

'Transitional Justice, Punishment and Security'

Thomas Leslie Hancocks

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Abstract

This thesis concerns the normative dimension of transitional justice – the problem of which moral and political values should guide the process of transition from conflict and authoritarian rule to democracy. The central thesis is that the value of security should be a normative priority in the process of transition, because establishing security is a necessary condition for democracy and other transitional measures (lustration, compensation, institutional development and reconciliation, to name but a few). The thesis develops an account of how the value of security informs a justification of the measures utilised in the transition to a politically legitimate state. In doing so, it explores how the value of security (much neglected in political philosophy) informs our understanding of central political problems and concepts – including state legitimacy, democracy, the function, content and value of laws (including the concept of the ‘rule of law’) and the role of human rights in state coercion.

Far from being an issue confined to the academy, the problems of transitional justice are a reality for a number of states around the world who are struggling to achieve democracy. This thesis represents a contribution to the scholarship around this process of political transition. It seeks to show the important insights that moral and political philosophy can provide for the process of moving from conflict and authoritarian rule to democracy. In doing so, it illustrates how the problems of transitional justice are in fact central problems for political philosophy.

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I. Introduction

After periods of conflict, authoritarian rule and political oppression, states are faced with the challenge of transitioning to more just, democratic and rights-respecting societies. Over the last few decades, the field of ‘transitional justice’ has emerged as an interdisciplinary area of scholarship which grapples with the question of how states should achieve the transition to democracy, while appropriately dealing with past wrongdoing.

The Nuremburg Trials gave rise to the first debates around transitional justice, though not under that name. This scholarship grew further after a number of democratic transitions in South America, Africa and the Balkans in the 1970’s and 1980’s, and after the decommunization and democratisation of ex-Soviet states in the 1990’s.¹ In their inception, these debates were largely the remit of scholars in law, social science and international policy.² Yet in the last two decades the field has attracted the attention of moral and political philosophers who have sought to focus on the ethical and political values which underpin the measures and policies which guide the transition from conflict and authoritarian rule to more democratic, rights-respecting societies.³

It is this normative dimension to transitional justice that I shall be concerned with in this thesis. My argument is that security should be a key priority in the transition from conflict and illegitimate rule to democracy and the rule of law. I will argue that the value of security should govern the sorts of measures that are employed in the wake of conflict—post-conflict punishment, the limited self-defensive actions carried out by citizens in the absence of a legitimate state, of the rule of law, of state coercion and of other measures which states employ to achieve democracy.

In this introduction I want to sketch the outline of this view, explaining why it is both novel and important. I should emphasise that this chapter will be largely

¹ For a full ‘genealogy’ of transitional justice scholarship, a history of the “development of ideas associated with ... phases of transitional justice”, see Teitel (2003).

² See for example Elster (2004a), Posner & Vermeule (2004) and Teitel (2000).

³ See, for example, early philosophical engagements by Elster (2004) and Pogge (2008, pp. 146–167) and more recent engagements Corradetti, Eisikovits, & Rotondi (2015), May (2012), Mollendorf (2008) and Murphy (2016).

descriptive and synoptic of the main arguments to be developed through the thesis. I will not commit myself to any substantive philosophical claims in this introduction.

The chapter will run as follows. In the following section, I provide four reasons as to why focussing on the morality⁴ of transitional justice, and on the normative principles that guide the process of political transition to democracy, is important. In section three I outline the arguments in each chapter of the thesis. In section four I introduce the emerging field of '*jus post bellum*', and explain how security has been problematically neglected by this emerging debate on the morality of war's aftermath. In section five I sketch the outline of the idea of security, and explain (albeit in brief) why pursuing security in the wake of conflict and authoritarian rule is important.

1. The normative dimension of transitional justice

Traditionally the remit of legal and social science scholarship, the problems involved in the process of transitioning towards democracy have increasingly interested moral and political philosophers. There are a number of reasons why focussing on the morality of transitional justice is important. In this section I will highlight four.

1.1. Different visions of justice

First, different cases of post-conflict transition have been guided by different moral principles, and views about what morality requires. For instance, many of the justifications of the trials of Nazi officials at Nuremberg were retributive – the argument being that trials were necessary because the remaining members of the Nazi administration were culpable for such heinous atrocities that justice required them to suffer punishment. The retributive nature of the trials is captured in the opening statement of the US prosecutor at Nuremberg, Justice Jackson:

The wrongs which we seek to condemn and punish have been so calculated, so malignant and so devastating, that civilisation cannot tolerate their being ignored...What makes this inquest significant is that these prisoners represent

⁴ More accurately, the thesis concerns the morality and *general jurisprudence* of transitional justice. An important aspect of general jurisprudence concerns the moral principles which underpin the law and legal institutions. In this thesis I will analyse security as a moral principle that should guide political practices, and also as a principle that informs the justification of aspects of law, including how laws should function, the standards they should meet and how legal institutions should be constructed.

sinister influences that will lurk in the world long after their bodies have returned to dust. We will show them to be living symbols of racial hatreds, of terrorism and violence, and of the arrogance and cruelty of power...any tenderness to them is a victory and an encouragement to all the evils which are attached to their name (International Military Tribunal Sitting at Nuremberg Germany, 1946, p. 3).

This desire for retribution is also illustrated by Churchill's initial rejection of political trials and his alternative suggestion to have the defendants shot. He is said to have once commented:

I'm changing my mind about the list of war criminals... I'd like sixty or seventy of the people around Hitler shot without trial (Quoted in Sprecher [1999, p. 28])

These retributive sentiments are common in the wake of the heinous acts that are committed in war or under authoritarian rule. And, at least in the case of Germany, these sentiments no doubt in part explain the quick trials and executions of prison camp staff in Auschwitz and Dachau, for example.⁵

Contrast the case of Nuremberg with other cases of post-conflict transition such as post-apartheid South Africa, which is a paradigm case of political forgiveness and restorative justice. As part of the Truth and Reconciliation Commission (TRC), past offenders were granted amnesty in exchange for information about crimes and their engagement with reconciliatory practices with victims. The examples of Germany and South Africa illustrate how different visions of justice guide different cases of political transition. It is therefore important to engage with these different moral principles to analyse their value, coherence, how they fit with other moral values and how they facilitate and indeed sometimes hinder the transition to democracy, to evaluate which principles, or perhaps which combination of principles, are the best to pursue for transitional societies.

1.2. Distributive justice demands

Secondly, focussing on the moral principles which guide cases of transitional justice is important because problems of distributive justice commonly confront states

⁵ The trials of the staff at Auschwitz took place 24th November–22nd December, 1947. The 23 death sentences were carried out in one day – 28th January, 1948.

transitioning from conflict and authoritarian rule towards democracy. This is most clearly the case with respect to measures such as compensation for victims but also with respect to resourcing institutional development, aid or education, for instance. These measures invite questions about who is owed what and by whom in political societies, questions which have traditionally been the remit of moral and political philosophy. Indeed, often conflicting principles arise with respect to these measures – does the value of achieving retributive justice outweigh that of reconciliation? Should institutional development take place before lustration measures to remove members of the past regime from positions of power? Should resources be allocated on the basis of need or desert?⁶ These decisions are made all the more difficult (and all the more important) by the fact that transitional states are often resource poor, and pursuing one value often comes at the expense of pursuing others. It is when these conflicts arise, that focussing on the moral values which underpin certain measures such as compensation, lustration, punishment, institutional development (to name but a few) becomes important.

1.3. The justification of international institutions

Thirdly, focussing on the normative principles guiding periods of transition is important because the international bodies which aid states during these periods often face questions about their role, and their responses often rest on appeals to moral principles. To give an example, the UN Security Council, which was formed in 1946 and whose primary role is to “promote peace and stability” globally, is constantly faced with normative questions concerning its mission and purpose in transitional contexts. It is when these international institutions face criticism – as was the case for the Security Council in its failures in the Balkan and Rwandan genocides, and its more recent failures in the 2002/2003 invasion of Iraq⁷ – that questions about the normative purpose of these international bodies and institutions come to the fore. In the case of Iraq, two camps emerged in the debate over the role of the Security Council. One held that the Security Council ought to serve a minimal role in deciding when the use of force was permissible, the other prescribed the more expansive role of “organising collective action to enforce institutional norms” internationally (Luck, 2006, p. 4). It is when these alternative, and

⁶ I should emphasise that I will not be interested in the value conflicts which arise in transitional justice, though for a good analysis of these conflicts see Elster (2004b).

⁷ See Luck (2006, pp. 3–4) for a discussion of the criticisms of the Security Council over its failures in Iraq.

sometimes conflicting, visions of the role of international institutions arise that a focus on the normative principles guiding these institutions, and the principles which support their policies, becomes important.⁸

1.4. Broader problems of political philosophy

Fourthly, and this will be particularly important with respect to the arguments in this thesis, transitional justice is intimately connected with other concepts, values and practices which moral and political philosophers have been long occupied with—democracy, punishment, the rule of law, human rights, security and political legitimacy, to name but a few. As I will illustrate throughout this thesis, the process of transition forces us to re-evaluate our understanding of these political concepts, values and practices, which we commonly take for granted in more developed democratic contexts under the rule of legitimate governments who respect the rule of law. This is to say that cases of democratisation and political transition force us to re-evaluate core problems of political philosophy—what is a politically legitimate state? Why does it matter that states possess legitimacy? What is the value of democracy? Are only democratic states legitimate? What is the rule of law? Is legal punishment morally justifiable? Does justified legal punishment require a legitimate state? I will return to these questions throughout the thesis, and I will demonstrate how the context of transitional justice and democratisation pose unique problems which must be accommodated by our understanding of these concepts and problems.

It is for these reasons that attending to the morality and general jurisprudence of transitional justice is important.

2. The argument of the thesis

In this section I will outline the main arguments of each chapter of the thesis.

In the following chapter I focus in more depth on the concept of security. As a political value, security has been under-analysed in political philosophy compared with other values such as liberty, justice and rights. Having highlighted some of the

⁸ While I will not engage directly with the UN Security Council, I draw out some of the implications of my arguments on the functioning of international institutions throughout the thesis.

shortcomings in the analysis of security by philosophers and criminologists, I introduce and defend a conceptual distinction between two senses of security – the negative and the positive senses. I then explore how this distinction elucidates the different ways in which security is valuable and is intimately related to values such as predictability, liberty, guarantees and the importance of being able to claim security from political institutions.

In Chapter Three I consider the question of whether it is permissible for citizens to engage in *rough justice* punishment in the absence of a legitimate state and of functioning state legal institutions. Having defined rough justice, and observed some cases of rough justice in transitional justice contexts (where they are ubiquitous), I draw upon some of Locke's arguments about the natural right to punish in the state of nature to develop a defence of rough justice based on deterrence, institutional improvement and the protection of basic rights. I conclude by considering the implications of my account for rough justice practices in cases of political transition.

In Chapter Four I develop a justification of legal punishment that is sensitive to some of the problems endemic to transitional societies. In particular, the account I develop is i) sensitive to the fact that transitional justice contexts are without a legitimate state and ii) responds to the fact of increased rights violations in fragile, transitional communities. The account I defend appeals to the more basic right to threaten in the interests of self-defence, as the basis of a justification for a rudimentary system of laws (threats) and punishments. Contrary to the mainstream view in the philosophy of punishment⁹, my account rejects the premise that a legitimate state is a pre-requisite for justified legal punishment, and instead defends the view that justified punishment can in fact facilitate the move towards a legitimate state.

In Chapters Five and Six I consider the problem of political legitimacy with respect to transitional justice. This is important because an essential goal of transitional justice (if not *the* essential goal) is the establishment of a legitimate state. According to the mainstream view in transitional justice scholarship, this means a state that is democratic. In chapters five and six I challenge this mainstream view. In particular, while I agree with the view that democracy should be the ultimate goal of political

⁹ This widely endorsed view in the philosophy of punishment is captured by Anthony Duff:

Any normative theory of punishment depends on some more or less articulated conception of the state (2001, p. xviii).

transition, I challenge two mainstream views about the role democracy plays in legitimising the state.

In Chapter Five, I reject the view that democracy is necessary to justify state coercion.¹⁰ This, I claim, is because there are occasions when democratic governance (in particular the majority rule aspect) can license injustice, and can conflict with other important goals such as the protection of minority groups. This, I argue, is exacerbated by certain features of transitional justice contexts—the presence of rival factional, cultural or religious groups and the absence of developed institutional safeguards to protect minority rights. I defend an alternative view of state coercion which holds the protection of human rights as a necessary condition on justified state coercion. I then explain how this view is better suited to the problems faced by transitional societies.

In Chapter Six I consider the problem of political legitimacy (which I distinguish from the problem of justified coercion). I challenge the view that democracy is a necessary condition on a legitimate state.¹¹ I then draw upon an argument developed by Machin (2012) which states that four necessary conditions must be met (horizontal equality, acceptable vertical inequality, publicity and an institutionalised voice) for a state to be legitimate. In defending this view, I present the outline of a view of political legitimacy which does not require democracy, but which preserves some of the more valuable aspects of democratic governance. I then explain how this view of legitimacy is better equipped to explain the right to rule in politically fragile and resource-poor contexts such as transitional societies.

In Chapter Seven I consider the permissibility of retroactive law-making in transitional justice contexts. Retroactive laws were famously applied during the Nuremberg trials to retroactively create the international crimes of genocide and crimes against humanity and to apply these crimes to the heinous acts of Nazi officials. Generally however, retroactive laws are considered to be both legally and morally problematic (in both general jurisprudence and under domestic constitutions and international law). In this chapter, I deny that retroactive laws are in fact legally and morally problematic. My claim is that there are certain cases where retroactive laws are neither. These are cases where de facto authoritarian officials amends the legal system to facilitate their unjust policies, and in doing so render themselves free from legal liability. In these cases, retroactively criminalising the acts of these officials is neither

¹⁰ Winter (2013) defends this view.

¹¹ This view is defended by Buchanan (2002), Winter (2013), Estlund (2008, pp. 85-97) and Christiano (2004), amongst others.

unfair nor legally problematic, I claim. I then provide a positive justification for retroactive laws on the grounds of deterrence and reasons based on the transition to democracy. My broader aim in this chapter is to challenge the strong presumption against retroactive law-making which exists in both general jurisprudence and under international law.

I conclude the thesis by drawing out some of the implications of my arguments for cases of political transition. I also seek to show how problems of transitional justice are genuine problems for moral and political philosophy.

3. *Jus Post Bellum* and 'Just Peace'

In this section I will show how the value of security has been problematically neglected in the emerging philosophical scholarship on the morality of war's aftermath.

Concomitant to the growth in transitional justice scholarship has been an increased philosophical interest in the morality of war's aftermath. This interest has evolved into the field of '*jus post bellum*'¹² (literally, 'justice after war'). *Jus post bellum* represents the third wing of just war theory which, with the traditional categories of *jus ad bellum* and *jus in bello* (governing, respectively, the initiation of war and conduct within it), forms the tripartite approach to the morality of war, assessing the justice of war's beginning, middle, ending and aftermath.¹³

Commentators of *jus post bellum* have placed emphasis on the importance of achieving 'justice' after war. The way they develop this view is by defending a number of principles to govern the aftermath of war, in the same way as just war theorists have developed principles to govern the initiation of war (*jus ad bello*) and the way in which war is fought (*jus in bello*).¹⁴

Larry May (2012), for example, introduces six principles for the *post bellum* phase—*rebuilding, retribution, reconciliation, restitution, reparation* and *proportionality*,

¹² For accounts of *jus post bellum* see, for example, Bass (2004), Freeman & Djukić (2008), Mollendorf (2008), Orend (2006, pp. 160–219) and Rodin (2008), amongst others.

¹³ There is an important distinction between the process of *ending* a war (i.e. of securing peace) and the aftermath of war (i.e. what to do when peace is secured). This distinction will not impact on my arguments in this thesis, though see Mollendorf (2008) for a discussion of the morality of ending a war, which he captures under the banner of '*jus ex bello*', which he distinguishes from *jus post bellum*.

¹⁴ *Ad bello* conditions on the initiation of war include *just cause, right intention, proportionality, legitimate authority* and *last resort*. *In bello* conditions on conduct in war include *discrimination, proportionality* and *necessity*.

arguing that “for a just peace to ensue, these principles must all be met, at least to a certain extent” (2012, p. 22). Brian Orend argues that “a more secure possession of rights” is what the successful transition from war should achieve and this requires *compensation, sanctions, rehabilitation, apologies and trials* (2006, pp. 160–189). And Gary Bass (2004) claims that *jus post bellum* should be guided by the principles of *economic reconstruction, restoration, war crimes trials, political reconstruction and reparation*. He claims that the primary duty of an occupying state is to “get out as soon as possible”, but that in the case of genocidal states, a just occupying power has a duty to:

Reconstruct the genocidal state: by imposing more stable political institutions; by arresting and trying war criminals; and even by intervening in the educational system to promote a more humane next generation (Bass, 2004, p. 412).

In all of these accounts of the priorities of the post war period there is a conspicuous lack of emphasis on the importance of achieving security. To be sure, theorists of *jus post bellum* have touched on the importance of principles and measures which are related to security. For instance, Larry May writes that states have an obligation to “rebuild (or build) the capacity to protect human rights” (May 2012). And in a more detailed argument, Williams and Caldwell (2006) have argued that *jus post bellum* must be built on the protection of human rights. They recommend the following measures to secure this goal: *restoring order, economic reconstruction, restoration of sovereignty and the punishment of human rights violations*. And they write:

Without order, a society can descend into a Hobbesian state of nature in which even the right to life may be impossible to secure... public order is an essential foundation for the restoration of human rights (Williams & Caldwell, 2006, p. 318).

Yet despite these summary accounts, the demands of security in the post-conflict period have been either underemphasised or else relegated in priority, behind what are often deemed to be more exigent goals—retributive or restorative justice, economic development, restoration, and so on. In this thesis, I want to show that the neglect of security is problematic.

Johnson has written that:

Perhaps the most difficult problem posed by contemporary warfare, all in all, is the difficulty of achieving a stable, secure ending to it (1991, p. 191)

I want to take this problem seriously, and I will argue that establishing security is a moral and political priority in the wake of conflict and illegitimate rule. My argument will not be that security is the *only* post-conflict priority, but rather that it is a priority which is so significant that it both shapes a number of the measures that we pursue in the wake of conflict and authoritarian rule and also that in limited circumstances it advises the suspension of other values commonly deemed to be requirements of justice after conflict.¹⁵

4. The moral significance of security

In this section I want to briefly highlight some features of the view that security should be a normative priority after conflict. Defending this view will be the aim of the thesis, so my claims here will be necessarily broad and synoptic. In particular, I will respond to two questions – what impact does the emphasis on promoting security after conflict and authoritarian rule have on our understanding of transitional justice measures? And why should security be a priority?

What impact does the concept of a secure peace have on our understanding of transitional justice? There are two points to raise here. First, throughout this thesis I want to argue that the value of security informs our understanding of the importance of certain measures. In particular, I will show how the value of security informs a

¹⁵ David Hume once wrote of the need to suspend principles of justice in times of catastrophe:

Suppose a society fall into such want of all common necessities, that the utmost frugality and industry cannot preserve the great number from perishing, and the whole from extreme misery; it will readily, I believe, be admitted, that the strict laws of justice are suspended, in such a pressing emergence, and give place to the stronger motive of necessity and self-preservation. Is it any crime, after a shipwreck, to seize whatever means or instrument of safety one can lay hold of, without regard to former limitations of property? Or if a city besieged were perishing with hunger; can we imagine, that men will see any means of preservation before them, and list their lives, from a scrupulous regard to what in other situations, would be the rules of equity and justice? (1953, pp. 18–19).

Hume is widely taken to be a consequentialist. I think his point here is more interesting than being a straightforward endorsement of consequentialism. I think his claim should be taken to be that in times of emergency or scarcity, different deontic considerations present themselves, such as duties of self-preservation, the preservation of others and allocating resources on the basis of need, rather than according to equity. This view is consistent with a range of broadly deontic (or at least non-consequentialist) moral views such as prioritarianism or moral pluralism, and need not commit us to consequentialism. The arguments in this thesis will be sympathetic to the Humean view.

justification of practices such as limited self-defensive violence and punishment in the absence of a legitimate state, retroactive law-making and of the problem of how we construct a democratic state. I will also show how the value of security impacts on how we understand the broader concepts of democracy, the rule of law, political legitimacy and other concepts which are ubiquitous in the literature on transitional justice and political philosophy. Second, in making these arguments I will show that the problems of transitional justice are in fact genuine problems for political philosophy, the neglect of which illustrates important limitations in how the concepts of political legitimacy, democracy, legal punishment and the rule of law have been understood and addressed in political philosophy. I will draw out some of the implications of my argument on problems in political philosophy in the conclusion.

Why should the establishment of a secure peace be a priority after conflict or authoritarian rule? One of the main arguments of this thesis is that promoting security-based measures is indispensable to transitional justice policies, and it is indispensable because security is a vital pre-condition for securing other important political goals (goals of transitional justice and of political societies more generally). Security is presupposed by a number of transitional justice measures such as lustration, international punishment and compensation. It is also presupposed by the measures we put in place to establish legitimate states, i.e. the basic conditions for political cooperation and a functioning democracy (even going to the ballot box to vote requires some level of physical safety, and that other of our basic needs are met). Security is also presupposed by other forms of institutional development—welfare systems which allocate provisions to the needy, healthcare systems which care for the sick, legal systems which apprehend suspects all presuppose some level of societal security. Indeed, throughout the following chapters I will develop these claims further.

It is because achieving most if not all political goods presupposes some level of security, that we should take security seriously as a goal of transitional justice (and as a desiderata of theories of justice) in a way that theorists in both transitional justice scholarship and in political philosophy more generally have failed to. Exploring and defending this position will be the aim of this thesis.

II. Negative and Positive Security

1. Introduction

Security is something we often take for granted in developed, democratic societies. Yet security is not enjoyed by all human beings universally. Insecurity in the form of violence, political instability, authoritarian rule or a lack of access to basic resources is a problem which confronts a large number of human beings around the world. Consider the following 2014 *United Nations Development Report*:

1.5 billion people live in countries affected by conflict—about a fifth of the world’s population. And recent political instability has had an enormous human cost: About 45 million people were forcibly displaced due to conflict or persecution by the end of 2012... more than 15 million of them refugees (United Nations Development Programme, 2014, p. 4).¹⁶

Security is also a central aim of transitional justice. In this thesis, I will argue that the establishment of security is a vital stage in the process of transition towards states that are democratic, human rights-respecting and subject to the rule of law. Security—in the first instance the basic security of human beings, but also the security of resources, of state institutions and of the economy, amongst other goods—are key priorities in this process of political transition.

In order to develop this view, it will be important to get clearer about what security is, and why it may be of value. This is the purpose of the present chapter. My aim is to analyse the concept of security—what it means to say something or someone is ‘secure’—in more depth. And in understanding what we mean by security, and why it matters to us, I want to better understand why it is something that states and

¹⁶ I should note that these figures do not take into account the more recent migrant crises in the wake of ongoing conflicts in Syria, Yemen, Iraq or Afghanistan, amongst other locations.

international bodies should seek to promote, particularly with respect to contexts that are politically insecure, and emerging from violence or oppression.

Compared with concepts like justice, liberty, legitimacy and human rights, the concept of security has been under-analysed by moral and political philosophers. Jeremy Waldron writes of security:

There has been no attempt in the literature of legal and political theory to bring any sort of clarity to the concept (2010, p. 112).

This neglect is problematic, because it results in a gap in our understanding of political concepts. And this gap in our understanding is problematic because many take it for granted that promoting security is a basic condition on the legitimacy of states.¹⁷ It is also problematic because security is often at stake in value trade-offs. For instance, the need to promote security is commonly appealed to in debates about the (legal and moral) permissibility of torture in ticking-time bomb¹⁸ cases. And security is commonly seen to be in tension with promoting liberty or privacy in debates over the permissibility of preventative (pre-trial) incarceration of terrorist suspects deemed to be dangerous, or in the search and arrest warrants granted to police, for instance. Understanding what security is, and why it is valuable, is essential for understanding how it relates to and sometimes conflicts with other moral values, and for understanding how much weight to assign to security when it comes into conflict with these values.

Debates around the meaning and moral value of security are nascent.¹⁹ And part to the aim of this chapter is to contribute to this emerging discussion about security as a moral and political value. More particularly, I want to contribute to this debate by introducing a distinction between the *negative* and *positive* senses of security. I will argue that there are in fact two things we may mean when we speak of something or someone being secure. Having defended the distinction between negative and positive security, I

¹⁷ This view of legitimate authority is famously defended by Hobbes (2008). Bernard Williams also defends the view that security is the first condition of political legitimacy. He writes that the 'first political question' is "the securing of order, protection, safety, trust, and the conditions of cooperation. It is 'first' because solving it is the condition of solving, indeed posing, any others" (Williams, 2005, p. 3).

¹⁸ Ticking time bomb cases are designed to test our intuitions about the permissibility of torture. We are asked to imagine that a terrorist subject has been apprehended. This suspect knows the whereabouts of a ticking time-bomb which has been placed in a highly populated area and is set to detonate imminently, killing numerous people. The question is, whether we may torture the suspect to gain information about the whereabouts of the bomb. The dilemma is thus between the safety and security of the terrorist suspect, and the safety and security of a large number of individuals.

¹⁹ See, for example, John (2011), Rothschild (1995), Waldron (2010) and Weinert (2009).

will go on to show how it impacts on our understanding of the value of security, and how it illustrates the ways in which security is intimately related to other values.

The chapter will run as follows. In the following section I analyse different aspects of the concept of security. I begin by considering the close relation between security and the concept of safety. I then consider some recent engagements with the concept by political philosophers and criminologists (Waldron [2010, pp. 111-164], [2012] and Zedner [2009]). In section three I introduce and defend a conceptual distinction between the negative and positive senses of security. In section four I consider the value of positive security—particularly the way it is intimately connected to the values of assurance, liberty and what I term ‘claimability’. In section five I point to a number of practices and institutions which evince the value of positive security. In section six I consider the value of negative security—particularly the way it is intimately connected to the values of negative liberty and safety from harm. In section seven I draw out some implications of the negative and positive security distinction on the problem of promoting security in emerging democracies.

2. The concept of security

In this section I will analyse the concept of security. I’m interested in what it means to say that an individual or a particular state of affairs is secure. I will begin by considering the relationship between security and the closely related concept of *safety*.

2.1. Security and safety

What does it mean to say an individual is secure? One way of understanding security is as being intimately tied up with the concept of ‘personal safety’. Dictionary definitions hold the two concepts to be broadly synonymous. The *OED*, for instance, defines safety as, “the state of being protected from or guarded against hurt or injury; freedom from danger” and the state of being secure as being “safe from danger, harm; to ensure the safety of; to protect”. According to this dictionary definition, to be secure and to be safe are broadly the same where this means being guarded or protected from personal hurt, injury, danger or harm.

Some commentators on security have taken a similar view. This sense of security is often gestured at by Hobbes, for instance. Though he provides no formal definition of the concept, he often writes of the perils of threats to “life or liberty” and of the “danger of violent death” (Hobbes, 2008, pp. 129-130) constitutive of the insecure *state of nature*.²⁰ More recently, Henry Shue has described security in the terms of physical safety, which he includes – with the right to subsistence – amongst his account of basic moral rights (1996). Security, in Shue’s sense, is safety from violations to one’s person,

No one can fully enjoy any right that is supposedly protected by society if someone can credibly threaten him or her with murder, rape, beating, etc... A full right to physical security belongs, then, among the basic rights (Shue, 1996, p. 21).

Neoclaus has also pointed to this sense of security as physical safety – which he claims is central to the corpus of 18th Century liberal thinkers such as Ferguson, Priestly, Paine and Paley (Neoclaus, 2007, p. 141). Writing of this tradition he claims, “security ... slips back and forth between ... security as simply safety from violence and security as facilitating the expression of human liberty” (Neoclaus, 2007, p. 141).

There are two key elements to this view of security as being broadly synonymous with personal safety. First, is the emphasis on *physical* or *bodily* security – to be insecure is to be subject to threats of harm to one’s person (killings, assault, physical violations). Second, is that security is a *negative* concept, where the sense of negative intended here is not the evaluative sense of bad or unwelcome but the sense of the *absence* or *negation* of certain things. Security is the negation of harms and threats of harm to one’s person.

Waldron, who has developed by far the most detailed analysis of security to date (Waldron, 2010, pp. 111- 164; 2012), has convincingly argued that the view which holds security to be synonymous with personal safety is limited. He terms this the ‘*pure safety*’ account of security (2012, p. 17) which he claims misses a number of the things that we generally deem to be constitutive of security. He highlights that the pure safety account fails to account for the particular fear of *violent* harm that we possess – the fact that it is not just any bodily harm that constitutes a threat to our security but *severe harms* which cause significant suffering. The pure safety account also fails to accommodate threats to our security in the form of threats of *material loss*. It says very little about the

²⁰ For Hobbes, the state of nature is the natural state of human beings prior to the formation of societies ruled by governments. His description of the state of nature is famously of a context full of violence, scarcity and harm (Hobbes, 2008, pp. 92-97).

phenomenon of *fear* and how it relates to security. It does not account for the importance of future-looking *assurances* against threats. It gives no explanation of the relationship between security and *other constituents of wellbeing* (such as health or religious freedom). It cannot account for disruptions to individual *ways of life* from threats to security. And it fails to account for the importance of *communal security*—the sense of security as a communal, political value (Waldron 2010, pp. 117–118).

Waldron holds that while it is true that some of what we understand about security is based on physical or bodily safety, it is important to have a more comprehensive conception of security that captures some of these broader intuitions about what a secure state of affairs amounts to.

I share Waldron’s scepticism about the explanatory scope of the safety view of security. While the concept of safety captures some of the aspects of security, it does not capture them all. To put this slightly differently, the concept of security seems to be a wider and more expansive concept than the concept of safety, capturing more than just the absence of harms and threats to our person.

Waldron’s alternative is to ‘deepen’ the pure safety to better account for the way security accounts for and relates to other values. I will turn next to consider Waldron’s account, which I will ultimately claim is limited as well.

2.2. Waldron on security

Waldron’s alternative view of security is based on what he terms a ‘deepening’ of the pure safety account (2012, p. 23). This deepening of the concept seeks to better account for the relation between security and other values and goods. What are these values and goods?

Waldron claims they are values such as ‘ways to life’²¹—the role security plays in facilitating our life plans and goals (including the plans and goals of those who are close to us). Secondly, security also plays a role in protecting the material goods required to carry out these goals (2012, p. 18). Thirdly, the importance of freedom from fear, and the significance that our mental states have in our understanding of security—“fear

²¹ By ‘ways of life’ Waldron means the routines, plans, goals and aspirations that make for a valuable human existence. He writes:

By mode of life, I mean not just daily routines but also the reasonable aspirations people have for their lives—the trajectory of their lives, if you like (Waldron, 2012, p. 18).

seems to be a mental state that is itself partly *constitutive* of insecurity” (2012, p. 18). The deepened view of security captures this affective aspect, as an important part of what it means for an individual to be secure. Fourthly, the pure safety account fails to account for the sense that security is important instrumentally as a “mode in which other goods are enjoyed” (Waldron, 2012, pp. 21-23), and Waldron’s deepened view captures this relation between security and other goods. The particular goods Waldron has in mind are political and social liberties (or ‘rights’). He claims:

Security is not only a good in itself but an underwriting of other values, a guarantor of other things we care about. Some of these values might be liberties. We might think of ourselves as secure (or insecure) in the privacy of our homes, secure (or insecure) against arbitrary incarceration, secure (or insecure) in our religious freedom. A demand for civil liberties is often a demand for security in this regard (Waldron, 2012, p. 21).

Waldron’s alternative view of security is preferable to the pure safety account because it better accounts for the way security relates to and is in part constituted by other values. Yet the problem is that in developing this alternative to the pure safety view, Waldron provides an overly *ideological* account of security based on a view of life within modern liberal democracies. This is particularly evident in Waldron’s emphasis on security as it relates to political and social rights (2012, pp. 21-23). Waldron’s claim is that there is an intimate interconnectedness between security and rights – “security is not only a good in itself but an underwriting of other values...Some of these values might be liberties” (2012, p. 21), “a demand for civil liberties is often a demand for security in this regard” (2012, p. 21), “security is something we value in connection with our rights – enjoying them securely” (2012, p. 22); “security is the *sine qua non* for the enjoyment of the very rights that are spuriously opposed to security” (Waldron, 2012, p. 22).

To be sure, there is a sense in which this is correct, security does underwrite many of the political and civil rights which we enjoy in developed, liberal democratic states. But the concern is that in developing this view, Waldron is claiming that we cannot fully understand the concept of security without a conception of political liberties in the background – that something is missing from our understanding of security without this vision of a society that protects liberal rights – to property, religious freedom, and so on.

This seems wrong. It still makes sense to speak of security – and of individual’s being secure – in communist societies, or pre-industrial societies, or even in benign dictatorships²², societies which do not promote the sorts of liberal rights protected in Western democracies (and the sorts of rights which Waldron has in mind). It also makes sense to speak of security in communities which are prescriptive about the ways of life that individuals must pursue – theocracies or totalitarian states which do not allow individuals to freely pursue their own life goals. There is an important sense in which individuals within these societies are still secure, even if they are not free to express themselves or to freely pursue their version of the good life. And while of course this sense of security may quite different from our rights-based sense of security in liberal democracies, we shouldn’t allow a set of ideological commitments preclude the possibility of senses of security that are non-Western or rights-based.²³

Where the ‘pure safety’ account of security is limited because it is too minimal – recognising security as being simply a matter of safety from physical harms – Waldron’s alternative is too wedded to a liberal ideology, to assumptions based on political arrangements particular to liberal societies. What we want, then, is a conception of security that is neither reduced to pure physical safety nor overly dependent on ideological commitments based on political arrangements at a certain time, in a certain part of the world.

Another field of scholarship that has engaged with the concept of security is that of criminology. I turn next to consider one criminological account developed by Zedner (2009) before developing my own alternative view.

2.3. Zedner on Security

The concept of security has been considered in depth by some criminologists.²⁴ The most developed recent account in the criminological literature (at least that I am familiar with) is that of Zedner (2009), which I will consider in this section.²⁵ While I

²² Assuming the dictator seeks to protect citizens.

²³ The broader point is that while our concepts should be sensitive to, and even in part shaped by, historical circumstances and values, they should not be so shaped as to become unintelligible to other ways of life or political arrangements that are not Western or liberal.

²⁴ See also Wood & Shearing (2012) and Loader & Walker (2007).

²⁵ I do not want to imply that Zedner’s view is representative of all of the views in the criminological literature. I draw upon Zedner’s view because it is the most comprehensive recent engagement with security in the criminological literature that I am aware of.

agree with certain elements of Zedner's view, I want to challenge Zedner's conception of what she sets out as the 'objective' sense of security.

Sensitive to the diverse contexts in which the concept of security is employed²⁶, Zedner writes that security is "not a single, immutable concept but many" (2009, p. 9). Zedner proceeds to analyse security by distinguishing between four senses of the concept—the '*objective*', the '*subjective*', the '*pursuit*' and the '*symbol*'.

The objective sense of security is the state of "being without threat" (Zedner, 2009, p. 15). Zedner writes that an aspiration to absolute objective security is necessary, yet that "it makes sense to recognise that its perfect attainment is unachievable" because "security is predicated on the continuing presence of that which threatens it" (2009, p. 15). The objective sense of security is contrasted with the subjective sense—which captures the phenomenological dimension of how we feel, experience and relate to secure and insecure contexts. It captures the importance of things like "freedom from anxiety or apprehension" and "varies not only according to objective risk but also according to extraneous factors such as individual sensitivity to risk and danger" (2009, p. 16).²⁷

Zedner also draws a distinction between security as a pursuit and security as a symbol. Security as a pursuit captures the sense of security as a societal goal, and encompasses the many legal and political measures that societies adopt to achieve that goal. Recognising security as a continuous pursuit is important, Zedner claims, because it, "means recognising that it is probably unattainable and at best impermanent" (2009, p. 19). It captures the essential mutability of security measures, the fact that societies must constantly amend and revise their approaches to security in the light of new threats. This is contrasted with the symbolic sense of security, which is altogether "less tangible", and is not concerned with the objectives for achieving security, but instead captures the "rhetorical" aspects of the concept. Zedner gives the following examples to illustrate this symbolic aspect of security:

²⁶ As Zedner writes of the concept of security, "It is wantonly deployed in fields as diverse as social security, health and safety, financial security, policing and community safety, national security, military security, human security, environmental security, international relations and peacekeeping" (2009, p. 9).

²⁷ I agree that the distinction between subjective and objective security is important. Objective security pertains to the factual matter of whether an individual is or is not secure. An individual is objectively secure if, as a matter of fact, their environment is a secure one. Subjective security, on the other hand, concerns an individual's *beliefs* or *feelings* about whether they are secure. While important, this distinction is not one I will discuss in any length in this chapter, because I am more interested in the distinction between negative and positive security, to be developed shortly.

Symbolic security underpins the promotion of neighbourhood watch and community safety stickers by local police; the security markings on bicycles, car radios and other valuables; and the security posters that adorn airports, railway stations and other places of high risk (Zedner, 2009, p. 22).

Symbolic security captures the way in which security is employed as a symbol in a range of societal practices and measures.

While interesting, there are reasons to be sceptical about Zedner's four-way distinction of the concept of security. In particular, I want to point to two concerns. The first challenges the strength of Zedner's distinction between security as a pursuit and security as a symbol. Zedner's account of the symbolic functions of security—neighbourhood watch, community safety stickers and security markings on bicycles, car radios and other valuables—seem, on the most plausible interpretation, to be measures employed to achieve security through deterrence. This is not to deny these measures are symbolic. But it is to question Zedner's division between what she terms the symbol and the pursuit. If these symbolic features of security are ultimately used to prevent theft, by reminding would-be thieves about the presence of authorities (as seems the most plausible explanation), then ultimately these measures look to belong to the sense of security as a societal practice involving objective measures to reduce insecurity. And this suggests the distinction between the symbolic and the pursuit is not that strong, indeed if it is present at all.

The second challenge is to Zedner's conception of objective security. Zedner claims that objective security is the state of "being without threat" (2009, p. 14), and the state of being "protected from threats" (2009, p. 14). Yet in my view there is an important distinction between the sense of security as being without threat and the sense of being *protected* from threats. Zedner captures these two states of affairs under the banner of objective security. But what I want to suggest is that both conceptually, and in terms of our understanding of the moral value of security, it is important to distinguish between these two states of being without threat and of being protected from threats, they do not amount to the same state of affairs.

In what follows, I want to develop a different way of carving up the concept of security which distinguishes between the positive and negative senses of the concept.

3. Negative and Positive Security

Where the 'pure safety' account of security is limited because it recognises security as being *only* a matter of being absent of physical threats, Waldron's alternative is too wedded to ideological commitments and thus limits the understanding of security to rights-based political arrangements particular to liberal democracies. And recent criminological engagements have failed to appreciate the significant distinction between being objectively free from threat and objectively protected from threat.

In this section I will put forward an alternative view of security – based on a distinction between the positive and negative senses of the concept. To be sure, there are valuable things to preserve from previous accounts – the 'pure safety' view captures the intuitive importance of physical safety in our understanding of security. Waldron's view captures the importance of security in facilitating people being safe, protected and free to carry out their life goals. Zedner's criminological view captures the importance of security as a communal pursuit – something we are constantly striving for and which guides legal measures and political practices. In my alternative account of security I will preserve some of these important elements from these previous accounts. My account preserves the importance of personal safety, and it also builds on this view by including (as Waldron does) the importance of the safety of our material possession and assets. My account also captures aspects of Waldron's view that security is essential for facilitating our pursuit of life goals, and Zedner's view that security is a societal pursuit which communities quest after.

The alternative view of security I will develop in this section is based on a distinction between two ways of understanding security – the *negative* and *positive* senses. One way of understanding security is as a negative concept – pertaining to the absence of harms and threats:

Negative security: the absence of harms to our person, our bodily integrity and our material possessions, and the absence of threats to these things in the foreseeable future.

Negative security²⁸ captures the importance of physical safety – safety from killings, assaults, physical violations – which is essential to our understanding of what it is to be secure. Yet negative security is not completely synonymous with bodily safety, it also captures the absence of harms to our financial and material possessions. Moreover, the negative sense of security captures an important temporal dimension to security in including the absence of *threats*. This captures the sense that what matters about security is not just the absence of immediate harm, but also the absence of foreseeable threats of harm.²⁹ Negative security, then, is the negation of harms and threats to our life, bodily integrity and possessions.

Contrast this with the positive sense of security which I define as follows:

Positive security: the existence of norms, rules or procedures which exist to protect and provide for individuals.

Positive security is the presence of measures which exist to protect and provide for individuals. These things, I claim, are the norms, rules or procedures which exist in political communities.³⁰

Where the negative sense of security captures the sense of security as being without harms or threats, the positive sense captures the sense of *being protected*, under the protection of a system of rules, norms and procedures which serve to protect and provide.

To see this distinction more clearly, consider the following desert island example:

²⁸ The sense of negative here is not the evaluative sense of bad or unwelcome but the sense of negation or the absence of something. And the same is true of positive which I here take to mean the presence of something.

²⁹ To give a good example that was presented to me by my supervisor. We would not feel secure playing a game of Russian roulette, not because harms are imminent (they may never come to me – the other player may be the unlucky one) but because of the foreseeable threat or risk of harm – it *could* be me in the future.

³⁰ Isaiah Berlin (1979) famously introduces a distinction between the negative and positive senses of liberty, from which I took some guidance in setting out my own conception of positive and negative security. Negative liberty is the sense of liberty as “not being interfered with by others” (1979, p. 123), which Berlin contrasts with the positive sense – the sense of liberty where individuals are able to freely pursue their own life goals – where “my life and decisions depend on myself, not on eternal forces of whatever kind.” (Berlin, 1979, p. 131). This positive sense of freedom requires the capacity for self-mastery, self-consciousness and an awareness of one’s own desires. Berlin’s account of negative liberty is similar to my view of negative security, to the extent that both require the negation of certain things. Yet Berlin’s account of positive freedom is quite different to my view of positive security, mainly because Berlin appeals to internal psychological states in his account of positive liberty. I shall consider the relation between negative liberty and my own sense of negative security in more depth below.

Suppose there are a number of individuals on a peaceful desert island. Each has access to sufficient resources and possessions to live a decent existence, and they do not face any immediate harms or foreseeable threats to their person or their possessions.

Could we say that these individuals are secure? In one sense, yes. These individuals are safe – they face no present harms or foreseeable threats, they have sufficient resources to guarantee their survival, at least in the foreseeable future. Yet in another sense, they are not secure. The reason for this is that they do not enjoy positive security. There are no norms, rules or procedures in place to protect and provide for these individuals. Because of this, they are not secure in the sense that they are not under the protection of a third party. As such, they have *no guarantees* that their circumstances will remain as they are – *no forward-looking assurances* that they will not be subject to threats in the future.³¹ They have *no back-up plan* or *insurance policy* to guarantee their continued wellbeing in the event that they suffer some form of hardship, say, if they were to suffer injury. They have *no healthcare guarantees*, or *guarantees that their fellow islanders will not target them* in the more distant future.

