis is to explore a resolution to the unhelpful opposition that has emerged between retributive and restorative forms of justice. These two forms of justice have grown in isolation from the other, with restorative justice at times appearing as a reaction to retributive justice. This is a debate that I will address more directly in the final chapter; for now, in this first chapter I shall resolve this impasse through a deconstruction of the binary relationship between justice and law. In doing so I shall outline the basic development and epistemology of justice as retribution. However, my primary objective is not an exposition of retribution as such. Rather, the goal of this research is to re-conceptualise justice. And I emphasise that the goal is indeed the *search* for justice, and exploration around our understanding of justice. For, as Jacques Derrida states, ‘one cannot speak *directly* about justice...without immediately betraying justice, if not law’ (1992: 10). Thus I shall write about the law and how it has informed our understanding of justice in the hope that justice itself will emerge, if only obliquely and partially, through the search. I shall therefore begin this *research* with the ideas most commonly understood around justice, that is, justice as retribution, *as law*. In deconstructing the relationship between justice and law I shall then explore violence as a constitutive component of law and potentially a limitation to our understanding of justice apart from law: the imperative *to be* just. But it is the expectation of justice that all the time compels this search. As Socrates exhorts Glaucon: ‘We must stand like hunters round a covert and make sure that justice does not escape us and disappear from view’ (Plato, 2003: 136).

¹ All Scripture references have been taken from the New King James Version (1979).

1.2. Retribution

1.2.1. *Tribute: Introducing Retribution*

There may be numerous ideas of the categories or levels of justice that come to mind when one considers such a topic. These varied forms of justice range from distributive, retributive and attributive justice, to social and economic justice, to restorative and creative ideas of justice. But perhaps most commonly justice is understood in relation to *tribute*, the two most common forms of which are *distributive* and *retributive*. Paul Tillich discusses this level of justice called *tributive* justice (1954: 63), which, he states, is entirely concerned with proportionality. Its tributive function is the honouring of a debt that is due, a tribute that is deserved. This form appears as 'distributive, attributive, and tributive justice, giving to everything proportionately to what it deserved, positively or negatively' (Tillich, 1954: 63).

1.2.2. *Responsibility: The Individual and Retribution*

This discussion on *retribution* is primarily concerned with the negative reward or tribute associated with justice. In *The Genealogy of Morals* (1913), Friedrich Nietzsche traces the development of retribution in terms of *responsibility*. He discusses the emergence of responsibility as an idea, a necessity, which coincided with the rise of community as that which made human beings to be *genuinely calculable* (1913: 63). Responsibility grew out of societies based on contractual agreements in which 'being human' translated from being entirely 'autonomous' and independent into communal, 'moral' beings, dependent on the society formed around them. Out of this relationship between the individual and society grew responsibility: 'man, with the help of the morality of customs and of social straitwaistcoats, was *made genuinely calculable*' (Nietzsche, 1913: 63). Morality became a responsibility towards the community of human beings to which the individual belonged. As a society is necessarily comprised of more than one individual, the element of calculation is required to negotiate the multitude of relationships that exist. Moreover this *knowledge* of responsibility is what man has called *conscience* (1913: 65).

Nietzsche argues (1913: 69) that the cardinal moral idea is of 'ought'² which stems from the idea of 'owe'. He then rhetorically asks if 'punishment developed as a

² The German *Schuld* can be translated as both 'debt' and 'guilt' and is rendered into English as 'owe' or 'ought' –from the translator's note in Nietzsche (1913: 69).

retaliation absolutely independent of any preliminary hypothesis of the freedom or determination of the will?’—a kind of objective payment for wrong. He responds to his own question by arguing that it was *not* the responsibility of the offender or even the idea of guilt that established these primal grounds of punishment, but rather *anger* at an injury, ‘an anger which vents itself mechanically on the author of the injury’ (1913: 70). The retaliation of anger is held in check, Nietzsche states, by the idea of ‘owing’ and equivalency, that an injury has an *equivalent* price which *can* be paid and *can* be expiated (1913: 70). The idea of equivalency and calculability, then, is fundamentally based in the ‘contractual relationship between *creditor* and *ower*’ (1913: 70).

Thus punishment, according to Nietzsche, is established upon a conception of tribute and proportion that is compelled by anger at injury and a belief in its expiation. Moreover, this calculation of tribute, Nietzsche argues—the ability to ‘assess values and think out equivalents’ (1913: 79)—is what distinguishes the human from the animal, man from beast, making him the “‘assessing” animal *par excellence*’ (1913: 80). This entrenched assessment and calculation has produced the ‘great generalisation’, according to which:

‘everything has its price, *all* can be paid for’, the oldest and most naïve moral canon of justice, the beginning of all ‘kindness’, of all ‘equity’, of all ‘goodwill’, of all ‘objectivity’ in the world. Justice in this initial phase is the goodwill among people of about equal power to come to terms with each other, to come to an understanding again by means of a settlement, and with regard to the less powerful, to *compel* them to agree among themselves to a settlement (1913: 80-81).

Thus the idea of justice was conceived as *equivalence*, as that which *compels* the need to reach an agreement or a settlement. It *compels* our assessment and calculation of the price of injury. It is about *equal power* and our *responsibility* to use that power *to come to terms with each other*.

It may be noted, however, that Nietzsche’s anthropology of punishment is not driven by an ideal human nature that inherently seeks the equity and balance of deed to reward, for this equivalency is not founded in a material equivalency or an idea of compensation that would essentially seek to *repay* what was taken or *restore* what was broken. Instead, the equivalency is this, states Nietzsche:

instead of an advantage directly compensatory of his injury (that is, instead of an equalisation in money, lands or some other kind of chattel), the creditor is granted by way of repayment and compensation a certain *sensation of satisfaction*—the satisfaction of being able to vent, without any trouble, his power on one who is powerless, the delight “*de faire le mal pour le plaisir de la faire,*” the joy in sheer violence: and this joy will be relished in proportion to the lowness and humbleness of the creditor in the social scale (1913: 72).

Thus the compensation is a *sensation of satisfaction*, the *joy in sheer violence*. He states later how suffering is a compensation for ‘owing’, obtained from a belief that ‘the *infliction* of suffering produces the highest degree of happiness’ (1913: 73). These are the representations of Nietzsche’s sordid ‘moral’ being who derives pleasure in the suffering of an offender; and it is that *pleasure* in the other’s suffering that he claims lies at the origin of equivalency in punishment and our understanding of retributive justice.

1.2.3. *Scapegoat: The Community and Retribution*

As society develops levels of authority and organisation, the actual power of punishment, Nietzsche argues (1913: 72), is handed to these ‘authorities’ so that the claim to compensation becomes a *claim on cruelty*. This claim forms the ‘sphere of the law of contract [in which] we find the cradle of the whole moral world of the ideas of “guilt”, “conscience”, “duty”, the “sacredness of duty”’ (1913: 72). It is therefore this ‘sphere of the law of contract’ that provides the *moral* foundation of law that locates the subjects of law in a sphere of *moral* responsibility steered by ‘guilt’, ‘conscience’, ‘duty’. However their origin is no peaceful or innocent thing, as Nietzsche states, but ‘like the commencement of all great things in the world, is thoroughly and continuously saturated with blood’ (1913: 72).

The *claim to compensation* that is transferred to a *claim to cruelty* at the introduction of ‘authorities’ who bear the burden of meting punishment, automatically introduces a hierarchical system of responsibility for exacting punishment: ‘Thanks to the punishment of the “ower”, the creditor participates in the rights of the masters’ (Nietzsche, 1913: 72). The creditor is positioned above his debtor with the ‘right’ to inflict suffering and pain in the agreement of being compensated for the wrong he suffered: ‘At last he [the creditor] too, for once in a way, attains the *edifying consciousness* of being able to despise and ill-treat a creature—as an “inferior”’ (1913: 72, emphasis added). The creditor is effectively allowed to scapegoat the

offender, stripping him of the rights and protections that are privileged within the community: 'The wrath of the injured creditor, of the community, puts him back in the wild and outlawed status from which he was previously protected: the community repudiates him—and now every kind of enmity can vent itself on him' (1913: 82). And here punishment is considered on a larger communal level in a similar way as it was previously considered individually: 'Punishment is in this stage of civilisation simply the copy, the mimic, of the normal treatment of the hated, disdained, and conquered enemy, who is not only deprived of every right and protection but of every mercy' (1913: 82).

The sudden placement of an offender as a scapegoat of the community—moreover the level of punishment at a communal level of scapegoating an offender—is elaborated on by René Girard in *Violence and the Sacred* (1977). A 'primitive' society (understood in fairly primal form similar to Nietzsche's allusions) brought into a state of violent upheaval will usually resolve this crisis by venting its dissent on a relatively innocent victim: a scapegoat. Girard (1987b: 74) employs a *psychosocial* understanding in which 'victims of unjust violence or discrimination are called scapegoats, especially when they are blamed or punished not merely for the "sins" of others, as most dictionaries assert, but for tensions, conflicts, and difficulties of all kinds'. The victim is then paraded as the cause of all malice in the community and acts therefore as a surrogate victim, for all malcontent is symbolically cast upon the victim: *the community repudiates him—and now every kind of enmity can vent itself on him* (Nietzsche, 1913: 82). At the victim's sacrificial death, violence is effectively 'expelled' and peace restored to the community. This is the 'generative' quality of violence that is able to *generate* peace and stability out of the malaise of uncontained violence, again echoing vestiges of Nietzsche's claim that the origins of responsibility, the responsibility of peace, are not themselves peaceful, but are *thoroughly and continuously saturated with blood* (1913: 72).

This apparent contradiction of the origins of peace is the premise of Girard's theory of the relationship between violence and culture: violence occurs as an ambivalent cycle of 'good' and 'bad' forms. At the heart of this distinction is Degree which differentiates and delineates good from evil forms of violence. Shakespeare's genius captured this universal reliance on Degree in grand fashion in *Troilus and Cressida* when, on the shores of Troy, Ulysses announces to King Agamemnon that Troy's vulnerability lies in the very collapse of that degree: Troy is weak because

'The *speciality of rule* hath been neglected' (I, iii, line 78). He proceeds to describe the chaos sweeping the camp of the Trojans on account of the collapse of degree, this *specialty of rule* that orders all endeavours. And degree is primal to order. Recounting the paths of the planets and their celestial realms, he brings us to the heart of the matter:

O! when degree is shak'd,
Which is the ladder to all high designs,
The enterprise is sick....
Take but degree away, untune that string,
And, hark, what discord follows! Each thing meets
In mere oppugnancy....
Force should be right; or, rather, right and wrong
(Between whose endless jar justice resides)
Should lose their names, and so should justice too (I, iii, lines 101-103; 109-111, emphasis added).

Violence can therefore take on the conflicting appearances of beneficence and malfeasance, both of which depend on the context and manner of manifestation. Violence will not remain at a static level, for it is, as Girard states, something *entirely communicable* (1977: 30): it is contagious and spreads until an entire community has plunged into a blood feud of violent contagion. Such uncontained violence can only be contained through a monumental act of beneficent violence, an instance of sacrifice that subsumes all the uncontained violence from the community upon itself, is sacrificed, and cures the community of the violent plague. The 'sacrificial mechanism' is that *system* that perpetuates and re-institutes the distinction, the Degree, of good from bad violence, by sacrificing a surrogate victim, a scapegoat who is imminently 'sacrificeable' and able to bear the burden of the entire community's malfeasance unto death (Girard, 1977: 2, 4).

The sacrifice of a surrogate victim is used as 'an instrument of prevention in the struggle against violence' (Girard, 1977: 17). Revenge creates a *cycle* of violence that the sacrificial victim was meant to break by its role as a surrogate victim. The cycle is perceived to be broken because the surrogate is not directly implicated in the violence as an offender or victim, but stands in the place of the offender as a surrogate. Moreover, it is precisely the abhorrence of violence which instils in human beings a 'duty of vengeance' (Girard, 1977: 15) and, instead of halting violence, perpetuates it. In this way violence is inherent in human beings and ubiquitous in

human culture. It is inherent because human beings are mimetic³, as is violence; it is ubiquitous because we employ violence to expel violence and generate culture and religion to stem the tide of violence. We experience intense repulsion at occasions of endemic violence, and sacred 'dread' at curative violence that quells its endemic form. Our responses to such instances are to quash rampant violence by responding with force—the force of violence itself. We are therefore driven by an impulse of revenge, which in itself is an impulse of imitation, of mimesis, that seeks to expel violence in the same way that it was manifested. Revenge is, simply, 'violence imitating violence' (Bailie, 1995: 93). In other words, we fight violence with violence. In the context of justice and social order, violence has, for both Nietzsche and Girard, a similar meaning in that it is instrumental in creating the highest degree of happiness, or the greatest experience of peace that the society regards as possible to attain.

1.2.4. Law: *The Transference of Retribution*

Thus far we have been presented with two objects of anger: Nietzsche suggested an offender to be the root of anger that a community must, based on the premise of tribute or equivalence—'a price that *can* be paid'—punish. Girard offered the scapegoat who is isolated in a community and given unto violence in order to cure the community of violence. Nietzsche explains the compulsion to punish as anger experienced towards an injury or offence which must be rewarded, negatively; Girard explains the compulsion to sacrifice a scapegoat as, essentially, anger towards violence, and a sacred dread that employs violence towards its own expulsion. In both explanations the response to an offence, whether an injury or uncontained violence (which are not dissimilar), is one of reciprocity *with the same offence*: violence responding to violence.

But the fact of such punishment (reaction or response) does not develop without end. In fact, such punishment reaches a certain threshold as the strength and solidarity of the community increases: 'the evil-doer is no more outlawed and put outside the pale, the common wrath can no longer vent itself upon him with its old license,—on the contrary, from this very time [that the community has consolidated

³ Mimesis is the fundamental characteristic of human beings that Girard employs in his anthropology. The concept has a long history that dates back at least to Freud (1922) and concerns imitation. Mimesis begins as the imitation of the desire for an object and progresses to the imitation of the desire itself, at which point the initial object of desire has fallen away and imitation leads to rivalry and rivalry leads to violence between the rivals. Girard terms these rivals as 'doubles' and 'monstrous doubles' at the outbreak of violence. See Girard's *Violence and the Sacred* (1977).

itself] it is against this wrath, and particularly against the wrath of those directly injured, that the evil-doer is carefully shielded and protected by the community' (Nietzsche, 1913: 82). Therefore the community seeks to impede anger and thwart retaliation against the offender as the strength (*qua* solidarity) of the community grows. Penal law is characterised by the ability to '*compromise with the wrath* of those directly affected by the misdeed' (Nietzsche, 1913: 83, emphasis added). As the community is established, it feels less threatened by the devices of an individual offender. The immediate need for punishment is proportionally assuaged by the community's consolidation.

This is the distinction that Girard makes between 'primitive' and 'modern' societies: primitive societies employed a *preventive* mechanism against the cycle of violence. Modern societies, on the other hand, employ a *curative* measure that does not *suppress* vengeance, but harnesses it 'to a single act of reprisal' (Girard, 1977: 15). The judicial system, Girard states, is undoubtedly the 'most efficient of all curative procedures' (1977: 21) but can only be made effective in restraining violence in a community when 'the intervention of an independent legal authority becomes *constraining*' (1977: 21). And what the legal system is meant to constrain is the impulse for revenge, which previous preventive procedures tirelessly attempted to avert. Thus the judiciary detaches from individuals, from the community, the need or obligation for revenge. But the detachment of revenge that the legal system performs must be, as Girard states (1977: 21), *constraining*:

Only then are men freed from the terrible obligations of vengeance. Retribution in its judicial guise loses its terrible urgency. Its meaning remains the same, but this meaning becomes increasingly indistinct or even fades from view. In fact, the system functions best when everyone concerned is least aware that it involves retribution. The system can—and as soon as it can it will—reorganise itself around the accused and the concept of guilt. In fact, retribution still holds sway, but forged into a principle of abstract justice that all men are obliged to uphold and respect.

For Nietzsche however, this compromise with wrath, this negotiation of punishment, introduces a characteristic of the strong towards the weak, an ability to see beyond the destructive potentialities of an offender by the very strength of the position of the community: 'It is possible to conceive of a society blessed with so great a *consciousness of its own power* as to indulge in the most aristocratic luxury of letting

its wrong-doers go *scot-free*' (1913: 83). But here concludes, indeed destroys—according to Nietzsche (1913: 83-84)—the reign of justice:

The justice which began with the maxim, "Everything can be paid off, everything must be paid off", ends with connivance at the escape of those who cannot pay to escape—it ends, like every good thing on earth, by *destroying itself*.—the self-destruction of Justice! We know the pretty name it calls itself—*Grace!* It remains, as is obvious, the privilege of the strongest, better still, their super-law.

Here Nietzsche introduces us to the growth of civilisation at a level of security at which institutions ('authorities') effectively displace the duty of revenge from the hands of the victims into the domain or 'sphere' of law. The law and judicial systems are highly effective, Girard similarly argues, in acting against revenge. But their effectiveness relies on their ability to *constrain* (1977: 21) the 'reactive feelings' (Nietzsche, 1913: 86) of revenge, an ability determined by society's confidence in the system: *The system can—and as soon as it can it will—reorganise itself around the accused and the concept of guilt. In fact, retribution still holds sway, but forged into a principle of abstract justice that all men are obliged to uphold and respect* (Girard, 1977: 21). Society's confidence is therefore located in the system's ability to effectively *manage* revenge; society's confidence is *enhanced* when the *fact* of revenge is hidden. For Nietzsche, revenge is concealed by new terminology—'guilt,' 'duty,' 'conscience' (1913: 72)—the introduction of a *vocabulary of conscience*.

