

## ANNUAL LECTURE

# Time for a rethink: victims and restorative justice

Antony Pemberton\*

## 1. Introduction

It is a great honour for me to be asked to make this contribution to *The International Journal of Restorative Justice*. Past annual lectures on restorative justice have been delivered by some of the keenest minds in our field, indeed within criminology more generally, and I remain awestruck that I have been considered worthy of being mentioned in the same breath as they are.

Scholarship on restorative justice has proven to be an enduring wellspring of thoughts about our reaction to wrongdoing. In its processes – such as mediation and conferencing – and in the outcomes it seeks – with a focus on repairing harm done, rather than punishment – it aims to supplement, change or even transform the societal-institutional reaction to crime (Marshall, 1999; Walgrave, 2008). It does so with the specific intention of improving the plight of victims of crime, proposing to offer both processes and outcomes that are more parsimonious with victims' experiences (Strang, 2002; Zehr, 1990). In particular, it harbours the potential that crime and conflict are approached as lived experiences of people first, rather than as abstract transgressions of a rationally constructed order.

However, I think that restorative justice is not yet fulfilling this potential. In line with the ambitions of the 'maximalist' perspective on restorative justice

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(Walgrave, 2008),<sup>1</sup> I believe a rethink is necessary to this end. I would like to position this lecture as a contribution to this rethink, but by no means as an end point. Instead, I hope that the ideas and perspectives in this article can assist my fellow restorative justice scholars in further debate, inquiry and thinking.

In my view, the first main barrier to fulfilment of the promise of restorative justice is that it implicitly retains too much of the thinking underlying criminal justice. I will expand on this issue later, but the main thrust of the argument is that this is due to restorative justice's adoption of the term *justice* (see also Christie, 2013). This is not because I think the aims of restorative justice should be reoriented to, for example, healthcare, welfare or therapy. To the contrary, if anything, restorative justice should be more rather than less focused on the wrongfulness in the experience of victimisation (see also Green & Pemberton, 2017).<sup>2</sup> However, my argument is that there is more to this normative experience, which perspectives on justice have a tendency to omit. To be more concrete, in the *theory of injustice* that I have started to assemble, the first step is understanding that injustice needs to be viewed as 'an independent phenomenon in its own right' rather than as an opposite/derivative/antithesis of justice. In addition, the extent to which justice *can* or is even intended *to be* a reaction to the experience of injustice has inherent limits. It is therefore key to distinguishing *countering injustice* from *doing justice*. This draws heavily on the work of political thinker Judith Shklar (1986, 1990).

A key consequence of unreflectively viewing injustice as the absence and/or opposite of justice is that injustice is understood in constructs and perspectives that are derived from justice.<sup>3</sup> One of those features is the centrality of rules guiding the relationships between people to justice and, as a consequence, conceptualising injustice as a breaking of these rules. According to Elisabeth Anscombe (1958), the reliance of our systems of justice on 'law conceptions of ethics' is a remnant of their theological, Christian origins, which lacks coherence when it is divorced from its divine heritage and fails to offer a full picture of injustice. In particular, it neglects that what is most ethically significant in experiences of victimisation is, as Jay Bernstein puts it, not 'broken rules, but broken bodies and ruined lives' (Bernstein, 2015: 4). Querying the lived experience of injustice as 'a phenomenon in its own right' is then a means to consider the features of an ethi-

- 1 Walgrave's maximalist perspective on restorative justice resists the limitation of restorative justice to a particular set of processes, finding, instead, any action that contributes to the goal of restoration to be restorative justice (see Walgrave, 2008: 23).
- 2 Again, this perspective draws heavily on Walgrave's views.
- 3 Something of an analogy can be made to other features of social life that have initially been framed as a negation. For instance, in studies of culture a Western-centric view can lead to an initial dichotomy of Western versus non-Western, while defining the latter in terms that are idiosyncratic to the former.

cal position that no longer operates under the shadow of this anachronistic theology.<sup>4</sup>