What I want to claim is that while it makes sense to say that the individuals on the desert island are secure in the negative sense that they are not subject to immediate harms or threats, it does not make sense to say they are secure in the positive sense that they are protected or provided for by norms, rules or procedures. Later I will highlight some examples of institutions which evidence this value of positive security. Prior to doing so, I want to get clearer on what positive security is by considering the way in which it relates to other values. Later in the chapter I will do the same with the negative sense of security.

4. The value of positive security

The desert island example illustrates some of the features of the concept of positive security. In this section I want to develop these further. I want to show how positive security is valuable because it is intimately related to other values – assurance, liberty and what I term ‘claimability’. Elucidating the relationship between positive

³¹ We are to assume here that the individuals on the desert island have not promised or contracted to not attack one another. If they had, then they may possess positive security insofar as a promise or contract may be said to be a rule, norm or procedure which exists to protect.

security and these three values will help us to get clearer on the concept of positive security, and will also help us to appreciate its importance.

Positive security exists, I have argued, when there are norms, rules and procedures in place to protect and provide for individuals in communities. Part of the role of these norms, rules and procedures of positive security is *restrictive* – to ensure that the standards of negative security are met by preventing individuals (through disincentives) from killing, harming or stealing from one another.³² J.S. Mill gestured at something akin to this function of the rules of positive security (though he does not put it in these terms) when he writes:

All that makes existence valuable to anyone depends on the enforcement of restraints upon the actions of other people. Some rules of conduct, therefore, must be imposed – by law in the first place, and by opinion on many things (Mill, 1974, pp. 63-64).

I certainly do not want to endorse Mill's strong claim that *all* that makes existence valuable depends on restrictions on others, because this seems absurd. Though Mill does capture the restrictive function of the norms, rules and procedures of what I have termed positive security. Mill not unreasonably suggests that these restrictions must take the form of laws, I do not share this view, however, and it is for this reason that I have framed positive security in the terms of 'rules, norms and procedures', rather than laws. This is because I believe it is in principle possible to have positive security in an anarchist society where there is no centralised authority which has the monopoly on law-making power.³³

³² Rules, norms or procedures may restrict and guide action in a number of ways. Legal rules, which are one example of the rules of positive security, impose negative legal obligations on individuals to not steal or kill, and positive legal obligations to pay tax, both of which are backed up with the threat of sanction. Other rules and norms disincentivise in other ways, for instance with the threat of social castigation attached to norms of etiquette, or the threat of sanction in sports games.

³³ The philosophical anarchist denies that a centralised, coercive system of law is ever permissible, and therefore rejects the permissibility of the state. A number of author's have defended this anarchist objection to the state in different ways. For an argument on the conflict (and ultimate irreconcilability) between political authority and individual autonomy see Wolff (1998) and for an argument from the 'communal' school of anarchism see Miller (1984, pp. 45-59). To be sure, different schools of philosophical anarchism defend different approaches to social disorder – 'individualist' anarchists hold that punishment and social order are the role of de-centralised protective agencies (Nozick, 1974, pp. 12-17), whereas 'communal' anarchists claim that social order can be promoted through communal disapprobation (Taylor, 1982, pp. 65-94) – moral norms backed up with the moral condemnation of the community attached to disobedience. The crucial point I want to highlight is that all of these measure are compatible with the 'rules, norms and procedures' of positive security. It follows that positive security is compatible with an anarchist society and does not in principle require laws.

As well as being restrictive, the norms and rules of positive security also serve to *provide*—to ensure individuals receive the goods they require for a decent, dignified life—goods such as welfare, healthcare, insurance, employment benefits (I will consider these examples of positive security institutions below).

What is valuable about positive security in this form of norms, rules and procedures? Here I will point to three values—assurance, liberty and the value of claiming protection. Moreover, I will also explain how these values—particularly the value of assurance—are related to time and the temporal element to positive security.

I will begin with the value of *assurance*. Recall the example of individuals on a desert island. These individuals possessed sufficient resources to enjoy a moderately decent existence and suffered no immediate threat to their person or material possessions. While enjoying security in the negative sense, I claimed, they did not enjoy security in the positive sense. One of the reasons for this, I argued, is that they did not enjoy any assurance or guarantees as to their safety (both bodily and in terms of material possessions) beyond the immediate future. Positive security provides assurance of safety in the future. It captures the important future—oriented aspect of security—the thought that what we value about security is not just that we are free from harms in the immediate present, but that we have reasonable assurance³⁴ that these harms will not present themselves in the future.

Possessing assurances about our future is valuable because we live our lives based on projections about how our futures will be. To be uncertain about the future is a significant burden, especially if this is uncertainty about our survival—whether we will live, be safe from attack or be safe from debilitating harm to ourselves or our personal possessions. What matters about security is not just that we are immediately safe but that we have assurances of our safety in the more distant future. This is what the individuals on the desert island lacked. And this assurance is one fundamental difference between the values of negative and positive security.³⁵

³⁴ I include the qualification of ‘reasonable’ on assurances to capture the idea that it is near impossible to have a 100% guarantee of security.

³⁵ There is a strong challenge to this view that positive security is required to given assurance. Consider a Garden of Eden case where individuals have access to near infinite resources required to live a good life. Such a case is a challenge to the need for positive security because it looks like we no longer need the rules, norms or procedures to protect or provide for us or to provide us with assurances. While interesting, I think the challenge fails. First, if we assume the individuals in this case are mortal (as they plausibly must be, if the example is to be interesting) then they would wish for the security of their health and insurance against accidents, and we could still recognise this as a form of procedure of positive security. Second, recall the original story of Adam and Eve—they are cast out of paradise for failing to obey rules. The original story captures the notion that even with near infinite resources, some individuals (for whatever reason) may fail to obey the rules of an authority. This supports the view that positive security (say, in the form of ten commandment-style directives) would be valuable. First, this provide extra assurance, we have clear

How do the norms, rules and procedures constitutive of positive security provide this assurance? One way is through their restrictive function. The norms, rules and procedures serve in part to deter or disincentivise individuals from harming, killing or stealing from others. In this sense, the existence of norms or rules provides *extra assurance* to individuals that are potentially subject to harm. In the absence of this norm or rule the individuals on the desert island rely on trust – they trust others not to harm them. But the restrictive function of the norms, rules and procedures of positive security provides extra assurance, on top of this trust, by dictating standards for what happens when individuals disobey directives (i.e. as laws do). Second, rules and norms provide assurance by providing individuals with the goods they require to live a decent, dignified life. State welfare and healthcare systems operate in this way – in the event of losing our jobs or suffering illness, we have assurance that we will not be financially destitute or likely to die. Thirdly, some procedures provide assurance by providing us with *insurance* or a *contingency plan*. Insurance policies operate in this way – they guarantee that in the event of financial hardship or personal accident, one’s mortgage will still be paid, or some level of income guaranteed.

The assurance provided by these measures is valuable because our expectations about how the future will turn out and about our own welfare looking forward, forms an important part of our planning and our everyday life. We make plans, form relationships, take on job opportunities, and take on commitments based on a vision of how our lives will be in the future. This expectation is guided by the deeper assumption that we will be safe and secure in our person, our health, wellbeing, and possessions in the future. Possessing confidence about our security in the future is important, and is fostered by the assurances provided to us by the rules, norms and procedures of positive security. Without these assurances, we would find it difficult to plan or to form proper intentions about our future lives. Our lives would be like the individuals in the desert island example, individuals who are content but who possess no certainty about their futures.

The second value of positive security is that of *liberty*. What I want to argue here is that positive security promotes freedom in certain ways. To see this compare the desert island community with a community that possesses the rules, norms and procedures of positive security (say, a community with an insurance industry or a hospital). Suppose

guidelines on what happens when individuals ignore rules. Second, these guidelines disincentivise rule-breaking. Indeed, I think we can see the directives of a deity in a Garden of Eden as being an example of valuable positive security.

an individual gets great pleasure from skydiving, and being able to pursue this activity is essential to them living a full and meaningful life. If this individual exists on the desert island, without the norms, rules and procedures to protect and provide for them they would likely be more cautious and risk averse, and for good reason. It would be irrational for this individual to skydive. What if they broke their leg? Could they be certain they could still work or gather food or protect themselves from others? Even a minor accident on the desert island could be fatal in the sense that it could seriously impact on their ability to survive. Whereas in a community with positive security, this individual would have a greater freedom to skydive. They have assurances in the event they are injured that they will receive medical care, unemployment benefits and will be insured against other harms or losses. In this respect at least (and other things being equal), communities with positive security promote freedom better than communities without positive security. Positive security gives individuals guarantees (greater assurances) and thereby gives them the freedom to pursue the things they find meaningful.

A third value of positive security pertains to what I will term 'claimability'. For something to be claimable in the sense I intend here it must be: i) someone's responsibility to ensure that a certain state of affairs (*X*) comes in being and ii) justifiable for an individual to make a claim to redress in the event that *X* does not occur. Take the example of a legal contract. In the event that a contract is violated, the individual who suffered from the violation is justified in claiming recompense from the one who is responsible for its violation, and the state generally takes on the responsibility to enforce this claim. In this sense contracts are claimable. I want to suggest that the same is true of the norms, rules and procedure constitutive of positive security. In the event that an individual (*a*) steals from another (*b*), *a* is justified in claiming against *b* by virtue of the norms or rules which prohibits stealing (they may also be justified in claiming against a police force, say, for failing to protect them).³⁶ Or in the event that an institution fails to provide healthcare for an individual (*z*), *z* is justified in claiming against this institution by virtue of the norm or rule which requires that individuals receive healthcare. Of course there are a number of further questions about who is responsible for providing redress, what constitutes a justified claim, what amount of redress is required, and so on. My point here is simply that the norms, rules and procedures of positive security can

³⁶ This is most obvious in the case of a *law* which prohibits stealing, because in this case the victim has a claim against the state, and the thief, to redress. Yet it is also conceivable that the same claims may be made in anarchist communities which are not governed by coercive laws, but other forms of norms or rules.

in principle be claimable, serving as the basis of a justified claim, and are valuable as such.³⁷

In this section I have sought to further develop the concept of positive security by explaining its relationship with the values of assurance, liberty and claimability. In the following section I want to briefly point to some examples of practices and institutions which evince the property of positive security.

5. Examples of positive security

In this section I want to illustrate how the value of positive security is evinced by certain practices and institutions. My aim in this section is largely descriptive – I want to pick out features of the world which positive security describes. My main claim will be that we in fact cannot understand the sense of security we commonly associate with these institutions *without* the concept of positive security. And this supports the distinction between positive and negative security I have introduced in this chapter.

To begin with, consider the examples of ‘*social security*’, ‘*job security*’ or ‘*financial security*’.

- i) ‘*Social security*’ requires the presence of procedures around the state’s provision of resources. Social security is not comprehensible as a negative concept – as the negation of harms or threats, but is essentially a positive concept, it requires the existence of political institutions which provide monetary assistance.
- ii) ‘*Job security*’ would not make sense without rules and procedures around work, and the protections and guarantees of employment rules and entitlements (the rights provided by job a contract such as the entitlement to an employment tribunal, for instance).³⁸

³⁷ One thing to raise here concerns the nature of the guarantees afforded by positive security. Guarantees can take a number of forms. For instance, I may have a guarantee from a friend or a parent that they will support me in times of financial hardship. While this promise would be claimable, it would not be claimable in the same way as a legal guarantee or some other procedure which obligated the state, or some other body, to support me. One reason for this may simply be that such a body would likely have greater resources than a friend or a parent. Another reason is that claims comes with different degrees of force – legal claims are more forceful than other forms of claim because of the associated legal sanction.

³⁸ One may respond that a lone famer on a plentiful desert island has job security. Yet I would question this – I would suggest that what the famer has is negative security in the sense that there is no harm or immediate threat to their livelihood – insofar as there is no guarantee that their employment *will* be secure

- iii) 'Financial security' would not make sense without rules and procedures such as rules of property ownership and protections to guarantee this ownership.
- iv) More difficult cases are those such as 'relationship security', a 'secure family' or a 'secure marriage'. My sense is that it does still make sense to speak of positive security with respect to these referents, we can still highlight certain social norms or norms of conduct which are constitutive of the security in things like marriage, families and relationships—monogamy, care and trust, for instance.

What I want to claim is that we cannot understand the sense of security used in these and other cases in purely negative terms. The sense of security in the notions of social security, job security or financial security do not make sense if they are understood only in the terms of absence of harms or threats. To understand these senses of security we require the positive sense of security—the sense of societal norms, rules and procedures protecting and promoting the security of certain things.

There is another sense in which positive security is descriptive—it provides an explanation of the function of institutions that exist in modern-day liberal societies. Here, though, we should be careful. I have already argued that Waldron's account of security is problematic because it rests completely on a view of life in liberal democracies where civil and political rights are legally protected. Waldron's insistence on the relationship between security and rights was problematic, I claimed, because it seems to imply that we cannot understand the concept of security without this particular view of rights-based political arrangements and the values associated with liberal democracies. I do not take this view. What I want to suggest is that while positive security is not the same as (nor does it require) laws or political rights, it can explain the sense of security connected to these things. Positive security can explain the following sorts of political institutions,

- i) Laws—both *first-order laws* such as those found in criminal and civil statutes (which are restrictive and disincentivise harms) and also *second-order* rules and procedures designed to protect suspects against the application of

in the future (i.e. potential threats from a physical accident or bad weather), they do not possess job security in the positive sense.

first-order rules (procedural rules such as due process, *habeas corpus*, fair trials with fair representation).

ii) Insurance or pensions schemes – institutions to provide remuneration in the event of hardship or loss or to the elderly when they can no longer work.

iii) Healthcare – institutions which exist to provide for those who face illness.

iv) Welfare for those who are vulnerable or less well off or who suffer hardship – unemployment benefits/ childcare benefits/ disability benefits/ support for injured soldiers – institutions/ procedures designed to provide compensation to those who have suffered harms/ loss or to provide for those who are jobless or otherwise unable to work.

My claim is that we cannot understand the sense of security that these laws, practices and institutions provide in purely negative terms, but requires the positive sense of security. These laws, procedures and institutions illustrate the norms, rules and procedures of positive security which exist to protect and provide for individuals. They also illustrate the closely related values of assurance, liberty and clamability. And in capturing these values, particularly the former, these practices and institutions capture the important temporal dimension of security, the relationship between security and the way we project ourselves towards our future.

6. The value of negative security

In this section I will analyse the concept of negative security. Like my analysis of positive security, I'm interested in how negative security is related to other values. My claim will be that negative security is intimately related to the values of negative liberty and safety from harm.

An individual is negatively secure when they are not subject to harms or immediate threats of harm against their life, person or property.

What is valuable about a state of affairs which is absent of these harms or threats? On the face of it, the question seems obvious. No one wants to be killed, attacked or stolen from. This would either end, or seriously impact on, our capacity to live a decent existence, to pursue the things that are meaningful to us. Yet it will be worth examining further exactly what is valuable about a state of affairs in which negative security exists.

This is because further values underpin our intuitions about negative security and recognising these values will help to provide a more comprehensive picture of what is valuable about negative security. What are these further values? I will argue that two values are intimately connected to negative security – *negative liberty* and *safety from harm*.

Our sense of what is valuable about negative security is guided by our intuitions about liberty and personal freedom. The ability to act freely and to freely pursue our life goals presupposes some level of negative security in the form of protection from harms and threats. In this sense, negative security is intimately connected to negative liberty. Negative liberty is the freedom from impositions which restrict our liberty – death, imprisonment, coercion or assault, for instance. Berlin, who first introduced the negative sense of liberty writes, “by being free in this sense I mean not being interfered with by others” (1979, p. 123). Many of these harms are also encompassed by negative security – and there is some level of cross-over between the absence of harms to our negative security and negative liberty. For instance, harms such as death, bodily assault or certain forms of coercion pertain to both.

Yet negative liberty and negative security are importantly *not* synonymous concepts. I may be negatively unfree (i.e. subject to liberty restrictions) yet possess negative security – as in a case where I am incarcerated away from others, but not subject to bodily threats, for instance. Or consider the case of coercive laws – such laws are liberty restricting and pose threats to our negative freedom, but they don’t infringe our negative security. If such laws licensed serious incursions against our persons or property, they may begin to pose a threat to our negative security, but while all laws are liberty restricting, not all laws curtail negative security.

The line between negative liberty and negative security is subtle, yet still intelligible. The point I want to raise here is that the values are sufficiently close that much of what we value about security links to what we value about negative liberty – the freedom from obstacles to our liberty. Personal freedom requires a degree of negative security – to be free is to be able to pursue our projects and life goals without interference, and this presupposes negative security in the form of protection from harms and threats to our life, person or property.

Negative security is also intimately connected to the value of being *safe from harm*. I have argued that safety and negative security are importantly different concepts (because the latter captures the absence of threats to our material possessions). Yet some

of what we value about negative security is connected to what we value about our personal safety. One of the problems of insecure contexts (and perhaps the main thing we *fear* about them) is the threat of violence and suffering. Violence is unwelcome because it involves physical and psychological harm. Harm is not only painful, it can otherwise be a serious obstacle to our interests and the pursuit of our life goals. It is for this reason, amongst others, that harm is dis-valuable. A state of negative security is therefore valuable, because it is absent of these harms to our person and material wealth in the present and threats of these harms in the foreseeable future: at least where this can be assured to a reasonable degree.³⁹

Related to this is the harm of fearing insecurity. The fear we feel about our personal safety, future wellbeing and material possessions can be seriously debilitating.⁴⁰ And this phenomenological dimension of how we respond to insecure contexts must be recognised as a form of harm which arises from how we relate to insecure contexts. This is to say it is not only the *actual* harm constitutive of violent attempts against us, or our property, that is problematic about insecure contexts. It is the fear and anxiety that we feel towards *potential* attempts that is partly constitutive of what is problematic about insecure contexts.⁴¹

Negative security relates to fear in the following way. To be immediately secure from threats to our person or possessions provides us with one reason to not be afraid. I would justifiably be fearful of an immediate threat to my person – say if someone were to begin to attack me, or if a war raged around me. The negation of these things would contribute to me not being fearful of immediate harm and foreseeable threats. Yet this is

³⁹ There is an important sense in which we can never be completely free from the threat of harm. Even in states we deem to possess a high level of security, there is the possibility that we may suffer harm. What we seek is a *reasonable* level of security, and a reasonable guarantee that we will not suffer such threats. One of the things that must be factored into this judgement of reasonableness is the potential for unwelcome value conflicts. We may, of course, ensure a greater level of security by curtailing other important values such as privacy or liberty. We may preventatively incarcerate those we deem to pose a threat to our security, or search their property without their consent, for instance. Yet these sorts of measures are problematic because they compromise values such as liberty or privacy. And arriving at a reasonable level of security will have to balance these sorts of conflicts between security and other values. For an account of the need to balance the sometimes conflicting values of security and liberty see Waldron (2010, pp. 20-47).

⁴⁰ The feeling of fear is an aspect of the subjective dimension of security, as noted above, I will not explore the distinction between objective and subjective security in any depth.

⁴¹ Of course, this fear may be rational, or it may not. It would be irrational to live in a constant state of heightened fear of a meteor strike, given the low probability of such a strike occurring. Yet it would not be unreasonable to fear attacks in a context in which such attacks are a daily occurrence. It would be less reasonable to fear attack in a quiet and peaceful rural village, than it would on the Gaza Strip – it would be completely rational to fear for our wellbeing and that of those around us within such belligerent surroundings. This is not to suggest that the actual phenomenon of feeling fear directly tracks the mathematic probability of our suffering harm. Though it is to say that fear is at least partly influenced by the contexts we find ourselves in, and our perceptions about the probability of harm within such contexts.

not the only way in which fear operates. Fear is a future-oriented mental state. I do not only feel fear in response to my immediate situation but I feel fear at potential threats which may arise in the future, or even fear the *uncertainty* about threats. It is here we see the relation between negative and positive security. Negative security provides a reason to not be fearful about present threats, but if we are to be assured and without fear about our future wellbeing, the rules, norms and procedures of positive security support this.

In this section I have argued that negative security is intimately related to negative liberty and safety from harm (bodily harm, material harm and the immediate fear of these threats).

7. Negative and positive security in emerging democracies

In this section I want to briefly draw out some of the implications of the negative and positive security distinction on the problem of promoting security in cases of transitional justice, where democracy is nascent. One of the core challenges of the process of political transition from conflict and illegitimate rule is that of establishing (or indeed re-establishing) an institutionalised set of civil liberties to protect individuals from incursions from the state, and from other individuals. In this section I want to highlight three implications of the negative and positive security distinction on this process of protecting and promoting civil liberties and cementing democracy.

The first point to raise concerns how the negative and positive security distinction relates to the actual *process* of political transition to democracy. Two points on this score. First, we can recognise the establishment of negative security as the *sine qua none* of bringing about a set of institutionalised civil liberties and for achieving effective democracy.⁴² Building institutions which protect civil liberties requires individuals to not be under threat of attack or physical violation. Building political or legal institutions while conflict rages would almost inevitably be a failed enterprise. Moreover, the processes of political participation required for democracy (i.e. political assembly or even voting at a voting booth) similarly requires individuals not to be under attack.

This seems to imply that one should secure negative security, prior to positive security. In some instances this may be the right way to go. Yet in many, if not most,

⁴² The problem of the pre-conditions required for democracy is one I take up in more depth in chapters 5 and 6.

cases bringing about negative security will *require* positive security measures. Think of measures such as humanitarian interventions, an effective police force, legal institutions to support law and order and promote human rights. These sorts of measures fall under the banner of positive security – they are guided by rules, norms and procedures which exist to protect and provide for individuals in fragile political societies. And in many cases these sorts of measures will be essential for establishing negative security – the negation of harms and threats. Indeed, given that transitional justice contexts are not the peaceful and plentiful desert islands of philosophical thought experiments, the promotion of negative and positive security will in many cases need to occur simultaneously.

Second, in this chapter I claimed that the concept of positive security is intimately connected to a number of other values. This is important for transitional justice and the move towards establishing procedural rights. Think of the civil procedural right to *habeas corpus* – the right of the accused to appear before a court to discover the charge under which they are incarcerated. One of the main justifications for this legal right is to prevent unjustified arrest, to prevent a state from falsely arresting and imprisoning individuals under false charges. The right is justified on the grounds of individual liberty, but also falls under the banner of both negative and positive security, as I have used the concepts.⁴³ That is, *habeas corpus* protects individuals from unjust incursions from the state, and as such it represents a procedure which exists to protect.

The example of *habeas corpus* illustrates the interconnectedness of liberty and security. The process whereby the right to *habeas corpus* became concretised into its current legal form represented a process whereby both liberty and security from the state were increased and improved. One of the ways in which they were improved is that they became claimable, they formed the basis of a justified legal claim against the state. Considered from the angle of civil liberties, we see that increases in positive security go hand in hand with increases in negative security and liberty.

The close interconnectedness between security and the pursuit of other values is reflected in recent UK legislation. Take the following example,

⁴³ It falls under the banner of negative security because removing the right to *habeas corpus* would result in increased threats against an individual's security (i.e. making them more likely to suffer arbitrary arrests). And it falls under the banner of positive security because it is an example of a rule, norm or procedure which exists to protect (in this case against the state).

Democracy, the rule of law, open, accountable governments and institutions, human rights, freedom of speech, property rights and equality of opportunity, including the empowerment of women and girls, are the building blocks of successful societies. They are part of the golden thread of conditions that lead to security and prosperity (HM Government, 2015, p. 10)

The policy reflects how security is intimately connected to other values. In liberal democracies these protections take the form of legal civil liberties. Yet positive security need not take this form, and I have claimed that (at least in principle) positive security may still exist in societies that do not endorse the sorts of civil and social rights essential to liberal democracies.

Third, the concepts of negative and positive security provide some explanation of the content of international legal norms, and also about how they may be implemented. The particular norm I have in mind is the '*Responsibility to Protect*', a relatively recent international political commitment (and emerging norm under international law) endorsed by member states after the 2005 UN World Summit. Article 139 of the 2005 *World Summit Outcome* captures the content of this norm:

Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means.

Protecting individuals from international crimes (genocide, crimes against humanity and war crimes) forms the basic content of the duty to protect. Most obviously, this commitment represents a commitment to bring about negative security—to prevent serious violations against individuals (in the case of genocide, violations on the basis of group membership). Yet the positive sense of security can also describe the sorts of measures that states should utilise to prevent international crimes. These include institutions to protect and promote human rights, aid to facilitate state capacity building, and development in international law (which itself may be seen as a form of positive security, as I have described the concept).

8. Conclusion

In this chapter I have introduced a conceptual distinction between the negative and positive senses of security. The former pertains to the sense of security as being without threat, the latter the sense of being *protected* from threat – under the protection of norms, rules and procedures. Throughout the thesis I will explain the different ways in which states can facilitate both negative and positive security in the process of transitioning towards democracy. I will start, in the following chapter, with the question of what *citizens* are permitted to do in pursuit of security, in the absence of a legitimate state. This concerns the permissibility of *rough justice*.

III. Rough Justice and Transitional Justice

1. Introduction

To what extent are citizens permitted to take justice into their own hands when the state fails to? May citizens punish wrongdoers in the absence of a legitimate state, when formal legal institutions fail to do so? If so, what justifies this punishment?

These questions concern the permissibility of '*rough justice*'. Rough justice is substantive justice carried out by individuals or groups outside of the official legal institutions of the state. On the face of it, rough justice is controversial. We generally assume that substantive justice should be restricted to the official legal institutions of the state – that only the state should punish wrongdoers or impose taxation in the interests of distributing welfare to the poor. Yet we also look favourably upon cases of vigilantism, seeing them to be permissible – and even in some cases obligatory. Think of Robin Hood-style cases where wealth is stolen from the rich and given to the poor, or Clint Eastwood-style cases where bad guys face justice vigilante-style when a legitimate state either does not exist or else fails to realise justice. Our intuitions are thus split. On the one hand we believe substantive justice to be the job of the state, and on the other we believe that individuals or groups are at least in some cases permitted to execute justice when official institutions are unwilling or unable.

The question that interests me in this chapter is whether rough justice, in particular punitive rough justice⁴⁴, is permissible in the event that a state fails to execute justice by punishing wrongdoers. This problem is particularly salient with respect to transitional justice contexts for at least three reasons. First, because in the wake of

⁴⁴ Rough justice may take other forms, for instance the *redistributive* form we see in Robin Hood-style cases, where social goods and resources are distributed (through theft) outside of the official institutions the state. These cases are distinct from the punitive form insofar as they concern the distribution of *goods* or *benefits*, not the distribution of harms. My focus in this chapter will be on the punitive form of rough justice.

illegitimate rule, official legal institutions are often slow, weak and ineffectual.⁴⁵ This raises important questions about whether (and if so for what reasons) citizens may execute extra-legal justice in place of official criminal law procedures. Second, vigilantism is common within both conflict and post-conflict societies. We can point to cases of vigilante groups in South Africa, Guatemala, Peru and Nigeria, amongst other cases.⁴⁶ In many of these cases the vigilantism was unjust – for instance the death squads who targeted innocent children in Brazil and Guatemala. Yet, in other cases, vigilantism served as a valuable means of controlling crime in the absence of a legitimate state. Such examples show that the question of the permissibility of rough justice is a question about the moral permissibility of real life practices in fragile political communities. Thirdly, there is a case to be made (and I will later make it) that rough justice practices can help to *accelerate* improvements in official legal institutions. This pertains to what Goodin (2014) has called the ‘justice-forcing’ defence of rough justice where rough justice may be justified if it improves formal systems of justice. Given that one of the central goals of transitional justice is precisely to reform institutions so that they are more just and effective, this defence of rough justice looks to be especially plausible in cases of political transition.

The aim of this chapter is twofold – first, to come to terms with what rough justice is, and second to develop an account of when it is morally permissible.

The chapter will run as follows. In the following section, I consider some examples of rough justice practices, both to illustrate their ubiquity, and to highlight some of the similar features which persist in different cases – features such as the lack of official authorisation, the fact that rough justice is carried out by individuals and non-state groups and that it is not subject to the procedural requirements of more formal legal institutions. In section three I consider, and ultimately reject, a number of arguments against rough justice. This is not to suggest that rough justice is *always* permissible, however. In section four I develop some of Locke’s arguments about the natural right to

⁴⁵ This is the case in many transitional contexts. To focus on the case of Germany in the wake of the second World War in particular, one commentators writes of the complete closing down of Germany courts and the removal of jurisdiction in the wake of Allied victory:

The unconditional surrender of the Great German Reich not only brought an end to institutionalized terror; it brought an end to the entire judicial system... The commander-in-chief of the Allied forces ordered that “all German courts... within the occupied territory are closed until further notice”. Jurisdiction was withdrawn from the People’s Court, the Special Courts, the SS Police Courts, and all other forms of special criminal justice. Their functions were taken over to a large extent by the Allied troop themselves (Müller, 1991, p. 201).

⁴⁶ For a detailed engagement with vigilantism in these and other cases see Abrahams (1998).

punish in the state of nature⁴⁷ to explain the *limited* conditions under which rough justice is permissible. The account I defend is broadly forward-looking – it states that punitive rough justice is permitted if it serves the aims of protection by restraining wrongdoers, deterring wrongdoers and deterring other would-be wrongdoers. In section five, I develop Goodin’s ‘justice-forcing’ principle, which I claim should serve as a ‘contributory reason’ in favour of rough justice punishment. I conclude, in section six, by considering some of the implications of the account I defend for rough justice in times of political transition.

2. What is rough justice?

In this section I want to get clearer about what rough justice is. I begin by considering some examples of rough justice (some of which come from contexts of transition from conflict and authoritarian rule). Following this I draw together some common features of rough justice – focussing on both defining characteristics and empirical generalisations.

2.1. The reality of rough justice

Consider the following description of the execution of Muammar Gaddafi at the hands of his rebel captors after his deposition in the 2011 Libyan revolution:

Muammar Gaddafi was immediately set upon by Misrata fighters who wounded him with a bayonet in his buttocks, and then began pummeling him with kicks and blows. By the time Muammar Gaddafi was loaded into an ambulance and transported to Misrata, his body appeared lifeless: it remains unclear whether he died from this violence, the shrapnel wounds, or from being shot later, as some have claimed (Human Rights Watch, 2012).

The killing of Gaddafi is a paradigm case of punitive rough justice. Amongst a number of other atrocities, Gaddafi was culpable of gross violations of international law – ordering the bombardment and starvation of his own people and the killing of wounded enemies in direct violation of the Geneva Convention.⁴⁸ In an act of rough justice,

⁴⁷ As I will explain later, state of nature theory offers a useful theoretical device to explore the permissibility of rough justice because social contract theorists such as Hobbes and Locke who employed the concept used it precisely to explore whether individuals may enforce justice in the absence of a legitimate state.

⁴⁸ A report by *Human Rights Watch* describes the crimes of Gaddafi and his forces thusly:

Gaddafi was seized and brutally killed without trial or due process by his captors, outside of the official legal procedures of the Libyan state.

Another example comes from Egypt, where members of a community administered fatal punishments to an individual suspected of theft during the 2011 political uprising:

In one case in March, residents of the village of Ezbat el-Gendaya... strung a man from his feet on suspicion he was a car-thief. The suspect was cut down, starting a fatal hours-long marathon in which he was beaten, escaped into a canal, was recaptured and beaten again. In a video shown to Bloomberg News by a villager, the man, his face and torso covered in blood, is dragged by one leg along a road (El-Tablawy et al. 2013).

The example differs in a number of respects from the Libyan case, chief of which is that in this case disproportionately severe punishments were imposed for a relatively minor crime. The example also illustrates the dangers of rough justice—both in terms of the disproportionality of the punishment relative to the alleged offence and also with respect to the guilt of the suspect. After the suspect's death there emerged questions about whether he was actually guilty, with some suggesting he lacked the mental capacity to have carried out the offence with the required responsibility to make him fully culpable.⁴⁹

Another set of cases illustrate the social order-promoting function of punitive rough justice. One example of this is the vigilante gangs in areas of Mexico, which have arisen in response to violent and coercive practices by drug gangs. One report gives the following case:

Angry peasants went door to door to rid the municipality of the bullies who trafficked heroin and harassed residents. Within weeks, most of the drug traffickers had fled, and order returned (Matloff & Orlinsky, 2014, pp. 63-64).

The function of these gangs is to promote social order and to remove threats to the community. To be sure, punitive methods are used to serve the end of social order—the

A brutal conflict began, with pro-Gaddafi forces indiscriminately shelling civilian areas, arresting thousands of protesters and others suspected of supporting the opposition, holding many in secret detention, and carrying out summary executions (Human Rights Watch, 2012).

⁴⁹ The report goes on to state that “questions about his guilt have since arisen, with the man's father saying he suffered from a psychological illness” (El-Tablawy et al., 2013).

use of threats or the imposition of harm. Because the state failed to do so, the members of these vigilante gangs served justice by assuming the role of protectors of the community, much like an informal police service. And they used rough justice practices to promote this end.

In a similar vein, we may think of less extreme though analogous cases of punitive rough justice, such as cases of ‘playground justice’ where school bullies are punished by other students, outside of the official disciplinary procedures. Or when siblings enforce justice on one another, outside of the authority of their parents. While different in nature and degree to political or community-punishment contexts, these cases have structural similarities insofar as individuals are imposing justice outside of the official procedures of authorities such as teachers or parents. While the defining characteristics of rough justice I highlight allow for these sorts of cases, in this chapter I will be chiefly interested in acts of rough justice carried out by citizens outside of the state.

In this section, I have introduced some cases of rough justice. I do so for three reasons. First, to show the broad range of rough justice practices. Second, to support the view (which still needs to be defended) that under limited conditions rough justice may be permissible in the absence of an effective state. Third, to show that it is counter-intuitive to say that rough justice is *never* permissible, given the valuable use it serves in at least some of these cases.

Later I will develop an account of the conditions under which individuals are permitted to engage in rough justice practices. Prior to this, I will highlight some of the defining characteristics of rough justice, in the interests of offering a clearer definition of what rough justice is.

2.2. Defining characteristics of rough justice practices

There are two defining characteristics of rough justice practices considered above (and indeed of rough justice more generally). Rough justice practices are:

- a. *Unauthorised*—not licensed by the state, or any other official body with recognised authority. Instead, rough justice achieves substantive justice either *in spite of* or *instead of* the state, or any other official authority.

- b. *Concerned with the distribution of goods or harms* – rough justice practices seek to either provide goods (money, property, welfare through taxation or theft) or impose harms (i.e. punishment or taxation).

These two defining characteristics are essential to rough justice practices. Twinned with this, we may also highlight some *empirical generalisations* pertaining to rough justice practices. These features are not essential to rough justice, but rough justice practices *tend* to have these empirical features,

- c. *Without procedural safeguards* – rough justice practices are not subject to official procedural rules such as due process, *habeas corpus* or fair, impartial trial procedures.
- d. *Substantively imprecise* – rough justice is generally substantively rough in the sense that it is disproportionate and the punishment rarely fits, or is equitable to, the crime.

In his definition of rough justice, Goodin (2014, p. 3-4) includes the defining characteristic that rough justice is ‘approximately just’ in the sense that rough justice punishments do not fit the severity of the crime. My view is that we should see this as an empirical generalisation, rather than a defining characteristic of rough justice. While rough justice punishments are likely to be often disproportionate, it is not inconceivable that rough justice punishments may reasonably fit the severity of wrongdoing. The same is true of the procedural safeguards condition – on my account, it is not inconceivable that rough justice practices can be subject to some procedural safeguards (i.e. trial procedures).

One objection to my definition of rough justice is that I have lost what is characteristically rough about rough justice practices. This objection states that there is another sense of roughness which my view fails to capture – the sense that is opposite to ‘perfect’ justice – justice which is imperfect, imprecise, not enough or too much. According to this sense, state justice can be rough as well because state sanctions and punishments sometimes fail to match the crime, or are sometimes not subject to fair legal procedures (fair trials, non-biased judges, and so on). While plausible, I think this sense of rough justice fails to capture what I take to be essential to rough justice – the absence of official authorisation. My definition captures this essential element while being

sensitive to some of the features of the competing definition by recognising the absence of safeguards or substantive imprecision as empirical generalisations. I agree that formal state justice can be rough in the sense of being imprecise and subject to far from perfect legal procedures. Yet this is to say that state justice evinces the same empirical features as in my definition of rough justice. State justice cannot be rough justice as I define it, because it does not meet the absence of official authorisation condition which in my view is a defining characteristic of rough justice.

With this definition of rough justice in place, I want to turn now to consider whether punitive rough justice is permissible. Why does rough justice stand in need of justification? There are two reasons. First, rough justice involves the imposition of harm.⁵⁰ Given that it is morally problematic to harm another individual—even if that individual has committed wrongdoing—it must be shown that the value of punishing justifies this harm. Second, rough justice is carried out by individuals or groups that lack official authority. Given that we generally restrict punishment to agents who possess some form of official authority (parents, teachers, the state) we must explain why punishment is still permitted despite this lack of official authorisation.

In the next section I will consider some potential arguments against punitive rough justice—arguments which support the view that rough justice is impermissible. Meeting these objections will be the first step to providing a positive justification of punitive rough justice, which I will do in section four.

3. Why may rough justice be impermissible?

In this section I will consider some arguments against rough justice. To motivate these arguments I want to focus in on a particular hypothetical case—consider the following:

Suppose a cold blooded murder has taken place in a community. The state has been ineffectual in punishing wrongdoers in this community (either because it is unable or unwilling). Tired of this lack of justice, a group of individuals gather together to capture and punish the culprit. They have been given a description

⁵⁰ These harms may take a range of forms and we need not think that the type of harm be restricted to incarceration used by most legal systems. Rough justice may involve whippings, beatings, public shaming, seizure of property. I will not go into any depth about what sorts of harms should be imposed in rough justice (see Goodin [2014] for a discussion of the different sorts of punitive measures that may be adopted in rough justice). Though, as with legal punishment, it seems right to think that some forms of punitive treatment would be prohibited—for instance the cruel and unusual punishments prohibited by many domestic constitutions and also under international human rights law.

of the culprit by individuals within the community who witnessed the murder. After some searching they happen upon an individual who fits the description. They are now faced with a decision of what to do next.

I take it that, intuitively, there is something to the view that the group may be permitted in imposing some level of punishment.⁵¹ That is, assuming that the group have both sufficient evidence to believe the suspect is guilty, and that the state will fail to punish them, it is not obviously contrary to justice that the group may be permitted to impose some level of punishment. Yet of course this intuition remains to be defended. To defend the use of rough justice punishment in this case we must reject some possible arguments against imposing rough justice in this case. What would such arguments look like?

There are two broad sets of arguments—authority-based objections and instrumental objections. I will consider each in turn.

3.1. Authority-based objections – the state monopoly on force

One objection to rough justice appeals to the argument that only the state possesses the authority to coerce and punish (through law). We generally take the state's monopoly on authority for granted—it is widely agreed that only the state has the authority to impose laws and enforce punishments in the event that laws are broken. And that states have this authority at the exclusion of other groups or individuals.⁵² It follows that punishment by individuals or groups outside of the state is impermissible.

One thing to note is that the monopoly on authority only applies to states that are legitimate. And if a state loses its claim to legitimacy, say by committing human rights violations against its citizens, or by being seriously ineffectual at promoting law and order, then a state may lose its claim to possessing the monopoly on force.⁵³ Indeed, the question that interests me here is precisely that of whether individuals are permitted to punish in the absence of a legitimate state. So we may think that the monopoly of

⁵¹ I take it that intuitions will likely be split on this, and that it is not yet clear on whom the burden on proof lies – on those who believe punishment is permitted or on those who believe punishment is not permitted. My point here is simply that there is *something* in the view that the group may be permitted in punishing.

⁵² To say the state has the monopoly on coercive authority is not to say that it is completely impermissible for other groups or individuals to use violence in certain cases. Limited violence is generally permitted in the interests of self-defence, or defence of others, for instance.

⁵³ I do not want to commit myself to any substantive view of political legitimacy at this stage. Though my assumption here is that on any plausible view of legitimacy, serious violations of human rights or serious ineffectiveness at promoting law and order would undermine a state's claim to legitimacy. I discuss the problem of political legitimacy in more depth in chapters 5 and 6.

authority objection fails to get off the ground, because when a state is illegitimate, it loses its claim to possessing the monopoly on coercion.

Yet we should still be open to the view that the authority to punish should be restricted to a state, even if this state is illegitimate. Could there be any arguments to support this?

Hobbes (2008) provides one argument. For Hobbes, only an official authority (in his view the sovereign) is permitted to punish wrongdoers because if other agents are permitted to punish then this sharing of authority and power will lead to the collapse of the commonwealth and a return to the belligerent state of nature. His argument may be summarised as follows:

- a) Humans are inherently self-interested and thus the natural pre-political state of nature is belligerent (Hobbes, 2008, p. 92-96).
- b) Joining together in commonwealth is morally preferable to remaining in the state of nature (2008, p. 129).
- c) The only way to ensure peace in the commonwealth is by instituting a sovereign (2008, 132).
- d) To establish and maintain peace, the power of the sovereign (including their power to coerce and punish) must be absolute (2008, p. 161).
- e) If other agents are permitted to execute their power, or if state power is shared amongst agents, then the sovereign will lose their power and civil war (and a return to the state of nature) will necessarily ensue (2008, pp. 250-260).
- f) Therefore, punishment by any group or individual other than that licensed by the official sovereign (or state authority) is impermissible.

Hobbes's argument for the monopoly of sovereign power is an instrumental argument. It appeals to the badness of a state of affairs in which power is divided, or where others besides the sovereign state are allowed to possess power, in order to explain why the sovereign, and the sovereign alone, is justified in enforcing its power.

Yet it is possible to challenge Hobbes' instrumental argument for the monopoly of force by appealing to cases where sharing authority across a range of state institutions does not lead to the dissolution of state power, and a return to the belligerent state of nature. One of the strongest examples of this is the separation of powers doctrine

observed by a number of democracies around the world. The separation of powers is a doctrine which advises that the most powerful institutions of the state – a) the *executive* b) the *legislature* and c) the *judiciary* – should be separated to avoid undue influence between these institutions.⁵⁴ Indeed, one of the reasons for maintaining the separation of powers is precisely to prevent the potential injustices of an overly powerful monarch. And the fact that there is relative peace in states which observe the separation of powers undermines Hobbes's claim that sustaining peace requires that a sovereign must possess absolute power, and that only an omnipotent sovereign can secure peace.

To be clear, the separation of powers example does not undermine the view that only the state ought to have a monopoly on power *per se* – only Hobbes's defence of the monopoly of force in the form of the claim that distributing power (to bodies other than a sovereign) will lead to civil war and the dissolution of the commonwealth.