It is this vocabulary of conscience that provides a kind of activity for humanity to participate against the threat of revenge. Nietzsche argues that it is the 'active,' 'attacking,' and 'aggressive' man who is so much nearer to justice than one who simply reacts (1913: 86). Moreover, this is also the sphere that has produced the need for law and provided law's 'earthly home' (Nietzsche, 1913: 86). For law is in this way 'active,' 'attacking,' and 'aggressive' as it arises not *from* our reactive feelings, but *against* these: 'law in the world represents the very war *against* the reactive feelings, the very war waged on those feelings by the powers of activity and aggression, which devote some of their strength to damming and keeping within bounds this effervescence of hysterical reactivity, and to forcing it to some compromise' (1913: 86). He motions his reader away from the idea that justice may emerge from or be found in the equivalency of reactive feelings, to assert instead that 'the *last* sphere conquered by the spirit of justice is the sphere of the feeling of

reaction!' (1913: 85). This last sphere, once conquered, is the interiorisation of the violent impulse to retaliate and seek revenge. This is why Nietzsche states above that the man nearest justice is the most active man, aggressive against his own violent impulses:

When it really comes about that the just man remains just even as regards his injurer (and not merely cold, moderate, reserved, indifferent: being just is always a *positive* state); when, in spite of the strong provocation of personal insult, contempt, and calumny, the lofty and clear objectivity of the just and judging eye (whose glance is as profound as it is gentle) is untroubled, why then we have a piece of perfection, a past master of the world—something, in fact, which it would not be wise to expect, and which should not at any rate be too easily *believed* (1913: 85).

Thus law becomes that trusted mechanism meant to calculate and weigh the price of injuries, to de-personalise injuries by channelling the reactive feelings of revenge into a sphere of objectivity, the sphere that provides law's 'earthly home'. Again we are led to understand justice in terms of that which *compels* law's, rather than our own, assessment and calculation of equivalence with regards to the cost of an injury and the anger of resentment the injury arouses. Law is that constant activity against revenge or resentment while simultaneously removing the offender from the offence, removing the 'victim of resentment out of the clutches of revenge', and finding within itself—that is, within law—grounds enough for its own *raison d'être* that it should substitute for the reactive feelings of resentment 'a campaign of its own against the enemies of peace and order' (Nietzsche, 1913: 87) that is interested in law for law's sake, for the peace that law promotes and sustains, and for the standardisation of equivalence that law affords and guides in the maintenance of a just society. Here, law is concerned with *maintaining* justice; it must *presuppose* justice in order to grow *from* and act on *behalf* of and in the *name* of justice. Law is necessary because of the possibility of resentment and the impulse of revenge. Law must maintain justice; for justice is threatened by the presence of resentment and the impulse for revenge. Concerning the foundation of law, Nietzsche (1913: 87) states the following:

The most dramatic measure ... to combat the preponderance of the feelings of spite and vindictiveness ... is the foundation of *law*, the imperative declaration of what in its eyes is to be regarded as just and lawful, and what is unjust and unlawful: and while, after the foundation of the law, the supreme power treats the aggressive and arbitrary acts of individuals, or of whole groups, as a

violation of law, and a revolt against itself, it distracts the feelings of its subjects from the immediate injury inflicted by such a violation, and thus eventually attains the very opposite result to that always desired by revenge, which sees and recognises nothing but the standpoint of the injured party [the victim].

If justice compels the calculation of revenge, and law is the mechanism of calculation, it is the presence of the impulse for revenge which calls forth law, while justice is the name of that in which the calculation is made. Thus law is not beholden to justice, but to calculation. Law as such is a *system of calculation*. Justice is an *ideal of equivalence*, of equity, which in and of itself is incalculable. Rather, Justice is the name of what is most sublimely calculated.

1.3. Law

1.3.1. 'Justice as Fairness'

Law as a system of calculation may be understood in modern political theory according to John Rawls' concept of 'justice as fairness' as put forth in *A Theory of Justice* (1971). We may find in Rawls a connection to Nietzsche in that Rawls' theory of justice is largely contractarian, located in community and responsibility. However Rawls concern is justice in a pluralist world of subjective circumstances in which people have differing plans for life and therefore differing conceptions of the good. This aspect of the circumstances of justice is emphasised, he states, 'by assuming that the parties take no interest in one another's interests.... As a consequence individuals not only have different plans of life but there exists a diversity of philosophical and religious beliefs, and of political and social doctrines' (1971: 124). Rawls therefore argues that because of such diversity in modern society, that 'society' as such no longer truly exists, that it has effectively been lost to the fragmentation of pluralism. The 'circumstances' of justice now occur in a 'constellation of conditions', he argues (1971: 124). Moreover, this constellation of conditions—the rise of plurality and subsequent collapse of 'society'—forbids any *appeal to a shared horizon of values* from which such a society could deduce its concept of 'the good'. Yet it is in spite of, even *because of*, this constellation of conditions, which essentially competes for the determination of the 'good', that the opportunity, indeed the possibility, for justice exists:

Thus, one can say, in brief, that the circumstances of justice obtain whenever mutually disinterested persons put forward conflicting claims to the division of social advantages under conditions of moderate scarcity. Unless these circumstances existed there would be no occasion for the virtue of justice, just as in the absence of threats of injury to life and limb there would be no occasion for physical courage (1971: 124-25).

Therefore justice is given an opportunity to 'make right' in a condition of difference and different conceptions of the 'good'. Justice is called on, essentially, to judge or determine what is good. Rawls (1971: 125-27) sets forth five conditions for deriving the principles of 'right': (i) principles should be *general* in their conception; (ii) *universal* in their application: 'They must hold for everyone in virtue of their being moral persons'. A conception of right will seek (iii) *publicity*, which aims for a public conception of justice, as well as (iv) impose an *ordering* on conflicting claims. The last condition is *finality*, such that ultimately the principles of right and justice must direct and arrange our respect of social institutions, above that of self-interest or even prudence. 'The complete scheme is final in that when the course of practical reasoning it defines has reached its conclusion, the question is settled'. In sum, Rawls states, 'these conditions on conceptions of right come to this: a conception of right is a set of principles, general in form and universal in application, that is to be publicly recognised as a final court of appeal for ordering the conflicting claims of moral persons'. Thus the crux of the determination of right and justice is procedure: the procedure for determining the principles for the conceptions of right must be fair in order for the principles to be just (i.e. fair procedure = just principles). In other words, fairness and procedure form the basis of Rawls' theory of justice.

Rawls postulates that 'the fundamental idea in the concept of justice is fairness' (1971: 305). Inasmuch as fairness is the fundamental idea of justice, justice relies on fair procedure for its ability to determine right: 'The aim is to use the notion of *pure procedural justice* as a basis of theory' (1971: 127, emphasis added). Moreover, underlying Rawls' procedural determination of justice and principles of right is an assumption of *absolute impartiality* on the part of the parties who determine the principles of right. He assumes 'that the parties are situated behind a veil of ignorance' (1971: 127). It is essentially an assumption that the parties elected to determine the principles of right know nothing, have no context, no history, no insight or premonition, no perspective and no opinion toward the world around them. 'As far as possible, then, the only particular facts which the parties know is that their

society is subject to the circumstances of justice and whatever this implies' (1971: 128).

It is clear that such a theory of justice addresses the ideal of justice at the level of a concept of law: essentially, justice is equated with law. This means that the procedural mechanism *of law* that is designed to maintain justice, to uphold justice, is itself named justice. Rawls' argument for 'justice as fairness' postulates that justice is *the* calculation, rather than the *calculated*, or the *right*. Henceforth the measure of the law is equated with the name of justice, and justice as an ideal which may compel law—beyond simple validation by the presence of anger and resentment—is obfuscated by the fulfilment of procedure, an obdurate adherence to procedure, in fact, to law itself.

1.3.2. 'Communicative Action'

A problem arises in the actual proceduralism of Rawls' vision of justice: a gap between his emphasis on *procedural justice* and its fair determination, based on the five principles mentioned above and relating to those parties whom he assumes to be *absolutely impartial* and who deliberate *behind a veil of ignorance*. The problem arises at the impasse of assumed objective parties appointed to determine what is right and just. The theory presupposes knowledge of what would be right and just, yet claims to rely on complete objectivity. Jurgen Habermas draws attention to this *problematique* of Rawls' theory in *Justification and Application: Remarks on Discourse Ethics* (1993). As Rawls claimed the existence of a fractured and pluralized modern society as the basis of a need for procedure and fair determination of right, Habermas claims that the essential objectification of rationality—operative *behind a veil of ignorance*—is inadequate in a modern pluralist society: 'Modern rational natural law responded to this constellation of problems, but it failed to do justice to the intersubjective nature of collective will formation writ large' (1993: 16). Moreover, he brings further emphasis to the problem of objective parties by stating that objectivity itself is problematic in its ability to determine right insofar as it requires and presupposes knowledge or intuition of what is right:

Everyday moral intuitions presuppose the existence of persons who are so constituted that they possess a sense of justice, from conceptions of the good, regard themselves as sources of legitimate claims, and accept the conditions of

fair cooperation. In short, the theoretical problem of justification is shifted from characteristics of procedures to qualities of persons (1993: 28).

However, Alessandro Ferrara (1999: 17) notes that Rawls' theory should rather be read to evolve from a purely procedural 'objective' determination of justice to a more *situated* context that embraces rather than shuns the multiplicity of social influences which construe our understanding. In this regard Rawls states:

What justifies a conception of justice is not its being true to an order antecedent to and given to us, but its congruence with our deeper understanding of ourselves and our aspirations, and our realisation that, given our history and the traditions embedded in our public life, it is *the most reasonable doctrine* for us (1980: 519, emphasis added).

Rawls' shift to employing our *deeper understanding of ourselves and our aspirations* in determining the reasonable may be more analogous to Habermas' own theory of communicative action than the latter admits, a theory that is firmly located in our subjectivity—indeed, our intersubjectivity—and one which seeks to communicatively, rather than impartially or procedurally, negotiate right and the good:

From the very start, communicative acts are located within the horizon of shared, unproblematic beliefs; at the same time, they are nourished by these resources of the *always already familiar*. The constant upset of disappointment and contradiction, contingency and critique in everyday life crashes against a sprawling, deeply set, and unshakable rock of background assumptions, loyalties, and skills (Habermas, 1996: 22).

1.3.3. From 'Sacred' to 'Secular'

Habermas argues that a defining characteristic of the modern pluralistic society is essentially the 'secularisation' of a once 'religiously sublimated sacred realm' (1996: 26). The sacred was that which bound together an otherwise fragmented society around certain archaic institutions (for example, the medieval tradition of law and the church; incest taboos and kinship societies [Habermas, 1996: 26]). The unifying power of the sacred was a belief that it sanctioned authority beyond our human ability to determine. 'The *fusion of facticity* [facts evaluated according to individual preferences] *and validity* [understanding validated by joint negotiation]

occurs not in the mode of the always already familiar, not in terms of basic certainties that, so to speak, stand behind us, but rather in the mode of an authority that imperiously confronts us and arouses ambivalent feelings' (1996: 24). The question raised for the modern 'secular' society is one of integration and a solution to the unifying power that was held by the sacred: 'how can disenchanted, internally differentiated and pluralized lifeworlds be integrated if, at the same time, the risk of dissension is growing, particularly in the spheres of communicative action that have been cut loose from the ties of sacred authorities and released from the bonds of archaic institutions?' (Habermas, 1996: 26).

These 'sacred authorities' are the very same entities that 'primitive' society appealed to in Girard's formulation of the 'sacrificial mechanism,' which uses violence to expel violence. This mechanistic understanding of violence, which assumes both 'good' and 'evil' forms, is at the heart of the *sacred*, the ambivalent transcendence of violence that holds a community in awe, or *dread*, of its potential for good or ill. It is this *awesome* existence of violence and the sacred that Girard distinguishes into 'impersonal' and 'personal' designations (1977: 256-57), the latter being an incarnation of the sacred in specific persons or beings (a scapegoat that is sacrificed and mythologized for the peace it was able to affect through its death), while the former indicates a transcendent quality sustained beyond the material manifestation of the sacred. It is the *transcendence* of violence, beyond the personal designation, that appropriates the distinction of good from bad violence. In this way, violence *itself* is considered sacred, as it operates in 'the interplay of order and disorder, of difference lost and retrieved' (Girard, 1977: 258). 'The language of pure sacredness,' Girard states, 'retains whatever is most fundamental to myth and religion; it detaches violence from man to make it a separate, impersonal entity, a sort of fluid substance that flows everywhere and impregnates on contact' (1977: 258). Thus Girard speaks not only of violence *and* the sacred, but violence *or* the sacred, *as* the sacred (1977: 258). And it is only violence understood this way—*as* the sacred—that introduces the transcendent quality of the sacred which provides for the distinction of good from bad violence. Moreover, for Girard, even when the sacred has been shorn from law's appeal, it retains its transcendent quality (1977: 24).

The source of Habermas' appeal is this: in a modern 'secular' society that has no 'sacred' or transcendence to which it may appeal and subscribe degrees of good

and evil, a new source of order must be established and effected towards the goal of peace:

As we have already assumed, the metasocial guarantees of the sacred have broken down, and these guarantees are what made the ambivalent bonding force of archaic institutions possible, thereby allowing an amalgam of validity and facticity in the validity dimension itself. The solution to this puzzle is found in the system of rights that lends to individual liberties the *coercive force of law* (1996: 27, emphasis added).

Yet if an awe-inspired respect for the sacred provided the purchase for law in primitive and pre-modern societies, and if that has been shorn from modern law, as Habermas and others claim, what provides modern law with societal footing and upholds it in the contemporary, 'secularised', mind? Habermas proposes a 'peculiar combination of freedom and coercion' bound up in modern law (1996: 27): 'Unlike ancient and pre-modern kinds of law, modern law regulates action not through conformity of motives but merely through sanctions and thus leaves the "motives for rule compliance open while enforcing observance"' (Ferrara, 1999: 49). But are these ideas of a *peculiar combination of freedom and coercion* not simply a modernised concept of peace and violence, those same concepts that drove societies held in awe ('dread') by the sacred and its provision for these to society? The mechanism is still the same: our freedom with threat of coercion that supposedly sustains justice in the law is *fundamentally* no different from a primitive 'awe' for the sacred violence that upholds peace and is sustained through a religious framework. It is the *coercive force of law* that is concerned with law itself, with the *enforcement* of law, rather than the upholding of an ideal of justice.

1.3.4. Thence 'Reverence'

It may appear that out of a fractured and pluralized modern society a notion of justice is in fact *not* that which compels society's complicity with law, but the *coercive force* of law's *enforcement*; that it is not the motives for rule compliance which law is fundamentally concerned with, but compliance itself and the regard for law. Immanuel Kant introduces us to the notion that moral worth or goodness is derived from duty, and '*duty is the necessity to act out of reverence for the law*' (Paton, 1948: 21). The word 'reverence' is similar to 'respect' and evokes feelings of ambivalence that usually result in complicity and obedience:

Because of our human frailty such a law must appear to us as a law of duty, a law which commands or compels obedience. Such a law, considered as *imposed* upon us, must excite a feeling analogous to fear. Considered, on the other hand, as self-imposed (since it is imposed by our own rational nature), it must excite a feeling analogous to inclination or attraction. This complex feeling is *reverence* ... (Paton, 1948: 21).

Moreover, primitive *dread* toward the sacred—the beneficent and maleficent works of violence—is not unlike the *peculiar combination of freedom and coercion* of law: the freedom promised with compliance; the coercion of force—law’s *enforcement*—to comply, for the sake of peace, with the letter of the law.

Yet all too easily, it seems, the compliance to law and law’s enforcement are themselves named justice. When criminals are ‘brought to justice’, what do we mean? Have they been brought *back* into a just relationship, just standing, with their community? Or have they simply been prosecuted by law, according to law, in the name of enforcing the law and in order that law may be upheld and its precepts respected? It would seem that all too easily justice is conflated with law and that law’s threat of violence—its violent enforcement—evokes the ambivalence that previously sustained *sacred* violence in ‘primitive’ societies and *legal* violence in ‘modern’ societies.

1.4. Violence

1.4.1. Introducing Deconstruction

Having now looked at the growth of retribution according to equivalent tribute and the emergence of law as a system of calculating retribution and managing revenge, we have come to view how, as law has developed into the primal source of unity in a modern, pluralist world, law itself has come to symbolise and even be equated with justice. Yet the development of law has shown just how reliant law is on force and violence for its enforcement; and therefore we are faced with the question ‘from whence justice?’ if law is cloaked in violence and not imminently nor immediately equitable with justice. The task will now be a *deconstruction* of the relationship between justice and law, still in the *search* for justice, now by way of the law’s responsibility to justice amid the threat of violence from within. Jacques Derrida has used deconstruction to address this task, for deconstruction, he states, ‘has done nothing but address [the problem of justice], if only *obliquely*, unable to do so

directly', for one cannot do so directly 'without immediately betraying justice' (Derrida, 1992: 10). Moreover, he suggests the following as the union between the role of deconstruction and the search for justice in law:

Justice in itself, if such a thing exists, outside or beyond law, is not deconstructible. No more than deconstruction itself, if such a thing exists. Deconstruction is justice. It is perhaps because law (*droit*) ... is constructible ... that it makes deconstruction possible. The undeconstructibility of justice also makes deconstruction possible, indeed is inseparable from it. The result: deconstruction takes place in the interval that separates the undeconstructibility of justice from the deconstructibility of *droit* (authority, legitimacy, and so on) (Derrida, 1992: 15).

It is therefore the proverbial chaff that the use of deconstruction hopes to separate from the wheat: that the source of law may separate itself *from* the promise of justice. Austin Sarat follows a similar path in the quest for justice concerning the use of violence amid the necessary enforcement of law. In *Law, Violence, and the Possibility of Justice* (2001b), he is compelled by the question of the extent to which the complicity of law with violence threatens the possibility of justice? He asks: 'Does law's violence stand as an impenetrable barrier to the achievement of justice in and through law? Or, alternatively, is violence necessary to the realisation of justice?' (Sarat, 2001b: 4). We are called to give an account of the tenuous relationship between justice and law, a relationship that has become an 'ineluctable link' influenced largely by Hobbes (Sarat, 2001b: 6-7) as well as Hegel and Kant (Mani, 2002: 33) and has since become the popular conception of where justice may be found or how justice may be understood. Sarat states,

Commentators from Plato to Derrida have called law to account in the name of justice, have asked that law provide a language of justice, and have demanded that it promote, insofar as possible, the attainment of a just society. Yet the justice described is elusive, if not illusory, and in some scholarship disconnected from the embodied practices of law, including law's violence (2001b: 6).

Our concern with such *elusory* justice will emerge more decidedly in the following chapter. For now, we will explore a portion of the literature that seeks to detach law from justice, in short, to *deconstruct* their assumed unity in the discourse on justice.