Using an etymological manoeuvre of Avishai Margalit (2002), I will argue that it is crucial to distinguish morality from ethics, with the former concerning the ‘thin’ relationships between people, and the latter a relationship within the self, which pivots on vital elements of identity that involve our caring for others. The latter thereby involves the lived ‘thick’ relationships we have with others: our families, friends, communities, which also resonates with the importance placed on such relationships in the literature on restorative justice. This relates to my subsequent argument that the experience of victimisation itself needs to be rethought. ‘Time for a rethink’ applies here as well. I will draw on Matthew Ratcliffe’s (2008) concept of existential feelings and Susan Brison’s (2002) phenomenology to stake the claim that victimisation comes fully into its own when it is conceptualised as an *ontological assault*: damage, diminishment or even destruction of the way people normally and unreflectively exist in the world. Indeed, its ethical damage can be conceived in the extent to which it *unmakes the world*: it uncovers (parts of) our way of being precisely through what it damages. Caring is an ontological feature of our *being-in-the-world*, and I will argue that we are in danger of misunderstanding the experience of victimisation if we neglect this. This is in line with the manner in which processes of restorative justice seek to re-establish connection between people, also through their narrative possibilities. It also suggests that what is key is not restoration, at least if that is taken to be a return to the situation before the ontological assault, but ‘*re-storying*’: a remade narrative, in which the ontological assault, its consequences and its aftermath have been integrated.

Understanding victimisation as an ontological assault also means that countering injustice concerns itself with the *fact of victimisation*, which relies on the first-person interpretation of the situation and can be distinguished from the manner in which justice processes conceive of victimisation, which follows the epistemology and subsequent ‘technical’ application of justice. The distinction between countering injustice and doing justice is similar to that between (healing) illness and (curing) disease in the philosophy of medicine (Pellegrino, 1979), and even more pertinent owing to the socially constructed and political nature of the law. Two key issues will be developed. First, like Pellegrino, I will argue the importance of the Aristotelian virtue of *phronesis* in the institutional response concerned with the fact of victimisation. Such practical wisdom and prudence in particular (social and political) contexts hews closely to the manner in which mediators approach crime and conflict. Second, understanding the *fact of victimisation* also emphasises the importance of the idiosyncrasies of choice, action and imagination in those living through this experience. That can be argued from a variety

4 It is anachronistic given that ‘the basic concepts ... belong to a theological framework that makes no sense in a secular world’ (Anscombe, 1958). My approach to establishing such a position is in line with Anscombe’s move following her jettisoning of such rule-based moral philosophy, as she proposed that we would be in need of an ‘adequate philosophy of psychology’. See for a similar approach Bernstein (2015).

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of philosophical perspectives, but I find the most general way of understanding the issues at stake is through David Graeber's (2015) recent elaboration of the distinction between *games* and *playing*. Where justice is structured like a game, with set rules and roles through which it comes to a resolution or a decision, countering injustice is a playful activity that embraces the choice, action and imagination of those living through the experience. It does not set boundaries on who is participating and how that should occur, does not have a clear end point, and in fact calls into question whether any ending will be reached. The potential of restorative justice in this perspective lies in the extent to which it is capable of harnessing, rather than ruling out, the 'playfulness' of countering injustice.

Elsewhere, my colleagues and I have already argued (Pemberton & Aarten, 2017; Pemberton, Aarten & Mulder, 2018) the partial parsimony of practices of mediation and conferencing and restorative justice thinking with *countering injustice*. The concluding section draws together the strands that have been developed throughout the article and emphasises a final issue. Systems of justice have served to obscure the reality that injustice is often irreparable, that there is no resolution. Restorative justice has inherited this tendency to gloss over the limitations of our institutions in the face of severe wrongdoing and evil. The article instead ends on a plea to resist the tendency to pave over the enduring suffering injustice can cause and to recognise that the baseline acknowledgement we owe victims in these situations is that such a resolution is beyond our powers.

## 2. Restorative justice as countering injustice? Injustice as a phenomenon in its own right

In her work, Shklar (1990) sketched what she called the 'normal model' of justice and the way that injustice is portrayed in this normal model. In many discussions of ethics and morality, examples of victimisation and suffering provide a starting point – but no more than that – for sustained reflection on the key elements of (processes of) justice. In seeming coherence with its etymology, injustice is then conceptualised as a lack of justice; as one pole with justice and/or as another side of one dimension with justice. The fact that the normal model understands injustice and justice as one dimension makes justice the obvious counterforce against suffering wrongdoing.