What other defences of the monopoly of state power are there? A second line of argument is that only legal punishment – carried out by an official legal authority whose laws have been broken – is permissible. It follows that rough justice is impermissible, because it is not carried out by those with legal authority.

There are three responses to this view. The first is to re-emphasise that the question of the permissibility of rough justice is precisely one of whether punishment is permissible when an authority (be this the state, or a school or parent) fails to administer punishment. What interests us here is cases where an official legal authority is either unable or unwilling to punish. Thus to object by stating that only legal institutions may justifiably punish is to beg the question, given that what interests us here is whether punishment is permitted when official authorities fail.

Second, one may appeal to intuitive cases where punishment looks permissible, even though it is not administered by the official legal institutions of the state. Think of siblings punishing one another when a parent fails to or a child punishing a bully on the playground for repeatedly harming other children.⁵⁵ If the legal authority objection were correct, then it would follow that these cases were impermissible – the world would be

⁵⁴ The executive is responsible for the governance of the state, and (at least in parliamentary democracies) generally encompasses the higher ranking electives in government. The legislative body are responsible for making new laws. In parliamentary democracies this is officials who belong to the party with majority support. The judiciary are the body responsible for interpreting and applying the law. The separation of powers doctrine recommends that these bodies are to a greater or lesser extent kept separate. One of the main recommendations of this doctrine is judicial independence – the independence of the judiciary from government.

⁵⁵ To be clear, there is a difference between preventative self-defensive harming and punishment. The former seeks to prevent wrongdoing, the latter is a response to wrongdoing. That said, I will later argue that preventing wrongdoing can justify limited rough justice punishment.

such that siblings were never able to punish one another or children were unable to retaliate to bullies. Intuitively, these cases of punishment do not (other things being equal) look to be always impermissible, even in the absence of a legal authority. And if these cases are intuitively plausible then I take it that the question of the permissibility of rough justice remains an open one, and is not precluded by the legal authority objection.

Third, we can challenge the view that states always possess the monopoly on power by appealing to the permissibility of state secession. Secession takes place when a state loses its claim to legitimacy (and therefore to possessing the monopoly on coercion) and a smaller group secedes to form its own political community. Secession generally takes place (and looks to be permissible) when a state persistently persecutes a minority group.⁵⁶ Secession is valuable because it can allow minority groups to escape persecution, or it may offer a chance for a smaller political community to reclaim their independence from a larger group who have usurped their territory. The permissibility of secession challenges the strength of the monopoly on power condition. It does so on the grounds that a state loses its legitimacy and thus its claim to the monopoly on power by violating the rights of its citizens. And the same applies, in principle, to cases of rough justice.

What, then, to make of the monopoly on authority claim? To be sure, there are some reasons for thinking that only the state should be permitted to introduce laws and execute punishments in the event that laws are broken. There is certainly something to Hobbes's claim that if the state does not have a monopoly on law-making power then conflict may ensue. One can imagine a case in which a number of political bodies are making and enforcing laws over a territory, and point to some problems. Which laws are binding over which citizens? Are citizens subject to the laws of all of these political agents? What if the laws are contradictory? Won't not these authority-bearing groups come into conflict? Even violent conflict?

Yet I take it that these reasons are *contributory* reasons against rough justice — reasons which form a presumption against rough justice in all but the most extraordinary of cases. And the extraordinary cases I have in mind are ones in which the state in question is illegitimate, inefficacious or otherwise fails to protect citizens. In these circumstances, the state's claim to possessing a monopoly on force is undermined and the presumption against rough justice is weakened.

⁵⁶ For a limited defence of the moral right of minority groups to secede see Buchanan (1997) and Copp (1998).

In this section I have argued that the monopoly of force condition is not absolute or unconditional and therefore that it does not preclude the permissibility of rough justice in limited cases. This leaves scope for the permissibility of rough justice in cases where a state is illegitimate or otherwise fails to protect and promote law and order.

3.2. Instrumental objections

Another set of arguments against rough justice are broadly 'instrumental'. They are instrumental in the sense that they appeal to the potential bad consequences of allowing groups or individuals to execute punishments, and claim that these consequences are sufficiently problematic that rough justice should never be permitted.

One set of instrumental objections concerns the potential for miscarriages of justice. We can note at least three objections: i) the potential for innocents to be punished, and, ii) the potential for punishments to be disproportionate to the wrongdoing and iii) the potential costs to those who administer rough justice—for instance, the threat of retaliation or the costs of psychological trauma.

The first challenge—that rough justice may falsely punish the innocent - is exacerbated by the fact that rough justice will typically not be subject to the same procedures of fair trial (with burdens of proof, fair representation, impartial judges, and so on) which are constitutive of official procedures carried out by legal authorities. One thing to note, though, is that even with such procedures, official state legal institutions still falsely imprison individuals.⁵⁷ Moreover, there is no reason to think that rough justice practices cannot be subject to some form of trial procedure which will mitigate the chances that the innocent will be punished. The point to emphasise is that the mere chance of punishing an innocent cannot be sufficient to undermine the permissibility of punishment because if it were, then state punishment would be impermissible. Instead, the possibility of punishing the innocent could inform a set of conditions on the way in which rough punishment is carried out, a point I discuss in more depth below.

The second instrumental objection is that rough justice punishments will inevitably be disproportionate to the degree of wrongdoing. That the punishment fit the crime is an intuitive principle of justice. It is clearly unjust for murderers to receive a

⁵⁷ It is difficult to get exact figures on the number of false convictions, though one study in America which includes a 'conservative' failure rate of 0.5% estimates that in one year there were 9,969 false convictions out of 1,993,880 (Huff, Rattner, & Sagarin, 1996, pp. 53-62).

week's imprisonment, or for traffic offenders to be punished with thirty years imprisonment. Underpinning this is the thought that the degree of punishment should be proportionate to the severity of the wrongdoing. And because rough justice will likely enforce disproportionate punishments, it is impermissible, according to this argument.

One way of meeting this objection is to emphasise that judgements of proportionality are difficult even in an official legal setting. In what sense is 30 years imprisonment proportionate to murder. Or 20 years to rape. Or in what sense is the severity of a traffic offence proportionate to a small monetary fine. These proportionality judgements make sense considered *ordinally* – that is, relative to one another in the sense that more severe offences should be met with a relatively more severe sentences (and vice versa for less severe sentences). But it is extraordinarily difficult to say with any certainty that punishments are proportionate considered *cardinally* – i.e. that 30 years imprisonment fits the severity of murder.⁵⁸

The point of these observations is to suggest that making punishment proportionate is not unique to rough justice practices, but is a notoriously difficult aspect of official sentencing decisions as well. Those in charge of official sentencing seek to achieve a 'best fit' where this factors in the severity of the wrongdoing, the deterrent capacity of the sanction, amongst other factors. In principle, of course, this applies to rough justice as well. Rough justice practices may be subject to 'best fit' proportionality requirements. These could include prohibitions on disproportionately severe punishments – for instance death penalties for minor theft. I take it, then, that the disproportionate punishments objection is not sufficient to undermine the permissibility of rough justice, if it is then why does it not undermine the permissibility of official legal punishment? Instead, like the punishment of the innocent objection, the disproportionate punishment objection would set conditions on how rough justice should be carried out (for instance a prohibition on punishment that is disproportionately severe).

Earlier I defined rough justice as having the empirical feature of substantive imprecision – that rough justice punishments rarely fit the wrongdoing. Below I will develop a limited justification of rough justice which is sensitive to this feature of rough justice. I will recommend what I term a 'principle of parsimony' as a condition on rough

⁵⁸ For a discussion of this problem of proportionality, and an attempt to resolve it, see Davis (1983).

justice punishments, which states that agents of rough justice should operate with a presumption in favour of more lenient punishments.

A final set of instrumental objections appeal to the costs of administering punitive rough justice for the individuals involved—costs such as the threat of retaliation or any physical or psychological dangers involved in administering rough justice, for instance. I take it that this objection would be weighty if individuals were *forced* to engage in rough justice. But assuming that individuals have chosen to take part in rough justice and are aware of the risks, then this objection loses its force.

The authority-based and instrumental objections to rough justice are weighty, but not sufficiently weighty to render rough justice impermissible. This is largely because the same problems are inherent to formal legal institutions as well.⁵⁹ Moreover, these concerns can be mitigated if rough justice practices are altered in such a way as to be sensitive to them—by including trials procedures or by setting proportionality conditions on punishments. Authority-based and instrumental objections to rough justice are thus not sufficiently weighty to preclude the permissibility of such practices. Yet meeting these objections is only the first step in a defence of rough justice. The second step is to provide some positive justification for why punitive rough justice is permissible. This will be the purpose of the following section.

4. Justifying Punitive Rough Justice

In this section I will provide a defence of the limited conditions under which rough justice is permissible. Prior to developing my own protection-based account, I want to begin by raising some points with respect to another potential option for justifying rough justice—the retributive defence.

⁵⁹ Goodin (2014, pp. 7-13) develops a number of different arguments as to why formal justice measures are 'rough' as well. These include that the range of punishments are sometimes "rough-grained" in the sense that there is not always the option to incarcerate and there is a less extensive range of sanctions; that rough justice punishments are disproportionate and that rough justice is "roughly authorised" in the sense that some procedures of state authorisation are questionable.

4.1. Reasons for skepticism about desert

Retributive justice is most commonly framed in the terms of moral desert.⁶⁰ According to this view, it is permissible to impose punishment on wrongdoers because this is what they deserve by virtue of their culpable wrongdoing. In terms of rough justice, this defence states that when the state fails to bring about a state of affairs whereby wrongdoers receive the suffering they deserve, then citizens are justified in imposing suffering on wrongdoers through rough justice practices.

On the face of it, the desert-based account has some attractive features. First, the principle that ‘wrongdoers deserve to suffer’ tracks the intuitions that a number of people share about how wrongdoers should be treated, particularly those who are culpable of serious wrongdoing. Many share the intuition that it would be a grave injustice if serious wrongdoing were not met with some form of punishment, and that for this reason there is virtue in inflicting suffering on those responsible for egregious acts. Returning to a case like that of Gaddafi, many share the intuition that it was right and just that Gaddafi suffered as he did, given the horrific acts he himself committed and sanctioned. That something would be seriously wrong if Gaddafi were to run free from his crimes and be living well somewhere. And that the virtue of this punishment is simply that an individual like Gaddafi deserved it.

While many share this intuition in the case of egregious wrongdoing like that carried out by Gaddafi, there are also reasons for denying that desert should be sufficient to justify punitive rough justice. To be clear, the particular argument I offer is not a knock-down objection to moral desert. Though it does advise caution about appealing to the moral value of desert to justify rough justice (and indeed to legal punishment more generally). The protection account I move on to defend in the next section does not rely on moral desert.

The argument I will outline against desert is a well know one, which other critics have termed the ‘whole-life objection’.⁶¹ The whole-life objection targets the view which underpins the desert justification that justice requires that an individual’s

⁶⁰ There are a number of different defences of retributive justice – rights forfeiture (Simmons 1991; Wellman, 2012), fair play theory (Morris, 1968) and more traditional ‘eye for an eye’ style accounts (such as that defended by Kant [2012, p. 106]). Here I will focus on the desert-based view because it is the most common defence of retributive justice. For desert-based defences of retributivism see, amongst others Berman (2008), Davis (1972), Kleinig (1973), Moore (1997) and Murphy (1973). For a synopsis of the different defences of retributivism see Cottingham (1979).

⁶¹ For a detailed discussion of the whole life objection to desert see Tadros (2011, pp. 68-73).

treatment (be this in the form of the reception of rewards or the imposition of suffering) should be proportionate to their desert. The whole-life objection states that the decision of what an individual deserves should be evaluated in light of a consideration of whether this individual has received what they deserve over the course of their entire life. To impose deserved punishment in response to wrongdoing in one-off cases is problematic, this objection goes, because this may not actually lead to an equal balance of treatment and desert.

W.D. Ross was the first to develop the whole-life objection to desert-based retributive punishment. He writes:

What we perceive to be good is a condition of things in which the total pleasure enjoyed by each person in his life as a whole is proportional to his virtue similarly taken as a whole. Now it is by no means clear that we should help to bring about this end by punishing particular offences in proportion to their moral badness. Any attempt to bring about such a state of affairs should take account of the whole character of the persons involved, as manifested in their life taken as a whole, and of the happiness enjoyed by them throughout their life taken as a whole... in the absence of such a view of the whole facts, the criminals that a retributive theory of state punishment would call on us to punish for the sake of doing so may well be persons who are more sinned against than sinning (1930, pp. 58-59).

Ross's point is that unless we have the full facts about a person's life and the treatment they have received, in imposing deserved suffering on wrongdoers we may be punishing someone who does not in fact deserve it.

To better see this objection, consider a more specific example. Suppose an elderly individual has lived a selfless life – giving their money to charity, helping those in need, being kind and compassionate to everyone they meet – and all of this at great personal expense. Suppose further that this individual has lived a life of hardship, suffering unjustified abuse and attacks from others (perhaps because of their race, gender or religious beliefs). Suppose further still that this individual's selflessness has gone unacknowledged – they have received no reward or recognition for their long life of service to others. Finally frustrated by life's injustices this individual, in an act of uncharacteristic anger, steals a small amount of money from another individual to feed themselves. In such a case can we still plausibly maintain the intuition that this individual deserves to suffer? That imposing punishment would mean that this

individual has received the justice they deserved? It seems difficult to maintain that justice would require making this person suffer, given the virtuous life they had led.

The case points to two worries about desert. First, we know too little about an individual's life and about their aggregate levels of desert and treatment to guarantee that the punishment they receive amounts to giving them what they deserve. Indeed, we may see this as being especially problematic in rough justice cases which lack the trial procedures which in part seek to discover the degrees of culpability of offenders. Second, if it is true that justice requires punishing the deserving, then why doesn't justice require rewarding the virtuous? That is, why should the elderly individual in the hypothetical case be made to suffer for their one uncharacteristic transgression, rather than receiving rewards and recognition for all of the virtuous acts they have carried out in the course of their life?

While it seems right to think that the state ought to show a proper concern for the wellbeing of its citizens, it is implausible to suppose that the state—or individuals outside of it—should be concerned with ensuring that individuals receive exactly what they deserve over the course of their lives. And I take it that the burden of proof is thus on the defender of desert to explain why this should be the case.

To reiterate, this worry about desert should not be seen as a knock-down objection. It does, however, advise caution about endorsing a desert-based defence of rough justice. I take it that the burden of proof is on the defender of desert to explain how the whole-life view does not seriously problematise the desert account of punishment.

4.2. Prevention, deterrence and restraint

In this section I will develop a broadly forward-looking justification of rough justice. The account is forward-looking in the sense that it appeals to the potential future benefits of punishing wrongdoers to ground a justification of when punishment is permitted. The account I defend has two aspects—first, it claims that rough justice is permissible if punishing wrongdoers serves to protect innocents by restraining wrongdoers, deterring wrongdoers or deterring would-be wrongdoers. Second, it states that rough justice may play a significant role in ameliorating the formal justice mechanisms of the state, and this serves as a 'contributory reason' in favour of enforcing

rough justice. These may be termed the ‘prevention-based’ and ‘justice-forcing’ principles, respectively.

To support the view that individuals may punish wrongdoers in the interests of protecting innocents I will draw upon some of Locke’s arguments about the natural right to punish in the pre-political state of nature.

4.2.1. Insights from state of nature theory – Locke on the natural right to punish

In this section I will consider Locke’s view that individuals are permitted to punish wrongdoers in the state of nature – a context absent of a legitimate, effective state, and that this permission is grounded in the more basic right to self-protection and protection of others.⁶² The Lockean view is not without problems, however, and in the following section I will challenge Locke’s view with a view to amending it to narrow the conditions under which punishment is permissible.

To frame the consideration of Locke, let’s imagine that we find ourselves in a community where no effective state exists, where there are laws but they are ineffectual in governing conduct and they are not backed up with a credible threat of sanction or punishment. Moreover, suppose this context is a fragile and violent one – perhaps due to residual violence from factional groups that had been at war with one another, or from supporters of a powerful dictator who persecuted minority groups. Violence, thefts and assault are common within this context, and due to the absence of effective laws members of the community have banded together in rough justice parties to put an end to the wrongdoing.

What are these individuals permitted to do? Locke claims that one of the natural rights that individuals possess in the state of nature is that of punishment.⁶³ According

⁶² Not all state of nature theorists endorse the right to punish in the state of nature. Hobbes rejects it, writing, “a punishment is an evil inflicted by public authority, on him that hath done, or omitted that which is judged by the same authority to be a transgression of the law” (Hobbes, 2008, p. 241). It follows that private punishments between individuals are impermissible. Yet Hobbes also claims that individuals possess a pre-political right to self-preservation, which they retain in political societies (Hobbes, 2008, p. 97). Supposing that punishment is one means for individuals to protect themselves in the absence of a legitimate state (as I will argue below it is), it is unclear why Hobbes cannot allow punishments in the interests of self-preservation.

⁶³ Importantly, Locke claims that the state of nature exists not only in the absence of a political state, but also when a state is illegitimate with respect to citizens. In Simmons terms, “persons can be in the state of nature not only before the institution of government, but also after its collapse or during the rule of a despotic government” (1991, p. 315). I am assuming here that the state and its laws are so ineffective at protecting and punishing that it is illegitimate (on any plausible account of legitimacy), and therefore that individuals are in a state of nature with respect to one another.

to Locke, individuals possess a natural right to inflict punishment on wrongdoers who violate natural law by committing rights violations against others without justification. In order to understand why the natural right to punish exists in man's natural state outside of political authority, it will help to take a brief detour into Locke's account of the individual rights which exist in the state of nature.

The state of nature, for Locke, is a context in which "men living according to reason, [exist] without a common superior on earth, to judge between them" (2003, p. 108). It is a context in which no political authority exists to mediate the private disputes of individuals. For Locke, while the state of nature is absent of man-made *positive* law, it is governed by *natural* law. This is God's law for men on earth (2003, p. 160) which exists for the preservation of mankind and imposes a duty on individuals that they "ought not to harm another in his life, liberty or possessions" (2003, p. 102). When an individual violates this duty, by violating the rights of others, natural law grants individuals the right to "execute the law of nature" in the form of the right to punish (2003, p. 103). To ensure that rights violations do not take place, natural law is enforceable. If natural law were not enforceable then, Locke claims, it would be "in vain" (2003, p. 103), by which he means it would be unable to fulfil its function of preserving individual rights and 'mankind' more generally. And it is from this right to enforce natural law that the natural right to punish derives.

Locke acknowledges that the notion of a natural right to punish "will seem like a very strange doctrine to some men" (2003, p. 103). One of the ways in which Locke meets such concerns is by setting conditions on the right to punish. The first is that the right to punish is not a right to use limitless or arbitrary force—individuals do not have "arbitrary power to use a criminal, when he has got him in his hands, according to the passionate heats or boundless extravagancies of his own will" (Locke, 2003, p. 103). Instead, the natural right to punish must be used with careful discretion.

The natural right to punish may only be exercised if punishment is to serve one of the following aims. First, to restrain wrongdoers and thereby prevent them from committing culpable rights violations:

That all men may be restrained from invading others' rights, and from doing hurt to one another... the execution of the law of nature is, in that state, put into every man's hands, whereby every one has a right to punish the transgressor of the law to such a degree as may hinder its violation (2003, pp. 102-103).

Second, the natural right to punish may be used in the interests of *detering* both the *wrongdoer* and *other would-be wrongdoers*:

Every man may upon this score, by the right he hath to preserve man in general... bring evil on anyone, who hath transgressed that law... and thereby deter him [the wrongdoer], and by his example others, from doing the like mischief (2003, p. 103).

Third, the right to punish may be executed in the interests of retributive justice. The natural right to punish may be enforced,

To retribute to him [the wrongdoer], so far as calm reason and conscience dictates, what is proportionate to his transgression (2003, p. 103).

From these passages we see that Locke defends the use of the natural right to punish on the limited grounds that it serves i) to restrain, ii) to deter the wrongdoer, iii) to deter other would-be wrongdoers iv) retributive justice.

Locke's account gives us some answers as to what the members of our hypothetical community may do. In the absence of a legitimate state, Locke's defence of the natural right to punish permits rough justice on the grounds that it serves one (or more) of these four goals. In the following section, I will raise some challenges to the Lockean view, with a view to amending his account to respond to some of these challenges.

4.2.2. Developing the Lockean view

In this section I want to raise two challenges to the Lockean account of the natural right to punish. The first challenge is that there is an incoherence in Locke's use of both retributive and forward-looking reasons for punishing, in many cases these two sets of reasons are fundamentally incompatible. The second is that Locke's view is problematically absent of a condition on the reasonable proof of guilt. I raise these challenges with a view to amending the Lockean view in such a way as to strengthen it against these objections, and thereby to make the view more plausible as a defence of

rough justice. In particular, I want to eventually defend the following necessary conditions on punishment:

- i) That punishment should serve to protect by restraining, deterring wrongdoers and would-be wrongdoers.
- ii) That a person has forfeited their rights against punishment (made themselves liable) by committing a rights violation.
- iii) That there is a reasonable guarantee that punishment will protect innocents.
- iv) That punishment is proportionate to and does not exceed the level of punishment required to prevent further rights violations.
- v) That there should be a presumption in favour of using the minimum level of force that can be reasonably deemed to deter certain wrongdoing.
- vi) That there have been some procedures put in place to establish the guilt of suspects

In this section, I will defend each of these conditions. But I want to start by challenging Locke.

The first challenge to the Lockean view is that it is not clear how the conflicting reasons that Locke provides in defence of the execution of the natural right to punish fit together. Locke claims that the natural right to punish may be exercised “to retribute to him [the wrongdoer]...what is proportionate to his transgression” *and also* to retrain, deter and deter others. But how do these backwards-looking retributive reasons relate to the forwards-looking deterrence and restraint-based reasons? Do they not come into conflict?

One case to suggest they do come into conflict is the following. Suppose that three individuals exist in a state of nature with respect to one another. One individual *A* attacks another innocent individual *I*. *I* is then faced with the decision of whether to punish *A*. *I* knows that the punishment of *A* will have a significant deterrent benefit on the third individual *B*. *I* also knows that only a very small degree of punishment will be required to deter and disincentivise *B* (a good natured person) from committing any wrongdoing themselves (a good degree less than that recommended by retributive

justice). In this case, the small degree of punishment required to deter conflicts with the basic requirement of retributive justice that the punishment fit the crime. The same indeed is true for punishments which far exceed the severity of the wrongdoing. Suppose *I* knows that their punishment of *A* will only deter *B* if it is extremely severe. Punishing *A* in the interests of preventing *B* will require a level of sanction that is far greater than that allowed by retributive justice.

The point of these cases is that there are times when the retributive reasons for punishing and deterrence or prevention-based reasons will come into conflict. We cannot hope that these fundamentally conflicting reasons for punishing will easily fit together in all cases. If the only way in which to deter and protect is through disproportionate punishment, it is simply not clear which principle we should endorse.⁶⁴

For this reason, I think we should amend the Lockean view, and given my scepticism about the desert-based retributive view highlighted above I think we should ground the justification of punishment on prevention and deterrence. The most plausible defence of these reasons for punishment is grounded in considerations of self-protection and the protection of other innocents. Consider the following principle:

Protection principle: it is permissible to punish wrongdoers in the interests of restraint, deterrence of wrongdoers and deterrence of would-be wrongdoers if doing so serves to protect innocents.

There are, however, a number of potential problems with a defence of rough justice grounded on the protection principle alone. First, if the value of punishing is that of protecting innocents, then why think that only those guilty of wrongdoing should be punished? There will be cases where framing and punishing an innocent individual may serve to deter others and thereby serve the aims of protection. And if it is protection which is doing all of the justificatory work, then why think that this punishment is impermissible?

Locke's account provides us with a way around this worry in the notion of *rights forfeiture*. For Locke, it is not the case that any individual may be punished in the state of nature, but only those who by committing a rights violation against another have

⁶⁴ The same challenge has been levelled to 'mixed accounts' of punishment (defended most notably by both Rawls [1955] and H.L.A. Hart [1970], respectively). Mixed accounts seek to combine the retributive and broadly consequentialist justifications of punishment into a more coherent justification. For more extended criticism of mixed accounts see Boonin (2008, pp. 207-212).

forfeited their rights against punishment.⁶⁵ Another way of putting this is in the terms of liability. By committing culpable wrongdoing in the form of a rights violation against another, individuals lose their right against being punished and thereby become morally liable to punishment. Liability is distinct from desert in a number of ways but chiefly because an individual can deserve punishment but not be liable for it. For instance, an individual may deserve bad treatment because they are a wicked, but they would not be liable for bad treatment because they had not committed a rights violation. Liability applies to cases where individuals commit moral (or indeed legal) rights violations, whereas desert tracks moral culpability, motive and character.⁶⁶

The notion of rights forfeiture provides an argument as to why punishing the innocent in the interests of protection is impermissible—innocents have not made themselves liable to be harmed because they have not committed a rights violation. It also provides a reason as to why only wrongdoers may be punished in the interests of protection—namely, that they have made themselves liable by losing their rights against punishment (by committing a rights violation). Consider the following principle,

Rights forfeiture principle: it is permissible to carry out punitive rough justice on an individual (in the interests of protecting others) *only* when this individual has forfeited their rights against punishment (made themselves liable) by committing a rights violation.

Amending the protection account with the forfeiture principle explains why it is impermissible to punish the innocent in the interests of protection. I want to suggest that rights forfeiture is a necessary condition on punishment. Others, such as Wellman (2012), have argued that rights forfeiture is sufficient for punishment. I don't agree with this view. For one, it looks to license punishing individuals for extraordinarily minor acts of wrongdoing, requiring rough justice punishment for theft of crisps, for instance. For this reason I think forfeiture is only necessary, twinned with other conditions such as prevention.

A second potential difficulty with the protection account is that there may be some uncertainty about the protective benefits of rough justice punishment. Given that this is an empirical question, it may be difficult to ascertain whether punishment will in

⁶⁵ For Locke's account of forfeiture see Locke (2003, p. 110) and for discussion see Simmons (1991). For a more developed defence of the rights forfeiture theory see Wellman (2012).

⁶⁶ For other differences between liability and desert see McMahan (2009, p. 8).

fact have any protective benefit. And if it doesn't, then we may wonder whether it is permissible for individuals to take on the costs of rough justice punishment, when there are no discernible benefits. We can meet this worry with the following principle:

Reasonable chance of protection principle: rough justice is only permissible if there is a reasonable guarantee that it will protect innocents by retraining wrongdoers, deterring wrongdoers or deterring other would-be wrongdoers from violating the moral rights of other innocents.

This principle limits rough justice to cases when there is a clear protective benefit that is discernible. Again, I want to defend this as a necessary condition on punishment.

At this point a third worry may arise that by removing a desert-like, retributive requirement that the punishment fit the crime, it looks like any level of punishment is permissible in the interests of protection. This is a worry because it seems to permit extreme levels of punishment in response to minor crimes, in the interests of preventing others – the death penalty for minor theft, for instance. And this is clearly unjust.

One way around this form of worry is to introduce a further proportionality requirement on the level of punishment that is permissible in the interests of deterrence, prevention and restraint. To justify such a condition one may appeal to analogous cases in which there are proportionality conditions on levels of justified harm. Take a case of self-defence. We do not generally believe that any level of violence is permissible in the interests of self-defence or defence of others – i.e. that we may kill an attacker to prevent them from hitting an innocent person. This is because such a level of force would be disproportionate to the level of harm to be prevented. Rather, we include a condition on proportionality – that the level of harm used in self-defensive violence must be proportionate to, and not unreasonably exceed, the level of harm prevented. Or take a case of military intervention. When a state intervenes in the conflict of a foreign state it is not the case that any level of force is justified to prevent further violence but only the minimum level of force that is required to prevent further harm. Thus it would be disproportionate for state *A* to intervene in state *B* and kill 10,000 people in the interests of saving 1,000 of state *B*'s citizens. Again, this is because this level of force would be disproportionate.

We can recognise the same proportionality requirement on the justification of preventive punishment in the form of the following principle:

Proportionality principle: rough justice punishment⁶⁷ must be proportionate to and not exceed the level of punishment required to prevent further rights violations.⁶⁸

Here, however, a fourth problem arises. This is that there is likely to be uncertainty about the level of punishment or restraint that will be required to prevent rights violations. This uncertainty is especially likely in the case of rough justice punishments because there is not the same evidence as to what level of sanction is sufficient to prevent certain rights violations as there are in formal justice systems. In this sense, rough justice has an inherent uncertainty, and administrators of rough justice are essentially in the dark. Who is to say that three days incarceration will disincentivise property theft? Or that whipping an individual for assaulting an innocent victim will prevent such attacks in the future? This is a problem that official state systems of punishment will suffer from less. State jurisdictions will have reasonable levels of data and research on the deterrent capacity of criminal sentences, for instance. And they may amend the level of sentence in light of this information. Yet the same evidence is not available for rough justice punishments.

In the face of this uncertainty, there are two ways in which a defence of rough justice may go. One could argue that more severe punishments should be the norm, on the grounds that such punishments would better deter and ensure protection. Or, one could try to defend a presumption in favour of less severe punishments – because in the face of uncertainty, justice requires this presumption. I want to defend the latter principle on the basis of three arguments – proportionality, that rough justice is prone to abuse and that wrongdoers may possess a reasonable excuse or justification for their acts. What we want is a principle that can accommodate these difficulties (to be outlined further below), and I want to defend the following principle:

Principle of parsimony: in the face of uncertainty about the level of punishment that will restrain, deter or disincentivise would-be wrongdoers, there is a presumption in favour of the minimum level of force that can be reasonably deemed to deter certain wrongdoing.

⁶⁷ To be clear, I do not mean to restrict this condition to rough justice punishments alone, the same condition could in principle apply to state punishment. Yet it may be especially important in the case of rough justice – given the absence of procedural safeguards, rough justice may be prone to abuse.

⁶⁸ I take it that this would provide one means of responding to the disproportionate punishment objection to rough justice detailed in section 3.2. above.

The principle of parsimony is supported by three arguments. The first pertains to the proportionality condition elaborated above, in the face of uncertainty about how much punishment will prevent, this condition informs a principle which limits the level of permissible force. That is, in the face of uncertainty about the balance of harms to benefits, the principle of parsimony requires the use of the minimal reasonable harm. Second, the condition on minimum punishment would be supported by the fact that rough justice is prone to abuse. Given that it may be easy for the administrators of rough justice to get carried away and to use excessive punishments, it is prudent to include a condition that minimal punishment should be the norm. Thirdly, the minimum punishment principle is sensitive to the fact that some wrongdoers may have reasonable justification or excuse for particular acts of wrongdoing which may have been missed by the absence of a trial. In the face of this potential uncertainty about the culpability of wrongdoers, it seems right to start with a presumption that the minimum level of punishment should be administered.

The second challenge to the Lockean account relates to Locke's treatment of how the guilt of wrongdoers is determined in the state of nature. Locke starts his defence of the right to punish with the fact of wrongdoing. That is, the discussion of the natural right to punish starts with the fact that wrongdoing—in the form of a natural rights violation—has taken place, and the guilt of the wrongdoer is not reasonably in doubt. Yet suppose, as may well be the case with rough justice, that this guilt is in dispute. Locke places no condition on proof of guilt in his defence of the natural right to punish. And this is clearly problematic if we apply Locke's defence to the case of rough justice where there may well be occasions when the guilt of a suspect is unproven. One worry with the absence of a trial or other procedures to prove guilt in Locke's account is that it makes it more likely that innocents will be punished.

One way around this worry is to introduce the condition that rough justice is only permissible in the event that there has been some attempt to establish the guilt of wrongdoers prior to the imposition of punishment. Consider the following principle:

Reasonable certainty of guilt principle: rough justice is only permissible in the event that there have been some procedures to establish the guilt of suspects.

Clearly, the justification for such a requirement is that it will mitigate the chance that innocent people will be falsely punished by rough justice parties.

Yet potential difficulties arise around the nature of this requirement. What are the precise details of the procedures to establish guilt? Are we talking about the same features of formal legal trials—requirements of procedural justice such as strict standards of proof and evidence, juries and judges, rights to fair representation, rights to appeal? It is implausible to suppose that these standards will be able to be met by those in charge of punitive rough justice.

Yet suppose less strict standards are introduced—imagine a requirement that at least one impartial person is required in procedures to establish the guilt of a suspect. Or, where in a case where only one individual has witnessed the crime, they prove the guilt to another—i.e. establishing motive, providing evidence of the act. Or that suspects are given the opportunity to have their defence heard by a small group of individuals. Or suppose that certain features of formal trials are preserved—the presumption of innocence, or standards of proof such as the less demanding civil standard of the balance of probabilities. It is not inconceivable to have these less strict standards as requirements on the permissibility of rough justice.⁶⁹⁷⁰

Indeed, the justification for procedures to establish guilt as a requirement of rough justice may be grounded in considerations of protection. If the justification of rough justice is that punishing wrongdoers serves to deter would-be wrongdoers then presumably practices which falsely punish the innocent will be less successful than procedures which apprehend and punish the guilty. Surely practices which only punish wrongdoers will have a greater deterrent effect on would-be wrongdoers. And this serves as a further protection-based reason in favour of some procedures to establish guilt.

In this section I have challenged the Lockean defence of the natural right to punish on two grounds—first, for its mixture of the fundamentally incompatible protective and retributive principles and second for including no condition on establishing guilt. I did so with a view to developing a narrower account of the conditions under which rough justice is permissible. I began by removing the retributive condition that punishment is permissible to retribute the wrongdoer with a proportionate level of harm. Instead, I placed emphasis on the forward-looking

⁶⁹ Earlier I argued that an empirical generalisation about rough justice practices is that they are not subject to trial procedures. To emphasise, this is only an empirical generalisation, it is not a defining feature. There is no reason—other than past experience of rough justice cases—to think that rough justice cannot be subject to limited trial procedures.

⁷⁰ I will not go into detail about the precise nature of these standards, my point here is simply that it is conceivable that they are and indeed ought to be included in rough justice practices.

dimension of Locke's account—that punishment is permissible for restraining wrongdoers, deterring them and deterring other would-be wrongdoers. I limited this defence with conditions on rights forfeiture, reasonable guarantee of protection, the presumption of minimum punishment, and the reasonable assurance of guilt. These limiting conditions are designed to limit the level of potential harm that rough justice practices may pose to the wrongdoer themselves, and to other innocents who may be falsely apprehended by rough justice parties.

5. The Justice-Forcing Defence

Here I will develop a second avenue for defending rough justice practices. More particularly, I will develop an argument for rough justice outlined by Goodin (2014, pp. 13-21) which is based on the idea of what he terms 'justice-forcing'. This justification appeals to the ameliorative effect that rough justice practices may have on official state legal institutions. According to this argument, individuals may be permitted to take justice into their own hands by punishing wrongdoers if doing so substantially improves the justness or effectiveness of an official state legal system. Goodin writes:

Someone might pursue a course of rough informal justice as a "justice-forcing strategy", aimed at inducing changes in a more just direction in the formal system of justice (Goodin, 2014, p. 11).

Goodin claims that the justice-forcing defence would be subject to two conditions. First, that the practices engaged in are *just in themselves*, unjust practices cannot permissibly be used in pursuit of improvements in official justice. Second, the *intention* behind rough justice practices must be directed towards the improvement of the formal justice system (Goodin, 2014, p. 12).

Goodin gives three examples of rough justice practices which had previously served this justice-forcing role: lynch mobs, foreign intervention and the seizure of property. I will focus on Goodin's example of the lynch mob, as this best illustrates the justice-forcing potential of punitive rough justice. Lynch-mob justice was justice-forcing, Goodin claims, because "lynchings were sometimes in response to a mob's perception that the court's verdict was... too lenient, by the prevailing standard of morality represented by the lynch mob" (2014, p. 12). To be sure, lynch mobs often operated with unjust motives (for instance in the lynchings of innocent members of particular racial

groups). Yet sometimes lynch mobs also achieved substantive justice in places where no formal justice system existed. And it is these cases which meet the ‘justice-condition’. Part of the benefit of achieving substantive justice was that they helped to accelerate the establishment of a “proper, trustworthy system of law enforcement... in the neglected community in which the rough justice occurred” (2014, p. 14). According to the justice-forcing rationale, then, lynch mob justice may in certain circumstances be permissible insofar as it achieves substantive justice and accelerates improvements in formal justice practices.

I agree with Goodin that rough justice can serve this ameliorative, justice-forcing role. And indeed this role may be especially important in times of transitional justice where one of the goals is to improve the formal justice institutions of the state. But what role should the justice-forcing defence play in a wider account of rough justice? There are three options—justice-forcing could be as i) a *sufficient* condition for justified punishment⁷¹; ii) a *necessary* condition on justified punishment, or iii) a *pro tanto*, *contributory* reasons in favour of punishment. Here I will defend the latter.

There are good reasons for scepticism about the view that justice-forcing should be a sufficient condition for rough justice. We can imagine cases in which no formal legal system exists, and there is no prospect of one existing (or no prospect of improving an illegitimate system that does exist), yet where there is still a significant protective value from punishing. If justice forcing is taken to be sufficient then punishment is impermissible in these cases, even though it may be incredibly valuable (for instance in protecting hundreds or thousands of innocents). As I’ve argued above, it is implausible to think that punishment is impermissible *because* no legal system exists, or because there is no prospect of improving an existing system.

The same problem arises if justice-forcing is taken to be a necessary condition for punishment. There will be cases when punishment serves a substantive function in protecting innocents but when it serves no ameliorative function in improving a state legal system. Again, it is implausible that punishment is impermissible in the event that it fails to improve a legal system, when the same punishment would serve to protect a large number of individuals. We can imagine a case in which punitively retraining a wrongdoer will prevent them from harming hundreds, even thousands, of innocents,

⁷¹ In places, Goodin endorses the sufficient condition view. For instance when he writes, “someone might pursue a course of rough informal justice as a ‘justice-forcing strategy’, aimed at inducing changes in a more just direction in the formal system of justice” (Goodin 2014, p.11).

yet where this punishment serves no justice-forcing function. If justice-forcing is taken as a necessary condition on punishment then this punitive restraint would be impermissible. I take it that this consequence is absurd, and it follows that justice-forcing should not be seen as a necessary condition on punishing.

Instead, I take it that justice-forcing should serve as a contributory reason in favour of punitive rough justice. Consider the following principle:

Justice forcing principle (j-f-p): forcing systemic improvements in formal legal institutions is a contributory reason in favour of punitive rough justice.

By a contributory reasons I mean a *pro tanto* reason – a normative reason which may be more or less salient in different cases, and a consideration that may be outweighed by other conflicting considerations. Justice-forcing, as a contributory reason, serves to supplement the protective account defended above. The idea is that it is the protection of innocents that serves to justify the infliction of harm of wrongdoers but, other things being equal, the idea that this punishment can help to ameliorate formal legal procedures serves to add extra justificatory force to support this punishment.

6. Rough Justice and Transitional Justice

In this section, I want to apply the account of rough justice defended in this chapter to a transitional justice context. Take the hypothetical case outlined above. Suppose we find ourselves in a community where no effective state exists, where there are laws but they are ineffectual in governing conduct and are not backed up with the credible threat of sanction or punishment. Suppose further that this context is a fragile and violent one – perhaps due to residual violence from factional groups that had been at war with one another, or because of residual violence from supporters of a powerful dictator who persecuted minority groups. Violence, theft and assaults are common within this context, and, in response, members of the community have banded together in rough justice parties to put an end to this wrongdoing. Suppose that within this context our rough justice party finds an individual they suspect to have committed a

rights violation against another innocent individual.⁷² They are faced with the decision about what to do.

According to the protection-based defence of rough justice, the rough justice party are permitted to punish if the individual they meet the following necessary conditions on punishment,

- i) The punishment serves the end of protection by restraining, deterring the wrongdoer or deterring other would-be wrongdoers.
- ii) Punishment is only directed towards those who have become liable (i.e. by forfeiting their right against punishment by violating the rights of another).
- iii) There is a reasonable guarantee that punishment will protect innocents (through retraining or deterring the wrongdoer, or other would-be wrongdoers).
- iv) The degree of punishment is proportionate to and does not exceed the level required to restrain or deter others rights violations.
- v) The minimum reasonable level of punishment is applied when there is uncertainty about the degree required to restrain or deter others.
- vi) There have been some procedures to reasonably establish the guilt of the suspect, when this is in question.

When these conditions are met, rough justice is permissible. This, twinned with the *j-f-p* principle which adds contributory force,

- vii) That punishment may ameliorate the formal justice mechanisms of the state.

If we think about the broader relationship between rough justice and the process of transition to a more just social order, two things support this protection

⁷² We may fill in the details of the wrongdoing differently – perhaps the individual has been suspected of heinous rights violations – perhaps it is a political leader who has committed genocidal crimes, for instance. Or perhaps they are suspected of murder. Or perhaps they are a petty criminal. The only thing that this would impact is the degree of punishment that is deemed proportionate to preventing others.

rationale. The first is that levels of crime and wrongdoing in the wake of periods of conflict, civil war or authoritarian rule will (as a general rule) rise (this is a feature of transitional justice contexts that I consider in more depth in the following chapter).⁷³ This could be due to several factors such as individuals becoming desensitised to violence, a scarcity of resources, residual violence, revenge violence, the reluctance of authoritarian rulers to relinquish power, amongst others. Both security and protection in post-conflict settings are thus key priorities, and the protection defence of rough justice is sensitive to this. Second, one of the main goals of political transition is to arrive at a more just legal system more generally. Indeed, one of the hallmark features of an illegitimate state is when judiciaries are partial, fail to implement fair hearings, serve political aims or otherwise violate the requirements of the rule of law. I thus take it that both i) setting procedural conditions on how individuals may conduct rough justice and ii) the justice-forcing defence will be important insofar as they facilitate broader aims of transitional justice and legal improvement. That is, given that we want transitional legal systems to better protect, and to conform to the requirements of procedural justice and the rule of law, these considerations support the protection rationale and the conditions on the reasonable assurance of guilt.

7. Conclusion

I started this chapter by posing the question: to what extent are citizens permitted to take justice into their own hands when the state fails? I have defended the view that citizens are permitted to punish wrongdoers to the extent that this serves a protective function. I established further conditions on this permission: that the wrongdoer has made themselves liable by forfeiting their rights, that punishing serves to protect innocents, that punishment is proportionate to the level required to restrain or deter, that the minimum reasonable level of punishment is applied and that there have been some procedures to reasonably establish the guilt of the suspect. These conditions limit the cases in which rough justice are permissible, but if we return to a case like Gaddafi's punishment, we have the basis for a justification of punitive rough justice. To be sure, the punishment would be quite different to that which Gaddafi actually received. Yet in principle, the account I have developed justifies punishing Gaddafi.

⁷³ To give an example, one study of homicide rates in post-conflict settings found that numbers of deaths more than doubled in some countries (Archer & Gartner, 1976).

In the following chapter I want to stay with the topic of punishment. Yet I will turn from cases of rough justice to examine the forms of punitive practices that rudimentary legal systems can engage in to achieve some of the goals of political transition.