1.4.2. *Justice, Force*

As a starting point we may take the relationship between justice and law. And as the two are distinguishable, they are nevertheless subject to one another: ‘if justice is not necessarily law (*droit*) or the law, it cannot become justice legitimately or *de jure* except by withholding force or rather appealing to force from its first moment, from its first word. “At the beginning of justice there was *logos*, speech or language” (Derrida, 1992: 10). It follows then that the reliance of justice on force was established at its inception, its first *word*, to establish it legitimately. So too does force rely on justice to legitimate, and indeed mandate, its application. Derrida brings Pascal’s *Pensées* to bear in this contemplation of justice and force. Pascal states: *Justice, force.—Il est juste que ce qui est juste soit suivi, il est nécessaire que ce qui est le plus fort soit suivi* [‘Justice, force.—It is just that what is just be followed, it is necessary that what is strongest be followed.’] (in Derrida, 1992: 10). This brief statement immediately draws us to the threshold of our understanding of justice as an ideal, the chief good; and that as such it *should* be followed, that is, it should be maintained and sustained. However, the good cannot be maintained or followed without force. The hope and promise of justice is the hope that what is strongest—that which shall enforce—be just. This is the quintessential function of law to wield power in the *enforcement* of that which is just.

1.4.3. *The Mystical Foundation of Authority*

However, a distinction must be made between the *force* of law and the *legitimation* of the law through an idea of what is just. Jacques Derrida draws from Pascal’s use of Montaigne for the expression *fondement mystique de l’autorité*, the ‘mystical foundation of authority’ (in Derrida, 1992: 11). Pascal cites Montaigne in *pensée* 293, stating:

[O]ne man says that the essence of justice is the authority of the legislator, another that it is the convenience of the king, another that it is the current custom; and the latter is closet to the truth: simple reason tells us that nothing is just in itself; everything crumbles with time. Custom is the sole basis for equity, for the simple reason that it is received; it is the mystical foundation of its authority. Whoever traces it to its source annihilates it (in Derrida, 1992: 11-12).

Montaigne (in Derrida, 1992: 12) was speaking of this ‘mystical authority’ when he stated ‘laws keep up their good standing, not because they are just, but because they are laws: that is the mystical foundation of their authority, they have no other.... Anyone who obeys them because they are just is not obeying them the way he ought to’. This is the separation of justice from law. Derrida draws the line a little more clearly for us: ‘The justice of law, justice as law is not justice. Laws are not just as laws. One obeys them not because they are just but because they have authority’ (1992: 12). And in this earthly city, human authority—which may be called law—is bound to force, a necessary prerequisite for its *enforcement*. We may therefore understand the *purpose* of law’s existence according to Nietzsche’s statement: *to combat the preponderance of the feelings of spite and vindictiveness...is the foundation of law* (1913: 87) juxtaposed to the mystical foundation of the *authority* of law’s existence: that law exists because it is granted authority, and not because it is inherently just.

We may perhaps go beyond this delineation of justice and law towards the *mystical foundation of authority*—from whence justice. We are reminded again of the mystical collusion with force—moreover with violence—that is foundational, if perhaps not necessarily to justice, then to law and law’s foundation of authority.

The very emergence of justice and law, the founding and justifying moment that institutes law implies a performative force [Justice’s] very moment of foundation or institution, the operation that amounts to founding, inaugurating, justifying law, making law, would consist of a *coup de force*, of a *performative* and therefore *interpretative violence* that in itself is neither just nor unjust and that no justice and no previous law with its founding anterior moment could guarantee or contradict or invalidate (Derrida, 1992: 13, emphasis added).

The moment of foundation or institution of law is violent and ‘interpretive’; it is interpretive insofar as justice had not yet been named, or determined, or known; law must be called forth in the name of justice in order that justice may be protected and maintained; moreover that *law* may be justified and validated. Prior to the founding violence of law—the *performative* moment of foundational violence—justice is unknown and unnamed and can therefore not be judged. But the violence that inaugurated law is its own judge, its own interpreter ‘that in itself is neither just nor unjust’. Here violence interprets itself in a moment of silence that cannot be judged by

law or culture. It is a moment of sacred violence responded to with silent dread because there can be no judgment since the unjudgeable violence is generating or founding our ability to judge. As sacred violence sustains feelings of reverence or ambivalence, law's founding violence is dreadful in its inability to be judged: there can be no ground for judgement as of yet, for the *standard* of judgement is not established: it is *being* established. Derrida (1992: 14) claims this to be the point where the discourse comes up against its own limit of performative power, what he calls the *mystical*: 'Here a silence is walled up in the violent structure of the founding act'.

1.4.4. Law's Monopoly on Violence

Derrida critiques a text by Benjamin titled *Zur Kritik der Gewalt* (1921), translated as *Critique of Violence*. Benjamin states that the interest of the law may appear 'surprising' (in Derrida, 1992: 33), for it is *not* ultimately concerned with a form of transcendence or an idea of divine authority in whose stead or interest law functions. Moreover, law is not even ultimately concerned with justice. Rather, the interest of law is first and foremost with law *itself*. Law's fundamental act of violence is the exclusion of all violence exterior to itself, thus claiming, Benjamin states, a 'monopoly of violence'. We noted earlier law's interest in the monopoly of revenge (Girard), and we may now proceed a step further by stating that the *enforcement* of law *relies* on violence. Furthermore, 'This monopoly [on violence] doesn't strive to protect any given just and legal ends but law itself' (Derrida, 1992: 33). We therefore see that violence is in fact *not* exterior to law, but very much an internal—moreover, inherent—trait of law itself: for violence 'threatens [law] from *within*' (Derrida, 1992: 34, emphasis added). Here we are faced with an apparent contradiction of law's complicity with violence in order to thwart violence. As Derrida (1992: 34) states: *au doit du doit*—'to the law, from the law'. It is in this type of circularity in complicity that law (here, the State) is faced with its greatest fear: a *legitimate* form of violence that is itself exterior to law. The state is less concerned with heinous acts of violence that are reasonably easy to place within law's parameters (these may include mass-murderers, large-scale drug syndicates, etc.). On the contrary,

The state is afraid of fundamental, founding violence, that is, violence able to justify, to legitimate, or to transform the relations of law, and so to present

itself as having a right to law. This violence thus belongs in advance to the order of a *droit* [right] that remains to be transformed or founded, even if it may wound our sense of justice (Derrida, 1992: 35).

It is this *foundational* violence, which may be more commonly understood as ‘revolutionary’, that has established states and communities in the same fashion spoken of above by Girard, and now Derrida (*par* Benjamin), in a more explicit marriage of *violence to law*. The generation⁴ of law and culture in general is always a violent moment, if not always gratuitously violent in the forms of genocides or mass expulsions. But the state inaugurates its new law *in violence*: ‘As this law to come will in return legitimate, retrospectively, the violence that may offend the sense of justice, its future anterior already justifies it’ (Derrida, 1992: 35).

Here we are brought upon a double bind that Derrida (1992: 41) explains in the apparent contradiction of law’s simultaneous destruction and creation. The bind is the judgement of the founding violence. On the one hand is the horrific, the savage: it destroys law and is repugnant to our sense of ‘justice’; on the other hand, the redemptive, ‘civilising’: it creates or reconstitutes law, and *renews* our sense of justice, even *accommodates* it. Derrida (1992: 41) calls this zone of transition the *ungraspable revolutionary instant*. It is *ungraspable* because we are unable to wield the judgement that so secures us to our laws and sense (‘belief’) that the law’s presence will be sure that those who orchestrate violence exterior to law are ‘brought to justice’. ‘It effaces or blurs the distinction, pure and simple, between foundation and conservation’ of law (Derrida, 1992: 41). The intermediary space between ‘good’ and ‘bad’ is terribly disconcerting in its moments of occupation, for it is here that Degree (Girard) is absent and our ability to judge, to *name* justice—that which we consider to be justice—vanishes along with the lines of degree.

1.5. Summary

From Nietzsche’s statement that *the commencement of all great things in the world is thoroughly and continuously saturated with blood* (1913: 72) to Girard and the development of the judicial system as a curative measure against violence, violence and force are ineluctably bound to the generation, protection, and maintenance of the

⁴ This is congruous to the *generative* violence expounded by Girard above. It is the form of violence that proposes to be constructive in its ability to *generate* institutions of some form or another, such as rites, religion, culture, law, etc.

good. Even the evisceration of the relationship between justice and force that we have just traced is bound up in a moment of violence that is foundational and even paradoxical in nature and scope. Girard has already provided a platform from which to understand the origins of culture around an instance of violence; Derrida has traced justice to a singularity that is apart from law—not alien to the use of force, but neither is it bound to its *enforcement* by an act of violence that penetrates this *fondement mystique de l'autorité*, this *mystical foundation of authority*.

In this chapter law has been explained as operating along a crucial distinction of 'good' and 'bad' violence—of sacred violence. And within that distinction lies our ability to *name* justice as that cherished presence of order. And we use law and know law as that which upholds and guards our idea of justice. We have granted the judicial system an *impregnable authority* through our unanimous consent that *it* should be the one to wield our violence and bear the burden of our vengeance, such that we ourselves are absolved as partakers of the violence we abhor. Yet something has occurred along our process of deconstructing law *from* justice, moreover, of deconstructing law *to* violence. Shaun McVeigh *et al* (2001: 110) state that 'once it is acknowledged that there is violence in the law, a threshold has been crossed'. Law as a detached system of calculation and objectivity, 'beholden to no one', forged *behind a veil of ignorance*, is compromised by the unveiling of its inherent violence.

Its foundations—once thought sacred, now revealed as simply violence—are shaken, and we, the subjects of law, are less able (or less willing) to trust law's monopoly in violence to cure society from violence. And it is not simply that there is a recognised 'danger dwelling in the house of the law', but that the threshold of distinction itself has been removed; that suddenly the lines between 'legal' justice and injustice have grown porous by the transitory flux of violence. Yet still the hope of justice remains for law and within law. Sarat suggests the following resolution between justice and law's violence:

In all legal orders, law's violence threatens to undo law, to destabilise it by forcing choices between its normative aspirations and the need to maintain social order through force. But unfortunately, except in the utopian imagination, there is no symmetry in the relations among violence, justice, and law. Violence is never similarly endangered by the claims of justice or the operation of law. Law is poised between the present reality of violence and the promise of a justice not yet realised (2001b: 8).

Still there remains *the promise of a justice not yet realised*. This is, after all, that which institutes law, if it is not itself law; it is justice that inspires law to its perfection, if not always successfully.

Benjamin (in Derrida, 1992: 42) introduces one further distinction or level within justice: between the divine justice that destroys law and the mythic violence that founds it'. The idea of divine justice that *destroys law* leaves obvious ambiguities, having just explored a discussion of law's reliance on degree and the role of degree in clarifying such ambiguities while remaining consistent with generative violence which establishes law. Yet the ambiguities of law's destruction are not resolved through the reinstatement of degree, but rather by an entirely unlawful—and to Nietzsche unjust—concept that promotes rather than halts the destruction of degree: that of '*Grace! Can you believe it?*'

In the next chapter I shall seek to lay out several conceptions of justice that ultimately relate to an ethic of compassion, responsibility, and love. I do so in the hope of coming to a deeper understanding of justice—one that transcends the epistemology of justice (as retribution) perceived as law-for-law's-sake, to a justice that comes to operate rather within the *spirit of justice for the sake of the living*.

Chapter II

Compassion, Responsibility, and the Law of Love

Owe no one anything, except to love one another, for he who loves another has fulfilled the law.... And if there is any other commandment, are all summed up in this saying, namely, "You shall love your neighbour as yourself".

Romans 13: 8-9

2.1. Introduction

The previous chapter concluded with Benjamin's mention of a concept of 'divine' justice that exceeds law as distinct from mythic justice that founds law, or calls forth law. The concept of a justice that destroys law, that is, a justice that takes law upon and into itself, destroying the degrees, limitations, and boundaries upon which law functions, creates obvious problems after a discussion on the reliance of peace and community on the existence of Degree.

Just as Girard described the sacrificial mechanism as that which reinstates Degree through sacrifice—affirmed by Nietzsche's notion that blood is present at the foundation of every human institution—Derrida (1992: 52) describes Benjamin's conception of divine justice as doing the exact opposite: 'Instead of founding *droit* ['right' or law], it destroys it; instead of setting limits and boundaries, it annihilates them; instead of leading to error and expiation, it causes to expiate; instead of threatening, it strikes; and above all, this is the essential point, instead of killing with blood, it kills and annihilates without bloodshed'. But the difference of blood illustrates the deeper and more profound difference between divine and mythic violence: mythic violence institutes law and is interested in law itself, whereas divine violence is interested in the *living*: 'Mythical violence is bloody power over mere life for its own sake, divine violence pure power over all life *for the sake of the living*' (Benjamin in Derrida, 1992: 53, emphasis added).

Moreover, Benjamin (in Derrida, 1992: 53) proceeds to state the primacy of the human soul in the paradigm of divine justice, that amid the destruction of law, the very foundation of law, it never threatens to mount 'an attack to destroy the soul of the living'. Conversely, the extent to which law is destroyed, it is done in order to *save* the living. This is the *spirit of justice* that exists on a different plane than the *mystical foundation of law*, both of which Derrida speaks of, and which distinguishes law from justice:

If I were content to apply a just rule, without a *spirit of justice* and without in some way inventing the rule and the example for each case, I might be protected by law (*droit*), my action corresponding to objective law, but I would not be just (1992: 17, emphasis added).

This *spirit of justice* is held in contrast to law's violent founding or institution that consists of 'a performative and therefore interpretative violence that in itself is neither just nor unjust and that no justice and no previous law with its founding anterior moment could guarantee or contradict or invalidate' (Derrida, 1992: 13).

In the previous chapter I argued that it is law's violent foundation which separates it from the spirit of justice, which is anterior to the inaugural and sustaining violence *within* law. The spirit of justice calls law into existence. But when it comes to law, it can only go as far as the call. Yet the call for justice remains after law is founded; it remains above law, beyond law's ability to attain from within law. Thus the call of the *spirit of justice* demands law's constant reinvention, a reinvention that must first destroy it: the bloodless annihilation of law in the service of justice, of divine justice. Perhaps at this point we may understand Derrida's (1992: 13) pronouncement of Pascal's *pensée* 263: '*Notre justice s'anéantit devant la justice divine*', 'Our justice comes to nothing before divine justice'.

2.2. Compassion

2.2.1. 'Divine Intervention'

Before discussing in more depth the concept of divine justice it may be useful to understand the 'divinity' of such justice as not needing to refer to an *actual* divinity or God or transcendent Being, but rather a transcendence as justice anterior to the finite institutions erected in the name of justice. This may aid us in understanding how divine justice could, or would want to, destroy and annihilate the degrees of law *for the sake of the living*, not law itself. For if justice were beholden solely unto the law—moreover, if law were in *fact* beholden to justice rather than force and authority for its enforcement—justice would cease to hold meaning or significance apart from simply being the fulfilment of the Law. But justice—divine justice—seeks to transcend the limitations of the law in order to save the living.

Having considered the epistemology of retribution in terms of equivalence (described by Nietzsche) and the establishment of law through objective procedures

(Rawls' thought experiment or methodological fiction), these set forth law from a premise of the *fundamental equality* of human beings. Thus such retributive epistemologies of law are able to purport and are indeed reliant on notions of their 'objective' establishment toward the good of all. Yet while human beings are indeed fundamentally equal insofar as there is an equally valid and legitimate claim to 'humanness' in each person regardless of their position in society, family history, racial, gender, or class affiliation, in reality the *conditions* of equality are quite different. Simone Weil (in Bell, 1998: 82) acutely points out that, 'although at the heart of being human there is equality of persons...as a matter of social *fact* we are far from equal' (emphasis added).

Weil describes the world as being structured around power—structures that exploit real positions of inequality in order to sustain positions of power and authority. This, she argues, is 'the whole of Realpolitik' (in Bell, 1998: 82). One may well consider the institution of law as one instrument of power, ideally a just power, established for the protection of just power (itself) against injustice (that which is against itself, or against law). Therefore law is interested *firstly* and *necessarily* in the preservation of itself. From this perspective of power and the actual inequality of fundamentally equal beings, Simone Weil *calls forth* the need for the 'divine': "divine intervention" is the only countervailing power that can tip the scales and balance things out' (in Bell, 1998: 82). One may speak of an inherent, ontological claim to justice based simply on the humanness of each person. Derrida approaches such an ontological moment in describing Benjamin's discussion of divine justice as follows:

'In other words, what makes for the worth of man, of his *Dasein* and his life, is that he contains the potential, the possibility of justice, the yet-to-come (*avenir*) of justice, the yet-to-come of his being-just, of his having-to-be just. What is sacred in his life is not his life but the justice of his life' (1992: 53-54).

This concept of an inherent possibility of justice introduces an ontological dimension to the subject of justice. In fact, not only is one introduced to an ontology of justice, but to the coterminous of being and justice.

2.2.2. *From Ontology: Love, Power, and Justice*

In *Love, Power, and Justice* (1954) Paul Tillich brings ontology to bear in addressing the three related subjects of love, power, and justice. Ontology is a philosophy of being which asks the infinitely difficult question ‘what does it mean to be?’ (Tillich, 1954: 23). In this way ontology proceeds beyond a nominalist reductionism that perceives solely the material, to address those things which are constitutive of being. Emmanuel Levinas (1998: 2) states: ‘the understanding of being implies not just a theoretical attitude, but the whole of human behaviour. The whole man is ontology’. His is a philosophy of inter-relatedness that understands being with another, with an *other* and *for* an other, which at its very conception is ‘an ethical event’ and constitutive of life itself:

But behold! The emergence, in the life lived by the human being (and it is here that the human, as such, beings—pure eventuality, but from the start an eventuality that is pure and holy), of the devoting-of-oneself-to-the-other (1998: xii).

We are thus brought into the world in terms of an existence for the other, ‘a preoccupation with the other...a responsibility for the other...this shattering of indifference...this possibility of one-for-the-other, that constitutes the ethical event’ (Levinas, 1998: xii).