In the normal model, justice is viewed as something that should be considered in abstract, which can apply irrespective of people's history and relations, that is, be universal, and upon which reasoned debate will converge, as being a matter of rational thinking. This rational thought also serves to distinguish injustice, as intentional wrongdoing, from misfortune and bad luck. It is a perspective that rules out the current context in which institutions of justice find themselves, and/or of the actual functioning of processes of justice. The fact that processes of justice in reality do not function in such an idealised manner cannot amount to an argument against justice, but are indictments of reality instead.

Contrary to such an ideal theory approach, Shklar argued that the virtue of justice could be strengthened by acknowledging its difficulties and limitations.

Her position was informed first by her moral scepticism: that she was convinced that there are many instances of key moral questions that will only emerge in reality and cannot be settled once and for all beforehand (see for a summary Yack, 1999). It was also due to her commitment to pluralism: the fact that she believed that many of our fundamental values can and will be at odds with each other. Freedom might conflict with welfare, different freedoms can be at odds with each other. The freedom of speech with freedom of religion, for instance. Deciding these matters is not once and for all, but contingent on the social and political context in which they are disputed.

Most pertinent to the issue at hand is Shklar's view that systems of justice might intend to counter injustice, but also, and more primarily, set out to achieve order and regularity, or, as she put it, 'well-oiled social functioning'. The form and function of systems of criminal justice can be understood in this light. This is perhaps most obvious in the explicit antipathy towards private revenge, as in Francis Bacon's dictum: 'Revenge is a kind of wild justice, which the more a man's nature runs to, the more ought law to weed it out.' The systems of compensation, reconciliation through payment to the injured party, that predated formal criminal justice and coexisted with private revenge, also served to pacify the threat that the victim's desire to take matters into his or her own hands poses for order and regularity.

However, the purpose of the system can only be fully understood if what it restores or redresses is not so much an antecedent condition of justice as one of social order. The presumption that initially there is a just situation, which is disturbed by the occurrence of an injustice and subsequently rebalanced by (the outcome of) a justice process, does not stand up to much scrutiny, even though it is the – perhaps implicit – view in the normal model of justice. In her book *The Grammar of Justice*, Elizabeth Wolgast (1987) makes this point at some length. Following a murder, a rape or the torture of a child, the punishment of the offender and his or her subsequent suffering might provide some satisfaction, but it cannot be said to restore the situation to the way it was before the offence. The victim is not returned to life, nor has she become un-raped or un-tortured. The return to the previous situation occurs by definition, not by fact.

To this, two separate and, at first glance, conflicting lines of criticism can be added. In the first, the point is that the suffering of the offender, even if it could be made equal to that experienced by the victim, differs because it is deserved, where that of the victim was not (Wolgast, 1987). In the second – an argument often made by proponents of restorative justice – it is argued that the suffering of the offender, rather than restoring a prior balance, merely adds the suffering of the offender to that of the victim, thereby increasing the pain in the world (e.g. Zehr, 1990). Moreover, the notion that an initial just situation existed is contradicted by any account of the history and the current prevalence of the occurrence of injustices (Shklar, 1990). Even a cursory examination of humanity's past reveals the ubiquity of unchecked murder, violence and even massacre and genocide, while any introductory criminology textbook can provide a compendium of the prevalence – the so-called 'dark number' – of crimes committed with *de facto* impunity today.