IV. Transitional Justice, Self-Defence and Punishment

1. Introduction

Transitional justice concerns the processes whereby states seek to move from conflict or authoritarian rule towards democracy, while at the same time coming to terms with legacies of wrongdoing. One of the central problems of transitional justice concerns legal punishment – implementing legal mechanisms to deal with past wrongdoing while at the same time promoting law and order and facilitating the transition to a more just legal system.

In this chapter, I will develop a moral justification of state punishment which is both philosophically cogent while at the same time sensitive to some of the problems endemic to transitional societies. Given that punishment involves the inflicting of harm on wrongdoers, it stands in need of justification – it must be shown why inflicting harm is permissible. One the main claims of this chapter is that certain features of transitional justice contexts – in particular the absence of a legitimate state, and the increased propensity of rights violations – illustrate the importance of a view of punishment that has some preventative function. And this preventative function serves a central role in the justification of punishment I defend.

The account I develop appeals to the more fundamental right to *self-defence* to explain why it is sometimes permissible to punish wrongdoers. Self-defence accounts of punishment⁷⁴ are all based on the view that individuals have a moral right to defend themselves against culpable violations of their moral rights. It follows from this right to defend oneself, according to the account I will defend here, that individuals also possess a *moral right to issue threats* against would-be wrongdoers to disincentivise culpable

⁷⁴ See Alexander (1980), Ellis (2003), Farrell (1990) and Quinn (1985) for different formulations of the self-defensive view. I will engage with some of these views throughout the chapter, and highlight how my own account draws upon and differs from these self-defence accounts.

rights violations. When attackers ignore such threats, individuals possess a *right to punish* those who attempt to commit culpable rights violations against them, where this latter right is based on deterrence and bolstering the credibility of threats. The purpose of this chapter is to defend this account, and then to show how it can meet at least some of the problems faced by transitional societies.

In developing this view, I want to make three important claims. First, and this claim runs contrary to the consensus view in the philosophy of punishment, that a legitimate state is not required for legal punishment to be permissible. Instead, according to the self-defensive view I defend, punishment is permissible in the absence of a legitimate state, so long as it serves to protect innocents. Secondly, and relatedly, punishment is not only permissible in the absence of a legitimate state, punishment can in fact *facilitate* the move towards a legitimate state. It does this by seeking to reduce the levels of wrongdoing and rights violations which pose a serious obstacle to achieving democracy, and implementing other measures, in the transitional period. Thirdly, I will explain how the self-defensive account can provide the outline of a justification for when and why it is permissible to enforce International Criminal Law (ICL). Both the defence of the self-defence account, and these three claims, represent the novel arguments in this chapter.

The chapter will run as follows. In the following section I elucidate two features of transitional contexts which, I will claim, any account of state punishment within such contexts must be sensitive to. In section three I outline the self-defence account. In section four I defend the account by responding to a number of objections that have been levelled against it by Boonin (2008). In section five I show how the self-defence account can provide the basis of a moral justification for a rudimentary system of law backed up with punishments. And in section six, I reapply the account to transitional contexts and explain how it resolves both of the problems I raised (the absence of a legitimate state and the increase in rights violations), and provides the basis for a justification of the enforcement of international criminal law.

2. Two Features of Transitional Societies

In this section I will highlight two features of transitional societies which any account of punishment must be sensitive to. I draw attention to these features because they support a view of punishment which emphasises the reduction of rights violations

as a feature of its justification. When the context in question is constituted by political instability, injustice and an increased likelihood of severe rights violations, an account of punishment which places emphasis on reducing this injustice looks to be especially important. And this highlights the plausibility of an account of punishment which serves a broadly deterrent function, even if deterrence is not the only feature of the justification.⁷⁵ As I will argue later on, the self-defence view I outline can be sensitive to this deterrent goal, while avoiding the problems commonly raised against consequentialist versions of the deterrence account—most notably that it violates the means principle by using wrongdoers merely as a means to prevent others.

2.1. The absence of a legitimate state and functioning institutions

The first feature of transitional justice contexts is the absence of a legitimate state and institutions which function to protect and provide for individuals. To be sure, this feature comes in degrees—in some transitional contexts there will be reasonably developed state institutions which play some role in protecting and providing for citizens, in other contexts these institutions will be almost non-existent. The degree of development is not significant to my argument here—what matters is that the establishment of a legitimate state is an important goal of transition, and that institutions—in particular punitive institutions—must play some role in helping transitional states to achieve this aim.

In the burgeoning literature on the philosophy of punishment, most accounts justify practices of state punishment by beginning with the existence of a legitimate state, where this means (in part) a set of reasonably sophisticated legal institutions which punish individuals for breaking the law. Given the existence of a legitimate state, with sophisticated institutions of legal punishment, theorists of punishment seek to provide a moral justification for the punitive practices engaged in by legitimate states. Sometimes these accounts carry quite radical revisionary implications for how legal institutions within modern democracies should be structured. Yet the key point is that this

⁷⁵ Another candidate for a wrongdoing-reducing account of punishment is the moral education theory e.g. (Hampton, 1984), which appeals to the educative power of punishment in reforming wrongdoers and thereby reducing the likelihood of reoffending. I will not engage with this account here both for reasons of space and also because there has been forceful criticism of the moral education view already (see for instance Boonin [2008, pp. 180-191]). The key criticism is that it is simply not clear why the moral education theory is a theory of punishment at all insofar as it lacks the crucial justification of harm element which is essential to an account of punishment. Given that we can educate wrongdoers, without imposing on them the sorts of harm essential to the practice of punishment, it is simply not clear why the moral education view offers a justification of punishment at all.

assumption remains the same—namely, that a legitimate (generally democratic) state exists and with it a set of sophisticated institutions charged with dispensing justice.

But the same model, premised on the existence of a legitimate state, is not applicable to cases of transitional justice. When we come to consider the permissibility of punishment within transitional contexts, we see that the assumption of the state, let alone a *legitimate* state, is problematic. Commonly, within such contexts, the developed institutions which we normally believe to be essential for anything like a recognisable state are not in place, or if they are then it is often the case that these institutions do not operate with moral justification in the wake of illegitimate rule.⁷⁶ Indeed, the challenge for transitional societies is precisely that of how to *bring into existence a legitimate state*—with institutions which legitimately govern, protect and provide for individuals.

The many theorists in the philosophy of punishment who believe that the existence of a legitimate state is a necessary condition for the permissibility of punishment⁷⁷ may simply deny that punishment is permissible within transitional justice contexts. This may be because the absence of a political body with the moral right to rule undermines the permissibility of institutions which dispense punishment. Or it may be because of the impermissibility of private, interpersonal punishments.⁷⁸ Or it may be because punitive practices that are not carried out by legitimate, regulated state institutions may be prone to barbarity and abuse, for instance (I highlighted some such instrumental objections in the chapter on rough justice).

The self-defensive view I outline below claims, on the contrary, that legal punishment is not only permissible when a legitimate state does not exist, but more strongly still that the establishment of a legitimate state can be facilitated through justified practices of threats and punishments. This is the case when the system in

⁷⁶ An example of this would be the introduction of unjust Sharia law systems in Iraq and Syria by the terrorist organisation ISIS. See Saul (2015) for a discussion of ISIS's legal system.

⁷⁷ A number of writers in the philosophy of punishment hold this view that the existence of legitimate state is a necessary condition of justified legal punishment. See, for instance, Boonin:

Whatever we might think about the coherence or existence of other forms of punishment, it is clear that a punishment cannot be a legal punishment, in particular, unless it is carried out by an authorized agent of the state acting in his or her official capacity, Call this the "authorization requirement" (2008, p. 24).

And Duff writes:

Any normative theory of punishment depends on some more or less articulated conception of the state (2001, p. xviii).

⁷⁸ Lyons, for instance, argues against private punishments (particularly Locke and Nozick's formulation of the right to punish) in claiming that, "it is not generally accepted that I have a right simply to hurt another who has done something wrong, just because he has done it, where there is no special relation between us" (1976, p. 210).

question serves to deter a significant number of wrongdoers from committing culpable rights violations against innocent individuals in fragile political contexts. If this rudimentary system of threats and punishments is able to achieve the end of protecting innocents, then the permissibility of punishment is not contingent on the existence of a legitimate state. Given that the establishment of a legitimate state is a central aim of transitional justice, this position is important, as I will argue further below.

2.2. The increase in rights violations

The second feature of transitional states which bears on the permissibility of punishment is the increased number of rights violations. To be sure, the number of rights violations may be less than had previously taken place under oppressive or illegitimate rule or in times of conflict, though this is sometimes not the case. Either way, the threat to life and to property often persists in transitional contexts, and pockets of violence commonly still exist in the wake of conflict, civil war or oppressive rule.

Take the following statistics on the levels of violence in post-conflict states from a 2011 *United Nations* report:

In parts of the Democratic Republic of the Congo, while the country was apparently on the road to peace in 2003–2004, widespread fighting between armed groups still continued, as did widespread human rights violations, including ethnic massacres and sexual violence. In Burundi, even after the signing of the Arusha Peace and Reconciliation Agreement for Burundi, war crimes and other grave violations of human rights continued unabated... In Northern Ireland in 2006, eight years after the signing of the “Good Friday Agreement,” the Independent Monitoring Commission ... noted continued, albeit significantly reduced, residual paramilitary violence ... In Kosovo, after the NATO-led intervention in 1999, Kosovar Albanians who were believed to have collaborated with the former Serb authorities were targeted in revenge killings. Attacks were also perpetrated on the Serb minority in an attempt to drive them out of Kosovo and to frighten Serb refugees from returning to Kosovo (United Nations Office on Drugs and Crime, 2011, p. 16)

And the following description of the case of El Salvador is particularly stark,

The example of El Salvador is notorious: on average, more persons died a violent death in the first four years of peace than during the civil war itself (Chr. Michelsen Institute, 2008).

The main implication figures like these carry for an account of punishment in transitional contexts is that it supports the view that punishment *should play some role in decreasing the threat of such rights violations*. That is, a system of law and order (however rudimentary) that played no role whatsoever in reducing rights violations would clearly be problematic. Individuals would have a justified complaint against such a system if it's existence did nothing to prevent the threat of violence, theft, and so on against them, especially given that such threats are more likely. This highlights the plausibility of a system which plays some role in reducing the level of culpable rights violations in transitional contexts.

To be sure, this does not yet show that a deterrence, self-defence-based account of punishment is morally permissible – but it does shift the burden of proof against those that deny that institutions of punishment should play any protective role whatsoever. This is to say that an account of punishment that is *purely* retributive or ‘backwards-looking’, and places no weight whatsoever on the role that a system of punishment plays in reducing the occurrence of wrongdoing, would be seriously limited in transitional contexts where there is a more serious likelihood of severe rights violations.⁷⁹

In the next section I will develop an account of punishment which is sensitive to this deterrent, wrongdoing-reducing function, which is grounded in the more basic right to self-defence. I will later show how this account can be sensitive to the two features of transitional states that I have highlighted in this section. My claim will be that it is through the introduction of a rudimentary system of law and order which issues threats backed up by punishments, that transitional societies can decrease rights violations and in doing so facilitate the process of moving towards a legitimate state.

Another point to address is why I do not endorse a straightforward deterrence-based view, according to which the function of punishing a wrongdoer is to deter other would-be wrongdoers. There are a number of well-worn objections to purely deterrent-based views of punishment – that they can justify scapegoating and punishing the innocent, that they unjustifiably use wrongdoers merely as a means to deterring others,

⁷⁹ One worry here may be that this looks uncharitable. But its not clear that it *is* uncharitable to views that completely deny that institutions of punishment should play a protective role. In any case, my point here is simply that the burden of proof is on those who deny that punishment should play a protective function, especially with respect to cases where right violations are more likely.

that they recommend grossly disproportionate degrees of punishment, amongst other challenges. The particular issue I have with purely deterrence-based views of punishment is that they bypass the agency of wrongdoers in their view of why punishment is justified. That is, in focussing solely on the future benefits of punishment, deterrence-based views bypass offender's agency – whether they carried out the offence as a fully responsible agent, whether they had any excuse or justification, whether they intended the offence, whether they knew or should have known that what they were doing was wrong. All of these things are incidental in the deterrence-based view, and it is for this reason that I do not endorse a pure deterrence view. Instead, the self-defence view preserves the importance of human agency in its justification of when it is permissible to harm a wrongdoer, as I explain in more depth below.

3. An outline of the self-defence account

In this section I will outline the self-defence account of punishment. To begin with, consider a standard case of justified self-defence:

An *attacker* (*A*) attempts to violently and culpably attack a *Victim* (*V*) and the only way for *V* to defend themselves is through engaging in preventative self-defensive violence against *A*.

Most agree⁸⁰ that *B* possesses a moral right to engage in this preventative self-defensive violence, on the condition that this violence is *proportionate* to that which is required to neutralise/ stop the attack, and that this violence is a last resort in preventing the unprovoked attack⁸¹. In other words, *V* does not act impermissibly by preventatively

⁸⁰ One exception to this 'most' would be staunch pacifists. I will not engage with the pacifist's arguments against the use of violence here.

⁸¹ These two conditions – the 'proportionality' condition and the 'last resort' condition – are defended by most writers on self-defence, and they are also required by law to permit self-defence in most jurisdictions. The 'proportionality' condition limits the degree of violence that is permissible in cases of self-defence. If an attacker threatens to steal a victim's purse, then it would be disproportionate to kill the attacker – this level of self-defensive violence would not be permissible because disproportionate. There is some disagreement about where the threshold of proportionate violence lies, though I will assume that there is a level of violence that is intuitively proportionate and a level of violence that is intuitively disproportionate (I discuss the question of what constitutes a proportionate level of punishment below). The 'last resort' condition also limits the type of self-defensive violence that is permissible. It dictates that violence can only be used in self-defence as a last resort. Thus if a victim is able to prevent an attacker by signalling a nearby police officer, instead of engaging in violence, then they must do so. It would not be permissible for them to engage in

attacking *A* in self-defence, and the reason for this is that *V* is in possession of a moral right to self-defence, a right they may execute in the prevention of culpable attacks against them.

The self-defence account of punishment I shall defend in this chapter states that the same right to self-defence informs a justification of punishment in the form of a system of threats, backed up with punishment in the event the threat is ignored. Clearly, though, the immediate problem arises that there is a significant moral difference between self-defensive violence and the use of punishment to protect individuals. This is because where self-defensive violence aims to *prevent* a particular attack, an act of punishment is in response to a *past act of wrongdoing*.

The challenge for those who defend a self-defensive account of punishment is thus to explain how the same right to self-defence which justifies preventive violence in the interpersonal self-defence cases can justify acts of punishment which respond to past wrongdoing.

The account that I will defend here relies on the notion of a *right to threaten*.⁸² The account states that if it is true that we have a right to engage in proportionate self-defensive violence, then we possess a *right to threaten* – to issue credible threats of harm in the interests of deterring potential aggressors from engaging in wrongdoing against us. The right to punish, on this view, arises when threats are ignored by wrongdoers.

Defending this view requires a defence of two independent claims:

- i) *V* possesses a moral right to issue threats against *A* in the interests of dissuading *A* from committing a rights violation against them.
- ii) In the event that *A* ignores this threat, *V* possesses a moral right to enforce the threat through the imposition of punishment on *A*.

In the remainder of this section, I will defend both of these principles.

violence if there are other, less violent means of preventing an attack. I will discuss this condition in more depth with respect to the right to threaten below.

⁸² For similar self-defensive accounts premised on the right to threaten see Quinn (1985), Farrell (1995) and Ellis (2003).

3.1. The right to threaten

I will begin by offering three reasons in favour of the right to threaten in the interests of self-defence. Together these reasons support the view that individuals possess a moral right to threaten would-be wrongdoers in the interests of self-defence.

First, we can provide some support for the right to threaten by observing certain practices which involve permissibly issuing threats with a view to disincentivise forms of behaviour. Think of the erection of a fence to protect private property with the attachment of a sign 'beware of the dog, he will bite'. Or signs on private land threatening vehicle clamping if an individual parks in that location. In these cases, it is not only the issuing of a *verbal* threat that looks permissible, it is the attachment of a significant *physical* disincentive⁸³ to deter certain behaviour which also looks permissible. Thus if an individual were to actually purchase a vicious guard-dog and place it behind the fence, or if clamps were imposed on cars, these activities do not obviously look to be morally problematic, given that a prior threat has been issued and given that the actual decision about whether or not to engage in a particular action is left down to the would-be wrongdoer themselves.

More controversial examples would be a 'trespassers will be shot' sign, or the erection of a set of severely harmful spikes behind a wall, with the issuing of the threat that these spikes will cause significant harm to those who scale the wall. These measures are controversial because they look to violate the proportionality condition, yet in some cases they may be permissible—and this point depends on the threshold of proportionate harm. The main point is that in certain cases it looks to be permissible not only to introduce a verbal threat, but to *back up* this threat with substantial disincentives to deter particular actions. And the reason underpinning this is that individuals possess a basic moral right to self-protection and protection of property. If the right to threaten holds in these minor cases of trespassing and parking on private land, then it certainly holds in more serious cases of wrongdoing (i.e. serious rights violations).

Second, threatening self-defensive violence does not violate a would-be attacker's rights. There is nothing in the act of saying "if you attempt violent act X, I will

⁸³ There is an important distinction between a purely verbal threat (i.e. a bluff) and a verbal threat backed up with physical disincentives. I will not talk in any depth about the permissibility of bluffing in this chapter. I take it that bluffing, if it is sufficient to deter, would be preferable to actually harming individuals. But I take it that in the real world, bluffing will not be sufficient, it will eventually be found out and the deterrent force of the threat would be lost. I will return to the issue of bluffing in places, though as I note will not dwell on it in any depth, because nothing in my argument hangs on the permissibility of bluffing.

prevent you through self-defensive action Y'' that violates a would-be attacker's rights. No one has a moral right against a *justified* threat. And if the attacker makes an unjustified attempt, they have forfeited their right against being (preventatively) threatened.

Yet one may still have a reasonable worry that even if the issuing of a threat is not a rights violation, it may still be morally problematic insofar as it imposes a *harm* on a would-be wrongdoer. Farrell (1995, p. 228) has raised this point, noting that the levelling of a threat in fact involves the imposition of two forms of harm (or as he terms them 'evils'). First, is the harm of *limiting the set of choices* available to a wrongdoer (i.e. by putting a disincentive on one course of action), second is the harm of imposing *fear* on a would-be wrongdoer about the consequences of following the course of action which the threat is attached to.

The most plausible response to this form of worry is to appeal – as Farrell does (1995, p. 228) – to a principle of distributive justice which holds that in a two-way choice over the distribution of harms (in the form of fear and limited choices), justice requires that innocent victims do not suffer harms but that these harms are distributed to those responsible for posing the initial threat of attack (*A*). That is, supposing that the choice is between not levelling the threat, whereby an innocent individual suffers from limited choice and fear of attack, or the levelling of a threat, whereby the would-be wrongdoer suffers from limited choices and fear, justice requires that the individual responsible for posing the initial wrongful threat suffers the burden (Farrell, 1995, p. 228). Although the levelling of a threat entails a harm, the innocent individual is justified in levelling the threat and imposing the burden of fear on the would-be wrongdoer to distribute these harms away from themselves. This avoids the worry that threatening is impermissible because it entails the imposition of harms.

A third reason in support of the right to threaten is that threatening would-be attackers is less harmful than actually engaging in self-defensive violence against them. To see this consider the following case:

Suppose that *A* is about to culpably attack and kill *V*. *V* has two options to prevent this attack: he may either break *A*'s arm or issue a threat to break *A*'s arm. Both options would be equally as effective at preventing the attack.

Clearly, on the assumption that it is in fact correct that both courses of action would be just as effective at preventing the attacker, *V* would clearly be obliged to issue a threat to *A*, and not to break *A*'s arm. This is because the issuing of threat is less harmful than actually carrying out the attack. And, other things being equal, we are obliged to choose the option that involves the least harm (this is required by the conditions of last resort and proportionality).

Together, these arguments support the claim that individuals: i) do not act impermissibly when they issue a threat to would-be attackers and, more strongly, ii) that individuals have a right to issue threats in the event that they are faced with an unjustified threat against them. By levelling such a threat against would-be wrongdoers, they do not act unjustly when their safety is under threat. The right to preventatively threaten is grounded in the more basic right to self-defence. The more controversial right, of course, is that of *enforcing* the threat through punishment in the event that the threat is ignored and an attack is carried out. I turn now to defend the right to punish.

3.2. The right to punish

In this section I will defend the view that individuals possess a right to punish in the event that a threat is ignored. I will claim that the right to punish is derived in part from the need to bolster the credibility of a threat and in part to ensure the deterrent capacity of threat-levelling. If an individual possesses a right to preventatively threaten self-defensive harm in the interests of self-defence, then they also possess a correlative moral right to impose punishment in the event that a threat is ignored. And this latter moral right, I will claim, is grounded in forward-looking considerations of prevention and general deterrence.

Before developing this account, I want to consider an alternative account of why the right to punish derives from the right to threaten. This has been developed by Warren Quinn (1985) who claims that the right to punish can be derived from the right to threaten by appealing to the notion of a '*conditional intention*'. I consider the conditional intention account here, because the limits of this account illustrate how a more plausible, forward-looking account of the right to punish may look, an account I will develop further below.

3.2.1. The conditional intention account

The conditional intentional account grounds the right to punish on the independent right to threaten (Quinn, 1985, pp. 361-373). In the act of levelling a threat against a would-be wrongdoer, this account states, we form a conditional intention to actually enforce the threatened harm in the event that the wrongdoer ignores the initial warning. In effect, we state: “if you do x , we will do y ” where x is the attempted attack (or any rights violation) which the threat seeks to dissuade and y is the retaliatory harm of punishment. In making this justified threat, we commit ourselves (form a ‘conditional intention’) to actually carry out the threatened attack in the event that it is ignored. Quinn writes:

If the urgency of self- protection makes moral room for threats it also make moral room for punishment... It is possible to hold that punishing a criminal for a crime does not violate his rights *because* subjecting him to the threat of punishment for such a crime did not violate his rights in the first place (Quinn, 1985, p. 370).

The reason for this, Quinn claim, is that we form a conditional intention to actually carry out the threat at the time of threatening. Quinn’s setting out of the argument has a number of steps, though the basic structure is as follows: if an innocent individual is justified in forming a conditional intention to harm in levelling a threat, and is justified in retaining this intention at each stage of the process – from levelling a threat to actually enforcing the threat – then the attacker cannot object when this punishment comes about. And the reason for this, Quinn claims, is that the in levelling a threat the victim forms a conditional intention and this conditional intention carries forward to justify the actual harm, in the event the threat is ignored (Quinn, 1985, p. 364).

This account of the right to punish appeals to backwards-looking considerations rather than the pursuit of further goods in explaining the right to punish. The justification of punishment looks back to the fact that a conditional intention was made in the past and uses this intention to explain why it is permissible to enforce the threat through punishment, after the threat has been ignored.

The problem with this defence of the right to punish is that the formation of a conditional intention is not sufficient to actually permit us carrying out the punishment in the event that the threat is ignored. This is because right up to the point where we

have to make the decision about whether to actually enforce punishment, we possess a *choice*. And this choice must be justified at the point of punishing. To see this consider the following case:

Suppose that *V* levels a threat against *A* to impose harm on them if they steal her handbag. Suppose further that in levelling this threat *V* forms a conditional intention to actually carry out this harm in the event the threat is ignored. *A* ignores the threat and decides to steal the handbag. *A* is, however, caught by *V*, and *V* is now faced with the choice about whether to punish *A*.

What reason would *V* now have for punishing *A*? The conditional intention account states that the fact *V* made a conditional intention at the time of a threat carries moral force in justifying punishment at the time of the decision over whether to punish.

The problem is that it is simply not true that the fact that *V* intended something in the past gives them any justification to do something harmful in the present. Suppose I form a conditional intention (justifiably) to kill someone at t_1 . Does the fact that I have intended this in the past contribute anything to my being justified in actually killing that individual at t^2 ? Clearly not. What matters is whether I am justified at t^2 , and my past intentions contribute nothing to that justification. Tadros has developed a very similar objection to the conditional intention account, he writes that,

The difficulty with this [conditional intention] argument is that human agency is not mechanical. If I form a conditional intention that I will break your leg if you destroy my car, once you destroy my car I retain a choice whether to break your leg. Furthermore, at least if I am being rational, the reason that I had for making the threat cannot provide a reason to carry it out (Tadros, 2011, p. 271).

The conditional intention account thus fails to generate a right to punish from the right to threaten. An alternative version of the self-defence account appeals to the *forward-looking* values of deterrence in deriving the right to punish from the right to threaten. I turn next to develop this account.

3.2.2. Deterrence and the creditability of threats account

In this sub-section I will set out an alternative version of the self-defence account. We may begin this defence of the right to punish by observing that in order for threats to work at deterring wrongdoers they must be credible.⁸⁴ This is not necessarily to suggest that bluffing is impermissible. In an ideal world bluffing without actually harming someone would be optimal. Yet it is to suggest that in the real world constant bluffing would likely be inefficacious and would render threat-making pointless. Suppose I issue a threat against an attacker at t^4 having previously levelled a number of threats at t^1 , t^2 , t^3 without actually punishing the attackers who ignored them. My threat at t^4 would be baseless, the attacker would see that my previous threats were not credible and would have very little reason to not carry out the attack. The best means of making threats effective, then, is by actually enforcing them in the event they are ignored. And this provides us with one reason to actually enforce the threat.⁸⁵

Yet here a worry arises that this defence of the right to punish looks to justify using wrongdoers as a means of deterring other would-be wrongdoers. This is problematic because it looks to be in violation of the '*merely a means principle*'. The merely a means principle is a principle of justice which states that it is morally impermissible to treat an individual in such a way as to use them *merely* as a means to some further end. And, the objection runs, if we punish wrongdoers solely for the reason of bolstering the effectiveness of future threats then we are impermissibly using them as a means to this end – namely, preventing others by ensuring our threats are credible.

If we endorse the judgement that it is impermissible to use individuals merely as a means in this way, then we agree with the '*merely a means principle*'.⁸⁶ We can see the

⁸⁴ Farrell makes an analogous point when he writes:

Our threats will deter only if they are credible and... credibility often requires both a readiness to act on one's threats and actually acting on them once they have been ignored (Farrell, 1995, p. 222).

⁸⁵ One objection here would be to appeal to cases of nuclear deterrence, where states successfully bluff to deter one another. The objection being that consistently bluffing seems to work, and does not weaken a deterrent threat. My sense here is that the reason nuclear deterrence is so effective is due to the scale of potential harm. Thus if the threat is nuclear holocaust – where civilisation itself is at stake – we may think that bluffing would be extremely useful at deterring. But the same doesn't apply to the bluff of proper punishment, proportionate to the threatened harm.

⁸⁶ The qualification of *merely* is very important in the formulation of the merely a means objection. It captures the notion that it is not impermissible to use individuals as a means, so long as we do not treat them *only* as a means. After all, we use one another as a means all the time – patients use doctors as a means of gaining treatment, a car salesman uses and is used by his customers to make a profit/ buy a car. These cases are not problematic because the individuals within them have a choice about the transaction and because their autonomy is being respected. The problem of using people as a *mere* means is that the element of choice is withdrawn and individuals are not respected as valuable agents. We can imagine for instance a variation of

force of the merely a means principle with the following set of cases – the *trolley case* and the *bridge case*:

Trolley case: a train driver is travelling down a track when he notices his brakes have been cut. Travelling at an unstoppable speed he notices that the track ahead splits in two – five people are down the track he is travelling on, one person is on the other track. If the driver does nothing he will kill the five people, if he diverts the trolley he will kill the one person, saving the five.

Bridge case: a train driver is travelling down a track when he notices his brakes have been cut. On the track ahead are five people, and if the train is not halted they are sure to be killed. On a bridge above the track are two people – one is a large man, big enough to stop the train carriage if he is pushed on to the track, the other is a smaller, stronger individual who while not big enough to stop the train themselves is strong enough to push the larger man in front of it, again saving the five.⁸⁷

When faced with this twin set of cases many share the intuition that while it is permissible for the driver to divert the train in the trolley case, it is not permissible for the smaller man to push the larger man on the track to halt the train. And this is because many believe the merely a means principle to be correct – that while it is sometimes permissible to pursue good consequences where harm to an individual is a *foreseeable* but *unintended* consequence, it is not permissible to *intentionally* use an individual merely as a means to achieving good consequences.⁸⁸

It is important to make this brief detour to the merely a means principle because it shows why the credibility of threat defence of the right to punish seems to be morally problematic. When we punish those who have ignored a threat with a view to supporting the efficacy of future threats we appear to be *intentionally* using them *merely*

a case in which a doctor is forced to write a prescription by gunpoint – in this case the agency of the doctor is bypassed and they are used merely as a means.

⁸⁷ Tadros (2011, p. 115) uses these twin cases in his discussion of the mere means principle, and my presentation of the principle is similar to his.

⁸⁸ There are different versions of the means principle and different arguments for why using people merely as a means is wrong. The version I have defended here is the most common formulation of the objection, though for a more detailed engagement with the different versions of the means principle see (Tadros, 2011, pp. 113-138).

as a means to pursuing a future good, where the good here is deterring other potential wrongdoers. In effect, we say to a wrongdoer: “I have to punish you, because if I did not the others would not be deterred the next time I level a threat. Your punishment is valuable to the extent that it will support the effectiveness and credibility of my levelling future threats”. Yet just as it is wrong to intentionally push the larger man to save the five in the bridge case, it is wrong to intentionally punish the one wrongdoer to pursue the good of deterring others by making threats more credible. The reason being that in both cases we are intentionally using an individual merely as a means.⁸⁹

While the means principle poses a serious objection to the ‘credibility of threat’ account, there is a way around it. To begin with, consider a particular example that is well used in the literature on self-defensive punishment.⁹⁰ This is the example of the ‘*automatic retaliatory device*’:

Suppose that after a number of attempts against them, *V* designs an automatic retaliatory machine which responds to attempts by imposing retaliatory harm on wrongdoers. Suppose further that once set in motion, *V* is unable to prevent the machine from imposing retaliatory harms. *V* clearly publicises the fact that they have this retaliatory machine, and that it imposes harms, to disincentivise would-be wrongdoers.

Would *V* be permitted in actually activating the machine? Or would *V* be impermissibly using offenders as a mere means if the retaliatory machine were to impose harm on them in the event that they ignore a threat? To be sure, if the *only* reason the machine is activated is deter others then we may think that wrongdoers are being unjustifiably used as a mere means. But this isn’t the case (and indeed such a defence would look more like a straightforward deterrence account of punishment). The machine is activated for two reasons: i) to support the credibility of threat-making and ii) to inflict harm on those who ignore a threat. Importantly, within this protective function of the machine, wrongdoers are not treated merely as a means. The wrongdoer is punished because they chose to take an informed risk by ignoring a pre-existing threat and attempting to attack an innocent individual. While it is true that the overall purpose of the retaliatory machine

⁸⁹ To be sure there are a number of dissimilarities between the punishment and bridge cases. The thing that interests me here is the analogous feature that in both cases an individual is being treated merely as a means.

⁹⁰ The example of the auto-retaliatory device is also employed by Alexander (1980), Ellis (2003) and Quinn (1985).

is to prevent future wrongdoing, those who attempt to violate victims are punished for their choice to commit wrongdoing—it is therefore not the case that wrongdoers are being punished *merely* as a means⁹¹ to prevent others. They are being punished i) because they ignored a justified threat (and thus their agency is being respected) and ii) to deter others (and to bolster the credibility of threats in line with this aim).

My claim is that all of these features are necessary for punishment to be permissible—that a threat has been ignored, that an act of wrongdoing has therefore taken place, and that punishment serves some deterrent function. We require the condition on an ignored threat to preserve the importance of agency in the view of justified punishment (and to avoid the mere means objection). And we require the condition on prevention because without some preventative benefit individuals would have no reason to erect a retaliatory system. Yet these elements should not be seen to be sufficient. In what follows I want to further explain the contours of the self-defensive view by responding to some objections.

4. Defending the self-defence account

In this section I will defend the self-defence account outlined above against a number of challenges that have been levelled against it. More particularly, I will focus on five challenges which have been raised by Boonin (2008, pp. 198-207): first, that the self-defence account permits the *punishment of the innocent*, second that the account permits degrees of punishment that are *disproportionately severe*, third that it permits punishments that are *disproportionately lenient*, fourth that the account fails to accommodate *degree of responsibility* and fifth that the account *fails to offer a moral justification of punishment at all*.

⁹¹ Recall the point made in footnote 85 above that what is problematic is using individuals *merely* as a means, where this means bypassing their rational agency and using them as a mere means to some further ends. But in the case of punishing an attacker for ignoring a threat, then it is not clear they are being used *merely* as a means precisely because their agency is being respected—they are given a choice to heed or ignore the threat. While they are being used to deter others, they are not being used *merely* as a means to this end.

4.1. The punishing the innocent objection

The first challenge to the self-defence account states that the account is flawed because it permits the punishment of the innocent (Boonin, 2008, pp. 198-201). Clearly, it is extremely important that a system of punishment does not intentionally punish individuals who have not broken the law (or otherwise committed a culpable act of wrongdoing), this is one of the worst injustices that a system of law can commit. While many state criminal justice systems will inevitably punish a few innocent individuals by accident, it is important that these institutions do not do so intentionally. There is a morally significant difference between those who do and those who do not break the law, and any account of punishment must be able to explain why it is only permissible to punish those who are guilty of crimes (or wrongdoing), and why it is not permissible to punish those who are not.

The punishing the innocent objection states that the self-defence account cannot explain why in certain cases it is impermissible to inflict harm on an innocent individual. To see this consider the following passage from Boonin:

Suppose that the prospect of becoming sick is not enough to deter most intruders from climbing over the fence...Suppose also that a second toxic substance is available that would ... make an intruder sick but would in addition have the following property: it would stick to the intruder's body for a long time and eventually infect all of his children. And suppose, finally, that although many would-be intruders would not be deterred by the prospect of being made sick by climbing the fence, they would be deterred by the prospect of infecting their children and causing them to suffer. In this case, it seems clear that the appeal to the right to deter would-be intruders that justifies coating the fence with the first toxin would also justify coating it with the second. But coating the fence with the second toxin amounts to activating a...device by which the builder threatens to punish not only offenders but their innocent children as well (2008, pp. 198-199).

Boonin's challenge is that the same deterrent logic that permits threatening harm and punishing would-be wrongdoers permits threatening harm and punishing innocent individuals (in his case, the would-be wrongdoer's children). This is because it looks to be permissible for an individual to level *any* level of threat to secure their own protection. And for the reason that the self-defence account licenses this injustice, it should be rejected.

The objection is misplaced. It is based on a misunderstanding about the conditions in accordance with which it is permissible to activate an automatic retaliation device in individual cases of self-defence. When we consider analogous cases of individual self-defence, we see that it is in fact *not* permissible to turn on the machine under the conditions that Boonin's case indicates – i.e. when an innocent individual is made liable to harm in the interests of deterrence. This is because, crucially, the permissibility of self-defensive violence changes if the choice is between suffering harm or harming another innocent to divert harm from oneself. That is, if the choice is between *V* suffering harm from an attacker, or *V* diverting harm from themselves by diverting the harm to another innocent individual – *I* – then justice requires that *V* suffers the harm, and does not inflict the harm on *I*. We can see this in a familiar human shield case in the literature on self-defence:

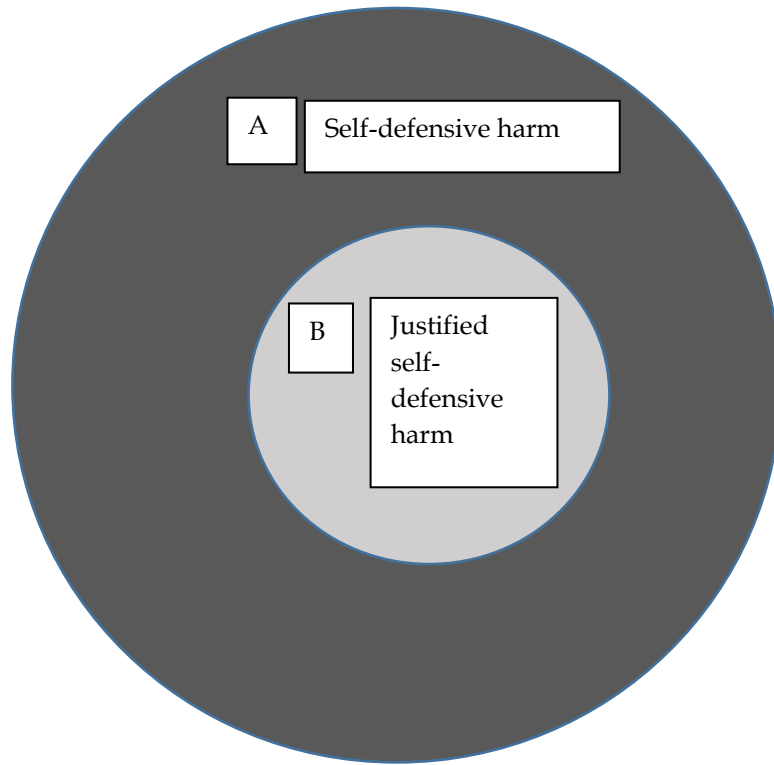
Suppose that *A* is about to attempt to kill *V* and the only way in which to prevent this attack is if *V* grabs a nearby innocent individual – *I* – and uses them as a human shield, thereby killing *I*.

Would *V* be justified in using *I* as a shield? No – given that *I* is in no way related to the initial threat posed by *A* and is innocent in the morally relevant sense, *V* would not be permitted to use *I* as a shield. In this case, justice requires that *V* is either killed or that *V* finds some other way to defend themselves which does not involve using an innocent individual.

The same applies to the decision about whether to construct a machine (or in Boonin's case erect a fence) which harms innocents in an attempt to protect other innocent victims. Just as it is impermissible to use another innocent individual to prevent an attack against oneself, it is impermissible to construct a machine which will foreseeably or intentionally target an innocent to divert harm to ourselves.

To see this consider the following diagram. It captures the important distinction between self-defensive harm in general and *justified* self-defensive harm.

FIGURE 1: SELF-DEFENSIVE HARM AND JUSTIFIED SELF-DEFENSIVE HARM



Circle A contains any conceivable harm a would-be victim could threaten and enforce against an attacker in the interests of self-defence. The scope of self-defensive violence is wide—disproportionate killing (i.e. killing in response to a minor threat), disproportionate attacks, kidnapping an attacker’s family, torture, using an innocent as a human shield, and all other conceivable forms of harm that could be employed for self-defence. Circle B contains the range of harms that it is *justifiable* to impose on an attacker. The scope of justified self-defence is by contrast small—it is constrained by considerations of proportionality, the non-liability of innocents to be used for self-defence, the significance of the responsibility of an attacker, that self-defensive harming is a last resort, amongst other factors.

This distinction between self-defensive harm and justified self-defensive harm is important and it explains why Boonin’s objection is misplaced. Boonin’s objection stands if we adopt the view that any form of threat or punishment are permissible for self-defence. This view is open to the complaint that would-be victims are permitted to kill an attacker’s innocent family in the interests of self-defence, for instance. But we need not commit ourselves to that view. Instead, if we understand that only justified self-

defence is permissible, the scope of justified threats/ punishment is minimised such that the account no longer looks objectionable.

4.2. The disproportionately severe objection

A second challenge to the self-defence account targets the degree of punishment it is permissible to impose in the interests of self-defence. There are two dimensions to this challenge – the first states that the self-defence account will in some cases license *disproportionately severe* punishment, the second states that the self-defence account will sometimes endorse *disproportionately lenient* punishment (Boonin, 2008, p. 201-203). Together, both challenges undermine the self-defence account. In this section, I will focus on the disproportionately severe objection, and in the following section I shall respond to the disproportionately lenient objection.

To see the first problem of *disproportionately severe* punishments, consider the following passage from Boonin:

In the too much punishment version, the self-defense solution justifies the right to inflict severe punishment for trivial offenses. Alexander, for example, raises this concern in the context of thieves who continue to try to steal his roses ... He believes that it would be permissible for him to move his rose bushes to a private island surrounded by shark-infested waters ... and that if this is so, then it would be equally permissible for him to construct a functionally equivalent moat to protect his rose bushes ... If it is permissible to build a lethal moat to protect one's roses, then, according to the argument that attempts to justify the self-defense solution, it must be permissible to threaten lethal consequences for stealing roses and, finally, to inflict those consequences on those who steal them. But a painful execution for petty theft will strike virtually everyone as morally unacceptable (Boonin, 2008, p. 202).

Boonin's point is that the same logic which permits self-defence permits disproportionately severe sanctions for trivial offences. And for the reason it licenses gross injustice, the account should be rejected.

This objection is misplaced, again because it assumes that it is permissible to threaten any level of harm in the interests of self-defence. This is not the case. As set out above, the sphere of harm it is permissible to threaten in self-defence is smaller than the full panoply of harms we may threaten in self-defence. Once we realise that it would not be permissible to threaten lethal violence to prevent a trivial threat (to build a lethal moat

to protect our roses, in Boonin's example), we avoid the disproportionately severe objection.

4.3. The disproportionately lenient objection

The problem of *disproportionately lenient* punishments follows from the fact that the self-defence account seems to be committed to the view that the least possible amount of harm must be threatened/used to prevent individuals from wrongdoing.⁹² Consider the following passage from Boonin:

Suppose that the threat of a \$500 fine would be enough to deter the vast majority of people from burning down someone's house...In this case, to protect our houses from being destroyed by arsonists, the self-defense solution would permit us to threaten them with a \$500 fine...it would not...entitle us to threaten a greater fine or a five-year prison sentence, because we are only entitled to threaten to use the least force necessary to protect ourselves...But since the right to punish is derived only from our right to threaten to punish, this means that since we would have the right only to threaten a \$500 fine against arsonists, we would have the right to punish them only in that amount (2008, pp. 202-203).

The problem, of course, is that a \$500 fine for committing serious arson in burning down someone's house is clearly a disproportionately lenient punishment for the severity of the offence. Yet it seems to follow that we are obliged to punish with \$500, if this is what is sufficient to deter.

My response here will not be to the objection in principle, because I do think it carries weight. But I do think it is possible to respond to the objection by highlighting reasons in support of a more plausible view of proportionate punishment. My response rests on a distinction between two ways of formulating an account of proportionality. One pertains to when we are building an auto-retaliatory machine to protect *ourselves* and *our property*, the other pertains to when we build a retaliatory device to protect a *large number of individuals in society* by disincentivising the acts of a large number of would-be wrongdoers. The transition between the two forms of machine – one to protect by disincentivising a small number of individuals, the other to protect by

⁹² This follows from the proportionality requirement in self-defensive punishment.

disincentivising a large number, is significant, I will argue, because it impacts on the judgement of what we deem to be a proportionate threat/punishment.