One stands in the face of difference and appeals for its demise or suspension for the sake of an ethic that compels us beyond the domain of what *appears* constitutive of peace and law—the degrees of ‘peace’ located upon foundations of violence. In the Gospel of Matthew (5:20) Jesus addresses a *perfect* adherence to the law, yet an *inadequate* righteousness, an inadequate ethic towards the other: ‘Unless your righteousness exceeds the righteousness of the scribes and Pharisees...’. He called people to an ethic of excess, one that exceeded the requirements of the law—already a high and *perfect* standard—to not forget but live according to ‘the weightier matters of the law: justice and mercy and faith’ (Matthew 23: 23).

Within the discussion on the ontology of being (Levinas), Tillich (1954: 25) relates his analysis of love, power and justice as the fundamentally constitutive characteristics of being, of ontology. ‘Life is being in actuality and love is the moving power of life.... In man’s experience of love the nature of life becomes manifest.

Love is the drive towards the unity of the separated'. To draw something of a synthesis between the conceptions of ontology of both Levinas and Tillich, one may argue that life (being) is being in actuality which bears upon itself the responsibility of one-for-the-other, the driving force of love between beings to annihilate the 'between' and extinguish their separation. It is the driving force of love. As much as Levinas is able to espouse an inherent responsibility because of our interrelatedness as beings, the existence or presence of responsibility presupposes (and requires) that the 'between' be conquered by responsibility. Moreover, the responsibility of love presupposes a separation of beings who strive to be actualised only by traversing their separation. Tillich continues with his initial statement of love as the driving force toward *the unity of the separated* to its completion as 'the reunion of the estranged. Estrangement presupposes original oneness. Love manifests its greatest power where it overcomes the greatest separation. And the greatest separation is the self from self. Every self is self-related and a complete self is completely self-related' (Tillich, 1954: 25, emphasis added). This is love as the driving force of life; devoting-of-oneself-to-the-other; the shattering of indifference—this *bloodless annihilation of difference* for the living is justice for the living. Can one picture Nietzsche writhing under the inconceivable motion of such love towards the other, even if at the sacrifice of itself?: 'God paying himself personally out of a pound of his own flesh... the creditor playing scapegoat for his debtor, from *love* (can you believe it?), from love of his debtor!...' (1913: 111).

The description of the motion of love toward the other, of love's ontology as beings' reunion, of being *as* ontology through love's driving force *to be*, intimates the necessary presence of power. Tillich (1954: 40) describes power as 'the possibility of overcoming non-being'; and again, power 'is being, actualising itself over [and] against the threat of non-being' (1954: 47). If we understand being as necessary for being-for-the-other and love as the driving force between beings and toward their reunion, then power is the actualisation of that reunion. In this way, power is that which conquers the threat of non-being, of being without the other, of the self remaining estranged from its relation to the other. For being *relies* on and is *dependent* on the other for being. To *be* is to be *reunited*; moreover, love is the compulsion to be reunited. And power is the actualisation of being reunited. As Tillich states:

The more conquered separation there is the more power there is. The process in which the separated is reunited is love. The more reuniting love there is, the more conquered non-being there is, the more power of being there is. *Love is the foundation, not the negation, of power* (1954: 48-49, emphasis added).

He calls these the basic formulas of both love and power respectively, which are essentially the same: 'Separation and Reunion or Being taking Non-Being into itself' (1954: 49).

Having understood love as the compulsion towards the reunion of the estranged, and power as the actualisation of being in reunion, justice, then, is 'the *form* in which the power of being actualises itself in the encounter of power with power' (Tillich, 1954: 67, emphasis added). Furthermore, he speaks of the adequacy of justice in the relation of the power of being to another power of being. Justice is adequate in the actualisation of being through power insofar as just power does not seek the suppression or limitation of the other, but the fulfilment of love and being in the other—of being conquering non-being. This is just power and justice as adequate to power. 'If life as the actuality of being is essentially the drive towards the reunion of the separated, it follows that the justice of being is the form which is adequate to this movement' (Tillich, 1954: 57).

From this basis of the adequacy of justice to the actualisation of the power of being, Tillich discusses three levels of justice. The first—also the basis of justice—relates to what has been discussed in the ontology of being: 'the *intrinsic* claim for justice by everything that has being' (1954: 63, emphasis added). The second level is one of equivalence, a justice that perceives everything to have a price, a price which *can* be paid, as discussed in the first chapter. The essential characteristic of this form of justice is *tribute* (1954: 63-64)—as discussed in the first chapter—a payment due a person, whether negative or positive, based on the circumstances that judge and determine (usually in accordance with some law or standard) what is due. The final level of justice Tillich names *transforming* or *creative* justice. The premise of creative justice can be found in the first level of justice, which argues that every being has an inherent claim to justice. Yet this claim to justice is dynamic, Tillich insists (1954: 64), as one can never precisely know what the outcome of an encounter of power with power (*qua* being-with-being) may be. Creative justice is, unlike tributive justice, not always *adequate* insofar as it is not always *equivalent* to the meeting of beings. However, where tributive justice may espouse an adequate or equivalent form,

creative justice is not *inadequate*—indicating deficiency of ability—but rather non-adequate in that it does not seek adequacy as such but a movement beyond or that exceeds adequacy. This concept of extravagant justice relates to the discussion of divine justice.

Within the Judaism-Christian tradition, Tillich states, the application of justice to man and God is a divine justice that transcends proportional justice and is not exclusively bound to the proportion between merit and tribute. Instead, the inherent dynamic claim to justice, which divine justice perceives, is able to dynamically change the proportion ‘in order to fulfil those who according to proportional justice would be excluded from fulfilment. Therefore divine justice can appear as *plain injustice*’ (Tillich, 1954: 66, emphasis added). Moreover, the divine justice that moves beyond law’s proportion reverberates in the Pauline doctrine of ‘justification by grace through faith’, which, ‘manifest in the divine act...*justifies him who is unjust*’ (Tillich, 1954: 66, emphasis added).

Creative justice is ‘the form of reuniting love’ (Tillich, 1954: 66) and acts dynamically beyond the requirements of the law to *justify those who are unjust*, of subsuming non-being within being, of being-for-the-other, of love bringing reunion to the estranged. Thus love requires justice to actualise itself between the estranged: ‘A love of any type, and love as a whole if it does not include justice, is chaotic self-surrender, destroying him who loves as well as him who accepts such love’ (Tillich, 1954: 68). And therefore, in the same way that justice is immanent in power—lest it become a perversion and exploit the other—so too justice is immanent in love:

Love does not do more than justice demands, but love is the ultimate principle of justice. Love reunites; justice preserves what is to be united. It is the form in which and through which love performs its work. Justice in its ultimate meaning is creative justice, and creative justice is the form of reuniting love (Tillich, 1954: 71).

‘Justification by grace through faith’, that is, ‘to *accept as just one who is unjust*’ (Tillich, 1954: 86, emphasis added). One is *accepted as just* based on their inherent claim to justice that comes simply from one’s existence, one’s being; *one who is unjust* by the measure of the law yet as a being remains an other and therefore *fundamentally justifiable*. And *through faith* being perceives the potential for being in non-being: the inherent claim to justice and grace that moves being towards (non-)

being, *being-coming-for-the-other*, making just the unjust. In this way, law is annihilated. Or rather, the *motion of love that transcends the limitations of law annihilates the need for and exceeds law*, and culpability is expiated by grace.

2.2.3. Attention: Justice as Compassion

Having invoked the idea of divine justice that acts as a kind of leveller to balance the factual inequalities of society according to the inherent claim to justice within each individual, Weil argues that the compulsion of justice is found in love and compassion. For her, instead of counterbalancing injustice in the discourse of 'rights' which proposes to overcome force with force, she believes that what is necessary is 'attention to injustice and a kind of justice that has as its most active ingredient love' (in Bell, 1998: 42). The aspect of 'attention' is fundamental to Weil's understanding of justice and is bound to the motion of love and compassion, for both move in parallel. Justice at its root 'consists in seeing that no harm is done to men', and is associated with the cry "'Why am I being hurt?'" (in Bell, 1998: 44). She gives the example that if one says to another *who is willing to hear*, "'What you are doing to me is not just'", you may touch and awaken at its source the spirit of attention and love' (in Bell, 1998: 44). Therefore, attention as constitutive of justice is the attention to the cry of injustice, an attention that must always find 'the words which can give resonance, through the crust of external circumstances, to the cry which is always inaudible: "'Why am I being hurt?'" (Weil in Bell, 1998: 39). It is not a demand for recompense or payment. Rather, it is a request to know why being is hurting being. Here the power of justice is displayed in its ability to 'awaken the spirit of attention and love' (Bell, 1998: 46). Just as Tillich described justice as that which preserves the reunion of the estranged, in the same way justice is able to *awaken the spirit of attention and love*. It is not an explicit standard as though bound to law, but implicit, bound to an inherent and dynamic claim to justice. If attention is adequately aroused by justice, it *cannot* remain impassive, for attention 'is a moral activity that creates the very human person by actively responding to his or her desire for good' (Bell, 1998: 47). Attention as an activity also consists of a certain empathy for the other: 'I have rather to understand *myself* from the standpoint of *the other's* affliction, to understand that my privileged position is not part of my essential nature but an accident of fate' (Bell, 1998: 47).

We are thus compelled to be attentive to the other as an other, to empathise according to our *essential nature*, that inherent claim independent of societal hierarchy or any *accident of fate*. And here we are brought upon the very heart of what it means to be compelled by love and compassion and be attendant to injustice, in the complete sacrifice of the self for the salvation of the other. Of the self's sacrifice Weil states:

I may lose at any moment, through the play of circumstances over which I have no control, anything whatsoever that I possess, including things that are so intimately mine that I consider them as myself. There is nothing that I might not lose. It could happen at any moment that I am might be abolished and replaced by anything whatsoever of the filthiest and most contemptible sort (in Bell, 1998: 47-48).

Weil's 'justice as compassion' may be understood epistemologically as consisting of 'attention' to the circumstance of injustice and the compulsion, drawn from an 'awakened spirit of attention and love', to *respond to the injured*. Her presentation of love's compulsion is one of absolute abandon to the other even to the point where '*I might be abolished and replaced by anything whatsoever of the filthiest and most contemptible sort.*' It is, as Levinas indicates, an ethical moment in which being is called unto being. And yet the compulsion is so profligate that its consequence may mean one's own abolishment. The attention of justice in circumstances of injustice, an attention that results in a response of so gratuitous a nature, resembles Derrida's description of justice as 'an experience of the impossible...[which] requires us to calculate with the incalculable' (1992: 16). For Derrida, such abandon is the ultimate 'ideal of justice', an ideal which

... seems to be irreducible in its affirmative character, in its demand of gift without exchange, without circulation, without recognition or gratitude, without economic circularity, without calculation and without rules, without reason and without rationality. And so we can recognise in it, indeed accuse, identify a madness. And perhaps another sort of mystique (1992: 25).

Here is a possible reformulation of the justice's conventions: to calculate is to give attention to. Moreover, 'the incalculable' is the necessary response from the heart of justice through love and compassion, responsibility and obligation, that are

incalculable: for the measure of love and compassion required from being by being is not prescribed by a set law.

2.3. Responsibility

2.3.1. *The Face of Responsibility*

This discussion is brought into what may seem a conflation of terms, where justice is compelled by love and compassion (or obligation and responsibility) towards being; an obligation that is loving and obligatory by the very presence of love, the presence of which is necessary to the actualisation of being. At the heart of this discussion of ontology we find ourselves brought face-to-face with the other and presented with the infinite obligation of one to the other. It is the ultimate obligation of empathy: ‘Love and justice—to be just toward a being different from oneself means putting oneself in his place. For then one recognises his existence as a person, not as a thing. This means a spiritual quartering, a stripping of the self; conceiving oneself as oneself *and* as other’ (Weil in Bell, 1998: 48).

Levinas (1998: 105) presents us with a picture of the asymmetry of being-for-the-other as reflected in being face-to-face with being when he states that ‘at the outset I hardly care what the other is with respect for me, that is his own business; for me, he is above all the one I am responsible for’. This is a relationship, which, for him, speaks of a sublimely spiritual caption of the divine in the face of the human, for ‘in human faces joins the Infinite’ (1998: 8). The result of this meeting is a deep and profound responsibility for the other, a responsibility so great it extends ‘beyond our intentions’ (Levinas, 1998: 3).

We have looked at the idea of ontology as constitutive of being, as that which essentially expresses and contains everything that is being, which, at its fundamental level, is the interrelatedness of being with being. Here, the self is only completely self when adequately, completely, self-related to the other. For Levinas, this is a relationship of being *as* being that is firmly located in the world rather than an abstraction or theoretical sphere of intellection. He states it this way:

To understand a tool is not to see it, but to know how to use it; to understand our situation in reality is not to define it, but to be in an *affective* state. To understand being is to exist To think is no longer to contemplate, but to be *engaged, merged* with what we think, *launched*—the dramatic event of being-in-the-world (Levinas, 1998: 3, emphasis added).

He presents an exceedingly active conception of being that requires action, in fact, presupposes action in order to affect being. To *be* is not to be without the other, but to *be-for-the-other*, reunited. For Weil, such action means giving attention, being attentive, and attending to the world around us, listening to the cry of injustice. For Levinas (1998: 8) this ineluctable relationship of being-for-being is epitomised in the face of the other: the *visage* that introduces and reveals the interlocutor with the infinite and eternal nature of this being. And this is the expression of the inherent claim to justice. In a sense, it is the finite expression of an infinite claim; the face makes being accessible as a relatable person—‘it is as a neighbour that man is accessible: as a face’ (Levinas, 1998: 9).

At the first moment of this encounter one is met with the responsibility for this person, a responsibility for one’s neighbour, a responsibility born of love for one’s neighbour, a responsibility which ‘takes upon oneself the fate of the other’ (Levinas, 1998: 103). As stated above, the relationship of responsibility is not one of symmetry or reciprocity, for it is a responsibility primarily concerned with love and love is interested, *firstly*, in the beloved. Levinas insists on its asymmetrical nature insofar as my responsibility for him is not restricted to or defined by conditions of equivalence as a price is to its adequate payment. In fact, we are *not* to relate reciprocally as in *an eye for an eye*, but rather ‘*Let him give his cheek to the one who strikes him....*’ Such a degree of responsibility is *not* that of reciprocity for equity is not concerned with responsibility—it is simply *fair*. Responsibility is generally *unfair*, or *non-fair*. We are speaking here of an ethic of responsibility rather than a market economy of relationships. *For if you love those who love you, what reward have you?* One’s relationship to the other is characterised by an infinite degree of obligations! (Levinas, 1998: 103-04). His *fate* is upon me, as my fate as a being is ineluctably bound to his. I am responsible for him *even* when he bothers me, or aggravates me, or persecutes me—even then his interests precede mine (Levinas, 1998: 106).

2.3.2. *Into Infinite Responsibility*

For Levinas, his ethic of responsibility and obligation proceeds from a conception of infinity in the other, yet the other is made accessible through the face. Responsibility is therefore located in a transcendent or infinite characteristic of being, a characteristic that transcends the material and knowable in such a way that the only way to exist is to engage with and be launched into the lives of other beings, and the other's being. Derrida espouses a similar notion of an infinite obligation and responsibility to the other, yet his premise seeks to remove the notion of a transcendent and locate responsibility firmly in the other and only in the other. While Levinas claims that 'in human faces joins the Infinite', Derrida (1995: 50) argues for the human face to join *only* the other's face. And *this* is the possibility for responsibility:

On what condition is responsibility possible? On the condition that the Good no longer be a transcendental objective, a relation between objective things, but the relation to the other; an experience of personal goodness and a movement of intention.

Regardless of whether or not one admits to the Infinite, the effect is similar: responsibility stems from *relation to the other—being* face-to-face—and is bound to a *movement of intention* which takes upon oneself the *fate* of the other, nothing but obligations and responsibility, even when—and perhaps particularly when—he persecutes me. Moreover, both Derrida and Levinas take the reader beyond the 'easy' sphere of calculation and reciprocity ('easy' because it is easily determined and safe because I do not risk [my] being) into the incalculable—first in a description of justice, then of goodness:

On what condition does goodness exist beyond all calculation? On the condition that goodness forget itself, that the movement be a movement of the gift [of responsibility] that renounces itself, hence a movement of infinite love. Only infinite love can renounce itself and, in order to *become finite*, become incarnated in order to love the other, to love the other as a finite other (Derrida, 1995: 50-51).

For both Derrida and Levinas there *is* a sphere of infinite obligation and responsibility to love; and for both infinity is brought into finitude in the other. Levinas individuates

the infinite in the face of the other; Derrida (1995: 40) locates finitude in the reality of death, the ultimate experience of individuation—and hence the *gift* of death—that only an individual can experience for him- or herself. And yet responsibility emerges as the *gift* of infinite love from the individuation of the person, from the possibility—indeed the certainty—of death, taking upon oneself the fate of the other: ‘This gift of infinite love comes from someone and is addressed to someone; responsibility demands irreplaceable singularity. Yet only death or rather the apprehension of death can give this irreplaceability’ (Derrida, 1995: 51).

Thus Derrida locates responsibility in the individual’s irreplaceability insofar as the mortal being has the gift, not only of death to oneself, but of infinite love to the other. This presents a ‘dissymmetry’, Derrida states (1995: 51), of infinite love and goodness on one hand and the irreplaceable mortal person on the other; an infinite (or incalculable) love and responsibility that has as its channel a finite and mortal vessel. This outcome of this dissymmetry, Derrida (1995: 51) insists, is guilt: ‘I have never been and never will be up to the level of this infinite goodness nor up to the immensity of the gift, the frameless immensity that must in general define (*in-define*) a gift as such’. The guilt that Derrida speaks of here is of a different sort than that which Nietzsche laments the human race for internalising, suffering by inflicting guilt upon itself, or within oneself, in the form of ‘bad conscience’; a guilt that is self-accusatory with no immediate benefit to society at large except to perhaps cause one to desire a little more fervently to adhere to the laws whose violation constantly affects internal turmoil. Nietzsche’s lamentable guilt is one of self-inflicted pain as a result of transgression, the commission of a crime (or sin) against a law. For Derrida however, his guilt is not one of *commission*, but of *omission*. It does not say that I have transgressed a law but rather that I have *not* done something, or that what I have done was not enough in terms of my responsibility to the other. Therefore it is *not* guilt determined by law but guilt determined by responsibility:

Before any fault is determined, I am guilty inasmuch as I am responsible. What gives me my singularity, namely, death and finitude, is what makes me unequal to the infinite goodness of the gift that is also the first appeal to responsibility. Guilt is inherent in responsibility because responsibility is always unequal to itself: *one is never responsible enough* (Derrida, 1995: 51, emphasis added).