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Again, none of this is intended to be an argument against (processes of) justice per se, but does speak against the way it is commonly conceived. What is intended to be restored or maintained by systems of justice is not the imaginary just situation that existed before the injustice occurred but a sense of social order in society. It is not primarily intended to rectify the experience of injustice, and, as victimological research has repeatedly confirmed, is most often not experienced as such by victims. Instead, these outcomes seek to maintain order so that 'we' can 'move on with our various projects and the victims have to learn to live with them', as Shklar (1990) concluded. As noted above, this applies to systems of punishment, as has been clearly addressed in restorative justice scholarship. But it is not restricted to this: it also applies to the alternatives to punishment that this literature is likely to suggest, like apologies, atonement or compensation. There is much value in criticising punishment as a means to restoring the situation before the injustice occurred. But the most fundamental issue concerns not the means in question – punishment or 'infliction of pain' – but the twin views that a previous situation can be restored, and that this is what a system of justice truly sets out to do.

Instead, justice, as Shklar argued, is both wider and narrower than countering injustice. Its central aim of 'well-oiled social functioning' means its focus is on order and regularity and entails an emphasis on rules and universality. In turn, it understands the experience of injustice in terms of rule breaking and seeks to impose norms and solutions to this rule breaking that apply across situations. However, it also means that it does not and cannot include a full picture of everything that is involved in injustice. Shklar already pointed to many of victims' paramount concerns that justice is likely to airbrush out of the picture: the personal details of what it felt like; the victim's story – past and present; the imprints it left on memory and body; and the particular and personal meaning that the event had in victims' lives. The latter also diminishes the extent to which misfortune and injustice can be adequately distinguished from each other.<sup>5</sup> The victim of natural disaster might perceive her fate as injustice, in that not enough was done to prevent the consequences from occurring. Shklar also emphasised that the colonisation of injustice by justice means that the suffering that remains after justice is supposed to have been done is viewed as misfortune rather than injustice.

Shklar passed away in 1992, before she could fully analyse her own insight. At a minimum, her work suggests that we should be more critical of attaching the term justice to social goods with which its peculiarities might conflict. The terms she mentioned in this regard – 'economic justice', 'social justice' and 'political justice' – merit the addition of 'restorative justice' (see also Pemberton & Aarten, 2017). The danger of this semantic conflation is that we will lose sight of these

5 I will not pursue this issue here in any detail, but simply agree with Shklar (1990: 54-55) '[...] which of our travails are due to injustice and which are misfortunes. When can we blame others and when is our pain a matter of natural necessity or just bad luck? [...] The very distinction between injustice and misfortune can sometimes be mischievous [...] On the border between misfortune and injustice we must deal with the victim as best we can, without asking on which side her case falls.'

contradictions, and/or allow the virtue of justice to (implicitly) trump other concerns.

In addition, moral scepticism, value pluralism and the inherent limits of justice reactions to injustice together already underscore the importance of viewing injustice as ‘an independent phenomenon in its own right’. Nevertheless, this leaves open the possibility that lived experiences of injustice remain parasitic upon different, competing and/or more general notions of justice (Nussbaum, 1990). The discrepancy between the system of justice in use and these different/competing/more general notions can be helpfully illuminated by victims’ experiences, and this is in itself already a reason to seek to hear victims’ perspectives. In addition, it emphasises the importance of avoiding the conflation of doing justice, with a full-blown reaction to the experience of injustice (Yack, 1999). That conflation would also obscure the reality that we might be able to meet the requirements of justice, without this having much bearing on the lived experience of injustice.

Put more simply, doing justice and countering injustice, to the extent they are possible, are overlapping but distinct objectives. Doing justice does not exhaust the question of countering injustice. What countering injustice in a particular situation might require often can and will run counter to the requirements of what it means to do justice. Evidence of this abounds in the restorative justice literature, most often discussed in terms of the ‘top-down’ principles of the legal framework set against the bottom-up requirements of the experiences and reality on the ground (e.g. Braithwaite, 2002).<sup>6</sup> Separating the two – at least conceptually – offers the possibility to use the experience of injustice as a marker for the reality that we cannot settle the answers to all moral issues in advance, as a means to acknowledge the fact that people can legitimately hold varying and context-dependent views on the underlying values, and as a recognition of the limitations of justice processes in countering injustice.