I will attend to the transition between these two machines in more depth in the following section. The point I want to make here is that the force of the disproportionately lenient objection applies most strongly to cases of a machine to prevent *individual* wrongdoing, and not to a *societal system* designed to prevent wrongdoing. In this latter case, the level of justified threat would plausibly have to be increased to deter more people. A societal *system* designed to deter and disincentivise culpable acts of wrongdoing could not routinely level disproportionately lenient sanctions, if it wants to serve its deterrent goal.

To see this think about the sorts of considerations that would have to be factored into a society's determination of what constitutes a proportionate threat. This would include considerations such as

- i) The severity of a particular act of wrongdoing.
- ii) The effect of wrongdoing on other innocent individuals.

i) The severity requirement captures the idea that more serious wrongdoing would generally require a greater degree of threatened sanction. If individuals are of a mind to commit murder, then a small fine would not reasonably deter them (it could in an individual case, but a far greater level of threat would be reasonably required in the interests of deterring a larger number).

ii) The effect of wrongdoing captures another morally relevant difference between cases of individual self-defence and a system of laws. This is that laws must factor in the effect of wrongdoing on other innocent individuals, which is not the case in individual self-defence. In erecting an auto-retaliatory device, an individual need only factor in the threat to themselves, but in erecting an analogous system a state must consider the likelihood and effects of wrongdoing on others. Thus where it may be permissible for an individual to level a lenient threat of a fine against a potential attacker, if this were sufficient to deter them, the state arguably would be permitted to level more severe sanctions in the interests of deterring others and thus preventing harm to other innocents.

To be clear, my response to the disproportionately lenient challenge is to agree with the challenge in principle, but to insist that it is strongest as a challenge to the auto-retaliatory machine an *individual* may erect in the interests of protecting themselves. It is less strong against a *system of laws* erected by a populace to protect innocents. This is because in this latter case legislators are forced to make more generalised, rather than specific judgements of proportionate sanction to deter a large number of would-be wrongdoers. In making this judgement, they would have to factor in a range of considerations (severity of wrongdoing and the effects of the wrongdoing on others) and determine proportionate levels of sanction on this basis. These sanctions would, I claim, have to be generally more severe.

4.4. The responsibility objection

A fourth objection raised by Boonin is the ‘no-excuses objection’ (Boonin, 2008, pp. 203-205). The objection states that the self-defence account cannot accommodate the important requirement that offenders who are less responsible for an offence (or indeed not responsible at all) should be punished less (or not at all) compared to those who intentionally commit the same offence.

The challenge states that the self-defence account cannot explain why those who are less responsible should not be punished to the same extent as those who intentionally commit rights violations. We may also consider cases of the mentally ill or children who, while they may pose a threat, are not liable to punishment or liable to less punishment by virtue of the fact they are either not responsible due to lack of capacity, or diminished responsibility. The self-defence account seems to justify the same level of harm against these individuals as it would against intentional wrongdoers who possess full capacity (and responsibility).

To respond to this objection we can highlight that at the level of an auto-retaliatory machine, or a system of societal laws, it would be *pointless* to activate the machine against those who are not responsible, or who lack the relevant agency to ignore a threat and commit an intentional rights violation. There are a number of reasons for this. First, threatening individuals who are unable to understand or be responsive to the requirements of such threats would be an unnecessary cost for such a system to bear, with no deterrent benefit. Second, there would be a number of reasons for wanting to deter only those individuals who commit intentional attacks – these individuals would

be i) more likely to reoffend against other innocents and ii) they would also be more responsive to a deterrent threat. These considerations support the view that it is not a worthwhile cost for a societal system to bear to level threats against non-responsible threats, or those who lack the relevant capacity for intentional wrongdoing. As such, the responsibility of would-be attackers can be factored in to the operation of the societal system of self-defensive threats.

The response here may be that this is too quick. We can see a preventative benefit of punishing those with no responsibility or with diminished responsibility insofar as we may incarcerate them or otherwise deter them from committing further wrongdoing. Yet recall the conditions under which we are permitted to activate the auto-retaliatory machine. There is no sense in which children, or those who lack the agential capacity to recognise threats, are liable to be harmed, and therefore the machine could not permissibly be activated to prevent such individuals.

4.5. The failure to justify punishment objection

A fifth challenge to the self-defence account is that it fails to justify punishment at all. To see this challenge consider the following passage from Boonin:

To return once more to the relatively simpler case of the spiked fence, if we understand the harm caused to the person who climbs the fence to be merely a foreseen consequence of constructing the fence, then there is no way to move from the assumption that building the fence is permissible to the conclusion that punishment is permissible (2008, p. 207).

The reason for this, Boonin claims, is that punishment involves the intentional harming of an individual in response to their committing wrongdoing or having otherwise broken the law. The problem is that the harm involved in self-defensive punishment is not intentional but is merely a foreseeable means of preventing wrongdoing. As such, the self-defence account fails to provide a justification of punishment at all.

We see this in Boonin's case of a fence which is erected to deter would-be wrongdoers. The erection of the fence is not intended to cause harm—indeed, if the builder *had* intended to cause harm, then clearly they could have developed a more suitable contraption to do so. Instead, the fence serves to prevent/ deter attackers from trespassing, and the use of harmful spikes is a means of prevention—a harm which is

required as part of the fence builder's attempt to protect themselves. The challenge to the self-defence account states that the erection of this fence—which is sufficiently similar to an automatic retaliatory machine—is not an instance of punishment at all because it lacks the *intentional* element that is required for an act to be act of punishment. Insofar as the harm is only foreseeable and not intended, the self-defence account fails to provide an account of punishment at all.

There are three responses that a defender of the self-defence account could develop. The first is to challenge the claim that in order for the infliction of harm to constitute an act of punishment it must be intentional. The second is to bite the bullet—to accept that this challenge is weighty, but that it does not undermine the self-defence account as a justification of when it is sometimes permissible to harm wrongdoers. The third is to deny that self-defensive harming does not involve the intentional infliction of harm.

Here I will defend the second response—I will argue that it is correct to think that the self-defence view does not justify the intentional use of harm. But, I argue, this is not a problem for the account. What we have is a justification of when it is sometimes justifiable to foreseeably harm someone in the interests of protecting ourselves and other innocents, and whether we want to call this 'punishment' or not is a semantic issue, which, while important, doesn't undermine the self-defence view as an account of justified harm.

In the philosophical literature on punishment, the condition of intentional harming is widely held to be necessary for a particular harmful act to constitute punishment.⁹³ Some take this as a definitional point—that the concept of punishment analytically entails the intentional infliction of harm. Others appeal to this condition as a means of distinguishing punishment from other coercive measures such as the detainment of the mentally ill or the enforcement of a system of taxes, for instance. Thus where punishment requires the intentional infliction of harm on wrongdoers, detainment and taxation involve the foreseeable infliction of harm (or coercion), in the interests of protecting others or the individual themselves, or of gathering finances for the public interest. In the latter two cases, the infliction of harm is a foreseeable means

⁹³ Many writers on the philosophy of punishment defend the intentionality requirement. See, for example, H.L.A. Hart—"it [punishment] must be intentionally administered by human beings other than the offender" (Hart, 1970, p. 5); "[punishment is] an evil *deliberately* inflicted *qua* evil on an offender" (Primoratz, 1989 p. 5); "to be a punishment, an act must involve intentionally harming someone *because* he previously did a prohibited act" (Boonin, 2008, p. 17); "punishment involves the intentional infliction of harm or suffering on others" (Tadros, 2011, p. 21).

to achieving some other goal. And if another, less harmful means served the same goal just as adequately, then this would be required. Whereas in the case of punishment the intentional infliction of harm is a necessary feature of the practice.⁹⁴

One thing to take from this comparison between the intentional harm involved in punishment and the foreseeable harming involved in other practices, is that the self-defensive account could be seen as a category of the latter sort of practice. That is, we can accept that the account is not an instance of punishment, because it does not involve intentional harming, yet recognise it as still being justified as a practice which involves foreseeable harming. And we may place self-defensive harming in the category of practices which use foreseeable harms to secure some further goods – practices such as taxation and preventative incarceration and the containment of the mentally ill, where the good in question is the protection of the innocent. This is to accept Boonin’s challenge to the self-defence view as a view of punishment, but to deny that this challenge undermines the account as an account of when it is sometimes justified to harm individuals. We can recognise societal self-defence as being permissible to protect others in the same way as taxation or containing the mentally unwell involve foreseeable harming to promote the good. And whether we want to call this punishment becomes a semantic issue.⁹⁵

5. From self-defence to a rudimentary system of law

In this section, I want to briefly explore the idea that the self-defence account of punishment outlined above can provide the basis of a moral justification of a system of law and order – taking the form of justified threats and sanctions. In particular, I will draw attention to some features which are relevant to the move from individual self-defence to a system of *societal defence*. Here the question shifts from what individuals are justified in threatening/ enforcing against wrongdoers in the interests of self-defence to what institutions/ practices a *society* is justified in implementing in the interests of defending the innocent.

To frame this discussion, consider the following case. Suppose a society is comprised of would-be wrongdoers (*A*’s), potential innocent victims (*V*’s) and a group

⁹⁴ This is consistent with the view that punishment may not be permissible if there is a less harmful method.

⁹⁵ For the sake of consistency, I will continue to use the term ‘punishment’ with respect to the self-defence account, notwithstanding the semantic objection to doing so.

of legislators (*L*'s). What measures would *L* be justified in implementing? One plausible set of measures would serve the aims of *preventing* wrongdoing. These would include measures such as a police force with search and arrest powers and surveillance, for instance. Yet on the assumption that some within group *A* will still be of a mind to commit wrongdoing, I take it that *L* would also be permitted to introduce a system for responding to this wrongdoing. Here we see the plausibility of a system analogous to the auto-retaliatory device outlined above. The main aim of this system would be *preventative*—to deter would-be wrongdoers from group *A* by prohibiting certain forms of action and by disincentivising individuals from engaging in these actions by making credible threats of punishment. In the event that these threats are ignored, the system (along the lines of the auto-retaliatory machine above) would then enforce these threats, and this enforcement would be justified to the extent that it serves the aims of general deterrence and the protection of the innocent.

Yet there are good reasons as to why the system of threats and punishments implemented by *S* should not directly resemble the auto-retaliatory machine. For instance, such a system would have to be *less automatic*—largely because innocent individuals may be accidentally apprehended by the system, and the system should be built in such a way as to include safeguards preventing the unjust punishment of the innocent. The problem of punishing the innocent would require certain procedures such as *trials* being built into the system, to ascertain guilt, in the event that this was in question. The point here being that operating a large auto-retaliatory machine in a society without safeguards on how suspects are apprehended could be dangerous, and we would want certain safeguards protecting individuals from the societal machine which is designed to protect.

One worry may be that the introduction of procedures to establish guilt and innocence would interfere with the system's ability to protect innocent individuals. Yet it's not clear that this argument stands once we realise *the threat that the system itself poses* to individuals who are innocent of wrongdoing. That is, if the purpose of the system is to protect the innocent from attack/wrongdoing—then it makes sense to include certain provisions to prevent the targeting of the innocent by the system itself. And once we understand that those subject to the harms of the system may be innocent victims, we have substantive reasons in favour of introducing safeguards to protect innocents accidentally apprehended by the system. Indeed, these safeguards may be grounded in the more basic right of self-defence, which in this case means protecting individuals from a system of laws that becomes too forceful, or which falsely apprehend the innocent.

Another safeguard we would plausibly wish to implement are measures to prevent the system becoming unruly and having too much power over individuals. This requirement would be less important in the case of an auto-retaliatory machine erected by an individual to protect themselves and their property – such a system would be less prone to abuse. Yet in the case of a societal system of self-defence, targeted against a number of would-be wrongdoers, it seems reasonable to include measures to prevent potential misuses of power. These would plausibly include provisions such as *civil* and *procedural* rights to guard against individuals being treated unjustly by the system. These may resemble the procedural rights included in most liberal democratic legal systems, such as rights to *habeaus corpus* (the right to challenge suspected unlawful imprisonment before a court), the presumption of innocence, rights to legal representation and to a fair trial and rights against unjust discrimination (such as rights to equal standing before the law).⁹⁶

6. Reapplication to transitional societies

In this section I want to return to the context of transitional justice and the problem of punishment therein. In particular, I want to highlight how the self-defence account can respond to the two problems which I highlighted as being endemic to transitional societies at the start of the chapter. And I will conclude by thinking about how the self-defence account applies to the context of international law.

To begin with, recall the two problems I highlighted in transitional justice contexts which, I claimed, bear on the permissibility of punishment in such contexts. First, the problem of the absence of a legitimate state and institutions which effectively protect and provide for the basic rights of individuals. Second, the problem of increased rights violations which are common within contexts of states transitioning from conflict and authoritarian rule.

The self-defensive view provides an account of punishment which does not require a legitimate state. We can imagine a community of individuals who erect a self-defensive system of law and punishment to protect the innocent from unjustified attack (or other forms of rights violations). This community can, in principle, erect this system

⁹⁶ Of course, I don't want to suggest that this justification of a rudimentary system of law would be different between societies. While I emphasise the plausibility of the account with respect to more fragile political contexts in this chapter, the same view can in principle inform a justification for laws and punishments in more developed liberal democratic contexts.

even though there is no legitimate state in existence, i.e. even though procedures are not in place to establish a legitimate government with the right to rule. Or we can imagine a just military intervention in a state in the midst of civil war. Even though this state does not have a legitimate government, this military power will still be justified in erecting a self-defensive punitive system, if in doing so they serve to deter wrongdoers (in both cases, punishment is justified because it serves to protect the innocent). Thirdly, we can imagine a case in which a just government who are undemocratic (say a benign elite group) could in principle erect a system of threats and punishments along the lines of the auto-retaliatory machine. My claim, then, is that a legitimate government is not a necessary condition for justified legal punishment.⁹⁷ According to the self-defence account, it is permissible for agents to establish a system of self-defensive punishment, assuming that the threats are justified⁹⁸ and the system serves its aim of protecting the innocent.

Second, the self-defensive view illustrates that punishment is not only permissible when a legitimate state does not exist, but more strongly still that the establishment of a legitimate state can be *facilitated through* justified practices of threats and punishments. This is the case when the system serves – as the self-defensive view seeks to – to deter a significant number of wrongdoers from committing culpable rights violations against innocent individuals. Consider the following case (which I take to be not wildly dissimilar to many cases of democratisation in fragile states).

Suppose a state is in the midst of transitioning from authoritarian rule (by a belligerent dictator) to democracy. The legal system is undeveloped and fails to effectively arrest and apprehend wrongdoers. Suppose further that it is *because* of residual violence from both supporters and opponents of the old regime, that democracy cannot be implemented.

⁹⁷ This is compatible with the view that it is all things considered best for a legitimate state to be in charge of punishment. This would ensure the laws are representative (democratic), for instance. My point here is simply that a legitimate state is not necessary for punishment and, in the absence of a legitimate state, punishment is permissible.

⁹⁸ An important element of a threat being justified is not just that it is proportionate to the harm it seeks to prevent but also that the individual issuing the threat is justified in doing so. This rules out a gangster with a history of wrongdoing from issuing threats to defend themselves. It would also rule out an illegitimate dictator from issuing threats to protect themselves and their friends in the elite. The reason being that in committing wrongdoing they lose their claim to be justified in threatening.

The self-defence account provides the outline of a system of punishment that in such a case would facilitate the move towards establishing a legitimate state. By seeking to prevent the instances of rights violations, self-defensive punishments can facilitate the establishment of a legitimate state. A system of self-defensive threats and punishment can also help to put in place the conditions required for elections, the just distribution of goods, and other pre-requisites for democracy. As such, I want to claim that the self-defensive view of punishment, and the rudimentary system of law and punishment it represents, can serve as a vital tool in the process of transition.

Third (though this suggestion is tentative, and comes with a number of qualifications) the self-defence view provides the basis of a justification for International Criminal Law (ICL), and an argument for when states should impose it. The basic thought is that we can understand international law generally, and aspects of ICL in particular (such as war crimes, crimes against humanity, genocide, torture and Crimes Against Peace) as serving an essentially protective function.⁹⁹

My claim is this. International law is still relatively undeveloped.¹⁰⁰ Yet it also provides a reasonably comprehensive list of acts that individuals—in the main state leaders—cannot do, on pains of facing punishment. These include acts such as genocide (persecuting or killing a group of people on the basis of their membership of a national, racial, religious or ethnic group), torture, aggression (unjustly initiating war), war crimes, amongst others things. These acts are prohibited under international criminal law which, in effect, serves as a threat—it says, ‘if you do these things, you will be (individually) investigated, tried, and (if found guilty) punished.’

Now, the self-defence account outlined above provides us with at least one reason as to why states should concern themselves with enforcing the threats of international law. To see this, consider the following case,

Suppose that a state is in the midst of transition from authoritarian rule. The previous regime leader—a military dictator—has been apprehended by

⁹⁹ Cassese captures this essential function of ICL in writing,

ICL primarily addresses the conduct of *individuals* and aims at protecting society against the most harmful transgressions of legal standards perpetrated by them (whether they be state agents or persons acting in a private capacity) (2008, p. 8).

¹⁰⁰ We see this in the fact that modern international criminal law is widely accepted to have its origins in Nuremberg, 70 years ago. See (Cassese, 2008, pp. 4-5) for a discussion of the undeveloped nature of international law more generally.

opposition forces and given over to the official state legal system (which has now been purged of officials sympathetic to the dictatorship and staffed with impartial legal officials).

There are (at least) two options for what could happen next—the dictator could be passed on to a relevant international criminal court, or they could be tried (under international law) by the national courts of the state.¹⁰¹ To be sure, both of these are viable options. Perhaps the international court is preferable insofar as it is safer, better resourced and therefore better able to meet procedural standards (fair trial, fair representation, etc.). Yet one reason in favour of a national trial is that this could increase the deterrent capacity of the punishment, sending a message to would-be dictators or otherwise unjust political officials *in that state* that any wrongdoing will be prosecuted. The key point I wish to emphasise is that the self-defence account provides the basis for a justification (or more modestly just one reason in favour) for punishing officials under ICL when a threat has been ignored and they violate their obligations under ICL—namely, that this serves to protect innocents in both the transitional state and in states worldwide, by strengthening the credibility of the threat of ICL and thereby deterring other would-be violators.

7. Conclusion

In this chapter I have outlined the self-defensive account of punishment. The account I provided is only an outline because further questions must be answered, some of which rest on substantive questions about the content of the law, including its relation to morality, and whether all laws can be understood as a form of threat backed up by a sanction.¹⁰² I have not engaged with these or other issues with respect to the self-defence account.

Instead, my focus has been on developing a cogent philosophical justification of punishment which is sensitive to and in part seeks to resolve problems endemic to

¹⁰¹ The principle of ‘Universal Jurisdiction’ allows for the trial of certain crimes under international law (piracy, slavery, crimes against humanity, war crimes, torture, and genocide) in any jurisdiction, irrespective of the nationality of the suspect. There are a number of justifications for universal jurisdiction, but one that is common is that some crimes are so heinous that they amount to crimes against the whole of humanity. For discussion of universal jurisdiction see Bantekas (2010, pp. 344-349).

¹⁰² This is perhaps the most natural way of reading Austin’s famous ‘command theory’ of law according to which “law is the command of the sovereign backed by sanctions” (Austin, 1995).

transitional societies – the absence of a legitimate state and the increased likelihood of rights violations. It is the ability of the theory to address these two aspects of transitional contexts that I take to be its key virtue. The consensus view in the philosophy of punishment is that a legitimate state is a necessary condition of justified legal punishment. And while I haven't challenged this view in itself, I have sought to show how the self-defence view justifies limited forms of self-defensive punishment that do not require the existence of a legitimate state. Moreover, my claim was that a legitimate state is not only unnecessary for justified practices of legal punishment, but that justified practices of punishment can in fact help in the move towards a legitimate states. In providing this account, the self-defence view illustrates how punitive measures (at both domestic and international levels), designed as a system of threats and punishments, can facilitate the transition towards the establishment of a legitimate state, and in doing so can help to achieve arguably the main goal of transitional justice. In the following two chapters, I want to look at this challenge of establishing a legitimate state in more depth, particularly with respect to the problem of political legitimacy.

V. Transitional Justice, Democracy and the Justification of State Coercion

1. Introduction

Transitional justice is concerned with how states should progress to more just political societies while coming to terms with legacies of wrongdoing. A central challenge of this process of transition concerns political legitimacy—how societies should move from periods of conflict or illegitimate rule to a legitimate state.

Naturally, the process of transitioning towards a legitimate state invites a number of questions about what political legitimacy is and why it should matter that a state is or is not legitimate. The aim of this and the following chapter will be to get clearer about political legitimacy, with particular reference to transitional justice contexts. Importantly, for reasons of space, there will be limitations on what it is possible for me to engage with. The problem of political legitimacy is a central problem for political philosophy, and it will be impossible to do full justice to the problem and the many sophisticated responses that have been developed to address it. As such, I want to confine myself to two broad questions concerning state legitimacy. In this chapter, I am interested in the question of what conditions a state must fulfil in order to be justified in coercing (through law). In the following chapter I will be interested in the problem of the (more demanding) conditions that a state must fulfil in order to be legitimate and to possess the exclusive right to rule.¹⁰³

¹⁰³ In dividing these two questions up in this way I by no means wish to suggest they are distinct. As I explain throughout the following two chapters, the two problems of legitimacy and the justification of coercion overlap such that a legitimate state is a state that is morally justified in coercing through law. My view throughout these two chapters will be that being morally justified in coercing is a necessary condition of a legitimate state. But being legitimate is not a necessary condition on being morally justified in legally coercing.

In this chapter, then, my focus will be on the moral justification of state coercion. Most commentators on transitional justice hold that the process of transition from conflict or illegitimate rule should seek to achieve democracy.¹⁰⁴ I agree with this view in both this and the following chapter. Yet what interests me in this chapter is the sorts of coercive practices that it is permissible for states to engage in when democracy is not in place, or where the goal is precisely that of establishing democracy in the wake of periods of illegitimate rule. In these contexts, I want to argue that democratic forms of coercion are in fact morally problematic, and in some cases dangerous. This is because implementing democracy without certain pre-conditions in place (around the protection of minority rights and other means of limiting the legislative powers of a majority supported government) can lead to injustice. I make this argument by highlighting a dilemma at the heart of democratic views of state coercion, between majoritarian rule and protecting minority rights (or human rights). In the face of this dilemma, I argue that the protection of human rights should be the normative priority, such that it licenses certain forms of coercion by the state. And in making this argument, I will challenge the view which is now reasonably popular in transitional justice scholarship and political philosophy that democracy is a necessary condition on state coercion.¹⁰⁵

The chapter will run as follows. In the following section, I consider the problem of state coercion (as a feature of state legitimacy). In section three I consider the popular view that democracy is required to morally justify state coercion – a view both implicitly and explicitly endorsed by both political philosophers and commentators on transitional justice. In section four I highlight the dilemma between democratic procedures and the protection of human rights. In section five I argue that in the face of this dilemma, the priority should be the protection of basic human rights. In section six I sketch the outline of this human rights-based view and explain how it informs a justification for some forms of state coercion.

¹⁰⁴ This view is common in policy documents on transitional justice—for instance, a UN document on transitional justice claims that a central aim of transition is to ‘reinforce the possibilities for ... democracy’ (United Nations, 2008), and the *International Centre for Transitional Justice* writes that ‘transitional justice should be designed to strengthen democracy’ (International Centre for Transitional Justice, 2009). According to this widely shared view, the fields of transitional justice and democratisation are broadly synonymous – the transition to a state that is legitimate (where this means in part is morally justified in coercing) is taken to be a transition to a state that is democratic. The view that democratisation and transitional justice are synonymous is particularly common in legal scholarship and policy documents around transitional justice. To give one representative passage:

Rwanda’s best hope for achieving democracy—and thereby preventing future interethnic violence—lies in its transitional justice experiment (Wierzyńska, 2004, p. 1939).

¹⁰⁵ Both Buchanan (2002) and Winter (2013) defend this view.

2. Political Legitimacy and the Justification of State Coercion

One of the main challenges of transitional justice concerns how states should move from a period of state illegitimacy to a legitimate state.¹⁰⁶ This process of transition invites questions which have long preoccupied social scientists and political philosophers—what is political legitimacy? And why is it important that a state possesses it?

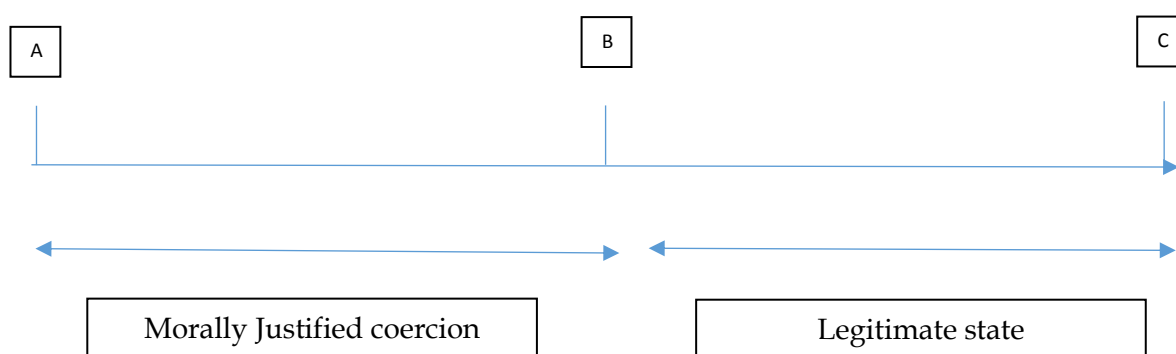
To say that a state is legitimate¹⁰⁷, in the sense I intend through this thesis, is to say that a state possesses a *right to rule*. There are different aspects to what constitutes the states right to rule, elements of which I will highlight in this and the following chapter. The element that I'm interested in in this chapter is the moral justification of state coercion. States routinely coerce their citizens, chiefly through the imposition of laws which direct their otherwise free conduct by threatening punishment or other forms of sanction if citizens disobey. What concerns me in this chapter are the conditions that states must fulfil to engage in certain forms of permissible coercion. Importantly, to say that a state is morally justified in engaging in some forms of coercive practices *is not necessarily* to say that it is legitimate. In the following chapter, I will be concerned with the more demanding standard of legitimacy.

Because this point will be important to my arguments in the following two chapters, I will illustrate it with a diagram.

¹⁰⁶ Transitional justice is concerned not only with the transition from illegitimate rule, but also transitions from conflict, civil war and foreign occupation, amongst other periods of belligerence. My argument applies to all of these cases of political transition.

¹⁰⁷ There is an important distinction between the normative and descriptive senses of political legitimacy. The latter sense of legitimacy is developed by Weber (1964, p. 71-74). According to this view, a political agent, or process, is legitimate if citizens believe said agent or process to be legitimate, and therefore habitually obey said agent or process. The descriptive sense is distinguishable from the normative sense. The normative account of legitimacy appeals not to empirical questions about whether citizens believe an agent, or process, to be legitimate, but to moral questions of permissibility and justification. On this view, a political agent is legitimate if it has the right to rule. It is important to note that when I speak of legitimacy in this and the following chapters I mean the normative sense of legitimacy.

FIGURE 2: DISTINGUISHING MORALLY JUSTIFIED COERCION FROM LEGITIMACY



Phases A to B represents the conditions that a state¹⁰⁸ must fulfil in order to be justified in engaging in certain forms of coercive activity (i.e. certain forms of coercive law-making). Phases B to C represent the conditions that must be fulfilled in order for a state to be legitimate (where this more demanding standard captures the full requirements of the right to rule, including the moral justification of coercion¹⁰⁹). In this chapter, I shall be concerned with the former, less demanding standard—what conditions a state must meet in order to permissibly engage in certain forms of coercive practices.¹¹⁰

We want states to be morally justified in their use of coercion for a number of reasons. One is that laws are liberty-restricting. Laws direct the otherwise free conduct of individuals in certain ways, chiefly by imposing positive and negative legal duties on individuals, duties whose violation comes with the threat of punishment or sanction. The central tenets of criminal law, for instance, impose negative duties of non-

¹⁰⁸ While my focus in this section is restricted to state coercion, the justification I develop could in principle apply to individuals or non-state groups. Indeed, there are certain common features between the justification of coercion in this chapter and the justification of rough justice and punishment in chapters three and four (to the extent that promoting security, in this chapter in the guise of the protection of human rights, is a priority).

¹⁰⁹ To reiterate, I do not want to suggest that the criteria for morally justified coercion and legitimacy are distinct. To say a state is legitimate is to say, at least in part, that it is morally justified in coercing and that constitutive of the right to rule is being morally justified in coercing citizens through law. To reiterate, my view through these two chapters will be that being morally justified in coercing is a necessary condition of a legitimate state. But being legitimate is not a necessary condition on being morally justified in coercing. See both Wellman and (1996, pp. 211–212). Dworkin (1986, p. 191) for variations of this view that legitimacy entails being morally justified in coercing.

¹¹⁰ As I explain further in the following chapter, my view aligns most closely with Simmons (2001). Simmons distinguishes between a morally justified state and a legitimate state. For a state to be morally justified it's existence must be shown to be, "on balance morally permissible... that it is rationally preferable to a feasible nonstate alternative" (Simmons, 2001, p. 126). This is distinct from the more demanding standards of legitimacy, the "complex moral right it [the state or government] possesses to be the exclusive imposer of binding duties... and to use coercion to enforce these duties (Simmons, 2001, p. 130).

interference on citizens (to not kill, steal, and so on), and tax laws impose positive obligations to provide wealth for the common good. Given that it is *prima facie* wrong to restrict and direct the otherwise free conduct of individuals, the authority of the state to introduce and enforce these laws requires moral justification.

Secondly, states not only coerce, but they claim to have authority over a particular jurisdiction or territory. As such, they impose laws and demand compliance not only from those who are born within the territory which the state has authority over, but also over foreign nationals who by entering this jurisdiction become subject to the state's coercive authority. Again, the fact that a state claims authority over all those within a particular geographical territory—including non-nationals—requires an explanation. We need a reason, or set of reasons, as to why the state is morally justified in exercising its authority in this given territory, over individuals who are not nationals of the state, country or region.

Thirdly, states claim to possess a *monopoly* of force and authority over a given jurisdiction. States use coercion exclusively—in such a way that the laws of the state have supreme power and no other group has a moral claim to impose laws. Buchanan captures this notion that states create and enforce laws monopolistically when he writes,

A state not only uses coercion to secure compliance with its rules, it also attempts to establish the supremacy of those rules and endeavours to suppress others who would enforce its rules or promulgate their own rules (2002, p. 690).

Given that legitimate states not only coerce citizens, but seek to have *exclusive* authority to coerce, this requires moral justification. We require a reason as to why the state, and the state alone, is morally permitted to create and enforce laws and to do so in such a way as to exclude other potential law-making bodies. It is for these three reasons that we want states to be morally justified in enforcing coercive laws.

Importantly, these latter two features (being morally justified in possessing the monopoly to coerce over a given jurisdiction, including over foreign nationals) will be particularly important with respect to the following chapter where I consider the conditions of a state being legitimate and possessing the right to rule. This is because only legitimate states have the monopoly to coerce over a given jurisdiction.

In what follows, I will be interested in the problem of the moral justification of coercion as a central (though not sufficient) element of state legitimacy. I will develop an

account of when a state is morally justified in engaging in forms of coercive practices which does not hold that democratic procedures are necessary to justify this coercion. My claim is thus that democracy is not required for a state to be morally justified in coercing. As I will show, the force of this (at first glance perhaps quite obvious argument) is that it runs contrary to views in both transitional justice scholarship and political philosophy.

3. The Democratic Justification of Coercion

In this section, I want to consider the view that democracy is a necessary condition on the state's being morally justified in coercing. In the scholarship and policy around transitional justice, a number of commentators have defended this view. Many commentators argue (or indeed often simply assume) that democracy is required to morally justify the states law-making procedures such that it forms a necessary condition on these procedures being justified.

Winter (2013) is representative of this view. He claims that establishing democracy is an essential aim of transitional justice, one that is required for the legitimacy of states. Winter argues that "a state has legitimacy when it is permissible for it to issue and enforce laws and regulations" (2013, p. 231). And writes:

It is a necessary condition of a legitimate political order that it enables those governed to play equal and meaningful roles in the process of government (Winter, 2013, p. 237).

Winter's argument may be stated as follows:

- i) A legitimate state is a state that is permitted to issue and enforce laws and regulations.
- ii) States which do not possess legitimacy are not permitted to enforce laws and regulations.
- iii) Democracy (understood as a system 'which enables those governed to play an equal and meaningful role in the process of government') is a necessary condition for legitimacy.

- iv) Therefore, only democratic states can permissibly issue and enforce laws and regulations.

The view that democracy is a necessary condition on permissible coercion is also common in the literature in political philosophy. The most detailed defence of this view comes from Buchanan, who writes,

If the wielding of political power is morally justifiable only if it is wielded in such a way as to recognise the fundamental equality of persons, and if democracy is necessary for satisfying this condition, then political legitimacy requires democracy (Buchanan, 2002, p. 712).

For Buchanan, a legitimate state is a state that is morally justified in coercing its citizens. It is a necessary condition on permissible coercion that the fundamental moral equality of citizens is respected. And democracy, for Buchanan, is the only form of governance that respects this moral equality. It follows, on Buchanan's account, that democracy is a necessary condition for justified coercion.

In what follows, I want to challenge this view that democratic procedures are a necessary condition for the permissibility of coercive law-making. Prior to doing so, I want to note how plausible the view in fact is by highlighting some reasons in favour of including democracy in a view of justified coercion. Though prior to doing this, I want to highlight a point on how we understand democracy.

In the literature on political philosophy, there are a wide variety of views about what democracy is, how it should be constructed and why it is valuable. For instance, there are different views about the procedures around democracy, such as whether democracy implies majority rule¹¹¹, or requires a voting lottery. While there is broad agreement that democracy means 'self-rule' or 'government by the people' there is substantive disagreement about whether this requires procedures of direct or representative participation. Third, there is disagreement about what is morally valuable about democracy and about what principle or collection of principles morally justify

¹¹¹ Some commentators hold that majority rule is essential to democracy. Wolff, for instance, writes that:

So widespread is the belief in majority rule that there is not a single variant of democratic theory which does not call upon it as the means for composing differences and arriving at decisions (Wolff, 1970, p. 38).

Other commentators believe other, non-majoritarian forms of democracy are possible, for instance Saunders (2010).

democracy, whether this is equality, or liberty, or autonomy or some combination of these values. In this chapter I will not take a stance on these substantive problems in democratic theory. This for two reasons. First, my argument is not contingent on any particular view of democracy. It applies only to the view that democracy is required for morally justified coercion, and this argument is not affected by the particular view of democracy we endorse. Second, I take it that there is *some* agreement about what democracy is, and what it requires, as a system of political decision-making which confers legitimacy, such that it is possible to meaningfully to engage with the view that democracy is a necessary condition of morally justified coercion. Cohen captures this very generalised sense of democracy:

The fundamental idea of democratic legitimacy is that the authorization to exercise state power must arise from the collective decision of the members of a society which are governed by that power (1997, p. 407).

I share this very broad sense of democracy, as roughly ‘rule by the people’¹¹², and will not endorse any more particular account of democracy beyond it.

There are a number of reasons for thinking that democracy should play some role in morally justifying the state’s use of coercion.¹¹³ From simple observation, we know that democratic states generally introduce laws that are reasonably just, and, at least compared to dictatorial or other forms of authoritarian states, democracies generally do a reasonable job of protecting basic human rights.¹¹⁴ We may also appeal to the value of representative governments and legislatures – that in order for laws to be justified, they must be shaped by and reflective of the views and interests of those who are subject to them. Others have appealed to the value of public reason and the role that deliberative democracy plays in “justify(ing) the exercise of collective political power...on the basis of a free public reasoning among equals” (Cohen, 1997, p. 412). Others still have sought to ground the justification of democracy in more substantive

¹¹² The only other element of democracy I believe to be essential (and indeed I’m unaware of anyone who denies this) is that democracy affords a vote to all citizens and all votes are counted equally.

¹¹³ The role that democratic participation plays within a wider account of the state needs not be restricted to its function in justifying state coercion, of course. J. S. Mill argued that one of the ways in which democracy is valuable is that it cultivates the character of citizens (1946, p. 136–151).

¹¹⁴ Some political philosophers (Arneson 1995) have provided instrumental arguments in favour of democracy on the grounds that democracy tends to lead to the protection of human and political rights (privacy, freedom of expression, religious expression). While it may be descriptively true that democracies tend to better protect political rights (that is, as an observation about the state of the world), it is important to distinguish between democracy and human rights protection – it is possible to have one without the other, a point that will be important with respect to my later argument.

moral values. Buchanan (2002), for instance, grounds his justification of democracy on the value of equality, or what he terms the ‘robust natural duty of justice’, claiming that only democracy can confer legitimacy to states in such a way that respects this principle.

Despite these reasons in favour of democracy, in what follows I want to challenge the view that democracy is necessary to justify forms of coercion by the state. Importantly, my claim will not be against democracy *per se*, or against the value of democracy, but is restricted to the view that democracy is a necessary condition on justified state coercion. I will do so by highlighting a fundamental tension between democratic rule and the protection of human rights. In the face of this tension, my claim will be that the latter—the protection of human rights—is a necessary condition on justified coercion, and that democracy is not.

4. Against the view that democracy is necessary for permissible state coercion

In this section, I want to challenge the view that democracy is necessary to justify state coercion. I do so in two ways—first, I introduce some transitional justice cases where it looks intuitively permissible for the political agents in question to enforce coercive laws and second, I highlight a tension at the heart of democratic law-making between democracy and the protection of basic human rights, a tension which I claim highlights the falsity of the view that democracy is required to justify coercion.

To begin with, consider the following cases of political transition,

- a) *Coup d'etat case*: suppose an illegitimate government responsible for serious rights violations against its people is overthrown by a rich elite group which forms a government, takes charge of the state's legislative institutions and implements laws which protect the human rights of citizens.
- b) *Transitional government case*: suppose in the wake of a civil war between rival groups, a transitional government is put in place (undemocratically) and succeeds in securing political stability and the protection of basic human rights through the introduction of laws.

- c) *Military intervention case*: suppose an international military power intervenes in a state in the midst of conflict, succeeds in ceasing the conflict, and implements (and funds) a government which keeps the peace and protects the basic human rights of citizens.

My claim is that the intuitive plausibility of these cases begins to show the implausibility of the view that democracy is necessary to justify the use of coercion by the state. Would we really believe these agents, who are in charge of the state's legislative institutions, to be unjustified in coercing through law by virtue of the fact that they have not come into power through democratic election? It seems difficult to motivate such an argument, given that in all of these cases citizens are substantially better off insofar as their basic human rights are better protected.¹¹⁵ The point I take from these cases is that the burden of proof is on those who do believe that democracy is required to justify coercion, to explain why in these cases the respective state agents are not justified in coercing.

How might a defender of democracy respond? One response would be to highlight that in the hypothetical cases, the problem is not one of the conditions of justified state coercion, but of the conditions that foreign powers or temporary political agents must fulfil to coerce. Thus, the counter-argument goes, while it may be the case that foreign powers or other political agents are justified in coercing, it is not the case that the state is, because a necessary condition on a state's being justified in coercing is that it is democratic.

This response is problematic because it fails to attend to how the cases are set up. In the coup d'état case, the transitional government case and the military intervention case the respective political agents precisely assume the control of the state's legislative institutions (we can assume that this is the only way in which they can effectively coerce, i.e. because there is already a set of reasonably developed political and legal institutions in place). I take it then, that the burden of proof remains on those who take democracy to be a necessary condition for state coercion to explain why in these cases we should maintain the view that democracy is required for coercion.

Consider a second argument. This takes the form of a simple and by no means original challenge to democratic authority – the *ad absurdum* challenge in the form of the

¹¹⁵ Importantly, my claim here is not that these agents are legitimate or that they have the right to rule in the stronger sense of being politically legitimate. My claim is the weaker claim that these agents who are in charge of the legislative institutions of the state are justified in coercing.

'tyranny of the majority'.¹¹⁶¹¹⁷ The argument points to the implausibility of the view that democratic participation can justify state coercion by showing that democratic authority, without further restrictions and conditions on majority rule, will license injustice. To see this challenge consider the following example:

Suppose a territory is composed of three factional ethnic groups. Group A represents 15% of the populace, group B 25% and group C 60%. Suppose a majoritarian democratic procedure is introduced to determine which political group ought to have the authority to coerce, and that the representatives from each of the respective groups have vowed to implement persecutory laws against members of the other groups. The vote affords each individual within each respective group one vote and considers each vote equally. Law-making power (and the authority to coerce) is then granted to the majority-supported group.

Assuming that each voter votes for the representative of their group, the tyranny of the majority challenge states that in such a case group C will have the authority to persecute the members of A and B. And for the reason that it looks to license this injustice, democratic authority is problematic.

One response here is that this fails to undermine the claim that democracy is necessary for coercion. All this case suggests is that along with democracy, we require further conditions which limit the legislative authority of the majority supported government.

But this response fails to capture the dilemma that is at play in this case. The case evinces the inherent tension between majoritarian, democratic rule and the protection of human rights (or minority rights). It is a tension inherent to democratic views of authority which Brian Barry captures well:

To be subject to a majority of a different language, religion or national identity is...threatening. In an area where nationalities are intermingled, like the Balkans, every move to satisfy majority aspirations leaves the remaining minorities even more vulnerable (1991, p. 35).

¹¹⁶ Alexis de Tocqueville presents the earliest detailed engagement with the problems of the tyranny of the majority in his *Democracy in America* (1963, pp. 254–270).

¹¹⁷ It is important to note that my arguments against democracy only apply to majoritarian forms of democracy. There is a debate in the scholarship on democracy about the extent to which democracy implies or requires majority rule. Yet majority rule is implemented by most, if not all, democracies worldwide. Indeed, majority rule is so essential to our understanding of the constitution and operation of democracy, that I take it that the concerns I raise about the tyranny of the majority are forceful.

Barry's worry, which I share, is that there is an inherent dilemma between satisfying the demands of a majority and protecting the basic rights and welfare of a minority.

To be sure, this is not a dilemma that democracies are unfamiliar with. And indeed, more developed democracies have found ways to preserve the virtues of democratic rule while at the same time protecting vulnerable minority groups from the excesses of majority power. Yet here I want to highlight two further descriptive observations about the nature of fragile, (typically) less developed transitional justice contexts which indicate that the problem of the tyranny of the majority poses a very real serious challenge to an account of democratic coercion in transitional contexts.

First (as in the hypothetical case above) transitional contexts are commonly composed of rival factional, religious, ethnic or racial groups. Think of the Tutsi and Hutus in Rwanda, or different ethnic and racial groups in South Africa, the Balkans, or Iraq.¹¹⁸ The distribution of rival ethnic groups in a given territory increases the chance of injustice carried out by a majority government against a minority group. And this descriptive feature of transitional contexts is something that any theory of justified coercion within such contexts should be sensitive to. Establishing laws in territories where there are pre-existing tensions between racial, ethnic or national groups in such a way as to prioritise the wishes of a certain portion of that populace (the majority) will only intensify the potential for injustice, and sharpen the dilemma between the wishes of a majority and the safety of a minority.