Finally, Derrida (1995: 52) cites Patočka in his *The Gift of Death*, who states ‘individuality has been related to infinite love and man is an individual because he is guilty, *always* guilty with respect to that love’.

2.4. The Law of Love

2.4.1. Remaining in the Debt of Love

Derrida’s discussion of guilt in terms of responsibility towards an other is poignantly reminiscent of Søren Kierkegaard’s discussion of the similar theme of ‘Our Duty to Remain in the Debt of Love to One Another’ (in *Works of Love*, 1949) as being infinitely guilty in the debt of infinite love. Just as Derrida describes guilt as being a result of us as finite beings infinitely responsible for the other and thus always remaining *never responsible enough*, Kierkegaard speaks of our ‘debt of love to one another’, which in the same way holds our finite mortality infinitely and eternally culpable in the debt of love, the debt *to* love, and the debt *for* love. Thus Derrida’s *gift* (the individuation afforded by death and the infinite responsibility that is its result) and Kierkegaard’s *love* (the *gift of love*) is a debt, the condition of guilt to owe, an obligation to an other which locates his or her interests supremely beyond my own or the interests of the debtor. I must restate that love in this broader discussion of responsibility and obligation, should not be understood as concupiscent love, but love that resounds the Greek *agape*, commonly understood as charity. Yet even ‘charity’ leaves us wanting of a better definition or description of this love; ‘charity’ falls short if it simply evokes the association of saccharine benevolence. It should rather be understood in terms of an infinite and guilty responsibility for the other (Derrida) which takes upon itself the *fate* of the other (Levinas) and attends to the cries of injustice (Weil) while finally emphasising our duty to remain in the debt of love (Kierkegaard).

Kierkegaard (1949: 143) states ‘love is perhaps most correctly described as an infinite debt: so that when love seizes upon a man he feels that he is infinitely in debt’. In this case, the terminology of debtor and creditor should expressly *not* be understood as one of tribute associated with the domain of calculation and market equivalence. Rather, this is a debt that cannot be expiated nor should it be. It is a guilt *to be* responsible which itself cannot and must not be assuaged. It is the very infinite character of love’s responsibility—of love itself—to remain in debt, incalculably so. For the moment it is calculated and appears ‘payable’, then love’s object becomes

itself, and its very nature is lost. Calculation is the ‘turning inward’ of a sum. It focuses upon assessing its deficit in order to prescribe a payment that will return it to nil. Love, however, (as with responsibility and justice) cannot calculate. The moment love calculates—that is, focuses inwardly and upon itself—the *object* of love is wrong, for then it seeks to save itself or remove itself from its debt to the other. Kierkegaard (1949: 147-48) gives an analogy of an arrow shot out from a bow that, as it flies, must always keep its sight trained on its object. At the moment it chooses to stop and assess its progress from the bow or to determine its height above ground or its status in the clouds, it has lost all velocity and will plummet to the earth, having failed dismally in its purpose for being shot out. Thus everything that wishes to be kept alive must remain in its natural element, Kierkegaard argues, using another example of a fish in water. It is the same for love. ‘Love’s natural element is infinity’ (Kierkegaard, 1949: 146). ‘Love cannot calculate,’ Kierkegaard states: ‘if its left hand never gets to know what its right hand does¹ then it is impossible to cast up the accounts, and equally so when the debt is infinite’ (1949: 144). Love’s chief characteristic, then, is infinity: that the person whom love seizes is suddenly and infinitely drawn in debt (Kierkegaard, 1949: 143); moreover, when the lover (or debtor) responds to such infinite debt by giving, infinitely, the beloved ‘comes into infinite debt’ (Kierkegaard, 1949: 143).

2.4.2. *Actions of Infinity*

But lest one fall into the trap of excessively waxing poetic or idealistic about love’s infinite characteristics and our duty to remain in the debt of the infinite responsibility to love, we may consider that love’s greatest characteristic (infinity drawing the beloved into its debt) is itself a characteristic of action. Thus love is an *activity* before it is an idea; it is *responsibility* before it is an ideal, a debt before a payment. As such, the natural outworking of such culpability is action, activity, or attention (Weil). Moreover, for Kierkegaard, remaining in the debt of love means ‘that it *involves action, not a mere expression about love, not a reflective interpretation of love*’ (1949: 152). Action is the movement towards the other, compelled by the debt of love. But love is *chiefly* movement or action—the *reunion* of

¹ In *The Gift of Death* Derrida reflects on this theme from the Gospel of Matthew by discussing the *secret* sphere of infinite responsibility in which our debt to the other remains hidden even—and especially—from us, such that even our greatest works of charity are *meant* to be hidden in secret (1995: 97-103).

the estranged. The very action of motion towards an other being is in fact the chief constitutive feature of love: without it, there would be, indeed *could* be no such thing as love, for then not even the *idea* or *interpretation* or *reflection* on love could exist. Therefore, if love is chiefly and primarily concerned with action—if not an expression *about* love, then an expression *of* love—it stands to reason that even the most contemplative moments of profound concern with love or philosophic engagement with the characteristics of love *must necessarily* result in love's activity *qua* love's expression. Hence Kierkegaard himself, a philosopher of seminal influence in modern philosophic projects (i.e. phenomenology and existentialism), in his most sustained reflections on the works of love, named the 'philosopher's stone' this: the least expression of love is infinitely greater than all sacrifices, and all sacrifices are infinitely less than the least expression of love in reducing the debt!' (1949: 147).

So one must ask 'What are the moderns' sacrifices?' The 'guilty-before-the-law' for the sake of my safety in the community? That one's rights are protected by ensuring that the offender be incarcerated and removed from the possibility of causing injury? Yet if one would continually insist on viewing one's position in society according to the measure of calculation we have absolved ourselves of any obligation and responsibility towards the other, even the offender. And thus our responsibility—indeed our *guilt*, not with regard to law, but to responsibility—and our duty to remain in the *debt* of love is itself sacrificed, along with the one who stands 'guilty before the law', the scapegoat expelled from society and from *being* and into non-being, the incarcerated self, *un-made*, *un-related* and *self-less*. Yet is it not our duty to remain indebted to love, bearing upon oneself the *fate* of the other, an infinite responsibility entirely *selfless* in its giving of itself for the other, without regard for itself for the sake of the other?

Understanding one's own guilt or debt to the other is the element Kierkegaard brings to bear in holding us accountable, holding us culpable, *to remain in the debt of love*: 'If the love in us is not so perfect that we truly *wish* this, then *duty* ['guilt'] will help us to remain in debt' (1949: 145, emphasis added). Modern individualism seeks to rid us of a notion of duty towards the other. Instead, we emerge as champions of our own 'rights', as individuals for whom obligation is placed upon the other for our own sakes—'I demand my rights...from you!' Perhaps what is lamentable in this scenario is that individual responsibility (conventionally understood) has been politicised to the extent that our responsibility as individuals (Weil, Levinas, Derrida)

is lost in the politicisation of responsibility. Our duty and responsibility are handed over to the 'authorities' to protect and secure. In his discussion of our infinite level of obligations to the other, Levinas (1998: 107) invokes a 'formula' from Fyodor Dostoevsky, a formula which, for Levinas, is 'the essence of the human conscience: All men are responsible for one another, and "I more than anyone else"'. The onus of responsibility, then, is on me, first, *more than anyone else*. And my guilt in that responsibility, my debt in that love, is so great and so infinite, that I will infinitely remain guilty, inexpiably the debtor. But 'unto whom?'

2.5. Subjects of Love

2.5.1. 'Who is My Neighbour?'

Kierkegaard addresses this question of the other which derives from the commandment *Thou shalt love thy neighbour as thyself* and proceeds to ask 'Who is my neighbour?' (1949: 15). Concerning 'the neighbour' he states: 'The word is evidently derived from "nearest", so the neighbour is the one who is nearer you than all the others, although not in the preferential sense.... "Neighbour" is itself a multitude, for "neighbour" implies "all men", and yet in another sense one man is enough to enable you to obey the commandment' (1949: 18). A similar point is made by Andrew McKenna in *Violence and Difference* (1992) where he applies Derrida's deconstruction to an example from the Gospels in order to address this same question: who is the other, the absolute other; or, in this case, who is my neighbour?

The story concerns the parable of the Good Samaritan (Luke 10: 25-37) and is particularly pertinent to this study for it not only concerns the *neighbour*, but our interpretation of the law. It begins with a lawyer who approaches Jesus in order to 'test him'. The lawyer said, "Teacher, what shall I do to inherit eternal life?" He [Jesus] said to him, "What is written in the law? What is your reading of it?" (v. 25-26). The text presents a lawyer, a position in society that indicates knowledge and understanding, especially with regards to law, but also presents a more general position of a person concerned with knowledge, the intellectual, the academic, one positioned to question authority. Moreover, the statement that the lawyer was 'testing' Jesus 'clearly suggests that his questioning is not innocent, direct, or straightforward, but strategic; he wishes not so much *to know how* to inherit eternal life as *to know whether* Jesus knows' (McKenna, 1992: 213, emphasis added). This strategy of disingenuous interrogation not for the sake of knowledge as such, but for the sake of

demonstrating if the other possesses the knowledge, is clearly laid forth in the lawyer's question, and is a tendency conspicuous in today's society, McKenna (1992: 213) insists, as 'a properly polemical desire to trip each other up, a desire not to know the truth but to show that others do not know it. This gives us a kind of negative security, perhaps the only kind available today: we are relieved of responsibility...'.

Aware of this strategy, Jesus responds to the lawyer not with an answer but a question. And it was a question concerning the law, directed to the lawyer. It was essentially equivalent to the lawyer's asking Jesus about eternal life: the expert is interrogated concerning the subject in which he is expected to be proficient (McKenna, 1992: 213). "What is written in the law? What is your reading of it?" So he [the lawyer] answered and said, "You shall love the Lord your God with all your heart, with all your soul, with all your strength, and with all your mind', and 'your neighbour as yourself.'" And he said to him, "You have answered rightly; do this and you will live" (v.26-28). Jesus credits the lawyer's response as correct. And here the reader first comes across the inherent action of Jesus' response to the theoretic question and response of the lawyer. The lawyer 'answered rightly', the text says, and Jesus responded with 'do this and you will live'. The initial presentation of eternal life—the subject of the lawyer's first question—is given: *Do this and you will live*. But this 'life' is not a result of the lawyer's correct theoretical answer to his theoretical question. On the contrary, it is in the *doing this* that he lives; it is in the action, not the knowledge, that lies the life that the lawyer's inquiry concerns. This inherent action, if initially indistinct, shall become overt by the end of the parable.

The action of Jesus' initial response also introduces his response to the lawyer's second question, which was more overtly suspect but one that intimates a response of similar action. McKenna (1992: 214) perceives this intimation and states the significance of the approaching question: 'There are questions and there are answers, and it is more than implied by this textual strategy that the answer to these questions is not in an answer, not in a word but in a deed.... There is also the implication that the answers inhabit the question and the questioner...'. Derrida (1995: 115), in a discussion on Nietzsche, makes a similar remark concerning the structure of the question by stating: 'the call of or for the question, and the request that echoes through it, takes us further than the response. The question, the request, and the appeal *must* indeed have begun, since the eve of their awakening, by receiving accreditation from the other: by being believed'. It is precisely this which Jesus

appeals to: that *the answers inhabit the question and the questioner* and have *already been believed*, yet which also provokes the question.

‘But he [the lawyer] wanting to justify himself, said to Jesus, “And who is my neighbour?” Then Jesus answered and said: “A certain man went down from Jerusalem to Jericho, and fell among thieves, who stripped him of his clothing, wounded him, and departed, leaving him half dead. Now by chance a certain priest came down that road. And when he saw him, he passed by on the other side. Likewise a Levite, when he arrived at the place, came and looked, and passed by on the other side” (v. 29-32). McKenna (1992: 215) emphasises the familiarity that this parable would have provided those listening, for it speaks of a familiar route—‘from Jerusalem to Jericho’—a route taken by a familiar man, most probably a Jew, just like those who were gathered around and listening to the parable. It is this *performative* dimension of Scripture, McKenna (1992: 215) states, that invites the listener into the parable to participate in the parable: ‘The man travelling is one of them—that is, one of us, one of our own as we listen to the story. He is also one of us as we interrogate the law in its relation to life’ (McKenna, 1992: 215). And what is perhaps least inviting and more disconcerting is when the invitation to participate means an invitation to participate *as the victim*. It says ‘View the story through the eyes of the *victim*, the one bloodied and wounded, the one robbed, beaten, and left for dead in a ditch.’

‘But a certain Samaritan, as he journeyed, came where he was....’ The next instant in this parable involves the introduction of a Samaritan, a remarkable introduction, remarkable concerning Jesus’ listeners, for the Samaritan is least expected of all to enter the scene. McKenna (1992: 217) explains the position of Samaritans in Jewish society at that time: ‘The Samaritan is not just other than the Jew, like a Roman or a Greek, but the Jew’s other self, the rival brother in the worship of Yahweh. He is a social and religious outcast, not just the enemy but, on the margin of Israel, its enemy brother, its rival double’. The Samaritan was not despised because he was too *different* but because he was too *similar*. He was considered abject and was rejected because of his too great similarity. His rejection was a struggle for difference; he was ‘the stuff that scapegoats are made of’ (McKenna, 1992: 217). Yet, contrary to expectations, the text continues thus: ‘And when he saw him, he had compassion. So he went to him and bandaged his wounds, pouring on oil and wine; and he set him on his own animal, brought him to an inn, and took care of him. On the

next day, when he departed, he took out two denarii, gave them to the innkeeper, and said to him, "Take care of him; and whatever more you spend, when I come again, I will repay you" (v. 33-35). Not only is the presence of the Samaritan remarkable, but his *approach* to the injured creates an entirely new crisis of value contrasted with the *passing by* of the priests and Levite. It symmetrically opposes their crossing by his approaching: *he went to him* and did *not* pass by, as did the priest and Levite who were the perhaps the most likely to be chivalrous. After all, they were Jews, as was the injured man. It was the Samaritan who was abject, yet who approached him. Further, this contrasting movement locates the victim in the centre of the text: both actions are related to the victim, and both are opposite, placing the victim as central. 'The victim, in a word,' McKenna (1992: 218) states, 'serves to deconstruct the differences informing the culture of Jesus' hearers'.

This structural parallel continues with the description of the Samaritan's benevolence, described in precise equivalence to the malevolence of the robbers: where the thieves strip, wound, and leave him half dead, the Samaritan bandaged his wounds, poured on oil and wine, and brought him to an inn. Three beneficent for three maleficent acts. McKenna argues that these symmetrical features are significant to our understanding of the text, but 'none of them so much as the radical *asymmetry* affecting the actions of the Samaritan' (1992: 219, emphasis added). Great care is given to describing the care the Samaritan gives to the injured man. His actions are meticulously accounted for and contrasted with the *ill-action* of the thieves and the *in-action* of the priest and Levite. Moreover, the Samaritan's benevolence *must* be so carefully accounted for to emphasis it to the listener. In the modern vernacular, the Samaritan is always associated with 'the Good Samaritan'—the descriptive is inseparable from the described. Yet at the time Jesus told this story, the exact opposite was true: the Samaritan was not considered benevolent but abhorrent, despised, and abject. Yet the Samaritan had compassion. And this is precisely the purpose of the parable: to deconstruct the cultural customs and taboos, the proprieties of the day, in order to place the interpretation of the law upon that of the victim—the one listening to the story and participating in the story as the victim (McKenna, 1992: 219).

Then Jesus said to the lawyer, "So which of these three do you think was neighbour to him who fell among the thieves?" And he said, "He who showed mercy on him." Then Jesus said to him, "Go and do likewise" (v. 36-37). Again the role is reversed, for Jesus responds to the lawyer, at the end of this story, with another

question; ‘which *do you think* was the neighbour?’ The onus of interpretation—the interpretation of the law of ‘*love your neighbour*’—is placed on the lawyer, the listener, in short, on us, the injured victims lying in the ditch. And the lawyer’s response is the ultimate goal of this entire discussion. The neighbour was *the one who showed mercy*. As mentioned, the lawyer’s initial question was theoretical—it concerned the *object* of neighbourly love: who should receive my love as my neighbour? The answer that was given reversed the initial theoretical premise into a practical response—the neighbour was the one who *showed mercy* and was therefore the *subject* of mercy, of love (McKenna, 1992: 219). Furthermore, the lawyer’s response did not *name* the Samaritan, but responded with the pronoun ‘he’. This leaves open the position of the neighbour, the subject of love, to *anyone*: ‘The neighbour is not a Samaritan but anyone, including one least expected, *especially* one least expected’ (McKenna, 1992: 220, emphasis added).

This story that Jesus told was fundamentally one that self-reflexively turns neighbourly love from the *object* to the *subject* and invokes action instead of theory. Kierkegaard (1949: 19), reflecting on this same passage, states it this way: ‘Christ does not talk about knowing one’s neighbour, but about one’s self being a neighbour, about proving one’s self a neighbour, as the Samaritan proved himself one by his compassion. For by his compassion he did not prove that the man attacked was his neighbour, but that he was the neighbour of the one who was assaulted’. Moreover, our *interpretation* of the law—the initial compulsion for the lawyer’s inquiry—also was turned from simply a theoretic inquisition to a practical interpretation...*from the perspective of the victim*. ‘The strategy of the parable’, McKenna (1992: 221) argues, ‘is to identify the law with the victim, with the victim’s perspective, to identify the law as interpretation from the perspective of the victim’.

2.5.2. ‘*Absolute Hospitality*’

Within this discussion of who is one’s neighbour, Derrida introduces a similar theme with regards to hospitality in his discussion of ‘the *absolute other*’ in *On Hospitality (De l’Hospitalité, 1997)*. Richard Kearney (2000) discusses Derrida’s position toward the ‘absolute other’ in ‘Aliens and Others: Between Girard and Derrida’, which contrasts Girard’s theory of the scapegoat (claiming the need for judgment) with Derrida’s invocation of an absolute other, the undecideably other. Here, rather than contrast Girard with Derrida, I shall contrast the *conception* of

decideability, implicit in Levinas' conception of justice, with that of undecidability, explicit in Derrida's conception of justice with regards to 'aliens and others'.