### 3. Morality, ethics and the relationship within the self

However, this might be as far as Shklar’s separation of injustice and justice goes. Her former student Bernard Yack (1999: 1112) made the point thus: ‘murder, and I would say injustice in general, invokes a harm such as killing, plus *the violation of some expectations we have about the behaviour of others.*’ The last part is crucial: Yack (1999: 1112) finds this to be a description of a basic sense of justice, whether it reflects ‘moral judgements about the high standards of behaviour we expect from rational and civilized creatures, or ... little more than the habits formed by repetitive actions of one sort or another.’ According to Yack, this leads to the conclusion that a full-blown sense of a just order of things might not be necessary in order to recognise injustice, but a sense of justice is, even though this

6 Braithwaite (2002: 565) offers different examples of the manner in which top-down standards can counter the reality on the ground, for instance: ‘Accreditation of mediators that raises the spectre of a Western accreditation agency telling an Aboriginal elder that a centuries old mediation practice does not comply with the accreditation standards is a profound worry’.

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sense of justice might not amount to more than a rudimentary expectation about the behaviour of others. People might use their experiences of 'broken bones and ruined lives' to amend or criticise our systems of rules. However, this criticism will at most lead to the adoption of a different set of rules, given the fact that 'broken rules', in the form of a 'violation of some expectations we have about the behaviour of others', are an indispensable element of such an experience.

However, I do not believe Yack's view to be the only way of understanding Shklar's perspective. I take issue with viewing injustice as something that can be fully understood in terms of the relationship between people, 'the behaviour of others' as well as including 'an expectation', a sufficiently intentional experience that it can be seen as a rule, though a rudimentary one. In my view, both these assumptions arise from viewing injustice in terms relevant to justice, rather than on its own terms, and it obscures the reality that much of the experience of injustice pre-empts holding these assumptions.

Central to my view is, first, the argument that we cannot truly understand the experience of injustice if we do not understand its nature as damage to, diminishment of or even destruction of the relationship we have with ourselves, rather than with others. Second, much of what this damage/diminishment/destruction entails concerns experiences we have of the self that form the taken-for-granted backdrop of our lives. We become aware of this backdrop only in the aftermath of the victimisation, rather than as an intentional expectation beforehand. Indeed, even in this aftermath (of the consequences) of this experience, it remains difficult and even impossible to put into words. I will discuss this issue in Sections 4 and 5.

I can clarify the first issue at stake here – concerning the relationship within the self – by drawing on Avishai Margalit's distinction between *morality* and *ethics*.<sup>7</sup> Margalit marshals the fact that the English language offers two (nearly) synonymous terms for the general framework of norms and values: ethics (from the Greek) and morality (from the Latin). Where these terms are commonly used interchangeably, Margalit deploys them to denote different aspects of normativity, with morality covering what he calls our 'thin' relationships with others and ethics referring to our thick relationships (see at greater length Pemberton, 2015).

Margalit understands morality to be the normative framework that guides people's dealings with others, solely on the basis of their common humanity. What he means by a 'thin' relationship does not have to amount to anything more than a purely symbolic sense of shared membership of the human race. It is the type of relationship that forms the kernel of theories of justice: for instance, Adam Smith's sympathetic but detached observers; Immanuel Kant's beings involved in pure practical reason, willing the moral law as a set of universally categorical imperatives; and John Rawls' participants in the original position, behind the veil of ignorance. For all the substantive differences between them, these normative frameworks apply indiscriminately to the whole of humanity and are

7 Margalit is not the only scholar to have used this distinction. Bernard Williams also did so in *Ethics and the limits of philosophy* (1985).



explicitly supposed to apply whether or not we ourselves are part of this relationship: morality should apply equally to our judgements of behaviour between others as to our own behaviour to others. For Margalit, ethics is another matter. He argues that we also have obligations for which applying a framework that covers all of humanity leads to counter-normative results: those that concern our children, spouses, friends and neighbours, for instance. Restorative justice theory and practice has busied itself with such thick and real relationships, rather than the abstracted thin relationships that constitute formal systems of justice (see already Christie, 1977; Zehr, 1990).