A second observation is that transitional states do not generally have systems or institutional safeguards in place that protect minority rights by limiting the power of a majority-elected government in ways that more developed democratic states do. These safeguards include,

- i) A strong judiciary that is independent from and uninfluenced by the majority-supported government.
- ii) Judicial review – a process which gives judges the last word on aspects of law and which limits the legislative decisions of a majority.
- iii) Developed police forces to ensure law and order.
- iv) Legal systems that are sufficiently developed such that they may enforce human rights law.

¹¹⁸ For a scholarly engagement with the problem of the tyranny of the majority in Iraq see Bapir (2010).

- v) Institutions which protect free speech and the freedom of the press (affording an outlet for expression to minority groups).

In developed democracies, these institutional procedures play an invaluable role in protecting minority rights and limiting the coercive power of a majority. The absence of such procedures in fragile transitional contexts serves only to compound the problem of the tyranny of the majority.

The problem with the view that democracy is necessary for justified coercion is, then, twofold. First, if we hold democracy to be necessary to justify coercion, we preclude valuable, undemocratic forms of political coercion and second, we are open to the problem of the tyranny of the majority, which is exacerbated by certain features of transitional justice contexts. Given that non-democratic forms of political coercion can secure valuable goals, and that democracy is in tension with the protection of minority rights, my claim is that democracy is not a necessary condition for state coercion.¹¹⁹ In fragile political contexts we want some forms of coercion to secure goals such as reducing wrongdoing or otherwise disincentivising certain forms of conduct, to secure collective action and to establish the conditions for other political goals (economic development, the allocation of humanitarian aid, establishing functioning political institutions, and so on). In the following section, I will sketch the outline of an account of justified coercion that is non-democratic.

5. Replacing democracy with human rights as a necessary condition for justified coercion

Thus far I have challenged the view that democracy is a necessary condition for justified state coercion. Let me be clear here that my argument is not that democracy is not valuable. Indeed, as I explain further in the following chapter, I agree with the consensus view in the transitional justice scholarship that democracy should be an end-goal of transitional justice. My claim is the more modest one that state coercion is

¹¹⁹ Of course, one may argue that even if democracy is neither a necessary nor sufficient condition for the justification of state coercion, it may provide a weighty *pro tanto* reason in favour of certain forms of coercion. This option is an open one. Indeed, according to the human rights based view of coercion I defend in the next section, it may well be the case that if a state protects human rights *and* is democratic, then this provides extra-justificatory force (given the values of democracy highlighted above). The main point I want to make is that it is the protection of human rights that does the work in justifying coercion, and while democracy may be a *pro tanto* moral reason in support of certain forms of coercion, it is neither necessary nor sufficient to justify this coercion.

permissible even though democratic procedures have not been used to establish those who possess law-making power.

In this section, I want to develop an alternative view which appeals to the protection of human rights as a necessary condition on forms of state coercion. Prior to elaborating and defending this view, I will begin by suggesting, albeit briefly, some reasons why the protection of human rights should be seen as a necessary condition on the use of state coercion.

5.1. Reasons for promoting the protection of human rights

First, democracy presupposes the protection of human rights. Without the effective protection of human rights democracy is near impossible. Even attending the voting booth to register my preference for a political candidate requires that my basic human rights are protected – that I am free from assault or physical interference, that I have sufficient resources to live a dignified life ¹²⁰, that I am not desperately impoverished such that my basic needs of survival are not met, and so on. Returning to the hypothetical case of the three rival groups above. If what we want in such a context is the establishment of democracy, then we can see how the protection of human rights would be a vital pre-requisite. Our first aim would be to prevent human rights violations in the form of violence, to provide citizens with basic welfare and healthcare and to otherwise establish the political conditions for democratic governance between these three rival groups.

A second reason relates to a point I raised earlier concerning the absence of procedures which serve to protect minority rights in fragile political contexts. My claim was that the problem of the tyranny of the majority was exacerbated by the absence of a strong and independent judiciary, processes of judicial review, a developed police force, a legal system sufficiently developed to enforce human rights law and institutions to protect free speech.

I want to raise a similar point here about the role of particular political mechanisms in limiting the legislative power of a majority-supported government. The particular political mechanism I have in mind are state constitutions. Constitutions serve to limit, and to set guidelines on, governmental and judicial power. Good constitutions

¹²⁰ Article 22 of the *Universal Declaration* posits the following right to a dignified standard of life ‘everyone...is entitled to realization...of the economic, social and cultural rights indispensable for his [or her] dignity’.

set limits on the sorts of legislative decisions a government can make, for instance, and on the way in which the laws of a majority-supported government may be interpreted and applied by the judiciary. To give an example, many domestic constitutions protect minorities against the forces of majority rule by affording all individuals rights (to free speech, to fair representation and to appear before a judge to challenge false arrests [*habeus corpus*]).

The problem with transitional contexts is that in the wake of conflict or illegitimate rule domestic constitutions are often no longer in existence or else have been amended to support and license authoritarian governance. Take as an example Richard Abel's description of rule under a majority-supported government during the apartheid in South Africa where the constitution was amended by the white-majority supported government:

South Africa in the 1980's was an extraordinarily inhospitable environment for legal challenges to state power. Parliament was supreme. There was no bill of rights. All judges had been appointed by the National Party, and most strongly supported apartheid. The organised legal profession was supine; opponent lawyers suffered mysterious burglaries, bombings and assassinations; legal aid was grossly inadequate (1999, p. 69).

The case of South Africa illustrates how an amended constitution can fail to serve its job of limiting the legislative power of a majority, and can in fact worsen the injustices of a tyrannous majority.

The absence or amendment of constitutions in times of political transition supports the view that democracy should not be a necessary condition on political coercion, and that human rights should. Domestic constitutions limit government power – they restrict what a majority-supported government can do. In the absence of a constitution, or in the event a constitution has been amended to support executive power, these limits are lost and the state is able to wield power unrestrained. My claim is that this coercive power and the potential for injustice can be mitigated if we set the protection of human rights as a necessary condition on political power. I turn now to provide a more detailed defence of the role human rights play as a condition on state coercion.

6. The function of human rights in an account of justified coercion

What we require from a human rights-based view of justified coercion is an account of why states are morally justified in coercing citizens in the interests of protecting human rights¹²¹, and of why protecting human rights is a necessary condition on state coercion. In this section, I make three points on this score. First, I argue that the protection of human rights provides the basis for a justification of the use of *some level of coercive force* by appealing to analogous cases in which coercion looks permissible to protect rights. Secondly, I argue that the protection of human rights provides the basis of a justification for the *creation of a system of coercive laws*. Thirdly, I argue that human rights serve not only to vindicate the use of coercion by the state, but also to *set limits on the sorts of coercive measures that are permissible*.

6.1. An analogous case of justified coercion

The first principle states that the protection of human rights¹²² serves to morally justify coercion. One may defend this principle by appealing to a broader principle about the protection of rights:

Protection of rights principle: it is sometimes permissible to use force to protect the basic rights of individuals.

The protection of rights principle is supported by other cases in which some level of coercive force—even violence—is permitted to protect rights. Think of cases of self-defence (outlined in the previous chapter), where some level of force is permitted to prevent culpable attacks against oneself or other innocents. In such a case, it seems

¹²¹ There is a sense in which this claim is uncontroversial, and does not need any defence. We generally take it for granted that states should protect human rights and can use some forms of justified coercion to achieve this. Yet given the controversial view of this chapter that democracy is not required to justify coercion, I will spend some time developing and defending the different elements of the human rights-based alternative.

¹²² I should emphasise that I use the term 'human rights'—rather than 'moral' or 'natural' rights—to capture the more expansive list of liberties included in most human rights declarations. These include political rights to free expression, freedom of thought and religious freedom, alongside the more basic rights to life, liberty and possession which are generally accepted to be basic moral rights, as well as human rights.

permissible to use some¹²³ level of coercive force to protect rights, and cases of self-defence support the *protection of rights* principle.

Yet by itself, the protection of rights principle is not sufficient to explain why the use of coercion by a state is permissible. This is because states do not use force to protect rights in only one-off cases, but systematically. What we want is a principle which justifies the use of coercion not only in particular cases, but through the *systematic* coercion of law – laws which seek to disincentivize rights violations with the threat of sanction and punishment. We must provide some positive support for such a system.

6.2. Human rights and the justification of a system of coercive law

The second aspect of the human rights-based account is that human rights protection can inform a justification of a coercive system of laws. To see this, consider the following principle:

*System of rules principle*¹²⁴: it is sometimes permissible to impose a system of coercive rules (backed up with threats of sanction or punishment) to direct the conduct of individuals in such a way so as to protect basic rights.

To support the system of rules principle, consider a case in which it looks permissible to impose a system of rules to direct the conduct of others in such a way as to prevent rights violations. Suppose there is a community comprised of a small group of attackers (*A*) and a larger group of innocents (*I*). Suppose further that one of the ways in which *A* may be disincentivized from attacking *I* is if a system of rules backed up with the threat of sanction is implemented. Even if the imposition of such a system is only *one* way of protecting members of group *I*, it looks to be permissible to implement such a system, assuming further conditions are met such as that the rules do not impose sanctions that are draconian or brutal. Grounding this is the thought that morality requires the protection of the basic rights of individuals in group *I*, and thus justifies the implementation of such a system.

¹²³ I say 'some' rather than 'any' to capture a proportionality requirement. It would not be that any level of force is justified but only a level that is proportionate to that which is required to protect/save/prevent harm.

¹²⁴ To connect this to the argument in chapter two, the system of rules would be an example of positive security, as a 'rule, norm or procedure which exists to protect'.

A second argument draws upon a principle that has been developed by Buchanan (2002, pp. 703–709). This principle states that no one has a moral right against being coerced to do that which they have a natural obligation of justice to fulfil. If this is correct, then a system of coercive laws does not violate an individual's moral rights if this individual possesses a moral duty to do the things that the law prescribes. More formally: 'a coercive law prescribing x does not violate the moral rights of an individual y if y has an independent moral obligation to do x .'

The above argument requires some qualifications, however. It may be the case that laws which coerce individuals to fulfil certain duties of justice—say, to give half of their income to those in poverty—are overly demanding, given that some level of discretion and autonomy should be afforded to individuals over their decisions about how they wish to distribute their wealth. There are two ways around this challenge. This first denies that such duties—such as that of giving half of one's wealth to charity—are indeed duties of justice. One may argue that such duties are overly-demanding, for instance, or may argue that the duty would be to give a 'reasonable' amount of one's wealth, and that enforcing coercive taxation would be permissible if it sought only to gain this 'reasonable' amount. The second response restricts the principle to negative duties of non-interference. On this view, an individual does not possess a right against coercive laws when these laws coincide with their negative duties such as those against killing, stealing or restricting the liberty of others. This view is supported by the thought that it would be implausible to suggest that the negative duties imposed by the criminal law violate the moral rights of individuals, because individuals have a moral obligation to not violate the basic rights of others (through killing, theft, etc.). Similarly, it would be implausible to suppose that I have a right against the policeman who restrains me to prevent me from killing another innocent individual.

While this second response is correct, we should be careful about restricting the principle to only negative duties of non-interference. This would only justify a very minimal set of libertarian laws which prohibit interference. Yet there are good reasons for thinking we want coercive laws to enforce some positive obligations as well, such as those which impose obligations to pay tax for the common good. Indeed, the human rights-based account can help to explain why coercion should enforce positive obligations. Article 22 of the *Universal Declaration* posits the following right to a dignified standard of life, 'everyone...is entitled to realization...of the economic, social and cultural rights indispensable for his [or her] dignity'. This article could serve as the basis

of a justification of tax laws which imposes positive obligations on individuals to contribute to a state system of welfare and healthcare, for instance.

These two arguments support the coercive rules principle. First, that it is at least sometimes permissible to introduce coercive laws if this serves as one means of protecting human rights. Second, individuals do not possess a right against coercive laws which impose obligations which coincide with their pre-existing moral obligations. It follows that a system of coercive law is (at least sometimes) i) permissible and ii) not impermissible because it does not violate the rights of those it imposes obligations on.

6.3. Human rights and restrictions on the limits of coercive authority

A third way in which human rights play a role in an account of coercion concerns the nature and content of the coercive laws in question. Human rights serve to prescribe limits on laws and on the ways in which they are enforced. This is a central function of modern day human rights law, which imposes obligations on states to respect the human rights of their citizens. In failing to do so, states lose their legitimacy under international law and, sometimes, their right to sovereignty – their right against interference by other states or international bodies. Indeed, it is a central principle of international human rights law that an illegitimate state is a state which violates the human rights of their citizens, and these states lose their right against interference.

Human rights can inform an account of the sorts of limits that apply to the content of legislation and the way in which it is enforced. Laws which seriously and systematically violate the human rights of citizens are impermissible, according to both human rights law and the human right-based view of justified coercion I defend in this chapter. Thus a state which legally licensed the systematic torture of its citizens, or imposed cruel and unusual punishments¹²⁵, would no longer be justified in coercing. And the human rights-based view of justified coercion can explain why. It is the protection of human rights which justifies forms of political coercion – and in failing to protect human rights or in actively violating human rights states are no longer justified in coercing.

¹²⁵ Torture is prohibited in most international human rights treaties. Article 7 of the *International Covenant on Civil and Political Rights* includes a right against cruel and unusual punishment – ‘No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment’.

In this section I have defended the following three principles, each of which explain how human rights serve to both justify the use of coercive authority, and also prescribe limits on the extent of that authority.

- i) It is sometimes permissible to use coercive force to protect basic human rights.
- ii) It is sometimes permissible to impose a system of coercive laws to protect basic human rights.
- iii) In order to be justified a system of coercive laws must not violate basic human rights.

Majoritarian democratic procedures provide an account of how potential law-maker, agents in charge of coercion, come in to power. According to the argument in this chapter, these procedures are not necessary to justify state coercion. To many this conclusion may seem controversial, and I have shown how it runs contrary to a number of views in the scholarship on transitional justice and in political philosophy. Yet three broader arguments support this conclusion.

First, to reiterate a point I have highlighted throughout this chapter, my argument here is not that these conditions must be met in order for a state to be legitimate. In the following chapter I defend a more substantive set of conditions on legitimacy as the right to rule. More modestly, my claim here is that democracy is not necessary for state coercion, but that protecting human rights is.

Second, I take it that even the most ardent advocate of the democratic account of state coercion will see sense in the human rights-based alternative. This is because effective (and safe) democracy *requires* the protection of human rights. And given that the protection of human rights is essential, if not a necessary condition, for the political association required for democratic procedures, the human rights-based view is sensitive to this view that effective and just democratic procedures require certain pre-conditions to be in place.

Third, the human rights-based view leaves scope for non-democratically elected political agents to use coercion in ways that look valuable, as in the hypothetical cases I presented above. In the coup d'état case, the transitional government case and the military intervention case, political agents assume control of the state's legislative

institutions (non-democratically) and introduce laws which protect human rights. The human-rights based defence of state coercion can explain why these agents are permitted to engage in this valuable coercive law-making which serves to protect individuals in ways that the view that democracy is necessary for political coercion cannot. I take this to be an intuitively plausible consequence of the account; we want these sorts of agents to be morally justified in implementing laws which serve to better protect human rights in fragile or violent political contexts (when the other option is belligerent, authoritarian rule).

7. Conclusion

In this chapter I have sought to challenge the view, prevalent in both transitional justice scholarship and political philosophy, that democracy is necessary to justify state coercion. I challenged this view by highlighting how non-democratic forms of law-making are valuable (and look permissible) and by illustrating a dilemma between minority rights and majority rule at the heart of the democratic view. I then argued that the protection of human rights should be a necessary condition on state coercion, and sketched different aspects of this view. Fair, safe and effective democracy presupposes the protection of human rights. Establishing the conditions for democracy should be a priority, I claimed, and one which morally justifies the state's use of coercion.

VI. Transitional Justice, Political Legitimacy and Democracy

1. Introduction

Transitional justice is concerned with how states should progress to a more just political order while coming to terms with legacies of wrongdoing. One of the central goals of this process of political transition is bringing about a state that is legitimate. In this chapter, I want to consider this problem of political legitimacy, with particular reference to transitional justice contexts. In the previous chapter I developed a view of the conditions that must be fulfilled for states to engage in morally justified coercion. My argument was that democracy is not a necessary condition on justified coercion, but that the protection of human rights is. In this chapter I am interested in the conditions that must be fulfilled in order for states to achieve the more demanding standard of political legitimacy as the right to rule. My argument will be that democracy is not a necessary condition on political legitimacy. This view, I will argue, is both unique to the mainstream view (for important reasons I outline below) and also better able to respond to some of the challenges which arise in transitional societies.

What is this mainstream view? Most commentators on transitional justice hold that the process of transition from conflict or illegitimate rule should ultimately seek to achieve democracy. According to this widely shared view, the transition to a state that is legitimate is taken to be a transition to a state that is democratic.¹²⁶ Underpinning this

¹²⁶ The prevailing assumption in favour of democratic legitimacy is now captured in international legal documents and scholarship in which there are proclamations and defences of the human rights to democracy and political participation. For instance, the *International Covenant on Civil and Political Rights*:

Every citizen shall have the right and the opportunity... (a) To take part in the conduct of public affairs, directly or through freely chosen representatives; (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors.

For legal commentary on the human right to democracy see Fox and Roth (2000) and Franck (1992). For a philosophical defence of the human right to democracy see Christiano (2011).

view is the assumption—which is often stated without defence—that democracy is required for legitimacy. And to the extent that only democratic states are legitimate on this view—democracy is deemed to be a *necessary condition* for legitimacy.

Throughout this thesis I agree with this broader view that democracy should be an end-goal of transitional justice, yet in this chapter I will challenge the view that democracy is a *necessary condition* for political legitimacy (i.e. that only democratic states are legitimate). This for two reasons. First, I argue that constructing a democratically legitimate state can be a prohibitively expensive task, one which a number of resource-poor states can simply not afford. Second, that other valuable forms of governance should be open for consideration in a way that the view that democracy is a necessary condition for political legitimacy does not allow. In the second half of the chapter, I draw on an argument developed by Dean Machin (2012) regarding the permissibility of non-democratic forms of governance. I do so with a view to developing an alternative view of legitimacy which preserves some of the valuable aspects of democracy, while at the same time avoiding the challenges that I raise.

I should stress from the outset that this chapter does not seek to offer a conclusive case against democracy. Nor do I seek to argue that democracy is without value. As I've already noted, my view is consistent with the view that democracy is, all things considered, the best form of political governance. And as I've noted I agree with the broad consensus in the commentary on transitional justice that the establishment of democracy should be an end-goal of political transition in the wake of conflict or illegitimate rule. Instead, my argument is specifically targeted against the view that democracy is *required* for a state to be legitimate—that states which are undemocratic are always necessarily illegitimate. And in making these claims, what interests me are those contexts in which democracy is difficult or even dangerous to implement, or where the emphasis on establishing democracy (because it is viewed as being necessary for legitimacy) is likely to prevent other important goals of political transition. In these cases, I will argue, we should be open to alternative views of legitimacy which preserve at least some of the more valuable elements of democracy, yet which are not democratic.

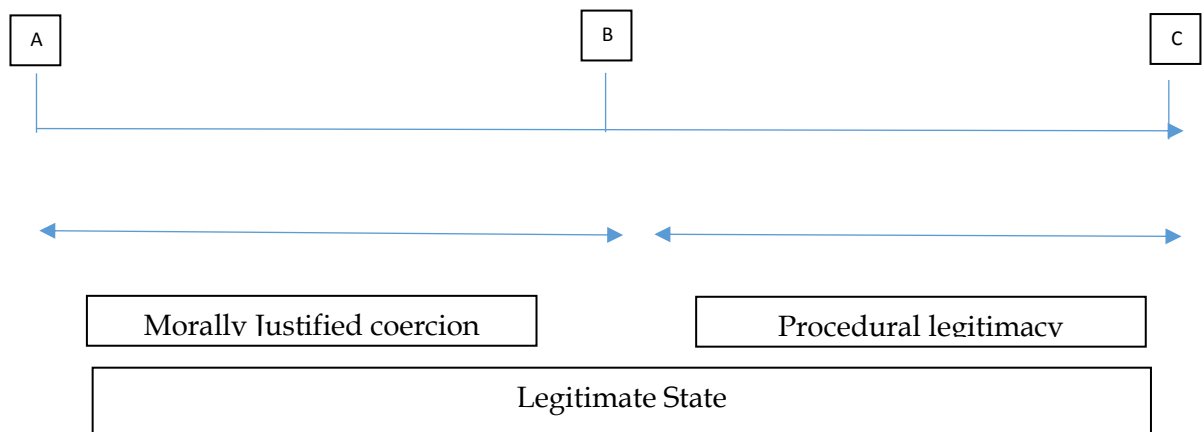
The chapter will run as follows. In the following section, I consider the concept of political legitimacy. In section three I raise two problems for the view that democracy is a necessary condition for state legitimacy. In section four I draw on an account developed by Machin (2012) with a view to developing an alternative view of legitimacy which preserves important aspects of democracy (such as publicity, representativeness,

equality), while at the same time avoiding the problems I identify. In section five, I consider some implications of my argument for the problem of legitimacy in transitional justice contexts.

2. What is political legitimacy?

In the previous chapter I argued that political legitimacy concerns the conditions under which a state has the right to rule. I claimed that this was distinguishable from certain forms of morally justified coercion (the subject of the last chapter) and that while morally justified coercion is necessary for legitimacy, the same is not true vice versa. Recall that I captured this with the following diagram.

FIGURE 3: DISTINGUISHING MORALLY JUSTIFIED COERCION FROM PROCEDURAL LEGITIMACY¹²⁷



In this chapter I will be interested in the conditions required for procedural legitimacy (between sections B and C).¹²⁸ The conditions required for legitimacy apply to the

¹²⁷ This diagram is slightly different from Fig.2 above. What I want to capture here is that both morally justified coercion and procedural legitimacy are required for a legitimate state. Importantly, the two diagrams are consistent with one another.

¹²⁸ The distinction between morally justified coercion and legitimacy is captured by Rawls. Rawls claims that legitimacy is a property of the procedures and processes through which political agents (and law-makers) come into power, and that this is distinct from the question of whether these procedures are just. He writes:

A legitimate king or queen may rule by just or effective government, but then may not; and certainly not necessarily justly even though legitimately. Their being legitimate says something about their pedigree: how they came to their office. It refers to whether they were the legitimate

procedures whereby law-makers come to power, whereas the conditions required for morally justified coercion apply to the standards of justified laws (in the previous chapter I argued that a necessary condition on this was the protection of human rights).

To be sure, the problem of political legitimacy has long troubled political philosophers, and there are a number of different views in the literature on political philosophy about the conditions that a state must fulfil in order to possess the right to rule. Some believe that the question of legitimacy *encompasses* political obligation¹²⁹ – that when a state is legitimate, citizens have a correlative moral obligation to obey the law.¹³⁰ Others claim that the problem of legitimacy is concerned solely with the justification of state coercion, and does not require political obligation.¹³¹

If my view were to be aligned with any other view in the literature on political philosophy, it would be closest to Simmons (2001). Simmons distinguishes between a state which is morally permissible and a state which is legitimate. For a state to be morally permissible its existence must be shown to be, “on balance morally permissible... that it is rationally preferable to a feasible nonstate alternative” (Simmons, 2001, p. 126), and this is distinct from the more demanding standards of legitimacy.¹³² I too maintain this distinction between permissible forms of coercion and legitimacy¹³³, and in this chapter I am interested in the more demanding standards of political legitimacy.

heir to the throne in accordance with the established rules and traditions of, for example, the English or French crown (Rawls, 1995, p. 175).

¹²⁹ The problem of political obligation concerns whether citizens are morally obliged to obey the law.

¹³⁰ This view of legitimacy was endorsed by some social contract theorists, most notably Locke (Locke, 2003, p. 142), for whom both the moral justification of coercion and the obligation of citizens to obey the law are grounded in the consent of citizens.

¹³¹ Wellman takes this view, claiming that a state is legitimate if it has a moral right to impose its coercive authority on citizens, which is separate from the question of whether citizens are morally obliged to obey the law (Wellman, 1996, pp. 211-212). Dworkin (1986) also endorses this view, writing that the question of justified authority – which Dworkin terms the ‘justification of general coercion’ – is distinct from the question of whether citizens are obligated to obey the law. He writes:

These two issues – whether the state is morally legitimate, in the sense that it is justified in using its force against citizens, and whether the state’s decisions impose genuine obligations on them – are not identical (Dworkin, 1986, p. 191).

¹³² For Simmons, legitimacy represents the:

Complex moral right it [the state or government] possesses to be the exclusive imposer of binding duties on subjects, to have it’s subjects comply with these duties and to use coercion to enforce these duties (Simmons, 2001, p. 130).

¹³³ My view is not identical to Simmons because his view is that legitimacy requires political obligation. I do not believe political obligation is a requirement of legitimacy, though as none of my arguments rest on this point, I will say nothing about it in this chapter.

I do not want to get too distracted by these competing views of the conditions required for political legitimacy. To the extent that my argument applies to all views of political legitimacy which hold democracy to be a necessary condition, I will not commit myself to any more specific view of legitimacy beyond the fact that I believe it requires both the moral justification of coercion and procedural legitimacy.

This may leave us wondering why we require conditions on the legitimacy of states at all. Why is it important to have standards on a state's legitimacy? Why not be content that a state is morally justified in coercing?

We want states to be legitimate for at least two reasons, both of which I noted in the previous chapter. First, in claiming to possess the right to rule, states claim to possess a *monopoly* on justified authority over a given jurisdiction. As I noted in the previous chapter, states use coercion exclusively – in such a way that the laws of the state have supreme power, and no other group has a moral right to impose coercive laws. States not only seek to have authority over citizens, but to have *exclusive* authority. And it is only legitimate states which possess the monopoly on authority, in such a way as to exclude other groups from coercing.¹³⁴

Second, on a related point, legitimate states have the right not only to coerce their own citizens but to coerce non-nationals within the particular jurisdiction or territory the state has authority over. States not only impose laws on those who are born within the territory which the state has authority over, but also over foreign nationals who by entering this jurisdiction become subject to the states authority. Again, the fact that a state claims the right to rule over foreign nationals when they enter a geographical territory means an account of legitimacy must explain why it is permissible for the state to exercise its authority over individuals who are not nationals of the territory.

It is for these two reasons – that legitimate states have a monopoly on force and that they possess this monopoly over a particular territory or jurisdiction – that we want states to be legitimate, and not just to be morally justified in coercing.

I want to raise one final point regarding legitimacy. This aspect will prove particularly important with respect to the remainder of the chapter. An account of political legitimacy must provide a response to what Buchanan (2002) has called the

¹³⁴ This point on the monopoly of force is illustrated by the distinction between morally justified coercion and legitimacy. A state which fulfils the conditions for legitimacy has a monopoly on force, and state which only fulfils the conditions for morally justified coercion does not. Thus if a military force assumed control of a state it would not have a monopoly on force (because it is not legitimate) and other forms of coercion would be permissible (i.e. rough justice practices or other punishments).

'egalitarian challenge'. The egalitarian challenge is a demand on the justification of political authority. It requires political power to be exercised in such a way as to respect the fundamental moral equality of human beings. In Buchanan's terms:

If we are all equal, what can justify some persons (the government) making, applying, and enforcing rules on us? How can the justified wielding of political power be squared with the fundamental equality of persons? (Buchanan, 2002, pp. 697-698).

The challenge states that political authority – the right of some individuals to rule over others – must be justified in such a way as to respect the fundamental moral equality of individuals, and this serves as a central demand on an account of political legitimacy.

Importantly, the egalitarian challenge must be met on two fronts (Buchanan, 2002, pp. 711-712; Machin, 2012, p. 103). First, an account of legitimacy must explain why the equality of individuals is respected in terms of the *substantive* content of law (the '*substantive requirement*'). Second, it must be shown how the equality of individuals is respected in the *processes* through which a state's laws are made (call this the '*process requirement*').¹³⁵

To be sure, democracy is not required to fulfil the substantive requirement of equality. It is conceivable that a monarch, or an undemocratically elected oligarchy could issue benign laws which respect equality, for instance in the form of laws which guarantee the human rights of all citizens are protected and respected in a manner akin to the view developed in the previous chapter. Yet democracy is commonly regarded as being essential to meeting the process requirement. This is because only law-making procedures which afford all individuals an equal say in decisions in the processes which determine who comes to make the laws can be said to respect the basic moral equality of individuals, or so one argument goes.¹³⁶ From the process requirement, then, it seems to follow that only democracy can confer legitimacy on a political authority.

¹³⁵ Importantly, both the process requirement and the substantive requirement of the egalitarian challenge must be met by an account of legitimacy. This is because even if laws respect equality in their content, this is separate from the question of whether the processes for deciding who gets to make the laws respect equality – something that must be independently justified. This view is very similar to my own overall view of a legitimate state which is one that is morally justified in coercing because it protects human rights and which is procedurally legitimate because it meets four equality-respecting conditions in law-making procedures. I explain this view, which is an amalgamation of the arguments in this and the previous chapter, at the end of this chapter.

¹³⁶ In Buchanan's terms:

A theory of legitimacy that does not include a democratic requirement faces an unanswerable objection: if the political system should express a fundamental commitment to equal consideration

In the following section I will consider this popular view that democracy is a necessary condition of procedural political legitimacy (from hereon just ‘legitimacy’) in more depth with a view to ultimately rejecting it in section four.

3. Democratic legitimacy

In this section, I will consider the view that democracy is a necessary condition for political legitimacy. Let me begin by re-emphasising the point that I am not seeking to develop a knock-down argument against the view that democracy is a valuable means of political governance. Rather, my precise target is the view that democracy is a necessary condition of political legitimacy – that without democracy a state does not and cannot possess the right to rule. As I shall explain below, my arguments are consistent with the view that democracy is the best means of political governance and (as such) should be a central aim of transitional justice. Yet according to my argument, it should not be seen as *required* for a state to be legitimate, as I shall explain in more depth below.

A second point to highlight as I noted in the previous chapter is that there are a wide variety of views about what democracy is, how it should be constructed and why it is valuable. For instance, there are different views about the procedures around democracy, such as whether democracy implies majority rule¹³⁷, or requires a voting lottery. While there is broad agreement that democracy means ‘self-rule’ or ‘government by the people’ there is substantive disagreement about whether this requires procedures of direct or representative participation. Third, there is disagreement about what is morally valuable about democracy and about what principle or collection of principles morally justify democracy, whether this is equality, or liberty, or some combination of the two. In this chapter I will not take a stance on these substantive problems in democratic theory. This for two reasons. First, my argument is not contingent on any particular view of democracy. It applies only to the view that democracy is required for

of persons, why shouldn’t this commitment be reflected in the processes by which laws are made and in the selection of persons to adjudicate and enforce the laws, not simply in the content of the laws (Buchanan, 2002, p. 712).

¹³⁷ Some commentators hold that majority rule is essential to democracy. Wolff, for instance, writes that:

So widespread is the belief in majority rule that there is not a single variant of democratic theory which does not call upon it as the means for composing differences and arriving at decisions (Wolff, 1970, p. 38).

Other commentators believe other, non-majoritarian forms of democracy are possible, for instance Saunders (2010).

legitimacy, and this argument is not effected by the particular view of democracy we endorse. Second, I take it that there is *some* agreement about what democracy is, and what it requires, as a system of political decision-making which confers legitimacy, such that it is possible to meaningfully to engage with the view that democracy is a necessary condition of legitimacy. Cohen captures this very generalised sense of democracy:

The fundamental idea of democratic legitimacy is that the authorization to exercise state power must arise from the collective decision of the members of a society which are governed by that power (1997, p. 407).

I share this very broad sense of democracy¹³⁸, as roughly ‘rule by the people’¹³⁹, and will not endorse any more particular account of democracy beyond it.

The view that democracy is necessary for legitimate political authority is common in the scholarship and policy around transitional justice. Recall the argument from Winter set out in the previous chapter that, “a state has legitimacy when it is permissible for it to issue and enforce laws and regulations” (2013, p. 231). And democracy is necessary for this coercion to be permissible:

It is a necessary condition of a legitimate political order that it enables those governed to play equal and meaningful roles in the process of government (2013, p. 237).

And Wierzyńska writes:

Since democracy signifies the rule of the people, it will act in the interest of the people-protecting the people's security, well-being, political liberties, and other human rights. Thus, a democratic government will enjoy ... legitimacy (2004, p. 1948).

The view that democracy is a necessary condition of political legitimacy is also common in the literature in political philosophy. The most detailed defence of this claim, as highlighted in the previous chapter, is from Buchanan (2002). Buchanan’s argument

¹³⁸ Note that this broad sense of democratic legitimacy does not take a stance on substantive points of disagreement in democratic theory – i.e. whether democracy implies majority rule, or the moral value of democracy.

¹³⁹ The only other element of democracy I believe to be essential (and indeed I’m unaware of anyone who denies this) is that democracy affords a vote to all citizens and all votes are counted equally.

is that political power must be wielded in such a way as to respect what he terms the *Robust Natural Duty of Justice (RNDJ)* (2002, pp. 703-709). The *RNDJ* is an egalitarian principle which requires that political authority is exercised in such a way as to ensure that the interests of all individuals are given equal consideration and that the fundamental moral equality of individuals is reflected in the procedures whereby law-makers come to power. Importantly, only democratic governance can fulfil the *RNDJ*. Buchanan writes:

If the wielding of political power is morally justifiable only if it is wielded in such a way as to recognise the fundamental equality of persons, and if democracy is necessary for satisfying this condition, then political legitimacy requires democracy (2002, p. 712).

Indeed, Buchanan's claim is precisely that democracy is required for the exercise of political power to be justified (i.e. to meet the condition on the fundamental equality of persons), and that democracy is necessary for procedural legitimacy as well. For Buchanan, only democratic procedures can meet the egalitarian challenge. And insofar as the egalitarian challenge must be met by any account of legitimacy, it follows that democracy is a necessary condition on legitimacy.¹⁴⁰ In the following section, I want to challenge this common view that democracy is a necessary condition on political legitimacy.

4. Challenging the view that democracy is necessary for legitimacy

In this section, I want to raise two objections to the view that democracy is a necessary condition of state legitimacy. In the following section I will draw on an account of legitimacy developed by Machin (2012) which preserves some of the virtues of democracy while at the same time avoiding the challenges I raise in this section.

The first objection I make highlights the financial costs involved in establishing democracy – funding elections, political campaigning, advertising, security costs, party-funding, and so on. In some states these figures are extremely high – figures for spending by candidates in the 2016 US election, for example, are estimated by some sources at \$6.8 billion (Berr, 2016), and costs for the 2015 UK elections are placed at

¹⁴⁰ Other authors have defended the claim that democracy is a requirement on state legitimacy in different ways. See for instance Estlund (2008, pp. 85-97) and Christiano (2004).

£113,255,271 (Cowling, 2013). Even in smaller South American states, total spending for elections is estimated in the tens of millions,

In Honduras, a very speculative estimate calculated public and private funds raised for the 2005 general election at USD 40.5 million...In Nicaragua...USD 18.2 million...The only available information on El Salvador corresponds to state subsidies, which came to USD 22.5 million...In the case of Panama...USD 13.4 million (Casas-Zamora & Zovatto, 2016, p. 59).

I highlight these figures to make the following point: if we endorse the view that democracy is necessary for legitimacy, then there will be states that will inevitably be illegitimate by virtue of the fact that they cannot afford the financial burdens required to establish democracy.

Take a state like Iraq. Since the war in 2003, the United States has invested billions of dollars into promoting democracy in Iraq. Some sources, taking figures from the US treasury, claim it has cost \$212bn to reconstruct the country, “with most of that cash going to security” (Khan, 2014). Other sources claim:

Billions went towards “Democratic nation-building,” such as a \$750 million dollar U.S. Embassy building in Baghdad; \$500 million for an Iraq police training program; and \$17.1 million towards fostering political competition in Iraq in 2011, though there were “no results reported”, according to United State Agency of International Development (Dovi, 2015).

Of course, it is true that these resources may not—indeed likely would not—have all been effectively allocated to democratisation. Many resources were lost to corruption and bribery, for instance. Yet, notwithstanding this misspending, suppose the US had not been involved in the attempt to democratise Iraq. Suppose the US had left immediately after the deposition of Saddam Hussein. Imagine how financially burdensome it would have been if Iraq had incurred these costs by itself. The billions of pounds required to promote democracy would have been so expensive for the state that it would have been seriously economically debilitating (Iraq’s GDP in 2015 was \$211.9bn [World Bank, 2017]).

I take it that this serves as a practical objection to the view that democracy is necessary for legitimacy. In light of the figures on the costliness of democratic elections and campaigns, there will be cases where states can simply not afford to be legitimate.

If we hold the view that democracy is necessary for legitimacy, then we must accept that vast sums may need to be spent to implement democracy, if a state is to enjoy the right to rule. And these resources must be spent, even though they can be better allocated to other state provisions. This is problematic, particularly in the case of fragile, transitional states, because it may simply be the case that states cannot afford the resources to implement democracy effectively. A view of legitimacy that is so costly to implement need not be wrong, of course. But having a view of the conditions required for the right to rule which involves potentially debilitating levels of financial investment (levels that many states around the world simply do not possess) does look extremely demanding, if not overly-demanding.

A second worry with the view that democracy is a necessary condition of state legitimacy is that this view immediately rules out as illegitimate other forms of political governance that look valuable. The objection has been developed by Machin (2012) who similarly challenges the view that democracy is a necessary condition of legitimacy. Machin introduces the following example to illustrate the objection:

[Imagine] there is a choice between two states of affairs – J and L. In J laws are made non-democratically, perhaps by a Millian Charlemagne, and fair equality of opportunity for J's citizens is secured. We can stipulate that L differs from J only in the following regard: in L laws are made democratically, fair equality of opportunity is not realised, and it is not realized *because* laws are made democratically. In all other relevant regards J and L are similar... The WDN claim [the claim that democracy is necessary for political legitimacy] implies that we cannot even consider J: it is not in the morally permissible set of law-making institutions (Machin, 2012, pp. 104-105).

Machin's argument is that it is problematic to view democracy as being necessary for political legitimacy, because other valuable forms of non-democratic governance are ruled out as being morally impermissible.

This is problematic for at least two reasons (though Machin does not cash out the objection in exactly these terms), both of which I noted in the previous chapter. First, because other non-democratic means of coercive law-making are valuable, but (as I explained in the last chapter) are always necessarily impermissible, according to this view, by virtue of the fact that they are not democratic. Second, there are cases in which democratic law-making can *lead* to injustice (in Machin's example, a failure to bring about fair opportunity, in my own view the tyranny of the majority set out in the

previous chapter), but because democracy is a necessary condition for political legitimacy this injustice must always be tolerated (in a trade-off between accepting or not accepting this injustice).

We can develop this objection further by making the view that democracy is necessary for legitimacy look even more counter-intuitive. Imagine there are two states – A and B. State A is democratic, but citizens have only two political candidates to choose from, candidates who have come to power as a result of gross inequalities in the distribution of wealth and who fail to properly represent the interests of a large number of citizens. Suppose further that state A is corrupt, fails to meet the basic needs of many citizens, implements policies which disadvantage minority groups and fails to provide effective welfare and healthcare. State B on the other hand is undemocratic (say, a benign dictatorship) but has a reasonably equitable distribution of resources, including excellent welfare and healthcare provisions, the state is also progressive and respects civil and political rights to free speech and political and religious expression. In the case of a comparison between these two hypothetical states, the problem with the view that democracy is necessary for political legitimacy, is that state B – which we can suppose is preferable to state A in all ways apart from that it is undemocratic – is and can never be legitimate (or possess the right to rule), even though it is valuable, and indeed preferable, in all other respects. I take it that this case shows that it is implausible to suppose that only democratic forms of law-making are permissible in such a case.

In this section I have raised two objections to the view that democracy is necessary for political legitimacy. In the following section I will consider an alternative view of legitimacy which has been developed by Machin (2012). This view preserves some of the more valuable elements of democratic legitimacy, while avoiding the two objections I have raised. Following this, I will draw out some implications of this alternative view on the question of establishing a legitimate state in transitional justice contexts.

5. Machin's alternative to democracy

The main argument that Machin (2012) develops, which I will defend and develop as well, is that some non-democratic forms of law-making can confer legitimacy to states, if these forms of law-making meet four conditions. The implication of this view that I'm interested in (particularly with respect to transitional justice cases) is that non-

democratic forms of coercive law-making can be legitimate if they meet the four conditions that Machin sets out.

In developing his account of legitimacy, Machin similarly seeks to respond to the argument that democracy is a necessary condition of political legitimacy. Machin seeks to show that this view is false, and that forms of non-democratic governance can in fact confer legitimacy (the right to rule) to states if these forms of governance meet certain conditions.¹⁴¹

In order to make this argument Machin claims (2012, p. 102) it must be shown that non-democratic forms of governance can meet the 'egalitarian challenge'. As outlined above, the egalitarian challenge is a demand on the justification of political legitimacy. It claims that political legitimacy – the right of some individuals to rule over others – must be justified in such a way as to respect the fundamental moral equality of individuals. Many democratic theorists, such as Buchanan (2002), use the egalitarian challenge to show that only democracy can justify the inequalities of political power. The reason it does so is that it affords all individuals a say in determining who comes to govern over them, and in doing so it succeeds in respecting the fundamental equality of individuals. In Buchanan's terms:

According to what may be the most plausible version of democratic theory, the inequality that political power inevitably involves is justifiable if every citizen has "an equal say" in determining who will wield the power and how it will be wielded, at least so far as the content of the most basic laws is concerned (2002, p. 710).

Buchanan's claim is that it is *only* democracy that can overcome the egalitarian challenge. And it is this claim that Machin's alternative account of legitimacy seeks to challenge.

To be sure, one may take a different approach to the egalitarian challenge by rejecting the principle of equality, or questioning its importance relative to other principles. For instance, one could deny that there is a fundamental moral equality between individuals, or downplay the importance of the principle in an account of

¹⁴¹ There is an important differences between my own and Machin's views of political legitimacy, which will impact on some of the conclusions we respectively arrive at. For instance, Machin holds that legitimacy (the right to rule) is a scalar matter of degree (2012, p. 103), and that agents (such as just foreign military powers) can have a right to rule in the weaker sense. My view is that the justified coercion and legitimacy are separate, such that a just military power would be justified in coercing but would not in any sense possess legitimacy (i.e. they would not be legitimate, even in the weaker sense). I note this only for clarity, none of my arguments are altered by this difference in views.

political legitimacy, or argue that other values (liberty, fair opportunity, or giving people what they deserve, for instance) outweigh the requirements of equality in the justification of political legitimacy.