Derrida distinguishes between the *right to hospitality* and *hospitality as a right*. The latter requires judgment of whom to allow in, of whom to include, thus necessarily excluding the other—the alien. Kearney (2000: 258-59) introduces Derrida's discussion of hospitality with regards to aliens and others by describing the political organization of the world:

The world belongs to everyone, yes, but within the borders of nation-states it belongs to some *more* than to others. Granted, some form of immigration/emigration laws are inevitable. That's the law and Derrida accepts this; but he goes on to argue that there's something beyond the law. Namely, justice. And justice demands extra, perhaps something that is ultimately impossible: unconditional hospitality to the alien.

This is justice as the impossible and hospitality as the unconditional. Along this line of decideability Derrida distinguishes the *forms* of hospitality: according to law, hospitality affords the right of decision to the host. The process of decision requires the guest (alien or other) to offer his or her name, thus symbolically concretising them into a kind of contract of agreement and reciprocity. From this basis the host decides on whether to include his guest, thereby becoming an other, or to exclude his guest, remaining an alien.

There can be no sovereignty in the classic sense without the sovereignty of the self in its own home, but since there is no hospitality with finitude, sovereignty can only operate by filtering, choosing and therefore excluding and doing violence. A certain injustice...is present from the outset, at the very threshold of the right to hospitality. This collusion between the violence of power or the force of law (*Gewalt*) on the one hand, and hospitality on the other, seems to be radically integral to the very inscription of hospitality as a right (Derrida in Kearney, 2000: 259).

In this way, hospitality as a right presents what Derrida has termed the 'aporia of the alien-other': 'the outsider (*hostis*) received as host or as enemy. Hospitality, hostility, *hostipitality*' (in Kearney, 2000: 259-60). Thus the law of hospitality, or hospitality according to law, is such that allows or demands judgment and calculation.

But Derrida proceeds to another degree of hospitality as justice, as justice beyond calculation or recognition. And in the context of hospitality—now a *just*

hospitality—justice takes with it hospitality, the host along with the hosted, into the realm of the incalculable. This is *absolute* hospitality, which has its door open to the absolute other, undefined and unnamed. It is a hospitality that ultimately makes subject the host unto the hosted, the absolute other. Where, under legal hospitality, or hospitality as a right, others were those who were named and accepted by the host into the contractual and reciprocal relationship set forth by the host; the strangers or aliens were similarly named and identified, yet excluded—by the right of the host—from being hosted. Absolute hospitality—that is *just* hospitality—Derrida (in Kearney, 2000: 260) argues, ‘requires that I open my home and that I give not only to the stranger (furnished with a family name and the social status of a stranger etc) but to the absolute other, unknown and anonymous; and that I have place (*donne lieu*), let come, let arrive, let him take his place in the place that I offer him, without demanding that he give his name or enter some reciprocal pact’.

Kearney (2000: 261) concludes his article by arguing for the role of both Girard and Derrida, insisting that the presence of judgement must exist concomitantly to an absolute hospitality or, as he states, a ‘logic of undecideability’. He argues that the need for this arises from the necessary delineation between absolutes or the acknowledgement of difference, between both ‘good’ and ‘bad’ (his is a differing premise of judgment than Levinas which excludes according to need; his is an exclusion according to ‘morality’ or ‘goodness’), and cites examples that we should be able to decide between: between ‘Jesus and Jim Jones, between Saint Francis and Stalin, between Melena and Mengele, between Siddartha and the Marquis de Sade’ (Kearney, 2000: 261). But perhaps this is not the location of judgment. Certainly one may decide on the difference between Jesus and Jim Jones or Saint Francis and Stalin—their difference is quite obvious. The question arises: ‘does our judgment of them determine how we are to respond to them, how we are to host them, *if* we are to host them?’ Or would not Jesus sit down with Jim Jones and Saint Francis with Stalin? If there is a difference between these pairs of characters, is not the *fundamental* difference that *if there be any virtue* in one of them it is precisely that they *would* sit down with the other, that they would indeed host the other, the *absolute other*, and be responsible for the other?

2.5.3. The 'Hour of Justice'

As argued above, Levinas describes being-for-being as a *fundamental* 'responsibility'. 'From the *start*, the encounter with the Other is my responsibility for him' (Levinas, 1998: 103, emphasis added). Thus at the very commencement not only of relationship—or simply the encounter—with the other, we are bound to be responsible 'for him' by taking on the *fate* of the other. At this initial moment there is 'nothing but obligations!', providing there is only one other (Levinas, 1998: 104). However, as is obviously apparent, our world is not shared between only two people. And it is the presence of a 'third party', Levinas states, that introduces the concern for justice which takes precedence over the burden of the fate of the other:

I must judge, where before I was to assume responsibilities. Here is the birth of the theoretical; here the concern for justice is born, which is the basis of the theoretical. But it is always starting out from the Face, from the responsibility of the other that justice appears, which calls for judgement and comparison, a comparison of what is in principle incomparable, for every being is unique; every other is unique (1998: 104).

Justice thus appears from the presence of a 'third party' which exhorts one to judge or to compare: 'where the right of the other person—but obtained only after investigation and judgment—is imposed before that of the third' (Levinas, 1998: 198). It has as its basis responsibility, the infinite responsibility and obligation that exist prior to the third other or between only two: an other and the other as 'interlocutor' (Levinas, 1998: 104). Yet such a 'call' is paradoxical in nature, as Levinas states, for it calls one to 'compare the incomparable', the incomparability of beings, each *unique* and each their *own* face. Derrida (1992: 16) similarly argues for the incalculability of justice and the paradoxical demand that 'it *requires* us to calculate with the incalculable' (emphasis added). Therefore justice emerges *from the responsibility for* the other, and the presence of the 'third' other.

We have spoken of responsibility that is infinitely guilty and always in debt. For Levinas, such infinite responsibility must judge and compare; moreover, *because* of such infinite responsibility one must now judge and compare. This is 'The *hour of justice*,' he states, 'of the comparison between incomparables who are grouped by human species and genus' (1998: 229, emphasis added). It may at first appear that Levinas' conception of justice in this manner essentially placates one from the above discussion of *never being guilty enough*. This would be an easy escape. The formula

remains, however—*All men are responsible for one another, and I more than anyone else*—it is not alleviated, appeased, or assuaged; it is neither expiated nor sated by the exhortation to judge. Weil's concept of 'reading' and paying 'attention to' harm and situations of injustice may aid our understanding for they are constitutive of Weil's *conception of justice* and coterminous to Levinas' *appeal for justice*. Our judgement and comparison is called on to *assess the need* of the injured, and much less the guilt of the offender. 'Guilty before the law' is *not* the basis from whence justice is called forth. On the contrary, the presence of infinite responsibility demands that, since we are each responsible for each (and 'I more than anyone else'), our *attention*—that movement of our debt to love—be paid where the price is highest, where the need is greatest. *Those who are well have no need of a physician, but those who are sick*' (Matthew 9:12). Thus *from* responsibility and love *comes* justice. This presents a linear progression that may itself be problematic, as Levinas (1998: 107) states: 'justice itself is born of charity. They can seem alien when they are presented as successive stages; in reality, they are inseparable and simultaneous, unless one is on a desert island, without humanity, without a third'.

Recalling Tillich (1954: 71), the interrelatedness of justice and love are emphasised by his statement, '*love is the ultimate principle of justice*. Love reunites; justice preserves what is to be united. It is the *form* in which and through which love *performs* its work' (emphasis added). Thus there is a certain linearity about the relationship between love and justice, yet they do not proceed at the exclusion of the other. 'Justice comes from love', Levinas (1998: 108) states, but 'Love must always watch over justice'. In fact, their inseparability is such that they become aberrations if experienced in isolation from the other: 'charity is impossible without justice, and...justice is warped without charity' (Levinas, 1998: 121). Both love and justice is to the other the *sine qua non*, the equipoise of an otherwise impossible or pervertible attribute.

2.6. Summary

It is divine justice which annihilates while it interprets the law from the perspective of the victim, with the victim and as the victim. It is an *ethic of action* toward the other, paying *attention* to the cry of injustice, and being *absolutely hospitable*, even to the least expected, *especially* the least expected. Such an interpretation of law asks only that it be compelled by the spirit of justice, as McKenna (1992: 221) states: 'It asks

only that we listen to what we say, that we take that word (*sub-specere*) literally, telling us that to interpret the law, to know the truth, we have to look around, but especially look from under, as from underfoot, from where the downtrodden are’.

In the next chapter I shall look at the approach to justice as reconciliation taken by South Africa’s Truth and Reconciliation Commission. It is a context set after apartheid’s legislated divisions of a society that sought peace and justice towards the establishment of a just democratic culture. I shall argue that justice as reconciliation is requisite to the establishment of a democratic order and therefore historically and conceptually prior to the possibility of a retributive legal system. In this way, restorative justice has greater *transformative* power in negotiating the transition from conflict to peacebuilding in emerging democracies.

Chapter III

Transition and Transformation: From Segregation to Reconciliation

*He has shown you, O man, what is good;
And what does the Lord require of you
But to do justly,
To love mercy,
And to walk humbly with your God?*

Micah 6: 8

3.1. Introduction

Thus far this thesis has discussed the violence within law and retribution along with a deconstruction of the relationship between law and justice. I then discussed justice in terms of an ethic of responsibility and obligation towards the other. In this final chapter I would like to use these conceptual distinctions to analyse the discourse surrounding South Africa's transition to democracy (1990-1994) and its recovery from apartheid through the Truth and Reconciliation Commission. It is my hope that by discussing the divisive characteristics of apartheid we may come to understand the role that the Truth and Reconciliation Commission played not only in *transition* but in *transformation* from an old order and into a new.

3.2. Transition

3.2.1. Apartheid

The twentieth century in South Africa could be characterised as one of increased separation between people. The separation was imposed by an imported culture, a white European culture, which had already developed a discourse of colonialism and separation in which the idea of apartheid could find purchase. The term 'apartheid' is an Afrikaans name that replaced the English word 'segregate' and was coined in 1917 by Jan Smuts (McClintock and Nixon, 1985: 340-41). However, the word apartheid did not reach international prominence until the Nationalist party came to power in 1948. 'From 1948 onward', state McClintock and Nixon, 'the official policy of apartheid ensured in a doctrinaire, unapologetic fashion that the old colonial racist edifice was buttressed with more methodological legislation' (1985: 341). Derrida (1985a: 330) describes the word apartheid as becoming the international



'watchword' for racism, specifically institutionalised racism. The word has never been translated, Derrida notes, as though other languages and tongues have been fearful of a kind of contagion that may be spread by its translation, by a language's incorporation of apartheid's meaning into its own lexicon. 'There's no racism', he states, without a language', and continues:

The point is not that acts of racial violence are only words but rather that they have to have a word. Even though it offers the excuse of blood, colour, birth...racism always betrays the perversion of a man, the 'talking animal'. It institutes, declares, writes, inscribes, prescribes. A system of marks, it outlines space in order to assign forced residence or to close off borders. It does not discern, it discriminates (Derrida, 1985a: 331).

The term apartheid experienced dynamic development under South Africa's apartheid regime along a path of 'political correctness' that made the idea of apartheid appear more palatable without changing the insidious nature of what apartheid represented. This point is important to note, that while the word apartheid changed form, it still represented the same thing—separation. And the separation did not change.

3.2.1. The Lexis of Segregation

The Bantustan policy cemented apartheid along artificial lines of citizenship. The Land Acts of 1913 and 1936 allocated black people to thirteen percent of the country's most arid land while white people—sixteen percent of the population—were given eighty-seven percent of the most fertile land (McClintock and Nixon, 1985: 348). After 1948 Prime Minister Verwoerd explained away the word by invoking the patronising concept of 'separate development', an 'ingeniously bipartisan phrase', state McClintock and Nixon (1985: 342), that 'expresses in miniature the acute schizophrenia which marked both the ideology and practice of South African racism under Verwoerd'.

The 1952 Orweillian Natives Act instituted a pass system where black people were required to carry passes that allowed them to be in white urban areas for a given period of time and granted forced removals from these areas to their Bantustans (McClintock and Nixon, 1985: 350). Then followed forced citizenship of the Bantustans, designed to deprive blacks of the privileges and rights of (white) South African citizens while availing them as labourers to the white South African citizens.

Thus South Africa was divided into nations of separate citizenship, as McClintock and Nixon state:

In this way, the Bantustan system, constantly refined and strengthened, has buttressed the capitalist economy while simultaneously serving the ideological purpose of justifying Nationalist claims that their policy is no longer one of racial discrimination but of safeguarding the sovereignty of distinct 'nations'(1985: 351).

His policy of 'separate development' was legislated by the Promotion of Bantu Self-Government Act of 1959 and continued in the service of apartheid's judicial scheme of dividing South Africa into a collage of separate nations. Voster succeeded Verwoerd and used this policy to deepen apartheid's divisions through forced removals of black people who were 'illegally' found in white areas. Moreover, the Bantustan system incorporated a new 'language of nationalities rather than of colour' (McClintock and Nixon, 1985: 343) that served to disguise the inherent racism of apartheid in a mask of celebrated 'multinationalism'. This bizarre attempt at masquerading apartheid as less racist or more inclusive than it truly was reached a climax under Botha who transformed the language of multinationalism to 'democratic federalism' (McClintock and Nixon, 1985: 344). His was a 'language of achievement', McClintock and Nixon (1985: 344) note, which sought international legitimacy while belying the sinister divisions of apartheid's discordant stratagems.

As stated earlier, one's consideration of the vicissitudes of the word apartheid should not distract from the reality of apartheid, the reality of institutionalised segregation in South Africa. In response to McClintock and Nixon's article (1985) in which they expound on the dynamic history of the word apartheid, Derrida emphasises the need to not dismiss the word for the sake of its history (1985b: 358). He states that he is repulsed by the word (1985a: 340), but emphasises that he is not repulsed by the *word* apartheid but by the 'thing that history has now linked to the word, which is why I propose', he states, 'keeping the word so that the history will not be forgotten. Don't separate word and history!' (1985b: 358). Derrida essentially castigates the authors for extricating the word apartheid from its nefarious history under a guise of acceptable terminology while its engrained edifices of segregation remained unchanged. In their exposition of apartheid's history, Derrida (1985b: 361) criticises them for attempting to put the word 'apartheid in quarantine!', and

continues: 'I, on the contrary, insist that we remember this: whether or not the term is pronounced by South African officials, apartheid remains the *effective* watchword of power in South Africa'. He continues,

The South Africans in power wanted to keep the concept and the reality while effacing the word, an evil word, *their* word. They have managed to do so in *their* official discourse, that's all. Everywhere else in the world, and first of all among black South Africans, people have continued to think that the word was indissolubly—and legitimately—welded to the concept and to the reality (Derrida, 1985b: 362).

What is lamentable in South Africa's experience with institutionalised racism is not a single *word* that came to represent this sustained human catastrophe, but rather the catastrophe itself, the catastrophe of sustained separation and discrimination that accorded rights to whom it deemed worthy and rescinded rights to whom it deemed un-worthy. Apartheid meant separation, and regardless of the plethora of terms that the Nationalist party experimented with *the reality of separation went unchanged*. Thus the white South African state institutionalised and legalised an elaborate system of segregation and separation that fostered a culture of separation and a fallacious distribution of basic human rights according to an unjust scale of difference determined by innocuously banal criteria. The legal apparatus of separation that girded the Nationalist regime established apartheid, established a *culture* of apartheid, of 'apart-hate'.

3.2.3. *The Crisis*

The struggle against the pariah institution reached its most brutal period during the 1980s in which it became increasingly clear that the apartheid apparatus was politically and economically unsustainable. This period saw an eruption in township violence as the apartheid state exacerbated factions in the townships and surreptitiously promulgated violence along these lines. Bailie (1995: 56) states that during this period 'the nature of social chaos underwent a change' into what had generally become acknowledged as 'a crisis of ungovernability' (in Bailie, 1995: 56). Vigilantism grew out of the desire for order and justice amid a collapse of the same and a state who, instead of quelling, often aided in the perpetuation of anarchic

violence.¹ This was anarchy as a cycle of violence perpetuated by ‘the absence of legitimate law enforcement, a problem inherent in the absence of legitimate government’ (Berkeley, 2001: 154). Citing Berkeley’s investigation of the third force, he quotes a South African police detective, who states:

People are looking for justice. They turn to political parties, or to armed wing, or to returned political exiles who can achieve justice for them. Political parties have become justice organisations for millions of people because there is a big vacuum that the police are either unable or unwilling to fill (2001: 154).

People are looking for justice.... By the 1980s apartheid had so fragmented South Africa that its townships slipped further into a malaise of violence that had fragmented even the struggle against apartheid. But *the people were looking for justice*. It became evermore clear that as the nation was divided by apartheid its only hope for progressing beyond the edifices of sustained judicial segregation was to look towards a paradigm that could heal the edifices of segregation and reconcile the divisions that apartheid had so divisively constructed.

3.3. The Truth and Reconciliation Commission

3.3.1. Reconciliation

By 1994 the need to heal the wounds left by apartheid and to establish a just legal order seemed imperative. But the form of justice that was sought was one of restoration and reconciliation that would ideally strive to transcend the divisions of the past rather than avenge the wrongs that were committed. It was a conception of justice that sought to restore people across divisions rather than avenge the specific crimes of apartheid. One may even say that the chosen route of recovery from apartheid was a blatant choice *not* to imitate the divisive patterns of the past but to encourage a new culture of reconciliation to bridge the schisms of a culture of ‘aparthe-hate’. The postscript of the Interim Constitution titled ‘National Unity and Reconciliation’ demonstrates this point through its stated goals as follows:

¹ Its use of a ‘third force’ has often sparked controversy concerning the state’s complicity with or involvement in township violence, but evidence has increasingly supported the existence of such a renegade force propped up, albeit unofficially, by the apartheid state.

The pursuit of national unity, the well-being of all South African citizens and peace require reconciliation between the people of South Africa and the reconstruction of society. The adoption of this Constitution lays the secure foundation for the people of South Africa to transcend the divisions and strife of the past, which generated gross violations of human rights, the transgressions of humanitarian principles in violent conflicts and a legacy of hatred, fear, guilt and revenge. These can now be addressed on the basis that there is a need for understanding but not for revenge, a need for reparation but not for retaliation, a need for *ubuntu* but not for victimisation (in Wilson, 2001: 99).

Therefore the objective was to heal the wounds of the past in order to lay the foundation for a reconciliatory future rather than one that languishes in the offence of the past. It sought to *lay the secure foundation...to transcend the divisions of strife of the past*. This *transcendence* was to come in the form of a new legal order considered just by the majority of the people in South Africa.

Perhaps the most remarkable aspect of South Africa's transition comes in the next sentence of the postscript, which states how the country hoped to accomplish this: according to the *need for understanding but not for revenge, a need for reparation but not for retaliation, a need for ubuntu but not for victimisation*. The forgers of the Interim Constitution recognised the need for reconciliation in establishing peace, and that not of revenge, retaliation, or victimisation, particularly on the heels of *a legacy of hatred, fear, guilt and revenge*. This is not to say that the modes of revenge and retaliation as punitive measures were rejected outright and for all circumstances, but for the sake of recovering from apartheid and constructing a legal order able to transcend past strife and division. In 1995 the 'National Unity and Reconciliation Act' was passed which established the Truth and Reconciliation Commission as the institution which would promote reconciliation in the nation's recovery from apartheid (Wilson, 2001: 8).

3.3.2. Restorative Justice

Accordingly, the Truth and Reconciliation Commission (henceforth 'TRC') was established upon an epistemology of justice that sought the goals of reconciliation rather than retribution. Restorative justice was chosen essentially as the *modus operandi* of reconciliation according to an understanding of justice as reconciliation rather than revenge or retribution. Former Archbishop and Chairman of the TRC Desmond Tutu describes restorative justice as *another kind of justice*, one in which

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 has injured by his offence (1999: 54-55).

Furthermore, the understanding of restorative justice as it was put forward by the TRC is important to an analysis of its procedure towards what the TRC perceived to be justice. The postamble of the Interim Constitution establishes 'a commitment that included the strengthening of the restorative dimensions of justice' (Van de Vijver 2000:136).

The TRC Report defines restorative justice as a process that 1) redefines crime as a shift from an offence against the state to an injury towards another human being; 2) is based on reparation rather than retribution in order to *heal* and *restore* all the parties involved, including victims, offenders, families, and communities; 3) it encourages all the parties involved in the crime to be involved in the process of restorative justice rather than place full responsibility in state judicial proceedings; and finally 4) it supports a criminal justice system that holds offenders accountable in overcoming injustice (Van de Vijver, 2000: 136, emphasis added). This description was consistent with John de Gruchy's understanding of restorative justice as 'an attempt to recover certain neglected dimensions [of the established criminal justice system] that make for a more complete understanding of justice' (2002: 202). In the framework of restorative justice, Howard Zehr (1990: 182) also offers an understanding of crime—the fundamental starting point of a retributive understanding of justice—as the following: 'Crime then is at its core a violation of a person by another person.... It is a violation of the just relationship that should exist between individuals'. As such, a restorative lens views the individual people involved in the crime and recognises the interpersonal dimensions of crime. Crime is to Zehr ultimately 'a violation of people and relationships' (1990: 184). The goals of restorative justice then are essentially two-fold: restitution and reconciliation. It seeks restitution and healing for the victims of crime, which includes a sense of recovery from the past and hope for the future. Secondly, restorative justice seeks the reconciliation, or healing, of relationships between the victim and the offender (Zehr, 1990: 186-187). As complete reconciliation may seem unrealistic in many cases, reconciliation should be viewed rather as a process on a continuum away from

hostility in what may be better described as *transformative* justice (Zehr, 1990: 190), which requires a complete break and shift away from the past in order to forbid the crime's recurrence.

3.3.3. Restorative 'Values' and 'Processes'

An understanding of the *ontological* assumptions of restorative justice (discussed in chapter II) is essential for differentiating it from a retributive model of justice (presented in chapter I). Moreover, this understanding is perhaps even more important for understanding the *epistemological* assumptions of restorative justice, which would no doubt shape our critique of justice within the context of the TRC. For if crime is understood as an injury to another person, and injustice as the loss of just relationship between people, then justice must be defined in light of these understandings. 'If crime is injury,' Zehr states, 'justice will repair injuries and promote healing' and therefore '*true* justice would aim to provide a context in which the process [of healing] can begin' (1990: 186).

One may also understand the ontological and epistemological dimensions of restorative justice in terms of values and processes respectively, as put forth by Heather Strang and John Braithwaite (2001). They divide the concept of restorative justice into two primary segments: a process and a values conception. As a process, restorative justice brings together all the *stakeholders* that have been affected by some harm, such as victims and their families as well as offenders and their families, communities, and state agents, such as police etc. (2001: 1). Restorative justice as a values conception holds *healing* as central: 'The idea is that the value of healing is the key because the crucial dynamic to foster is healing that begets healing' (Strang and Braithwaite, 2001: 1-2). This fundamental values conception is a primary distinction of restorative from punitive measures of justice for it is not based on reciprocity and equivalence, but on fostering healing—and that not just the healing of a specific harm but a healing that, as they state, *begets* healing, that promotes continued healing, that establishes, essentially, a culture or value of healing. Moreover, the process of healing is most effective when restorative justice is conceived and implemented according to both its process and values conception (Strang and Braithwaite, 2001: 2). That is, effective healing requires the process promulgated by restorative justice (incorporating all stakeholders) as well as the values conception which restorative justice retains (in which a positive outcome is the ultimate goal).

In conjunction with the characteristics of restorative justice put forth by the TRC, Strang and Braithwaite contribute another six principles that may aid our understanding of restorative justice: 1) to foster awareness; 2) to avoid scolding or lecturing; 3) to actively involve offenders; 4) to accept ambiguity within the process; 5) to separate the offence from the offender; and finally 6) to view ‘every instance of wrong-doing and conflict as an opportunity for learning. And we [Strang and Braithwaite] might add, an opportunity for grace’ (2001: 12). This feature is perhaps one of the greatest virtues of the restorative values of such a conception of justice as Strang and Braithwaite iterate, ‘The bigger the wrong, the deeper the conflict, the better the prospect for...collective and emotional transformation to motivate real justice, including social justice’ (2001: 13). A restorative understanding of justice perceives the greatest circumstance of evil as an opportunity for the greatest triumph of grace over evil, effecting *real* justice towards both the offender and the offended; that justice, in its greatest and most powerful form—nothing less than reconciliation itself—may be brought to bear in the most unlikely of circumstances.

Over the past few decades restorative justice has increasingly come into the spotlight in academic and legal debates concerning the legal mechanisms employed by both state and civil societies in sustaining justice. According to Strang and Braithwaite, this is largely because ‘We live in an era of disillusionment about justice and the state’ (2001: 2). Recalling the substance of the first chapter and specifically Habermas’ critique of Rawls, the state’s ability to invoke a belief in the transcendence of law towards a sustained just legal order amid societies of increased plurality is increasingly being called into question. This is a matter that raises further questions concerning popular belief in our political institutions to effectively ‘rule’ over the general citizens, questions beyond the scope of this essay yet relevant to our considerations of justice and the imperative pursuit of a more reconciliatory approach to order in society. That political and legal institutions are being called into account over justice (or indeed *by* justice and the need *for* justice) should compel justice as a topic, as an ideal, as a promise of something always *yet to come* towards people to consider more fully the ethical imperative of justice that exists anterior to the foundation of law, an ethical imperative that compels our relationships to one another—from one to an other—and between societies, political institutions and states.

3.3.4. Restorative Punishment

An aspect of this discussion that is important to note is that I do not wish to necessarily draw a definitive distinction between restorative and punitive or retributive forms of justice, although those distinctions have been made and are important. My desire is not to cast one out for the sake of the other and to suggest that punitive justice should be rejected outright for the complete embrace of restorative processes and values. Rather, the debate surrounding the implementation of justice procedures, such as restorative or retributive measures, should be concerned with the values of each understanding of justice and raise questions as to the nature of their potential compatibility. Kathleen Daly (2000: 33-34) addresses this very problem, where restorative and retributive measures of justice have been, she states, unnecessarily and wrongly polarised. She argues that even within restorative values there remains a necessary role for punishment. However, she argues that the issue at stake is our understanding and definition of punishment itself, that 'restorative justice processes and sanctions should be seen as "alternative punishments" rather than "alternatives to punishment"' (2000: 34).

A starting point for the commonalities of restorative and retributive justice is with that of responsibility: 'restorative justice practices embrace retributive justice assumptions of individual culpability and they also include a wider notion of community (or, at times, familial) responsibility for those acts' (Daly, 2000: 35). Moreover, not only the consideration of the meaning or definition of punishment is important to this discussion, but the *purpose* of punishment. Daly (2000: 39) states that popular understandings of punishment are 'the "intentional" or "deliberate imposition of pain" on offenders'. Such an idea would most commonly be equated with incarceration in prison. On the other hand, she proposes an alternative understanding of punishment: 'Another way to define punishment practices is anything that is unpleasant, a burden, or an imposition of some sort on an offender' (Daly, 2000: 39). This broader definition of punishment enables the virtue of punishment—the clear statement of *wrong* in harm—to not be excluded from restorative justice without being directly punitive in meting out an equal payment according to the harm done. Thus even within this form of punishment lies the promise for restoration and reconciliation.

If we consider Daly's broader understanding of punishment in view of the TRC, it would be consistent with understanding the Commission's commitment to

truth-telling as a method of *restorative* punishment. It was *restorative* insofar as it required the confession of wrong by a perpetrator, that the offence was political and not personal, and that the whole truth of their particular story was told in order to receive amnesty. Thus the truth of the injustice perpetrated under apartheid was brought to light, publicly and individually. It may be described as a restorative process of punishment because not only were offenders in many ways restored (or at least reconciled) to victims through the process of telling the truth, but the offenders were in many ways reconciled to themselves by stating the truth and confessing that it was *wrong*. Moreover, it may also be understood as restorative *punishment* insofar as telling the truth required a public confession of wrongdoing, bearing with it a degree of shame and (hopefully) remorse, certainly *unpleasant* burdens carried by the offender yet redemptive in their ability to, through confession (punishment), reconcile (restore) themselves to the truth, the wrong of the offence, and the person wronged by their offence.

3.4. Locating Just Transformation

3.4.1. Ubuntu

As much as we have explored the tenets of restorative justice as a process and values conception, particularly in view of the discussion on justice ontologically in the previous chapter, I shall now like to discuss the cultural context in which restorative justice was employed by the TRC, a context which provided purchase for the values of restorative justice. As noted above, the postscript of the Interim Constitution articulated ‘the need for *ubuntu* but not for victimisation’. This was a statement that invoked an ‘ethic of otherness’ beyond a legal system of retribution. Reconciliation was conceived as a greater concern than retaliation; as such, the relationships between people who had been estranged by the nefarious political machine that was apartheid were the people on which the construction of the future would revolve. And thus *ubuntu* was invoked as an appeal to the ‘other’, even an other that may have at the time of greatest offence appeared face-less (to recall Levinas’ appeal), yet remained ineluctably bound to the humanity of their victim.

The concept of *ubuntu* may be roughly translated as ‘humanness’ and can be located within a discourse of African humanism that is quite contrary to a Western vision of individualism. *Ubuntu* ‘embodies a different ethic of “being there for each other”...[and] does not require specific contexts for implementation’ (Chubb and Van

Dijk 2001: 218). It understands the self as a part of a greater whole that is the community. It states that *I am because we are* (Mbiti, 1969: 2, 108) rather than the Western axiom *I think therefore I am*, and is therefore inextricably bound to a shared identity with others that cannot stand in isolation. Archbishop Tutu further elaborates on the communal identity of the individual by articulating an African *Weltanschauung* in which ‘a person is not basically an independent, solitary entity’; but rather ‘a person is human precisely in being enveloped in the community of other human beings, in being caught up in the bundle of life. To be...is to participate’ (in Krog 2002: 110). Tutu’s statement of *ubuntu* is profoundly reminiscent of Levinas’ description of being that requires the other and involves ‘be[ing] *engaged, merged* with what we think, *launched*—the dramatic event of being-in-the-world’ (Levinas, 1998: 3, emphasis added). It might find similar location within the postmodern philosophic discourse and the concept of the ‘other’, which states that individual existence is dependent upon the community of *Homo sapiens* of which we are part. Jean-François Lyotard expounds on this notion in an elaboration of a portion of the Hebrew Decalogue:

Thou shalt not kill thy fellow human being: To kill a human being is...to kill the human community present in him as both capacity and promise. And you also kill it in yourself. To banish the stranger is to banish the community, and you banish yourself from the community thereby (1993: 136).

The ‘other’ is the requisite of any one’s attainment of being. This realisation brings with it a necessary ethic of otherness that relies on and provides for the other person. One is compelled towards the other not only for the sake of the other but for the sake of one’s self.

What is more is that, in what Leonhard Praeg (2000: 269) describes as an *immanent* understanding of law and justice, the individual forgoes a certain level of autonomy through ‘a rhetoric of solidarity and loyalty that reach back to the traditional *I am because we are* through a history of slavery and oppression [that] interact with Western conventions of understanding justice’. The *because* in the above statement presents an imperative that seeks to rescind a linear *if-then* perception of logic or justice in the determination of the self in favour of a circular relationship between the *I* and *we* (Praeg, 2000: 275). John Mbiti presents this dichotomy by

adding to the above maxim so that the complete phrase states 'I am *because* we are, and *since* we are, *therefore* I am' (in Krog, 2002: 110, emphasis added).

This elaboration on the theme of *ubuntu* is illustrative of the ultimate goal of justice within this African philosophic and ethical discourse of justice: that is, we are individual persons by the *imperative pursuit of community* that resides in the 'since we are' portion of Mbiti's statement. This is the pursuit of an *ubuntu* justice, a restorative justice. It is the foundational act of community formation as a part of a protracted struggle to effectively establish a culture of human rights where a notion of individual rights had not previously existed. But when a culture that recognises individual rights has not previously existed, such a culture requires a premise of *communal* formation from which an individual's rights within that community can be safeguarded. As the Interim Constitution of National Unity and Reconciliation stated, the most pressing need that the TRC was established to address was the restoration of community: '*The pursuit of national unity, the well-being of all South African citizens and peace...*'. And as *ubuntu* was a prominent concept in the culture of the majority of South African people, and espoused the communal premises that the TRC's goal of national reconciliation required, it provided the necessary contextual foothold for the values of restorative justice to take hold towards the goal of national reconciliation.

3.4.2. Identity in Solidarity

Richard Wilson, one of the TRC's most outspoken and prolific critics, argues that community formation requires an other against which to forge its own identity. The equation of *ubuntu* with notions of justice, reconciliation, and human rights in the TRC in many ways framed the way the South Africa, as a nation, went about forming its own new identity after apartheid ended. Of this new identity formation Wilson states:

Every ethnic or national identity needs an 'other' against which to oppose and, therefore, define itself: it is what the other is not and will find difference no matter where it looks. The most significant site of otherness for the new South Africa has not been other nations, *it has been itself*. The relationality of constitutional nationalism is often constructed in an opposition between the present self and the past other. The old nationalism was based upon a particular view of history/culture/race/truth/rights, etc., which is ritually rejected in favour of revised formulations of those concepts (2001: 16, emphasis added).

The TRC induced a process of moral condemnation against South Africa's 'other': apartheid. It needed to do so (Wilson, 2001: 56) and did it in such a way as to form an identity ideal in terms of *ubuntu*, an ethic of 'otherness', against the divisive tenets of apartheid. It sought to forge a new order along lines of inclusion against the old order built upon the lines of exclusion.

Within this discussion of identity formation and following the argument of Derrida's *On Hospitality*, George Pavlich (2001), however, suggests a deconstructive strategy that emphasises hospitality over exclusion in the creation of *solidarity* rather than community (which requires exclusion). This is a form of identity formation not labelled community because of the presupposed conditions of exclusion for the creation of the community. Instead, for Pavlich (2001: 59), the pursuit of solidarity through a 'dissociative strategy [which] emphasises hospitality over exclusion by welcoming diversity, and pledging an ongoing responsibility to others' may help guide us through a form of identity creation not fundamentally exclusive but inclusive, not punitive but restorative. He argues against the 'communitarians' who espouse certain axioms that concern an ontological anteriority of community, assumptions of community as a finite entity, and community's formation against an other, 'defining what a community *is* by deferring to what it is *not*.... The normal (the same) is thus demarcated from the other, the familiar from the strange' (2001: 59-60). Traditionally, therefore, identity and community formation has been associated with the necessary distinction and separation from an other, against an other, that enables the one to be distinguishable and identifiable. For Pavlich, the role of a dissociative strategy is to open the community to the possibility of an identity as yet to come in the way Derrida (1992) speaks of the promise of justice still to come (*avenir, á-venir*). It is the conception of a dynamic identity rather than a static one forged against an other. For Derrida (in Pavlich, 2001: 64), this dissociation from exclusion and association with diversity is the very precondition for unity, stating that '...separation, dissociation is not an obstacle to society, to community, but the condition...of community, the condition of any unity as such'.

'The new South African identity is constructed upon a discontinuous historicity, where the past is not a past of pride, but of abuse. The past history of the nation *qua* nation of rights is a history of a catalogue of violations, and pride is only to be found in resistance, by those struggling to recover an "authentic" democratic tradition' states Wilson (2001: 16-17). He is critical of the stated need for truth stories

to be told in the TRC as merely a mechanism for establishing legitimacy for the post-apartheid democratic order. There was an identity proposed against an other—a heinously exclusive and oppressive other. ‘The TRC codified’, Wilson continues, ‘the official history of martyrs of that struggle [against apartheid] in order to institutionalise those shared, bitter experiences of apartheid, which were silenced before, as a unifying theme in the new official version of the nation’s history’ (2001: 17).