Yet there are good reasons for wanting to preserve the principle of equality as both a bedrock moral principle, and as a demand on procedural legitimacy. Two reasons stand out in particular – one moral and one specific to transitional justice cases. First, the principle of equality – that all individuals are morally equal and that this should be reflected in an account of what gives some individuals the right to rule – conforms with a number of our shared intuitions about the value of individuals. Second, basic moral equality as a desideratum of political legitimacy is important – indeed especially important – in the wake of periods of political oppression and authoritarian rule, when the basic moral equality of individuals is not respected, and where for that very reason, we reject that dictators or other forms of authoritarian rule have the right to rule.¹⁴² There is thus a strong intuitive argument in favour of preserving egalitarian principles as morally bedrock, and also contextual reasons which arise from the context of transitional justice. As such, I believe we should take the egalitarian challenge seriously as a demand on political legitimacy.

Machin seeks to show that it is not democracy *per se* which is necessary to meet the process requirement of legitimacy. Instead, four conditions must be met. And, crucially, it is the *fact that democracy meets these four conditions* that means it satisfies the process requirement of legitimacy, and not democracy *per se*.

The four conditions are as follows (Machin, 2012, pp. 106-107):

- i) Horizontal equality
- ii) An acceptable level of vertical inequality
- iii) That citizens have an institutionalised opportunity for a voice.
- iv) Publicity

I will explain each in turn.

¹⁴² One hallmark feature of an illegitimate state is that it fails to respect the basic moral equality of individuals. This may be because of the persecution of minority groups, because legal systems fail to respect the principle of 'equality under law' (that all are subject to the same laws, and that the law does not discriminate against particular groups) or because a monarch or dictator rules in such a way as to not consult those subject to their rule (thereby failing to respect the fundamental equality of individuals' interests).

The requirement of *horizontal equality* states that political procedures which confer legitimacy must respect horizontal equality – “the equality between citizens *qua* citizens” (Machin, 2012, p. 106). The condition of *acceptable vertical inequality* requires an explanation of why some individuals can come to possess law-making power, and why this inequality in power (between law-makers and citizens) is not unacceptable. Both of these conditions are met, Machin claims, through procedures which grant citizens a say in electing and removing their state’s lawmakers.¹⁴³ Such procedures also account for acceptable vertical inequality – law makers have the right to rule because they have stood to be a representative and have gained the support of the people in procedures which grant citizens a say in who comes to make the laws which govern over them (Machin, 2012, p. 106).

The third condition is that citizens are afforded an *institutionalised opportunity* to voice their opinion on who should come to create the laws which govern over them. This is important for a number of reasons – “it gives citizens some control over their own fate”, “it publicly declares that citizens are moral equals” and “it offers a way of legitimizing certain laws independently of their content” (Machin, 2012, pp. 106-107). All are achieved when decision-making procedures offer individuals a voice in who governs over them.

The fourth condition is that of *publicity*. The importance of publicity as a condition on legitimacy is that “citizens are entitled to some account of why their legislature passed law *f* rather than law *g* (or indeed no law at law)” (Machin, 2012, p. 107). And the need for transparency is grounded in a more basic principle about the need for openness in the working of political institutions more generally. Here Machin cites Jeremy Waldron:

Society should be a *transparent* order, in the sense that its working and principles should be well-known and available for public apprehension and scrutiny (Machin, 2012, p. 107).

Machin’s argument is that when these four conditions are met, the process element of the egalitarian challenge is fulfilled. That is, when the conditions of horizontal equality, acceptable vertical inequality, an institutionalised voice and publicity are met, the question – “if we are all equal, why should only some of us wield political power”

¹⁴³ There is an important question about *how many* citizens must vote to achieve these two conditions. The example below of the BCCA below illustrates that not all citizens need to participate in political procedures in order for them to confer legitimacy, so long as this exclusion is justified.

–is responded to acceptably, and the procedures are legitimate. The fundamental equality between citizens is respected, and the inequalities between citizens and lawmakers are justified. Crucially, Machin claims, it is only because democracy meets these four conditions that it responds to the egalitarian challenge.

At this point one may quite reasonably object that the four conditions look to be so intrinsic to democracy, that surely only democratic forms of legitimacy can meet them. There are two responses to this concern. First, there has been no mention so far of affording one vote to one person, or of requiring votes from all individuals, or indeed of elections at all. Nor has there been any mention of political parties or of promoting political competition. Nor indeed have we heard any of the taglines of democracy ‘rule of the people’, ‘will of the people’ or ‘majority rule’. The point being that none of the features typically deemed to be essential to democracy are required by the four conditions.

Second, Machin introduces an example of non-democratic governance which meets the four conditions. To illustrate how the four condition can confer legitimacy on political procedures Machin appeals to an example from the scholarship on deepening democracy. Accounts of deepening democracy seek to, “enable citizens to have a meaningful input in bureaucratic (and other) decisions in circumstances in which it is not feasible for all citizens to have a say” (Machin, 2012, p. 109). In the event that a democratic procedure which affords a vote to all individuals cannot be assembled, then the field of ‘deepening democracy’ seeks to explore alternative means of political participation.

The example Machin gives is that of a Citizen’s Assembly in British Columbia (BCCA) which was used to make recommendations on electoral reform for the democratic system of British Columbia (2012, pp. 109-110). Members of the assembly were taken from representative groups—according to a representative distribution of age, gender, race, and so on. The Assembly heard presentations from specialists and consulted with citizens in their process of deliberation on how best to reform the electoral system.

Machin claims that the Assembly satisfies the four conditions of political legitimacy, and as such that the decisions of the assembly are legitimate.¹⁴⁴ First, the

¹⁴⁴ Clearly, the point here is not the assembly has the right to rule British Columbia—this was never in question, the assembly is not a legitimate state. The question is whether the decisions of the assembly are legitimate, and the claim here is that they are because the procedures which arrived at these decision met

assembly offered British Columbian citizens an *institutionalised opportunity* for a voice in electoral reforms. Machin writes, “not all of those who were interested in joining the BCCA [British Columbia Citizens’ Assembly] were admitted but there were good reasons for this in terms of the diversity and representativeness of the BCCA” (Machin, 2012, p. 109). This also explains how the Assembly meets the conditions of *vertical* and *horizontal* equality. The Assembly meets the condition of acceptable vertical equality because exclusion was justified on the “plausible” terms of representativeness and diversity (2012, p. 109), in light of the fact that it was logistically impossible to consult all citizens. The condition on horizontal equality is met because individuals are not discriminated against on unjustifiable grounds, and as such they are respected as equal *qua* citizens. Machin writes, “it [the Assembly] didn’t make any invidious comparisons between the included and excluded citizens” (2012, p. 109). Finally, the Assembly held *public hearings* and published its findings and in doing so met the publicity requirement. Accordingly, the Assembly meets the four necessary conditions of legitimacy.

Machin’s four conditions, he claims, are necessary for procedural legitimacy. They confer legitimacy because they respond to the process requirement of the egalitarian challenge – “the problem that if we are all equal, how can some come to rule over others?” It is the fact that democracy typically meets the four conditions that it responds to the egalitarian challenge. But democracy itself is not necessary for procedural legitimacy, the four conditions are.

Machin qualifies his defence of the four conditions in a number of important ways. First, he claims the account is not meant to show that non-democratic forms of law-making are to be preferred, all things considered (Machin, 2012, p. 103). The four conditions show that some non-democratic forms of law-making are morally permissible (if they meet the four conditions) not that they are morally preferable, all things considered, to democracy. Second, the defence of the four conditions is not intended to meet all of the requirements imposed by different accounts of legitimacy (Machin, 2012, p. 106). As noted above, there is a wide diversity of views in the literature about what legitimacy requires, and developing an account which meets all of the requirements of these views would be, in Machin’s terms, “a difficult task”. Instead, the more limited aim of the four conditions view is to show first, “that addressing the process-aspect of the egalitarian challenge does not require democracy” and second, that

the four conditions. In principle, the same applies to the procedures adopted by the state to explain why the state possesses the right to rule.

“non-democratic forms of law-making cannot be excluded from consideration” (Machin, 2012, p. 106).

There are two further points I want to raise here. First, I want to re-emphasise that the four conditions are not *sufficient* to legitimise political power, but only necessary. Other conditions must be met by all things considered legitimate states and indeed I will later claim that the condition on justified coercion set out in the previous chapter is one of them. Second, one virtue of the four conditions view is that it provides normative guidance about legitimate and illegitimate forms of governance, and why we should seek to move from the latter to the former (as an implication for transitional justice contexts). Machin writes:

Dictatorship is ruled out because it is regularly incompatible with the requirements of publicity and because it denies citizens any institutionalized opportunity for a voice in decisions that affect them (2012, p. 107).

So too would other forms of governance which did not allow citizens a say in who comes to govern – monarchies or oligarchies, theocracies or plutocracies. The four conditions thus provide normative guidance by explaining when and why a political agent does or does not possess the right to rule.

The main point I want to take from Machin’s view – which is illustrated by the case of the British Columbian assembly – is that non-democratic forms of governance can confer political legitimacy. In the following section, I will explore this conclusion with particular reference to transitional justice.

6. Implications for transitional states

Thus far I have challenged the view – common in the literature in political philosophy and in scholarship on transitional justice – that democracy is a necessary condition of political legitimacy. Drawing on an account developed by Machin I introduced an alternative view of the necessary conditions required for a state to possess the right to rule. In this section, I will draw out some implications of my argument for the problem of political legitimacy in the context of transitional justice.

To begin with, recall the problem of political legitimacy in the context of transitional justice. Transitional justice is the process of moving from authoritarian rule

or conflict to more just political societies, while at the same time coming to terms with legacies of wrongdoing. One of the central problems of transitional justice is the establishment of a legitimate state which possesses the right to rule (with all the important permissions this encompasses—the monopoly on power, meeting the egalitarian challenge and so on). According to the mainstream view in the literature on transitional justice and political philosophy, the establishment of a legitimate state is the establishment of a democratic state—only states that are democratic are legitimate in the sense that they have the right to rule. Machin’s four conditions view which I have defended in this chapter challenges this mainstream view. It states that four conditions are necessary for legitimacy, and not democracy. These conditions—horizontal equality, an acceptable level of vertical inequality, that citizens have an institutionalised opportunity for a voice and publicity—must be met for a state to be legitimate. And, importantly, it is only because democracy satisfied these four conditions that it confers legitimacy on states.

Here I want to unite this view of procedural legitimacy with the necessary condition on morally justified coercion set out in the previous chapter. An all-things-considered legitimate state, on this view, is a state that is both morally justified in coercing and fulfils the condition on procedural legitimacy,

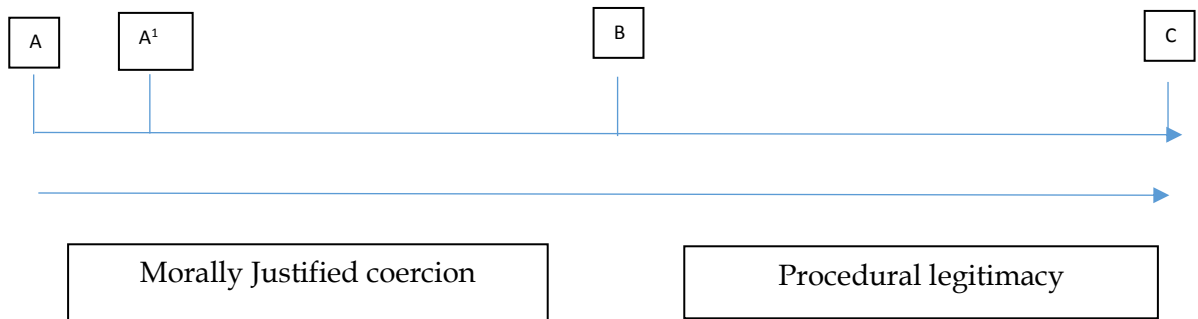
- a) Morally justified coercion,
 - i) The protection of human rights.

- b) Procedural legitimacy
 - ii) Horizontal equality.
 - iii) Reasonable vertical equality.
 - iv) Institutionalised voice.
 - v) Public equality.

All of these conditions must be met for a state to be legitimate, on the view I have defended in this and the previous chapter.

Here I want to briefly consider what this view of political legitimacy means for cases of transitional justice. Consider a variation of the diagram I outlined above,

FIGURE 4: A REPRESENTATION OF TRANSITIONAL JUSTICE



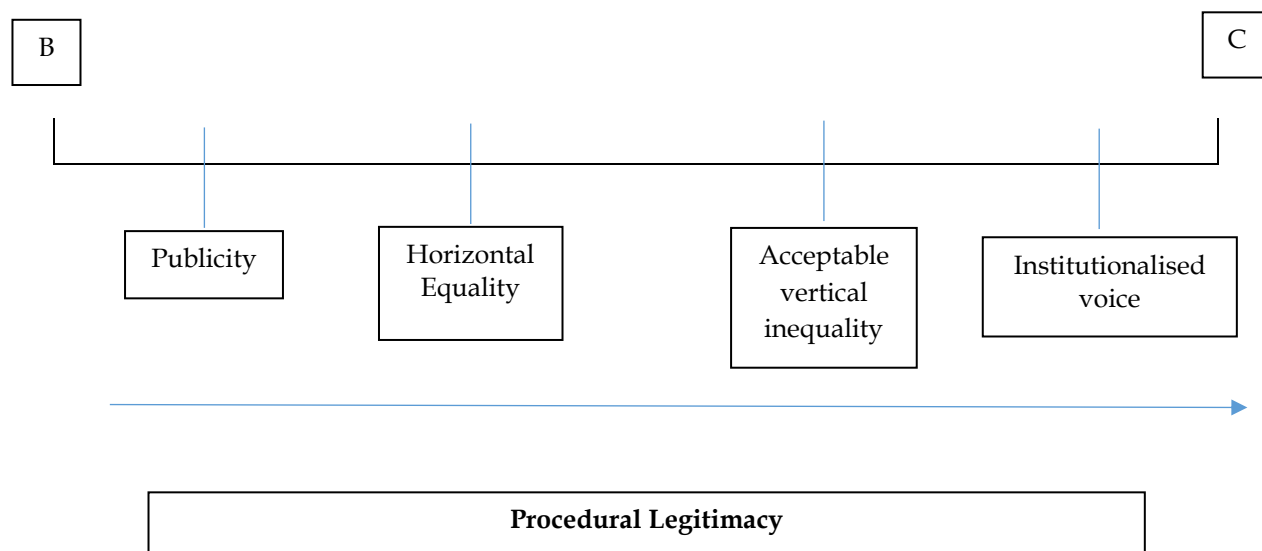
Suppose we represent the process of political transition from authoritarian rule to democracy as preceding from A to B to C. A represents a period of illegitimacy where governments are authoritarian (or otherwise undemocratic), commit systematic rights violations and fail to respect the rule of law (or fail to respect the moral equality of individuals in other ways). Suppose at A¹ the illegitimate state is deposed and a transitional government comes to power (say a foreign power, or a rich elite). On my account, between A¹ and B this government should be engaging in justified coercion¹⁴⁵, a necessary condition of which is that human rights are protected. Having secured the protection of human rights, between B and C this agent should be seeking to establish the four conditions of horizontal equality, an acceptable level of vertical inequality, that citizens have an institutionalised opportunity for a voice and publicity. At phase C, in securing both morally justified coercion (protecting rights) and procedural legitimacy (procedures which meet the four conditions), the state in question is legitimate, and possesses the right to rule. Importantly, both the conditions on justified coercion *and* the conditions on procedural legitimacy must be met if the process of transitional justice is to achieve a legitimate state, on this view.¹⁴⁶

¹⁴⁵ Indeed, to take the broader view of this thesis, one of the ways in which the government should be engaging in justified coercion is through practices of punishment formulated along the lines of the self-defence view defended in chapter four. Moreover, I take it that citizens may be justified in engaging in rough justice in the interests of self-defence. This would be permitted because we have not yet arrived at a legitimate state which possesses the monopoly on coercion.

¹⁴⁶ One point to raise with respect to this representation of transitional justice is that it is unlikely that the process of transition will be as seamless as the process implied by the diagram. The process will unlikely be an easy transition from illegitimate rule to a transitional government to a legitimate state.

Let me focus in on the phase of moving towards procedural legitimacy between B and C in more depth.

FIGURE 5: STAGES OF TRANSITION TO PROCEDURAL LEGITIMACY



At B we have arrived at a state which is morally justified in coercing, and between B and C we are seeking to establish a state that is procedurally legitimate and has the right to rule. One virtue of the ‘four conditions’ view is that it explains the conditions that a transitional government must put in place (between B and C) to secure the right to rule. There are two elements to this. First, as noted above, the four conditions explain what is wrong about illegitimate states. In this sense the four conditions inform a normative account of the elements of illegitimate states that should be changed. According to the four conditions, illegitimate states are morally problematic because,

- i) Horizontal equality is not respected – citizens are not treated as equals (for instance through laws which persecute minority groups).
- ii) Acceptable vertical inequality is not met – an authoritarian ruler fails to rule in such a way that the inequalities in political power between them and citizens are morally justified.
- iii) Publicity – authoritarian rulers make laws secretly, in a way that is not transparent or open for citizens.

- iv) Institutional voice – citizens are denied a say in the processes whereby laws are made and therefore the substantive laws will not be representative.

In explaining what is wrong about the law-making procedures adopted by illegitimate or authoritarian states, the four conditions provide an account of what should be *altered* at an institutional level during the period of political transition.

Second, and relatedly, the four conditions provide a positive account – a kind of blueprint – of the stages that states must go through in order to progress towards procedural legitimacy. There are three things to note on this point. First, there is no reason why the progression through these stages should be in any particular order, or indeed cannot take place simultaneously. Second, some measures will fulfil more than one of these conditions – for instance a procedure which is representative and affords citizens a say in who comes to possess law-making power will fulfil the horizontal and institutionalised voice conditions. Third, making the transition through these stages will be a vital pre-requisite for achieving fully-fledged democracy (recall it is because democracies achieve these four conditions that they are procedurally legitimate). As such, we can see achieving these conditions as being part of the broader transitional goal of arriving at a democratic state.

To be sure, to re-iterate a point I have made repeatedly, this view is consistent with the view that democracy is the best form of governance, a form that confers legitimacy on states in a way that no other form of legitimacy can.¹⁴⁷ But in the event that democracy is prohibitively difficult – because it is too expensive, because establishing democracy will divert resources from other important institutions or because establishing democracy will mean other important political goals cannot be realised – what we want is a view of legitimacy that can preserve some of the important elements of democracy while avoiding these challenges.

The four conditions view provides this account. In not requiring a vote for all citizens, advertisement, candidate funding, costly elections, the four conditions promise to be less costly (at least in principle) than democracy (or at least judging by our knowledge of how democracy functions in most democratic societies). Further, the four conditions allows scope for valuable non-democratic governance, in ways that the view

¹⁴⁷ We can for instance accept the arguments of some philosophers that the rights which arise from democratic political arrangements protect more basic moral human rights better than any other form of legitimacy (Arneson 1995). Or that egalitarian principles are best secured by democracy (Buchanan 2002), or that democracy best secures liberty, or better cultivates moral citizens (Mill 1974), and so on.

that democracy is necessary for legitimacy cannot. Recall the hypothetical case I outlined above. There are two states – A and B. State A is democratic, but problematic in other ways (there are only two candidates, they are not representative, there are inequalities in wealth, and so on). State B is undemocratic, but is valuable in other ways (reasonably equitable distribution of resources, excellent welfare and healthcare, respect for civil and political rights, and so on). According to the necessary condition view of democracy, state B can never be legitimate. But according to the four conditions we have an account of how state B can become procedurally legitimate and thereby possess the right to rule, which does not require democracy.

7. Conclusion

In this chapter I have challenged the view that democracy is necessary for political legitimacy. Drawing closely on an account of legitimacy outlined by Machin (2012), I defended an alternative view in the form of four necessary conditions on political legitimacy – horizontal equality, acceptable vertical inequality, publicity and an institutionalised voice. Meeting these conditions does not require democracy, and it is only because it meets these conditions that democracy is deemed to be necessary for political legitimacy. Importantly, this view is still consistent with the view that democracy is, all things considered, the morally best form of political governance. As such, we can preserve the mainstream view that democracy is a crucial feature of the end goal state achieved by transitional justice. In the event that democracy is too costly, or otherwise difficult to achieve, the four necessary conditions inform an account of legitimacy which a state must fulfil in order to be legitimate. Twinned with the condition on morally justified coercion set out in the previous chapter, the four conditions explain what transitional governments must achieve in order to possess the right to rule.

VII. Transitional Justice and Retroactive Law

1. Introduction

Retroactive laws operate on actions which take place prior to their application. Retroactive laws which *apply* liability to past conduct (the form of retroactivity I will be interested in this chapter) are viewed as being both legally and morally problematic. Legally, they are problematic because they are deemed to violate widely adhered to principles of legality – that there can be ‘no crime without the law’ (*nullum crimen sine lege*), and the prohibition against *ex post facto* law – which prohibits laws which operate on matters taking place prior to their enactment (literally, ‘after the fact’). They are morally problematic because it looks to be unfair to punish an individual for an act that was legal at the time it was carried out. So the argument against retroactive laws from general jurisprudence goes.¹⁴⁸

In this chapter I want to challenge this view that retroactive laws are always legally and morally problematic. My claim will be that the legality-based problems and unfairness of retroactive laws are dependent on the nature of the acts to which retroactive laws apply, the nature of the law-making which permitted the conduct to which retroactive laws apply and a law-maker’s knowledge of these two factors. My claim, to state it from the outset, is that it is neither contrary to principles of legality nor unfair to retroactively criminalise acts if these acts were i) a serious act of moral

¹⁴⁸ See, for instance, Fuller argues that, “a retroactive law is truly a monstrosity. Law has to do with the governance of human conduct today by rules. To speak of governing or directing conduct today by rules that will be enacted tomorrow is to talk in blank prose” (1969, p. 53); Raz argues that, “One cannot be guided by a retroactive law... The law must be open and adequately publicized. If it is to guide people they must be able to find out what it is” (2009, p. 214); and Blackstone, “There is still a more unreasonable method... which is called making of laws *ex post facto*; when after an action is committed, the legislator then for the first time declares it to have been a crime, and inflicts a punishment upon the person who has committed it... he had therefore no cause to abstain from it; and all punishment for not abstaining must of consequence be cruel and unjust” (1979, p. 46)

wrongdoing and ii) the only reason the act went unpunished is because a law-maker amended the legal system to legally permit themselves to carry out such acts and iii) a lawmaker's knowledge of both i) and ii).

This argument is significant for two reasons. First, there is a strong general presumption against retroactivity in both scholarship on general jurisprudence and under international law. My argument challenges the strength of this presumption in a way that no other commentator has done (or at least no other commentator that I am aware of). Second, owing to the fact that retroactive laws are always deemed to be both legally and morally problematic, commentators overwhelmingly frame cases where retroactive laws look justified in *pro tanto* terms (the idea being that the *pro tanto* importance of securing justice outweighs the *pro tanto* injustice of retroactively holding an individual to account). But my argument challenges the view that retroactive laws are always legally and morally problematic, and thus denies that there is always a dilemma at the heart of retroactive law-making.

The motivation for my arguments in favour of retroactivity in this chapter is to defend the use of retroactive laws, under limited conditions, in cases of transitional justice. The question of the permissibility of retroactive law-making within transitional justice states is an important one for at least two reasons. First, transitional legal systems are commonly faced with the problem of dealing with past wrongdoing carried out by officials of a past, undemocratic regime. The introduction of retroactive laws offers one means of legally holding to account those in office who were responsible for acts of political wrongdoing that were legally licensed at the time they were carried out. Second, transitional states are commonly faced with the *forward-looking* challenge of transitioning to a more just legal system/ society more generally. Incoming transitional governments must seek ways of ameliorating previously unjust or inefficacious legal institutions, which had commonly been used by a past regime to serve unjust political aims. This was the case in Germany in the wake of the Second World War, Argentina in the wake of the Junta government of the 1970/80's, South Africa in the wake of the apartheid, amongst a host of other cases of political transition. As I will argue below, the use of retroactive laws offers transitional states one legal means through which to facilitate the transition to a more just, more democratic legal system, while legally holding past political wrongdoers to account. My arguments are thus meant to carry implications not only for how retroactive laws are viewed in general jurisprudence, but also for how they are viewed as a legal measure in transitional justice contexts.

The chapter will run as follows. In the following section I analyse what a retroactive law is, distinguishing them from other forms of backwards-looking law-making. In section three, I consider the argument against retroactivity – in particular, the legality-based reasons and the view that retroactive laws are unjust because they are unfair. In section four, I focus on a particular instance of political wrongdoing – the case of forced disappearances in Argentina – with a view to providing some context through which to understand my claim that retroactive laws are in fact not unfair nor contrary to principles of legality when they are applied to the acts of unjust law-makers. In section five I develop this argument by establishing a limited set of conditions under which retroactive laws are neither legally nor morally problematic. In section six, I provide a positive justification for retroactive laws on the grounds of deterrence, and supporting the move towards a democratic state.

2 What is a retroactive law?

Above I defined a retroactive law as a law which ‘operates on acts which take place prior to their application’, but this definition requires more care. There are a number of ways in which laws can operate on past acts. For instance, laws may alter the legal status of a past act by removing or attaching liability to them. Or laws may change the level of sanction attached to illegal conduct. Or, laws may change the *form* of liability attached to a past act – for instance from public to criminal, or change the legal rights or duties that individual’s possess with respect to past acts (i.e. the amount of tax payable on a particular transaction).

One important distinction is between *retroactive* and *retrospective* laws.¹⁴⁹ Retrospective laws alter the legal status of past acts, *but only effect this change from the time of their creation, and subsequently* (i.e. today and in the future). For instance, imagine a retrospective tax law is introduced on a Tuesday which changes the legal status of a transaction on the preceding Monday such that an individual now has to pay extra tax. Suppose they have until Friday to pay the amount. In this case, the law is backwards-looking (applying to past conduct) but also prospective (it is only enforceable from the time the law comes into place on Tuesday).

Retroactive laws, on the other hand, change the legal status of a past act in such a way as to make this law enforceable at the time it was carried out (if this were

¹⁴⁹ For more on the distinction between retrospective and retroactive laws see Juratowitch (2008, pp. 9-12).

physically possible). An extreme (and somewhat unrealistic) example of a retroactive law would be a murder case. Suppose a murder takes place on Monday (and murder is not illegal). A retroactive law made on Tuesday would make all the acts of murder on Monday illegal, and would make it possible to punish all those who committed murders on the Monday. To put this slightly differently – a retroactive law changes the law in such a way as to declare that the new law is and was always the law, such that past acts in violation of this law are punishable. In our case, a retroactive law against murder, introduced on Tuesday and applied to the conduct of Monday, would make a murder carried out on Monday liable for punishment on Tuesday, when the law is introduced.

This means, as Waldron captures, that retroactive laws are more controversial than retrospective laws:

Retroactive legislation is more radical. A retroactive law is one that operates on past events as though it were in force when the past event took place (Waldron, 2004, p. 632).

The crux of the difference between retroactive and retrospective law concerns the way in which the law attaches to past conduct. Where retrospective laws look back to the past and amend laws in the present and future as a result, retroactive laws change the legal status of a past act in such a way as to make past acts liable for legal action. In what follows, I will be interested in retroactive laws of the form which *attach* criminal liability to past acts (like in the improbable murder case above).

3. What is wrong with retroactive laws?

In this section I want to attend more closely to what exactly is problematic about retroactive laws. I will draw attention to two factors in particular. First, retroactive laws are legally problematic because they violate principles of legality and are thus contrary to the requirements of the rule of law. Second, retroactive laws are morally problematic because they are unfair.

3.1. Legality-based problems

One reason that retroactive laws look to be problematic is that they are prohibited in both international law and in many domestic constitutions. Article 11 of the *Universal Declaration of Human Rights* captures this prohibition against retroactivity:

No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed.

Identical wording is set out in Article 7 of the *European Convention of Human Rights*, under the principle 'No punishment without the law'. In the domestic case, the American constitution *Article 1, Section 10, Article 1* states:

No State shall enter into any Treaty, Alliance, or Confederation... of ex post facto¹⁵⁰ Law.

The Prohibition is also captured by the constitutions of a number of states worldwide – including the UK¹⁵¹, Canada, Brazil and Germany, to name only a few.

Many legal documents, both international and domestic, thus prohibit retroactive law-making. And the main legal reason for this prohibition is that retroactive laws are in violation of widely held legal principles and norms. These are the principles of 'no crime without the law' (*nullum crimen sine lege*) and the prohibition on *ex post facto* laws.

As principles of legality, these two norms set standards on the ways in which laws should be made and should operate. As such, they fall under the broader umbrella concept of the 'rule of law'. To be sure, the concept of the 'rule of law' has a number of meanings¹⁵², but the sense I intend here is that of a set of principles which prescribe a

¹⁵⁰ When applied to laws the term *ex post facto*, literally 'after the fact', captures any form of law which applies to past events. Both retroactive and retrospective laws are examples of *ex post facto* law.

¹⁵¹ For a discussion of the history of the presumption against retroactivity in English common law see Juratowitch (2008, pp. 27-42).

¹⁵² The *Oxford Dictionary of Law* captures these different meanings. One sense points to the rule of law as distinguished from the rule of men, or the rule of a monarch. This captures the feature that the rule of law offers predictability, assurance, stability, and so on. Another sense is attributed to Dicey as a set of concepts identified as being essential to the English legal system – "the absolute predominance of regular law, so that the government has no arbitrary authority over the citizen' the equal subjection of all (including officials) to the ordinary law administered by the ordinary courts; and the fact that the citizen's personal freedoms are formulated and protected by the ordinary law rather than by abstract constitutional declarations." The sense

criteria for good law-making – on the procedures through which laws are made and on how they operate on the conduct of the individuals who are subject to them.

A number of jurisprudential scholars have outlined accounts of rule of law standards¹⁵³, and many of these accounts share the principle that retroactive laws should be prohibited. I will briefly draw attention to two notable accounts of the rule of law because they help to explain why the two principles of legality are so established and widely adhered to.

Lon Fuller introduces the following rule of law standards: i) Generality; ii) Promulgation; iii) Non- retroactivity; iv) Clarity; v) Non-contradiction; vi) No laws that require the impossible; vii) Constancy of the laws through time and viii) Congruence between official action and declared rule (Fuller, 1969, pp. 46-91). On the prohibition against retroactive law Fuller writes:

A retroactive law is truly a monstrosity. Law has to do with the governance of human conduct by rules. To speak of governing or directing conduct today by rules that will be enacted tomorrow is to talk in blank prose. To ask how we should appraise an imaginary legal system consisting exclusively of laws that are retroactive, and retroactive only, is like asking how much air pressure there is in a perfect vacuum (Fuller, 1969, p. 53).

Fuller's argument in this passage is twofold, one claim is ontological, the other is normative. The ontological claim is that retroactivity is so opposed to the basic function of law in guiding conduct that it is logically impossible to conceive of a system of retroactive law.¹⁵⁴ The normative claim is that that retroactive laws are monstrous,

of the rule of law I intend here is similar to this latter sense as a set of procedural and substantive requirements on the nature and procedures around laws and law-making.

¹⁵³ Importantly, the main source of disagreement about the standards of the rule of law concerns the moral status of these standards. This disagreement in turn rests on a broader disagreements between natural law scholars and positivists about the moral status of law more generally i.e. law's relation to morality and whether laws must have moral content if they are to be laws. I will not get into this debate here.

¹⁵⁴ Fuller adopts a slightly different view elsewhere, such that his overall position on how retroactive laws relate to the broader function of law is somewhat ambiguous. In *Positivism and Fidelity to Law* he writes:

There would be a certain occult unpersuasiveness in any assertion that retroactivity violates the very nature of law itself. Yet we have only to imagine a country in which *all* laws are retroactive in order to see that retroactivity presents a real problem for the internal morality of law ... a general increase in the resort to statutes curative of past legal irregularities represents a deterioration in that form of legal morality without which law cannot exist (Fuller, 2009, p. 60).

Fuller's general position seems to be that while retroactive laws are irregular, they are not absolutely prohibited but nor should they be used too much. This is a position very similar to my own in this chapter.

because it is unjust to hold individuals to account for actions that it is impossible for them to avoid (a feature I will consider in more depth below).

Similarly, Raz introduces the following standards in his conception of the rule of law: i) All laws must be positive, prospective and clear; ii) Laws should be relatively stable; iii) The making of laws should be guided by open, stable, clear and general rules; iv) The independence of the judiciary must be guaranteed; v) Principles of natural justice must be observed; vi) The courts should have review powers over the implementation of other principles; vii) The courts should be easily accessible; viii) the discretion of the crime-preventing agencies should not be allowed to pervert the law (Raz, 2009, pp. 214-219). On retroactivity in particular Raz writes:

One cannot be guided by retroactive law. It does not exist at the time of action... The law must be open and adequately publicized, if it is to guide people they must be able to find out what it is (Raz, 2009, p. 214).

Driving Raz's account is the basic idea – analogous to Fuller – that the basic function of law is to guide conduct. And for this reason, there should be a strict presumption against retroactive law-making. The standards of the rule of law prohibit it.

These two views about the rule of law are by no means exhaustive but they provide some explanation of the two principles of legality highlighted above. They illustrate why the principles prohibiting *ex post facto* laws and of 'no crime without the law' are so established. The prohibition against *ex post facto* laws is important because if law is to serve its basic function in guiding conduct it must be prospective.¹⁵⁵ The principle of no crime without the law is important because laws must be clear, publicised in advance, public and there must be convergence between official enactments and declared rules. As such, these two principles of legality conform with the requirements of the rule of law.

¹⁵⁵ Both H.L.A. Hart and Fuller, amongst a number of other legal scholars, converge on this view that the basic function of law is to guide conduct. Hart writes, "I think it quite vain to seek any more specific purpose which law as such serves beyond providing guides to human conduct and standards of criticism of such conduct (Hart, 2012, p. 249). And Fuller claims, "Law is the enterprise of subjecting human conduct to the governance of rules" (Fuller, 1969, p. 106).

3.2. The unfairness of retroactive laws

Retroactive laws are not only legally problematic in being in violation of widely held principles of legality, they are morally problematic as well. The main reason for this, at least on the face of it, is that retrospectively holding someone legally liable for conduct that was legal at the time it was carried out looks to be unfair. In the following section I want to deny that it is always unfair to retrospectively criminalise certain acts. But prior to doing so it will help to draw attentions to some of the reasons that may underpin the judgement that retroactive laws are unfair.

Consider a case in which an act is retroactively criminalised after the fact. Suppose trespassing is not criminal on a Monday (say, because the notion of private property does not exist). Yet suppose that the law changes and trespassing becomes illegal by a law passed on a Tuesday. Suppose the law is retroactively applied to the previous Monday such that all of those who trespassed on the Monday become liable for punishment from the Tuesday onwards. The use of retroactive law in this case would be morally problematic for at least three reasons,

- i) *Fair-warning* – retroactive laws are unfair because they violate the principle of ‘fair warning’. It is a basic requirement of fairness that individuals are given fair warning about what actions come with legal liability attached so they may conform their conduct to the requirements of the law.
- ii) *Inability to do differently* – retroactive laws are problematic because they make it impossible for individuals to do anything to avoid liability. If individuals do not know which conduct will be criminalised in the future, they are unable to do anything differently to avoid liability in the present.
- iii) *Certainty about the law* – individuals rely on the law to guide their behaviour. It is only if laws are prospective that individuals can know the law, rely on it and therefore plan their lives in light of it. A retroactive law undermines the certainty that individuals can have about the law.

Together, these three reasons highlight why retroactive laws are usually considered to be unfair and thus morally problematic.¹⁵⁶

¹⁵⁶ Other commentators have pointed to a longer list of problems with retroactive law-making. Duxbury (2013, pp. 147-149), for instance, highlights thirteen problems with retroactive law, including: that

Indeed, I agree that the legality-based reasons considered in the previous section, and the morality-based reasons considered in this chapter are weighty, and they serve to explain why there should be a general presumption against retroactive laws. Yet despite this strong presumption against retroactive law-making, I will argue that there are exceptional circumstances under which it is neither contrary to principles of legality nor unfair to introduce retroactive laws against certain acts.

To make this argument, it will be important to get clear about what these exceptional circumstances are. And to illustrate this I will appeal to a particular case of political wrongdoing from a case of political transition from authoritarian rule. What I want to draw attention to in appealing to this case is both the nature of the acts in question and the nature of the law-making under which said acts were not criminalised and thus deemed to be perfectly legal. It will be important to keep these two factors in mind because they will be important to my later argument (in section five) that retroactive laws are neither legally nor morally problematic when applied to a morally wrong act that was permitted because a law-maker adjusts the law to permit it.

4. The Exceptional Nature of Transitional Contexts

In this section I want to highlight an exceptional case of law-making which will provide the context for my argument in the following section that under certain conditions retroactive laws are neither legally nor morally problematic. To illustrate these condition I want to consider a particular case of political wrongdoing – the case of Argentina under the rule of a military Junta in the 1970's and 80's.

4.1. Forced Disappearances in Argentina

In 1976, the Argentine government was overthrown by a *coup d'état* and replaced with a military Junta led by the military generals Videla, Massera and Agosti. There

retroactive laws judge yesterday's conduct by today's standard (2013, p. 147); that retroactivity "militates against legal finality... and certainty" (2013, p. 148); that retroactive law "amounts to an abuse of the legislature's temporally specific democratic mandate" (2013, p. 148). There are two things to note with respect to Duxbury's list. First, some of the arguments simply do not apply to retroactive law-making in transitional justice cases, for instance the worry that retroactive law may undermine a democratic mandate. Second, some of Duxbury's problems in fact serve as the basis of arguments *in favour* of retroactivity. Think about the ostensible problem that retroactive laws judge yesterday's conduct by today's standard. This looks to be a substantive benefit in the case of a transitional society trying to implement legal measures to combat previous wrongdoing by an unjust regime.

followed seven years of military dictatorship, one of the main policies of which was the suppression of communists and other leftist opponents to the regime which the Junta labelled as 'subversives'. The Junta employed forced disappearances against subversives, which comprised arbitrary arrests, mass detention without trial, torture and killing. The disappearances policy was introduced swiftly, as one commentator writes:

In but the first sixteen days of the new de facto government, 152 individuals died in political violence: 19 policemen, two members of the military, 68 "presumed guerrillas," nine civilians whose corpses were later identified, and 54 civilians whose identities remained unknown (Feitlowitz, 1998, p. 25).

Overall figures of deaths from the policy of forced disappearances are estimated at 30,000 (Hernandez, 2013).

To effectively implement the forced disappearances, the Junta seized control of the judiciary to ensure that their actions had no legal resistance. One of the ways in which the Junta ensured the disappearances policy was legally permitted was by removing past members of the judiciary and replacing them with legal officials who were sympathetic to their policies, and willing to turn a blind eye. As one commentator writes:

The day of the coup, the Junta extended the state of siege... arguing that this provided a legal justification... the supreme court was purged, the Prosecutor General and Federal judges replaced, and all new judges were required to swear an oath of loyalty to the acts and objectives of the Process of National Reorganisation (Guest, 1990, p.26).

The Junta also amended parts of the constitution on the grounds of 'national security' so as to give themselves greater discretion to implement oppressive measures. Another commentator writes:

A flurry of statutes and decrees, instructions, special provisions and resolutions criminalized participation in either political parties, or labor strikes; publication of all news items concerning terrorist activity, subversion, abductions or the discovery of bodies, unless officially announced; various modes of criticism of official policies in university classrooms; and all 'political acts' that relate to a political party, regardless of whether such acts resulted in concrete action (Snyder 1984, p.510).

The passage illustrates that the Junta's law-making served not only to permit their brutal and oppressive policies, but to criminalise the acts of those who were opposed to their rule.

The policy of forced disappearances is a paradigm case of political wrongdoing by an authoritarian government that was legally licensed by the Junta regime at the time. Judicial independence was lost, and the judiciary was staffed to ensure that they would turn a blind eye to the disappearances policy. Importantly, the sympathetic judiciary served only to provide *extra support* for the policies of the government, who had already legally licensed their acts. This is an important point – the Junta had *legally permitted their acts* with a plethora of legislation granting the government discretionary powers in the interests of national security. The presence of a sympathetic judiciary served only to further support (or rather to not challenge) the repressive policies.

The forced disappearances policy imposed by the de facto Junta government provides a context through which to assess the permissibility of retroactive law. The key factors I wish to highlight is the is the following,

- i) The fact of serious moral wrongdoing.
- ii) That the serious wrongdoing was legally permitted by officials with *de facto* law-making power.
- iii) That the law-maker knew both i) and ii).

These three factors will be important in my later arguments about the permissibility of retroactive law in the following section. What I want to argue is that when these three conditions are met it is neither legally problematic nor morally impermissible to retroactively criminalise the acts of political wrongdoing.

Prior to developing this argument I want to draw attention to one more point. Transitional legal systems are different from 'normal', democratic, peacetime legal systems because they must reckon with serious past political wrongdoing (analogous to the case of forced disappearances in Argentina). Moreover, a second, broadly forward-looking aim is that transitional legal systems must facilitate the transition to more just societies, which respect human rights and the rule of law. This goal serves as a factor which impacts on the sorts of legislative mechanisms that a transitional government can put in place to reckon with past political wrongdoing. When I point to the 'exceptional nature' of transitional societies, I want to highlight these two elements, one backwards-

looking and one forwards-looking, which legal systems in transitional societies must reckon with.

5. Are retroactive laws always legally and morally problematic?

Earlier I elucidated the different ways in which retroactive laws are considered to be both legally and morally problematic. They are legally problematic because they contravene widely adhered to principles of legality, and the requirement that laws should be prospective, which is informed by the standards of the rule of law. They are morally problematic because it is unfair to legally hold an individual to account for an act that was legal at the time it was carried out. According to the mainstream view in general jurisprudence, it is *always* the case that retroactive laws are morally and legally problematic. And it is this mainstream view that I will challenge in this section.

Prior to doing so, I want to point to a second element of the mainstream view. It follows from the view that retroactive laws are always legally and morally problematic that commentators frame the problem of the permissibility of retroactive law-making in *pro tanto* terms. We see this in much of the scholarly engagement with the use of retroactivity at the Nuremburg trials, and in scholarship elsewhere on the permissibility of retroactive legislation. Consider the following passages:

Since the internationally illegal acts for which the London Agreement established individual criminal responsibility were certainly also morally most objectionable...Justice required the punishment of these men, in spite of the fact that under positive law they were not punishable at the time they performed the acts (Kelsen, 1947, p. 165).

The moral reasons in favour of punishing the legally innocent defendants can sometimes outweigh the legality-based reasons against doing so (Altman & Wellman, 2004, p. 57).

And H.L.A. Hart writes of the retroactive punishment of a woman who accused her husband (whom she had been wanting to leave) of treason against the Nazi government, a crime for which the man was killed:

Odious as retrospective criminal legislation and punishment may be, to have pursued it openly in this case would at least have had the merits of candour. It

would have made plain that in punishing the woman a choice had to be made between two evils, that of leaving her unpunished and that of sacrificing a very precious principle of morality endorsed by most legal systems (Hart, 1958, p. 619).