This invocation of a forgettable past in order to not be forgotten is consistent with Pavlich’s suggested dissociative strategy of identity formation, the first step being an avoidance of ‘an essential, immutable being of community’ but rather addressing ‘the memory of a spirit that relentlessly calculates collective solidarity’ (2001: 64). Thus the present *imperative pursuit of community* is one that calculates solidarity vis-à-vis the exclusive parameters of the previous other—apartheid—in the face of a new ideal of solidarity. The second aspect of a dissociative strategy is similar and espouses not an essentialism of community definition but an opposite and dynamic solidarity: it seeks to prevent the community from being closed off in fixed entities, to confront the contingent processes that institute images, programs, or practices bearing the community mantle’ (Pavlich, 2001: 65). Third is a concern with the voices of the ‘subjugated other’ (Weil’s *attention* to the cries of injustice) and ‘opening up given identities to their exclusions, and to doing this on an ongoing basis’ (Pavlich, 2001: 65). This is, according to Pavlich (2001: 65), a concern with ‘present calculation’: ‘tracing past memories and yet gesturing towards the future’. Or recalling Derrida once again, it is ‘like being a host who welcomes without giving up a “host” identity’ (Pavlich, 2001: 65). The final point is an awareness of exclusion at the moment of identity formation and therefore a response to be responsible for those momentarily excluded:

This approach hospitably opens up to the other whose future coming implies the possibility of new patterns of engagement; in this way deconstruction affirms its ethical responsibility towards otherness. It extends an inclusive welcome to those excluded by its contingently erected identities. In so recognising a responsibility towards others, deconstruction remains open to promises of justice (and perhaps democracy) that are never fully decided (Pavlich, 2001: 65).

In this way, identity is formed not in a manner that excludes itself from an other, but seeks out the other; indeed, it is formed in otherness itself and only through otherness, but that not the exclusion of the other but the inclusion and recognition and embrace of otherness, of difference, that establishes the conditions for identity. As Pavlich (2001: 66) concludes, 'In an important sense, seeking out otherness is a practice of freedom, and a special feature of just and democratic solidarities'.

3.4.3. Human Rights Talk

The aspect of reconciliation that the TRC incorporated into its procedures—indeed that informed its entire conception and compulsion—has been another point of contention among academic discussions surrounding the TRC and societies in transition. For Wilson, the use of reconciliation and amnesty as the means of nation-building were anathema to the more individualist and realist located beliefs in the state's rights to prosecute and enforce law. Human rights are especially a contentious issue for Wilson, egregiously compromised by the tenets of reconciliation within the TRC. His greatest apprehension is the potential smuggling in of impunity through the use of amnesty as a means of covering the sins of apartheid in the struggle towards national reconciliation and ultimately national identity formation:

While exalting a new 'culture of human rights' and rational rule of law, new political leaders wrap their complicity within the sophistry of reconciliation talk. Reconciliation was the Trojan horse used to smuggle an unpleasant aspect of the past (that is, impunity) into the present political order, to transform political compromises into transcendental moral principles. Reconciliation talk structures a field of discourse in order to render commonsensical and acceptable the abjuring of legal retribution against past offenders. It creates a moral imperative which portrays retributive justice as blood-lust and 'wild-justice' and as an affront to democratisation and the new constitutional order (2001: 97).

I find these statements actually quite remarkable. They are remarkable because the author ultimately appears to advocate the state's 'right' to govern and enforce its laws retributively. He does so all in the name of 'human rights', but arguing for a more concise definition of human rights to be used as 'narrow legal instruments which protect frail individuals from powerful state and social institutions' (Wilson, 2001: 224). Wilson therefore strongly relates human rights with retribution, both of which rely on a radically individualist view of an individual who possesses certain

inalienable rights and retributive justice which views an offender as having individually transgressed another's rights. Moreover, earlier in the same work he argues that the conflation of human rights with amnesty and reconciliation conflict 'with a state's duty to punish human rights offenders as established in international criminal law' (2001: 25). However, I do not believe that Wilson has adequately acknowledged the role that human rights and reconciliation played *together*. Human rights were obviously recognised as having been violated under apartheid. The apartheid government itself was condemned by the United Nations when it adopted the International Convention on Suppression and Punishment of the Crime of Apartheid in 1973. It was largely for this reason that the transitional government chose to offer amnesty to crimes committed *outside* apartheid's parameters, labelled 'political' crimes, rather than prosecute an entire regime which lasted for many decades. Having recognised the human rights violations under apartheid (and *of* apartheid itself) and the unfeasibility of attempting to prosecute *all* of these, amnesty—on the condition of truthful confession—was chosen as the most feasible way to address these violations; reconciliation was chosen as the mechanism by which to transcend the divided culture that apartheid had fostered and promote an entirely different code of existence, placed into the hands of individuals—victims towards offenders—instead of in the hands of the state legal system.

Insofar as Wilson expresses the need for a more limited understanding of human rights I would agree; but I part company with him in his purpose for saying this. 'Human rights are important preconditions of liberty and freedom but they are too narrow to define liberty itself', Wilson states (2001: 224). His engagement with the concept of human rights as it was employed in the TRC is one that regrets their conflation with reconciliation and restorative justice, arguing that it 'usurps' the state's right to prosecute offenders. My agreement with him is that human rights are inadequate in bringing a society through a transition to democracy. Human rights are defensible through law to the degree to which the law is established according to a community's desire to protect human rights.

Law presupposes that a legislating subject (community, society) exists and that it has established the law in order to sustain its existence and order. In an established democracy this subject is referred to as 'the people'. In an emerging democracy—a nation trying to slough off the legacy of apartheid or colonialism—the subject as such *does not yet exist*. 'The people', as a subject, must first be created as a

community (see above discussion *Identity in Solidarity*) who recognise the desire for justice and acknowledge the need for law. In that sense, restorative justice provides a conceptual paradigm that places the democratic subject—‘the people’—prior to the establishment of law insofar as it is the people that restorative justice is primarily concerned with before it is concerned with matters of jurisprudence and legal prosecution. In this way law is established according to its subject’s call for justice, as a *just* legal system, the laws of which are accordingly enforceable. But the law cannot be imposed to create the subject—the subject must first establish the law. To do so, to establish a legislating subject, is the function and importance of restorative justice for it emphasises our ontological interdependence. Therefore, not only is restorative justice conceptually prior to retributive justice, the subject of restorative justice is historically prior to the possibility of law.

Another reason for which human rights alone are inadequate to the task of transition is as an ethic. Rights do not inherently propose a form of compulsion towards another person. Their most vociferous voice is one of violation and transgression rather than an ethic of being for the other. This is perhaps how Wilson is unable to perceive the necessary portrayal of human rights in a way that combined them to an already understandable philosophy such as *ubuntu* that goes beyond claims of one’s inherent rights as a human being to claims of humanness that are dependent on the same claims of those around us—that my being is dependent on yours, even the perpetrator who caused me harm. As was mentioned in the last chapter of listening and attending to the cries of injustice, that injustice which cries out speaks from a much deeper harm than simply a violated right. Weil elaborates more eloquently on this same theme by stating the following of human rights *vis-à-vis* the need for an ethic of obligation:

Relying almost exclusively on this notion [of rights], it becomes impossible to keep one’s eyes on the real problem. If someone tries to browbeat a farmer to sell his eggs at a moderate price, the farmer can say: ‘I have the right to keep my eggs if I don’t get a good enough price.’ But if a young girl is being forced into a brothel she will not talk about her rights. In such a situation the word would sound ludicrously inadequate (in Bell, 1998: 41).

The example of a girl taken into a brothel only begins to lead us onto a path of the many injustices that the millions of people in South Africa, Africa, and around the world have suffered under despots and tyrants, suffering in which the claim to a

violated human 'right' appears woefully derisory. When a child has been taken from her home before she is ten years old and told to carry weapons and execute 'enemy children' during the day and serve the sexual desires of adult soldiers at night, can one honestly speak of a right that has been violated, a right that would somehow be compensated through the state's right to prosecute the offender? Or can greater healing power be found by an offender sitting face-to-face with the victim of rape, confessing the evil of that crime, a crime that is above all committed against her and not against a law that forbids. Rights talk is inadequate to a country in transition, that is, a country that seeks to transcend a nefarious past of human *being* violations and reach into a future of a culture that acknowledges that indeed there are inherent rights to each person, rights that at the time of transition are inadequate to carry a society beyond the memories of hurt and the past.

3.5. Summary: Transformation

It should be clear that my proposition does not amount to underestimating the importance of human rights and the relevance of a retributive model of justice. On the contrary, rights are necessary *after* a society has transitioned into a culture of democracy and the recognition of human rights. However, it is in the *transition to* such a culture that human rights—and retribution I might add—fall short. 'It must be clear to all', Bell (1998: 43) states, 'that no final settlement on "rights" should be made without "justice" that includes "charity" and genuine "attention" to the decades of harm done to the non-white majority by the former white rule'. This was the role of the TRC and the importance of its restorative model of justice: to transform a nation—the government, legal system, and concepts of justice and reconciliation in the minds of South African people—into a just society that acknowledges and upholds human rights and the state's right to retribution.

But it is the greater power of *transformation* that distinguishes an ethic of being-for-the-other and justice as restoration, as reconciliation, from the sterile mechanisms of legal retribution. This is the arena where restorative justice asserts its greatest strength: in its transformative value that exceeds that of a retributive understanding of justice precisely because of its inherent ethical concern with the other, not simply a concern with 'fairness' or equivalence, a concern which should compel one towards the other, towards the cry of injustice. Moreover, the need for truth-telling and the public acknowledgement of wrongdoings are essential in the road

to reconciliation and transformation, for these decri injustice as unacceptable and oblige the listeners to *attend* to those cries. Braithwaite and Strang argue for this transformative potential of restorative justice with the following:

For such profound collective wrongs as genocide and apartheid, the world is slowly learning that undominated and state-assisted story-telling is needed, so that truth can lay a foundation for reconciliation, and so that collective shame which is acknowledged collectively can motivate just society transformation (2001: 11).

Once again, this argument is concerned with transition and the transformative strength of restorative justice in establishing a just democratic subject, rather than to argue for the abolition of retributive legal systems. The ethical constitution of a restorative justice values system is capable of transforming the system upon which crime is punished—the very legal system itself that is (will be) responsible for the sustained prosecution of crime. But the system—that emergence of and call for law—must come from a just basis in order to be itself just and avoid the crisis mentioned at the outset of this chapter. As one legal theorist states, it is often necessary, where a ‘just society’ does not yet exist, ‘to transform ourselves into the kind of community that could justly punish’ (in Mani, 2002: 36). Mani (2002: 36) names a justly established society—a just society—as the chief prerequisite to the institution of law and the mechanism of retributive justice: ‘If societies are themselves not legally and socially just, state-imposed punishment could represent an added injustice on offenders who are themselves victims of structural injustice’.

It is the values conception (Strang and Braithwaite) and ontological (Weil, Tillich, Levinas) understanding of justice as an ethic of being-for-the-other, of obligation, of infinitely guilty responsibility towards the other (Derrida), a justice that heals (Strang and Braithwaite) that comes closest to articulating the profound heart of justice, a subject that has evoked discussion for millennia and promises to continue to, just as it remains itself as yet to come, a promises and hope never fully realised for we are never fully relieved of the guilt or debt to love (Kierkegaard) an other. Restorative justice is the most complete epistemology or systematic exposition based upon such a conception of justice, and provides the greatest transformative power for a culture, a society, or a nation in transition to just governance that acknowledges democracy, human rights, and the state’s right to prosecute crimes against its legal system.

But perhaps more importantly, restorative justice is located at the level of the people who are brought before its influence, the people injured and the people who have injured, and seeks to restore each of them to themselves as well as to each other. I cannot help but bring to bear the words of Kierkegaard who, encouraging the previously mentioned 'debt of love', argues for the power—the transformative power—of loving, above all, love itself in another person. By doing so, he states, we may love forth love in the other, transforming them not by an institutionalised system of rehabilitation, but an ethic between individual people, between a person harmed and the person who has harmed, of healing that *begets* healing:

... the lover who edifies has but one course—to presuppose love; what further he constantly has to do is only constantly to constrain himself to presuppose love. Thus he loves the good forth, he encourages love, he edifies. For love can be and will only be treated in one way, by being loved forth (Kierkegaard, 1949: 175).

As stated above, my intention is not a renunciation of retribution as such, but a rethinking of punitive forms of justice in a transitional society. I am reminded of the words of Dostoevsky's orator who stands as a *paraclete*—an advocate—at the end of *The Brothers Karamazov* arguing the limited ability of punishment in favour of a more holistic approach for the accused:

There are souls which, in their limitation, blame the whole world. But subdue such a soul with mercy, show it love, and it will cure its past, for there are many good impulses in it It is not for an insignificant person like me to remind you [the jury] that the Russian court [we might invoke South Africa's example of the TRC here] does not exist for the punishment only, but also for the salvation of the criminal! Let other nations think of retribution and the letter of the law, we will cling to the spirit and the meaning—the salvation and the reformation of the lost (1996: 848-49).

The formers of the TRC said, '*Let other nations think of retribution and the letter of the law, we will cling to the spirit and the meaning*' ...of justice, of reconciliation, of a new nation built on solidarity that transcends the divisions of the past. Should this be seen as the abrogation or the triumph of justice? For justice resides in the relationships between people, but requires the presence of people between which to reside. When those people have been removed from each other, how then shall justice reside? But

where reconciliation is sought, justice is sought, and where justice is sought, there peace will reside.

Conclusion

It is my sincere hope that this discussion will encourage renewed reflection on the substance of justice and the way in which we pursue it. Although the content of this research has taken fairly philosophic and theoretical grounds, the inspiration behind this thesis arose from pragmatic and desperate circumstances. I am reminded of a quote by Kurt Lewin (in Braithwaite and Strang, 2000: 203) who said 'there is nothing as practical as a good theory'. The quote was expounded on by Braithwaite and Pettit who said 'there is nothing as practical as a good philosophy and the best philosophy is informed by practice'. South Africa's use of The Truth and Reconciliation Commission is just one example of how a theory of justice, informed by a very real context according to very real needs, may help effect restoration in a society and work towards its transformation and reconciliation.

Moreover, as Strang and Braithwaite iterated in the last chapter, 'The bigger the wrong, the deeper the conflict, the better the prospect for...collective and emotional transformation to motivate real justice, including social justice' (2001: 13). Such evils are therefore opportunities for justice. And many such opportunities exist at this very moment. The presence of children who are implicated in conflict as combatants provides a clear example of such an opportunity. There is a plethora of reasons for their involvement in conflict—they were forcibly conscripted by rebel armies; they saw their families killed by the enemy and are then offered an opportunity for revenge; they were street-children provided with food and shelter by a militia and told to repay the debt by bearing arms. Regardless of the manner of their involvement in conflict, these child soldiers are implicated in one of the great injustices of our times and their involvement in war demands that our faces be turned towards them and ask how might justice be done for such as these? This continent has witnessed egregious amounts of injustice in the past. Yet the face of peace in the future is immensely dependent on the way in which we dispense with injustice in the present. Shall violence continue to be the method used against violence, or are there not more constructive, more restorative measures that could be employed against the discordant forces of conflict? It is hoped that this research has demonstrated that indeed there is.

Out of these contexts of seemingly inexorable conflict arises the imperative to re-conceptualise justice apart from the conventions of retribution in the pursuit of peace. Albert Einstein said that peace is not the absence of conflict but the presence of justice. And justice is active: it seeks the opportunity to exist, to redress, to effect good where evil has presided. As stated in the final chapter, my intentions have not been the subversion of retributive or punitive forms of justice as such, but the greater consideration of justice *as* reconciliation and restoration. And the reason for this is simple: there is greater transformative power in a justice that seeks to restore and reconcile relationships and people. And transformation is what is needed in a continent plagued by conflict and injustice, for it is transformation and reconciliation that will allow divisions of conflict to be breached towards the construction of a new just legislative subject—‘the people’. As has been argued, reconciliation and restorative justice are conceptually prior to the democratic subject of ‘the people’; reconciliation is requisite to the creation of ‘the people’. In that sense, restorative justice provides a conceptual paradigm that places the subject prior to the establishment of law insofar as restorative justice is primarily concerned with people before it is concerned with the just procedures of law. In this way law is established according to its subject’s call for justice, as a *just* legal system, the laws of which are accordingly enforceable. But the law cannot be imposed to create the subject—the subject must first establish the law. To do so, to establish a legislating subject, is the function and importance of restorative justice for it emphasises our ontological interdependence. Therefore, not only is restorative justice conceptually prior to retributive justice, the subject of restorative justice is historically prior to the possibility of law.

If the perpetuation of such rampant injustice is to be thwarted we must look toward a strategy that compels our societies beyond the plagues it has languished in and pursue an alternative, an alternative that does not reciprocate violence with violence by pursuing revenge. Instead, an alternative should seek to break the cycle of violence by transforming paradigms of reciprocity—‘just desserts’—into one that pursues the seemingly impossible and incalculable: responsibility, obligation, attention, reconciliation and love. Perhaps this is where one raises the question of the pragmatist and realist: can one actually trust qualities or virtues such as love and responsibility in societies encased in war? Kierkegaard reminds us that love must first of all be ‘loved forth’ in another person, and that more than anything else love loves

love itself in the other, that is, love sees in the other the capacity to love. Is this not the recognition of the greatest human right? That beyond my right to education or housing or the basic necessities of life, but that as a human being—in order to *be* human—I have the right to responsibility, a right to be responsible to love my neighbour, the individual nearest me as well as every person I come into contact with. Likewise, as the parable of the Good Samaritan demonstrates, it is my responsibility as a human being to be a neighbour—the one who shows mercy toward those in need. These are examples of the values that restorative justice promotes and that possess the ability to transform and placate the heinous cycle of revenge that perpetuates violence and entrenches injustice. They also offer the impetus for not only political *transformation*, but subject *formation* as a more sustainable and democratic culture that respects individual human rights.

The practical implication of an ethic of responsibility and the pursuit of justice that restores rather than repays is indeed a risk. It is a risk because much is at stake. Yet greater power lies in mercy than in retribution, for it reaches into the deepest chasms of the human heart. Thomas Merton (in Zahn, 1980: xxix) said the following concerning the inherent strength of a non-violent approach towards an adversary: ‘Non-violence, ideally speaking, does not try to overcome the adversary by winning over him, but to turn him from an adversary by winning him over’.

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