In these three passages, the purported dilemma at the heart of retroactive law-making is framed as follows. There are legal and moral reasons against retroactive punishment, but (at least in the case of the egregious wrongdoing punished at Nuremberg, and in other cases) there are moral reasons in favour of punishing. And, these commentators claim, in the case of Nuremberg (and in other cases), the moral reasons for punishment outweigh the legality and morality-based reasons against.

In what follows, I want to deny this way of approaching the purported dilemma between legality and justice which some commentators take to be at the heart of retroactive law-making. I want to claim that the legality and morality-based reasons against retroactive laws do not apply in exceptional cases. It follows from this that retroactive laws are *not always* legally and morally problematic. And it follows from this that there is not always a dilemma at the heart of retroactive laws such that their permissibility need not be framed in *pro tanto* terms.

To make this argument, I must challenge the arguments against retroactive law-making. These are as follows:

- 1) Legality-based reasons
 - i) No crime without the law – it is legally prohibited to punish the legally innocent.
 - ii) All laws must be prospective to guide conduct (therefore *ex post facto* laws are prohibited).
- 2) Morality-based reasons
 - i) It is unfair to hold individuals to account for actions that were legal at the time they were carried out.

To be clear, I agree that these principles have weight in most cases. My claim is that *they do not apply in all cases*. In other words, my challenge is to the universality of these legal and moral principles against retroactivity. I will claim that these principles are conditional, dependent on certain factors persisting in different cases. In the event

that these factors do not persist, these legal and moral principles do not apply. In what follows, I will develop this argument further.

5.1. The prohibition against punishing the legally innocent

The first principle is that there is no crime without the law (*nullem criminem sine lege*). This states that it is legally prohibited to enforce a legal sanction unless a pre-existing law has been violated. An analogous principle states that it is legally impermissible to punish an individual who is legally innocent.

On the face of it, this principle seems like a universal legal maxim. And clearly the principle has strong intuitive support. A legal system which routinely punished those who had not violated an existing law would be both morally and legally repugnant. But while weighty as a principle of legality, my claim here is that this principle is not universal. The force of this principle of legality is contingent on the nature of the legal system under which laws are made, and also on the procedures in accordance with which laws are made. I want to claim that when law-makers amend a system of laws to permit their own acts, then the principle that it is legally impermissible to punish the legally innocent is void.

To see this consider the following case:

Nefarious King: Suppose a nefarious King seizes power of a state through unjust means. He introduces a number of new laws which are legally and morally problematic. One such law is a prohibition against murder for all citizens, except for himself. And the reason for this exemption is that the King wishes to permit his favourite practice of arbitrarily killing citizens whom he does not like the look of. Suppose further that the King actually introduces this law in the form of a legal statute which applies to all citizens, except for himself (say he justifies it on the basis of 'national security'). For years subsequently, the King engages in practices of arbitrarily killing his citizens.

Suppose the King is deposed, and a new (more just) government is faced with the problem of whether to punish the King for his moral offences. Does the principle that it is legally prohibited to punish the legally innocent have any weight on their deliberations? Does the King's technical 'innocence' bear on their decision over whether to punish him? I want to claim that it doesn't – that the King's technical legal innocence has no bearing as a principle of legality. And this is because the *only* reason that the King

is legally innocent is because he amended the laws in such a way as to permit his acts, and he had *de facto* law-making power.

Importantly, my claim here is *not* that the king is not legally innocent because of his moral culpability. My argument is not that the King is not innocent because he is guilty of gross moral wrongdoing. Nor is my claim that the King's wrongdoing is so heinous that it outweighs the principles against punishing the legally innocent. This would be to return to the *pro tanto* manner of approaching the problem which I am precisely denying in certain exceptional cases. Instead, my claim is that the principles of 'no crime without the law' or the prohibition against punishing the legally innocent do not stand as principles of legality in the event that the only reason a law-maker is innocent is *because they amend the law so as to legally permit their acts*. In the event that legal innocence is the result of amendments to the system, then the principle that it is legally prohibited to punish the innocent is void.

My claim is that because the *only* reason that a King (or indeed a regime member with law-making power) is technically innocent is because they have altered the rules in their favour. When this happens, the principle that it is prohibited to sanction the innocent is void in this case. It holds no weight whatsoever.

Let me suggest an alternative legal principle, which I take it to be more plausible:

It is legally prohibited to punish the legally innocent when their legal innocence is not the result of their having amended laws in their own favour to license their acts.

I take it that this more plausible principle means that the prohibition against punishing the legally innocent does not apply to the hypothetical case of the King above, or to the cases of political wrongdoing in Argentina. To be sure, the principle which prohibits punishing the innocent is important in most cases, the principle simply does not apply in the event that technical legal innocence is the result of an alteration in the law. I thus take it that the principle of legality is not universal, but is conditional on the nature of the law-making in question.

And my claim is that the mainstream view that retroactive laws are always legally problematic because they violate the prohibitions against punishing the legally innocent is incorrect, and does not apply in this case. It follows from this that the prohibition against punishing the legally innocent is not *pro tanto* either. For a principle

to be *pro tanto* it must have a level of universality such that it applies in every case to which it has a bearing. But here I am precisely denying the universality of the prohibition against punishing the legally innocent.

5..2. The rule of law argument against retroactive laws

The second legal principle against retroactivity states that it is always prohibited to enforce retroactive laws because this deviates from the rule of law requirement that laws must be prospective. Recall that the requirement of prospectivity is held to be essential to law-making by scholars in jurisprudence (e.g. Raz and Fuller). And it follows from the requirement of prospectivity that retroactive law-making should be prohibited.

In this section I want to challenge the view that it is always prohibited to deviate from the rule of law. In making this argument, I want to show that in exceptional circumstances deviations from the rule of law standards are permissible. And if it is permissible to deviate from the rule of law standards in exceptional circumstances, then it may be permissible to deviate from the rule of law and enforce retroactive law.

For this argument to undermine retroactive law-making it must be the case that the standards of the rule of law are absolute, and may never be altered or deviated from. As a description of how laws operate in liberal democracies, this is not the case. Many state constitutions permit deviations from the rule of law in exceptional circumstances such as war, or terrorism, in times of extreme emergency or in the wake of natural disasters. In these cases, where sometimes the very existence of the state is under threat, many constitutions permit deviations from or suspensions of, the rule of law.¹⁵⁷ This was the case in the wake of 9/11 and after terrorist attacks in Europe, for instance. In many of these cases states such as the UK and the US resorted to extraordinary measures, with governments granting themselves broad discretionary powers which involved deviations from the rule of law and incursions on procedural civil liberties with the use

¹⁵⁷ To be sure, while common, this constitutional provision is not necessarily universal. As two commentators writes:

Today, different constitutional systems differ greatly in their treatment of the subject matter of emergency powers...Many modern constitutions contain explicit, frequently detailed, emergency provisions...While explicit constitutional reference to emergencies is common, it is by no means universal. The constitutions of the United States, Japan, and Belgium, for example, are almost entirely devoid of references to states of emergency and to emergency powers (Gross & Aolain, 2006, p. 37).

of measures such as pre-trial detention, extraordinary rendition¹⁵⁸ and greater powers of surveillance.¹⁵⁹

To be sure, this is a descriptive claim about the nature of state constitutions, and by itself this will not undermine the argument that the rule of law prohibits retroactivity. This is because while it may be the case that state constitutions do permit deviations from rule of law standards, it may also be the case that they ought not to.

Yet we can also support deviations from the rule of law by appealing to moral arguments. To begin with, it will help to get clearer on how states of emergency or exception work. A state of emergency is an exceptional circumstance such as a war, a natural disaster, a time of serious resource scarcity or terrorism. In a state of emergency, the standards of the rule of law which are normally non-negotiable in peacetime, democratic settings are replaced with state of emergency legislation. This legislation grants states broader discretionary powers. Most commonly, during a state of emergency states limit the civil rights of citizens (to privacy, against pre-trial detention or against having their property searched without a warrant, for instance). To be sure, these measures, which are generally justified on the grounds of national security, are controversial. The key point here is that they are often permitted by a shift in legislation from the normal rule of law standards to a state of emergency.

That states of emergencies exist, and require some kinds of alteration to normal standards of law and law-making, is not really in question in the scholarship around states of emergency. The debate is largely over whether states of emergency can be ‘accommodated’ within normal legal standards¹⁶⁰, the extent to which normal principles of legality can be suspended and the extent to which civil liberties can be curtailed in the interest of national security. The issue, then, is really one of how to structure laws and constitutions around the fact that states of emergency exist, and the extent to which broader discretionary powers may be granted to governments.¹⁶¹

¹⁵⁸ Extraordinary rendition takes place when a state seizes a suspect and removes them, without trial, to face punishment in another country. See Bingham (2010, pp. 138-143) for discussion.

¹⁵⁹ See Bingham (2010, pp. 133-159) for a discussion of these measures as they were applied in the UK and US.

¹⁶⁰ See Gross & Aolain (2006, pp. 15-85) for a discussion of the different ‘models of accommodation’ utilised by liberal democracies in response to states of emergency.

¹⁶¹ Different answers are given to this question. For instance, some have argued that rule of law standards exemplified by common law systems can, “inform a rule-of-law project capable of responding to situations which place legal and political order under great stress, for example, states of emergency or executive decisions about national security” (Dyzenhaus, 2006, p. 17). On the other side of the debate, more controversial theorists—most notably Carl Schmitt—take the view that legal norms can be completely suspended in the event of a ‘state of exception’, where this is the decision of a sovereign who must decide (and has executive power to decide) what is best for the preservation of the state (Schmitt, 1985, pp. 5-15).

I do not want to take a stance on the exact way in which states of emergency license deviations from the rule of law, or on how laws or constitutions may respond to the states of emergency which can at time threaten the existence of the state. All that I require for my argument is the broadly accepted premise that states of emergency permit deviations (albeit extremely limited deviations) from the rule of law standards. The way this operates is that the rule of law standard is temporarily suspended and replaced with state of emergency legislation. As it stands, this is a descriptive claim, though we can support it with different moral arguments – for instance emphasising the importance of security or justice or prioritising the needs of society. Again, I do not want to take a stance on the exact justification for deviating from the rule of law standards in times of exception, nor do I need to. All that I need for my argument is the premise that deviations from the rule of law form the basis of an argument that shows i) the rule of law is not a universal or non-flexible standard and ii) certain states of exception can permit the suspension of the rule of law and a recourse to limited forms of emergency legislation. This illustrates why it is the case that the rule of law is not sufficient to undermine the requirements of the rule of law.

My argument can be stated as follows:

- i) In exceptional circumstances (such as a state of emergency) it is permissible to suspend the rule of law and have recourse to emergency legislation.
- ii) Transitional justice contexts provide an example of an exceptional circumstance.
- iii) Therefore, in a transitional justice context it is permissible to alter or deviate from the rule of law.

I take it that the second premise does not require too much support. But here are some reasons why transitional justice contexts represent an exceptional circumstance. First, transitional justice contexts are not normal, peacetime democratic settings. They are precisely contexts in which democracy is the goal, and putting in place the conditions for democracy. Second, with transitional justice contexts it is common that a legitimate state does not exist, and again this is precisely one of the goals of political transition. Third, transitional states must implement both legal and non-legal measures to reckon with serious wrongdoing carried out by political officials or citizens under the past

regime. Fourth, there remains a threat of residual violence and other security-related problems. These reasons are far from exhaustive, but they illustrate the exceptional nature of transitional justice contexts and demarcate important differences between transitional justice and normal, peacetime contexts. Given that transitional justice represents an exceptional case, my claim is that the rule of law is not an universal standard and that in transitional justice cases deviations from the rule of law are permissible. It follows that the rule of law-based argument is not sufficient to preclude the permissibility of retroactive law-making, law-making which is in conflict with the rule of law requirement of prospectivity. And given that the standards of the rule of law are suspended in exceptional circumstances, it follows that there is not always a *pro tanto* reason against retroactivity on the basis of the rule of law.

To be clear, I do not want to deny the importance of rule of law standards. In all but the most exceptional of circumstances these principles set important standards on how laws are made. My claim here is that there are exceptional social circumstances – where laws must respond to unique challenges which are not present in peacetime, democratic contexts – which can permit deviations from normal standards, and that transitional justice contexts provide one such example of an exceptional circumstance. There is, of course, an inherent tension in this claim. This is because one of the essential goals of transitional justice is not only achieving democracy but achieving the rule of law as a standard on the procedures of law-making. One may thus quite reasonably wonder why deviations from the rule of law should be permitted in the context of transitional states. My response is to emphasise that if deviations from the rule of law help to achieve the conditions required for the rule of law (i.e. removing security threats, removing corrupt officials, removing corrupt members of a judiciary) then this may serve as a lesser-evil justification for deviating from the rule of law. I provide this positive account in section six below.

5.3. The moral argument against retroactive laws

In this section I will consider, and challenge, the moral argument against retroactive law-making. I will claim that it is not always, unconditionally unfair to

retroactively hold individuals to account for acts that were not illegal at the time they were carried out.

Recall that the argument states that retroactive law-making is problematic because it is unfair to hold an individual to account for an act that was legal at the time it was carried out. This for three reasons: i) fair-warning, ii) inability to do differently and iii) legal certainty. In this section I will claim that it is not always, unconditionally unfair to retroactively hold individuals to account for acts that were not illegal at the time they were carried out. Again, it follows that there is not always a *pro tanto* moral principle against retroactivity.

While it is certainly true that retroactive laws *are* unfair for the reasons noted above in most cases, I want to argue that there are certain conditions under which these reasons do not apply. I will claim that the unfairness of retroactive laws is dependent on a number of factors. First, the *nature of the action* that is to be criminalised. Second, the *nature of the laws* and the *way in which they were made*. Third, a law-maker's *knowledge* of these two factors:

- i) The nature of the action in question – whether an action *x* was a serious act of moral wrongdoing independent of what the law says about it.¹⁶²
- ii) The nature of the law in question – whether the reason action *x* was legally permitted was because a law-maker permitted themselves to carry out *x*.¹⁶³
- iii) The law-maker's capacity to know both i) and ii).¹⁶⁴

¹⁶² The condition on *serious* moral wrongdoing is important because I take it that it may be unfair to retroactively punish a law-maker who permits acts whose wrongness is up for reasonable moral debate – euthanasia, or abortion, for instance. Take a case like that of Henry VIII. While we may want to retroactively hold him to account for legally permitting the beheading of his wives, it's not as clear that we would want to retroactively punish him for legally permitting his own divorces. And the condition on moral wrongness can explain this divergence in intuitions.

¹⁶³ This condition is important because my claim is that retroactive laws are only not unfair if they apply to those responsible for making the law. I thus restrict my justification for retroactive law for cases of individuals who possess this law-making power.

¹⁶⁴ The capacity for knowledge condition is significant because it looks to be impermissible to retroactively punish individuals who lack the capacity to know that they are committing morally wrong acts, or to know that they have altered the laws to permit their acts (i.e. the mentally ill or children).

My claim is that these three factors impact on the unfairness of retroactive laws such that if a law-maker carries out a morally wrong act, and the reason the act was legal at the time it was carried out was because the law-maker had amended the law to legally permit it, and the law-maker had the capacity to know these things, then *it is not unfair* to retroactively criminalise their acts. To see this, return to the case of the King,

Nefarious King: Suppose a nefarious King seizes power of a state through unjust means. He introduces a number of new laws which are legally and morally problematic. One such law is a prohibition against murder for all citizens, except for himself. And the reason for this exemption is that the King wishes to permit himself to kill citizens who belong to a particular group that he despises. He sees it as his Kingly duty to eradicate this group, and thus prohibits others apart from himself from murdering. For years subsequently, the King murders members of this group.

Suppose that the King is eventually deposed, and a new government is assembled which is charged with reforming the legal system. Would it be unfair for this new government to retroactively attach liability to the actions of the King?

I want to argue that it would not be unfair. This is because the three reasons which explain the unfairness of retroactive laws in most cases do not apply in this case. The King could not complain that a retroactive law fails to provide him with fair warning because he is the one with law-making power – he knows that the only reason he is able to commit such heinous acts is because he himself has this power. The fair warning concern applies to citizens who are subject to laws, and not to officials who (at least in the case of the King) have made themselves exempt from the laws which only apply to others. Given that he was the one with law-making power, the King cannot reasonably complain that the retroactive application of liability violates the principle that all laws must provide *him* with fair warning about which conduct is prohibited. Second, the worry that retroactive laws make individuals subject to them unable to do anything different also dissipates in the case of law-makers like the King. He has the opportunity to not commit moral wrongdoing, and to not legally license this wrongdoing. The King has full discretion over his actions and over the laws he introduces. Thus the excuse that he was unable to do things that would avoid retroactive liability in the future is void.¹⁶⁵ Third, the worry about legal certainty again only has strength in the case of citizens who

¹⁶⁵ One response here would be that the King would not be able to do things that avoid retroactive liability from a future law-maker. My view here is that the king *ought* to have known that his actions would potentially be made liable to a criminal sanction.

are subject to the law. Given that the King has law-making authority it is simply not the case that retroactive laws would undermine the King's certainty in the system. Indeed, he is precisely the individual responsible for fostering certainty in the legal system.

To be clear, my claim here is not that retroactive laws are permissible because of the King's heinous moral wrongdoing. Although the fact of wrongdoing is significant (indeed in my view necessary), it is the fact of an amended law which does work in justifying retroactivity. Nor is my claim that the importance of securing justice outweighs the unfairness of retroactive laws. My aim in this chapter is precisely that in certain cases there is not a *pro tanto* dilemma at the heart of retroactive law-making. This is because it is precisely not unfair to criminalise the morally wrong acts of officials who have law-making power, where the only reason their acts were permitted at the time was because they amended the law in their favour. Importantly, the case of the King is similar, in all relevant respects, to the case of senior government officials (who commit moral wrongdoing and also have law-making power) in authoritarian states, like the case of Argentina set out above. This is a point I will return to below.

I have emphasised the importance of retroactive laws applying only to the conduct of law-makers who have amended the law to permit their own actions. This is significant because my defence of retroactive law-making applies only to the actions of such law-makers, and not to the actions of ordinary citizens who do not possess law-making power. This is because to retroactively criminalise the actions of ordinary citizens *does* look to be both legally and morally problematic. To see why this is the case consider a variation of the case above:

Blue-Eyed Group: Suppose a nefarious King introduces a number of new laws which are legally and morally problematic. One such law is a prohibition against murder for all citizens, except for a select number of citizens with blue eyes whom the King favours. The King wishes to permit his favourite practice of arbitrarily killing citizens from a particular (non blue-eyed) group, and he allows the members of the blue-eyed group to similarly carry out such killings. For years subsequently, the King, and his blue-eyed group, engage in practices of arbitrarily killing citizens.

Suppose again that the King is eventually deposed, and a new government is assembled which is charged with reforming the legal system. Would it be unfair for this new

government to retroactively attach liability to the actions of the King's blue-eyed group?

The members of the blue-eyed group fail to meet the law-making condition that I have held to be necessary to the permissibility of retroactive laws. While their grossly immoral acts were legally permitted, these citizens did not have law-making power. As such, they may quite reasonably object that retroactive laws criminalise acts which were legal at the time they carried them out. In doing so, they violate the conditions of fair warning, inability to do otherwise (though this is contestable in the case of immoral acts) and legal uncertainty.

I'm less certain that the use of retroactive laws in this second case would not be legally problematic or unfair. The members of the blue-eyed group do have a justified complaint that they are being punished for an act that was not illegal, that they were not given fair warning, that they were unable to differently, amongst other complaints against the retroactive application of laws in such a case. This need not mean that retroactive laws are impermissible. In such a case, a justification for punishing the members of the blue-eyed group could be formulated in *pro tanto* terms. That is, the moral value of punishing those culpable for gross offences would outweigh the principles of legality and fairness, though I will not develop this argument here. The key point in this section is that while it may be unfair to retroactively punish those who did not have law-making power, it is not unfair to retroactively punish those who i) commit moral wrongdoing and ii) have law-making power through which they legally permit this wrongdoing and iii) have the capacity to know i) and ii).

I want to reiterate the fact that this challenge to the legal problems and unfairness of retroactive laws as they are applied to law-makers is contrary to the mainstream view in general jurisprudence (and according to domestic constitutions and international laws) that retroactive laws are always, necessarily unfair. And that, therefore, there is always a *pro tanto* principle against them.

6. A positive justification for retroactive law-making

Thus far my arguments have been largely negative. I have challenged the view that retroactive laws are always impermissible because they violate principles of legality and morality. Yet while these arguments show why, under limited conditions, retroactive laws are not contrary to legal or moral principles, they do not yet provide us with reasons in favour of why retroactive law-making should be carried out. To make this argument, I want to develop a positive justification for retroactive law-making. This will be the purpose, albeit briefly, of this section. In particular, I want to introduce two sets of reasons in favour of retroactive law-making: first, a deterrence-based argument and second, an argument based around the context of transitioning to democracy.

Prior to developing these arguments, I want to make a brief comment about the use of retroactive law at the Nuremberg trials.

6.1. Retribution

The most common justification for the use of retroactive law at Nuremberg—both at the time, and in subsequent scholarship on the trials—was a retributive one. The argument was that the defendants at Nuremberg were guilty of such heinous acts of wrongdoing that they simply deserved to suffer punishment, and for many this punishment meant death. Altman and Wellman capture this retributive argument thus:

The most obvious and popular reason to punish the defendants at Nuremberg was simply that they deserved it. This retributive conviction is not difficult to explain: justice demands that morally guilty people be punished for their wrongdoing, and given that the defendants at Nuremberg were so horribly morally guilty, it would have been a gross transgression of justice if they had been left unpunished (2004, p. 58).

I do not want to deny that there are sometimes strong retributive reasons for retroactively punishing wrongdoers, particularly those culpable of such heinous acts as the Nuremberg defendants. As such, I want to leave this open as a possible avenue for justifying retroactive law-making in some cases, and say no more about it here.

I do however wish to place emphasis on, and further develop, the forward-looking reasons in favour of retroactive punishment. I do so because I want to situate

the justification for retroactive law-making in the context of transitional states where (as I have highlighted in previous chapters) there is the threat of residual violence, where legal system are underdeveloped and where the goal of political transition is to achieve democracy, the rule of law and a respect for human rights (as well as a more just legal system more generally). This sort of context highlights the plausibility of two broadly forward-looking reasons: deterrence and reasons which arise in the context of transitions to democracy (what I will term ‘democracy-based reasons’).

6.2. Deterrence

The first argument in favour of retroactive law-making appeals to the value of deterrence. It states that retroactive law-making is justified if it serves to deter individuals from committing undesirable actions in the future. This could take the form of general deterrence – where we retroactively punish in the hope of deterring a number of would-be law breakers; or special deterrence – where we retroactively punish to deter the wrongdoer themselves from committing further acts of wrongdoing (and breaking the law).

Here, of course, a difficulty arises in that we may quite reasonably wonder why we should retroactively punish at all. If the goal is to deter future acts, then surely there is no need to go back into the past to criminalise conduct. Surely it would be just as effective to introduce a statute in the present – expressing the message ‘from now on all acts *X* are criminal’. And surely this achieves the values of deterrence, while avoiding the need for retroactive legislation.

To see why this isn’t the case return to the example of the King above. The King introduces a law which permits him to arbitrarily kill his citizens. The King is deposed, and the new government is faced with the problem of whether to retroactively punish the King. One deterrence-based reason for retroactively punishing the King would be based on ‘making an example’ of him. What we want to do is to express a very clear message to any would-be King or authoritarian ruler seeking to amend the legal system to serve unjust ends that such conduct will be punished. One way of doing this is by making an example of the King through retroactively holding him to account. This ‘making an example’ rationale is often applied to international criminal trials, and was certainly appealed to in the case of Nuremberg. The thought is simply that we strengthen

the deterrent message of a law by holding someone up as an example of an individual who has become liable to said retroactive law.

A second deterrence-based reason for retroactively punishing the King is based on special deterrence. This states that retroactively punishing the King for his past acts is permissible if this serves to disincentivise him from committing further acts of wrongdoing. We can see the strength of this justification in cases where leaders are reluctant to relinquish power, or where they threaten further violence. This would support retroactively holding them to account for their past wrongdoing in the interests of preventing them from committing future wrongdoing. Suppose a king threatens to continue carrying out unjust policies. Suppose further that his past acts were grossly immoral, but legal at the time he carried them out (because he altered the law so as to legally license them). Retroactively criminalising these past acts would serve as one way of preventing him from carrying out future injustices (we can punish the king for his past actions, incarcerate him and thus prevent him).

Both the arguments from 'making an example' and special deterrence provide deterrence-based reasons in favour of retroactively attaching liability to past acts of political wrongdoing.

6.3. Democracy-based reasons

A second set of reasons in favour of retroactive law is based on the role that retroactive law-making can play in facilitating the transition to democracy. The basic thought is that by retroactively criminalising the acts of undemocratic leaders, emerging democracies can signal their commitment to democratic values while at the same time facilitating the transition to a most just, and more democratic legal system.

This argument rests on two sets of principles—norm expression and legal development.

The former rests on the premise that some laws have expressive content. Think of anti-discrimination laws, minimum wage laws, or laws against pornography. One reason for introducing such laws is that they signal a commitment to certain values—values like equality, decency, repugnance at the mistreatment of minority or vulnerable groups, or women.

This expressive element to law may have a number of functions—to alter behaviour, to change prevailing social norms or it may have a non-instrumental, expressive function. Sunstein (1996) has analysed this expressive function of law. He points to the example of antidiscrimination laws and laws around capital punishment, which he claims a society may adopt irrespective of their instrumental function:

A society might identify the norms to which it is committed and insist on those norms via law, even if the consequences of the insistence are obscure or unknown. A society might, for example, insist on an antidiscrimination law for expressive reasons even if it does not know whether the law actually helps members of minority groups. A society might endorse or reject capital punishment because it wants to express a certain understanding of the appropriate course of action when one person takes the life of another (Sunstein 1996, pp. 2027–2028).

If we accept the premise that laws can have expressive content, then we can see an important expressive function in the introduction of retroactive laws in transitional contexts. By retroactively attaching liability to lawmakers who introduced laws that were contrary to natural justice, or otherwise unfair in licensing immoral conduct, emerging democracies can signal a commitment to equality, liberty and other democratic values. In retroactively holding past undemocratic law-makers to account, the incoming transitional government can convey the message that past law-making was wrong, and that the reason it was wrong was that it fails to reflect principles of natural justice—equality, liberty and so on.

A second element to the democracy-based justification for retroactive laws is based on legal improvement and the setting of precedents. According to this justification, the retroactive application of liability is justified if it serves to kick-start substantive improvements in the legal systems of transitional states. And the reason that transitional states may punish past law-makers is that they not only put in place a new statute (something to the effect that ‘unjust law-making of the form X is never permissible’) but in retroactively applying this statute they set a precedent for future cases.

Here it is possible to draw a lesson from the use of retroactive law at Nuremburg. The International Military Tribunal (IMT) not only created the legal categories of *crimes against humanity* and *crimes of aggression*, it introduced the principle that state officials could be held individually responsible for committing such acts. We know, with the

benefit of hindsight, that the introduction of individual responsibility at Nuremburg had a substantial ameliorative effect on the development of international law. It also served to set important precedents for future international tribunals in Rwanda, Yugoslavia and in the more recently formed International Criminal Courts (ICC).¹⁶⁶ As Cassese writes:

In the wake of the major [Nuremburg] war trials momentous changes in international law took place...A conspicuous number of international instruments, including the Statutes of the ICTY [International Criminal Tribunal for the Former Yugoslavia], the ICTR [International Criminal Tribunal for Rwanda] and the ICC [International Criminal Court], were then drawn up embodying the prohibition of crimes against humanity, certain of which improved and extended the London Agreement (2005, p. 441).

While the case of Nuremburg is a case from international law, the same applies in principle to cases of domestic transitional states. Statutes criminalising the past acts of officials can serve to kick-start significant improvements in a legal system, and retroactively applying these statutes can serve to set a precedent for the punishment of future cases of political wrongdoing.

One difficulty here concerns the promotion of the value of the rule of law (as a requirement on the nature of laws and of the legal system more generally). There is a tension in the view that we should utilise retroactive punishments to promote the rule of law, because (as I've noted) retroactive laws are in violation of the basic requirements of the rule of law (clarity, prospectivity, and so on). It strikes me the most plausible response here is that if deviations from the rule of law are permissible in exceptional circumstances (as I have argued they are), then securing the rule of law would serve as a justification for deviations from the rule of law in exceptional circumstances.

7. Conclusion

The purpose of this chapter has been to provide a justification of retroactive law in a limited range of cases, with particular reference to transitional justice contexts. The first part of the chapter was largely negative—I challenged the common view that retroactive laws are always and unconditionally unfair and legally problematic. The

¹⁶⁶ For an analysis of the use of the Nuremburg precedent of individual responsibility at the tribunals in the former Yugoslavia and Rwanda see Ratner and Abrams (2001, pp. 187-227).

second part of the chapter provided a limited justification of retroactive laws on the grounds of deterrence, and reasons based on the transition to democracy.

Returning to the case of Argentina, one implication of the view defended in this chapter is that it is neither legally problematic nor morally impermissible to retroactively criminalise the members of the Argentine military Junta for their unjust yet legally permitted policy of forced disappearances. This follows from my arguments that it is neither legally nor morally prohibited to criminalise a past act *X* if *X* constituted i) an act of serious moral wrongdoing and ii) the only reason *X* was not criminalised at the time was because law-makers amended the law to permit or license *X* and iii) the law-maker had the capacity to know i) and ii).

It follows from my arguments that retroactive law-making should not be viewed as sceptically as it is in general jurisprudence and under both domestic constitutions and under international law. Indeed, the significance of my arguments is not only that they challenge the strength of the presumption against retroactive law, but also the claim that retroactive laws can serve as one legal method through which to legally respond to challenges common to transitional justice contexts. Retroactive law-making offers an important tool for transitional governments to hold to account past regime members. And given that in certain circumstances the use of retroactive law is neither legally nor morally problematic, and can serve important forward-looking aims, the general presumption against retroactivity should in my view be reconsidered.

VIII. Conclusion

The aim of this thesis has been to engage with the normative dimension of transitional justice—the problem of the moral and political principles which should guide the process of transition from conflict and authoritarian rule. The central claim is that security is a priority for periods of transition to democracy. Establishing security is a central priority of transitional justice for a number of reasons—because security is a pre-requisite for democracy, because security in the form of civil and procedural rights is routinely denied by authoritarian rule and because security is essential for securing other goals of political transition, chiefly that of establishing a legitimate state.

These claims, amongst others, have animated the main arguments made throughout this thesis. In this concluding chapter, I want to give a synopsis of the main arguments of each chapter, before drawing a number of implications from the arguments of the thesis on the field of political philosophy more generally.

In Chapter Two I focussed on the concept of security. As a political value, security has been under-analysed in political philosophy relative to other values such as liberty, justice and rights. I began by drawing attention to some of the shortcomings in the analysis of security by philosophers and criminologists. I then introduced my contribution to the debate in the form of a conceptual distinction between two senses of security—the negative and the positive senses. I argued that the positive sense of security captures the sense of the presence of ‘rules, norms and procedures’ which exist to protect and provide. I then explored how the positive sense of security is valuable because it is intimately related to values such as assurance, liberty and the importance of being able to claim security from political institutions.

It has been common for philosophers to understand security as a purely negative value – pertaining to the absence of harms and threats to our person. Yet one of the main implications of this chapter is that without the positive sense of security we cannot appreciate different senses of security, and the role that security-measures play in modern societies. The positive sense captures the sense of security employed in the uses of ‘food security’, ‘job security’ or ‘financial security’. Moreover, the positive sense of security encompasses the sorts of protections provided to us by certain laws and procedural rights (*habeus corpus*, fair trials and impartial hearing) which exist to protect us against the excesses of state power. I concluded the chapter by claiming that security (both negative and positive) should be a core priority in the transitional towards democracy – because security is the *sine qua none* of establishing civil and political rights, institutional development, political assembly and other prerequisites for democracy.

In Chapter Three I considered the permissibility of rough justice – the problem of whether citizens are permitted to take justice into their own hands when the state fails to. Having defined rough justice, and observed some cases of rough justice in transitional justice contexts (where they are ubiquitous), I drew upon some of Locke’s arguments about the natural right to punish in the state of nature to develop a defence of rough justice based on deterrence, security, institutional improvement and the protection of basic rights.

According to the protection-based defence of rough justice I defended, rough justice is permissible in the absence of a legitimate state if:

- i) Rough justice punishment serves the end of protection by restraining, deterring the wrongdoer or deterring other would-be wrongdoers.
- ii) Punishment is only directed towards those who have become liable (i.e. by forfeiting their right against punishment by violating the rights of another).
- iii) There is a reasonable guarantee that punishment will protect innocents (through retraining or deterring the wrongdoer, or others would-be wrongdoers).
- iv) The degree of punishment is proportionate to and does not exceed the level required to restrain or deter others rights violations.
- v) The minimum reasonable level of punishment is applied when there is uncertainty about the degree required to restrain or deter others.

- vi) There have been some procedures to reasonably establish the guilt of the suspect, when this is in question.

When these conditions are met, rough justice is permissible. This, twinned with the justice-forcing-principle, which added contributory force to the justification of enforcing rough justice.

- vii) That punishment may ameliorate the formal justice mechanisms of the state.

These conditions limit the cases in which rough justice is permissible, but if we think of a case like the punishment of Gaddafi, then the account provides the basis for a justification of punitive rough justice against Gaddafi, and other war criminals. To be sure, the punishment would be quite different to the brutal punishment that Gaddafi actually received. Yet in principle, the account I have developed still justifies punishment.

In Chapter Four I developed a justification of legal punishment that is sensitive to some of the problems endemic to transitional societies. There are two challenges of transitional justice which any account of punishment must be sensitive to: i) the absence of a legitimate state (and that establishing a legitimate state is a goal), ii) the fact of increased rights violations in fragile, transitional communities. The account I defended appealed to the more basic right to self-defence, and the right to threaten in the interests of self-defence, as the basis of a justification for a rudimentary system of law (threats) and punishments. Contrary to the mainstream view in the philosophy of punishment, my account rejects the premise that a legitimate state is a pre-requisite for justified legal punishment, and instead defends the view that justified punishment can in fact facilitate the move towards a legitimate state. Moreover, protection and the prevention of wrongdoing was essential to my account, and as such it meets the second challenges of the increased propensity of wrongdoing. It is the ability of the theory to address these two aspects of transitional contexts that I take to be its key virtue.

In Chapters Five and Six I considered the problem of political legitimacy with respect to transitional justice. In chapter five I attended to an essential element of state legitimacy – the justification of state coercion. In particular, I sought to challenge the

view, defended in both transitional justice scholarship and political philosophy, that democracy is necessary to justify state coercion. In doing so, I sought to show how non-democratic forms of coercive law-making are valuable (and look permissible). I then argued that the protection of human rights should be a necessary condition of state coercion. This view is important, I claimed, because fair, safe and effective democracy presupposes the protection of human rights. Establishing these conditions for democracy should be a priority, I argued, which morally justifies the state's use of coercion.

In Chapter Six I challenged the view that democracy is necessary for political legitimacy. My challenge was on two grounds—first, that democracy can be debilitatingly costly for fragile states, and second that the view that democracy is necessary for political legitimacy precludes other important, and valuable forms of political governance. Drawing closely on an account of legitimacy outlined by Machin (2012), I defended an alternative view which holds that there are four necessary conditions on political legitimacy—horizontal equality, acceptable vertical inequality, publicity and an institutionalised voice. Meeting these conditions does not require democracy, and it is only because it meets these conditions that democracy is deemed to be necessary for political legitimacy. Importantly, this view is still consistent with the view that democracy is, all things considered, the morally best form of political governance. As such, we can preserve the mainstream view that democracy is a crucial feature of the end goal state achieved by transitional justice. Yet in the event that democracy is too costly, or otherwise difficult to achieve, the four necessary conditions inform a less demanding account of legitimacy which a state must fulfil in order to be legitimate.

In Chapter Seven I provided a limited justification for retroactive law, with particular reference to transitional justice contexts. The first part of the chapter was largely negative—I challenged the common view that retroactive laws are always and unconditionally unfair and legally problematic. The conclusion of my argument was that it is neither legally nor morally prohibited to criminalise a past act *X* if *X* constituted i) an act of serious moral wrongdoing and ii) the only reason *X* was not criminalised at the time was because law-makers amended the law to pardon or license *X* and iii) the law-maker had the capacity to know i) and ii). The second part of the chapter was positive, I provided a limited justification of retroactive laws on the ground of deterrence, and reasons based on the transition to democracy.

There were two implications of the arguments in this chapter. First, that it is neither legally nor morally problematic to retroactively criminalise the actions of members of a regime, when the only reason their unjust conduct was legal at the time was because they amended the laws to license it. Secondly, that the general presumption against retroactive law-making in both general jurisprudence and under international law should be weakened in such a way as to allow for this specific case. Indeed, the significance of my argument is that it not only challenges the strength of the presumption against retroactive law in general jurisprudence but also that it shows that retroactive laws can potentially serve as one legal method through which to legally respond to challenges common to transitional justice contexts. Retroactive law-making offers an important tool for transitional governments to hold past regimes members to account. And given that in certain circumstances the use of retroactive law is neither legally nor morally problematic, and can serve important forward looking aims, retroactive laws should be seen as one tool amongst others to facilitate the transition to democracy.

1. Implications for political philosophy

Bernard Williams once argued that the problem of establishing security forms what he terms the “first” political questions:

I identify the “first” political question in Hobbesian terms as the securing of order, protection, safety, trust, and the conditions of cooperation. It is “first” because solving it is the condition of solving, indeed posing, any others. It is not (unhappily) first in the sense that once solved, it never has to be solved again. This is particularly important because, a solution to the first question being required *all the time*, it is affected by historical circumstances; it is not a matter of arriving at a solution to the first question at the level of state-of-nature theory and then going on to the rest of the agenda. This is related to what might count as a “foundation” of liberalism. It is a necessary condition of legitimacy that the state solves the first question (Williams, 2005, p. 3).

There are a number of elements to this passage from Williams, but the elements I take to be most important is that establishing security is a vital prerequisite for other political goals, and that establishing security is a problem that we must continually return to. The passage is important because it illustrates the problem with the relative neglect of security in political philosophy. Whatever our views are on legitimacy, distributive

justice, or on other core problems of political philosophy, establishing security must be seen to be essential to the construction of just political communities. Whether we are liberals, conservatives, democrats, socialists, advocates of neo-liberalism, security is essential to the sorts of societies we want to construct and, in William's view and indeed my own, it is essential to the justness of governments which rule over us.

I take this to be the first implication of my account for political philosophy more generally. I have claimed that security is essential for the process of establishing democracy, and that concerns with establishing security should guide transitional justice practices. But this lesson generalises to political philosophy more generally. Security is an essential aspect of political communities. And it is one which informs our understanding of things like the rights of citizens to protect themselves when states fail to, of punishment and of the way in which we construct legitimate states, including how they use their coercive power. Security must be taken seriously as a political value in a way that political philosophy has yet to do.

The second implication I want to draw from my arguments in this thesis concerns how we understand the value of security, and how states should go about establishing security measures. In chapter two I argued that philosophers have tended to understand security in purely negative terms – as the negation of harms and threats to one's person. This understanding of security lends itself to a view of security measures which serve this negative function – to minimise rights violations and to prevent acts of wrongdoing such as theft. This is, of course, an important element of security. But, I claimed, it is not the whole story. This is because there is also a positive sense of security which encompasses the norms, rules and procedures which exist to protect and provide. The value of these rules, norms and procedures is not only that they serve a negative function (though they do do this as well). It is that they promote the values of assurance, liberty, guarantees and the importance of being able to claim security from political institutions, values that are essential to the functioning of things like laws, insurance policies and healthcare provisions, amongst other measures.

There are two things I want to highlight here with respect to how we understand security. First, we must attend more closely to how states go about implementing security measures, understanding this process as not only requiring negative measures to prevent harms and threats, but also positive measures (rules, norms and procedures) to secure other future-oriented goods and values. The values I highlighted were those of assurance, liberty, guarantees and the importance of being able to claim security from the state, but these are not necessarily exhaustive. Second, and relatedly, we must better

understand how security relates to, protects and is partly constituted by other values. The relation between security and liberty has been the subject of much legal and philosophical scholarship.¹⁶⁷ But what about the relationship between security and assurance? Between security and the (legal and procedural) guarantees we require to live a good life? Between security and the right to claim certain goods or protections from the state? Between security and the way in which we relate to our futures? These relationships have been underexplored by political philosophers. And if my arguments as to the importance of security in political societies are correct, then this neglect is problematic.

A third implication I want to draw out concerns how we understand the core problems of transitional justice as problems of political philosophy. In the introduction I claimed that problems of transitional justice are fundamentally ethical – that measures such as compensation, war crimes trials, lustration or reconciliation encompass basic problems of moral and political philosophy, i.e. problems about whether and when we should give people what they deserve, the tensions between forward and backwards-looking principles, the value of forgiveness, amongst others. But here I want to turn this claim on its head, and suggest that it is not only the case that ethical and political concepts have a bearing on transitional justice, but that transitional justice has a bearing on basic problems of political philosophy,

Throughout this thesis I have argued that certain features of transitional justice contexts force us to reconsider basic concepts and assumptions of political philosophy. Recall the following claims,

- a) That the absence of a legitimate state in transitional contexts forces us to reconsider the rights of individuals to engage in rough justice practices when a state fails to realise justice.
- b) The fact of increased rights violations in transitional contexts, forces us to factor in considerations of protection and prevention into our understanding of why punishment is justified.
- c) The fact that establishing a legitimate state is a central goal of political transition forces us to challenge the assumption in the philosophy of

¹⁶⁷ For an analysis of the relationship between security and liberty see, for example, Posner (2001), Waldron (2003), Himma (2007) Neoclaus (2007) and Mockaitis (2016).

punishment that a legitimate state is a necessary condition for justified punishment.

- d) The fact that the majority rule element of democracy can lead to the tyranny of the majority forces us to reconsider (and in my view reject) the role that democracy plays in justifying state coercion.
- e) The fact that democracy can be extraordinarily costly forces us to reconsider the way in which it relates to state legitimacy, and (I claimed) seek other conditions of legitimacy which preserve some of the valuable elements of democracy.
- f) The fact that retroactive law-making can serve a valuable role in transitional contexts forces us to reconsider the unfairness of retroactive law-making and the general legal presumption against it in both domestic constitutions and under international law.

These arguments show how the challenges of transitional justice force us to re-evaluate the way we understand certain core problems of political philosophy and general jurisprudence—the rights of individuals to realise justice, the permissibility of state punishment, the problem of justifying state coercion, the problem of state legitimacy, the way we understand and construct democracy, the construction of good laws and legal institutions, amongst others. As such, I want to claim that transitional justice is and should be regarded as a genuine problem for political philosophy, one that forces us to reconsider the principles, values and protections that we sometimes take for granted in the context of developed liberal democracies.

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