Elsewhere, I have argued the relevance of Margalit's inclusion of such a 'thick relationships' ethics to victimology (Pemberton, 2015). Two additional points Margalit makes merit attention here, even though this will lead me to amend the way he deploys the term ethics. The first concerns his remark that 'a special case' of such a thick relationship is the relationship to one's self. The second concerns his understanding that ethics is guided by caring, for which he explicitly refers to Heidegger's (1927/1962) notion of *Sorge*, which Margalit finds to be a basic feature of the human condition. I think Margalit is (partially) correct on both counts; however, rather than his view that the relationship to one's self is a special case of a thick relationship, I think it encompasses *all* thick relationships. That also seems to me to be more parsimonious with Heidegger's use of *Sorge*. Margalit ends up using caring as a bridge between the self and the other, which is not the way I understand Heidegger. Indeed, it was exactly refuting such a Cartesian 'subject-object' distinction that was one of the main themes of his *Being and time*. For Heidegger, caring is more than a basic feature of the human condition, but rather forms the ontological structure of human existence. It is indeed what *distinguishes* human *being* from other existence. To care is to have final ends *for the sake of which* we carry out our daily activities and in terms of which we organise our time and have a meaningful orientation in the everyday world. These final ends, which define our identities, are not goals that we aim to achieve at one discrete point in time and then leave behind in the past. They are the *towards which* a person conducts himself. Who I am, in part or in full, follows the commitments that are related to this care structure: choices can be made that go against these commitments but not without a revision of the self. Put differently, we *care* about certain possibilities, persons and relationships because they define who we will be. Each one of Margalit's thick relationships can be rephrased as elements of identity: I am a father, a son, a friend or a neighbour. And on Margalit's terms, failing obligations that correspond to these elements of identity call into question who I am.

By shifting the emphasis from thick relationships to identity, it also makes clear that what is key here is not so much the 'expectations' of those important others but instead the ethical significance of the way in which one views oneself. This does not concern primarily the expectations that others are right to have of me, but instead the experience of how I, in my actions and experiences, maintain my own identity (e.g. Clark, 2000; Williams, 1985). In my view, this is where the experience of injustice comes fully into its own: where justice concerns (the transgressions of) the moral relationships between people, the experience of injustice

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involves the ethical relationship within the self. The manner in which this comes under threat in victimisation is the subject of the following section.

#### 4. An ontological assault: the role of 'existential feelings' in victimisation

In recent publications, my colleagues and I have taken to referring to severe forms of victimisation as an 'ontological assault', an attack on being (see Pemberton, Mulder & Aarten, 2018). The phrase 'ontological assault' is derived from the phenomenology of life-threatening illness (Pellegrino, 1979). It also retains the double meaning that the phrase has in this literature. First, it concerns the direct onslaught on the victim's existence, the confrontation with the actuality of one's demise, the end of one's being. Second, it also highlights features of being that hitherto were taken for granted and/or remained implicit. Illness 'transforms the "lived body" in which self and body are unified and act as one in the world to the "object body" where the body is a source of constraint and is in opposition to the self' (Garro, 1992: 104, see also Gadow, 1980). This makes explicit the extent to which the manner in which the body-self unity is an implicit but necessary feature of the way we normally exist.

The experience of severe forms of victimisation has a similar capacity to 'unmake the world' (Janoff-Bulman, 1992; see also Crossley, 2000). The experience not only reveals the reality and possibility of imminent threat from others, but also exposes a reality of features of one's existence, precisely through the damage it does to them. Recent work by philosopher Matthew Ratcliffe is of crucial importance to understanding the nature of this damage (Ratcliffe, 2008, 2012, 2017; Ratcliffe, Ruddel & Smith, 2014). He points to a class of affective experience that concerns ways of finding oneself in the world, which shape all experience, thought and activity. These existential feelings concern 'the intimate association between feeling, how one finds oneself in the world and one's grasp of reality' (Ratcliffe, 2012: 25). Examples are experiencing contingency, uncertainty, insecurity, homelessness and uncanniness. As Ratcliffe (2012) emphasises, when existential feelings remain stable we are most often oblivious to their role. But when they change, we can experience this change and/or the absence of the way the world felt before. This offers a glimpse of these existential feelings. Nevertheless, because these existential feelings normally form an implicit taken-for-granted backdrop for experience, they are likely to be difficult to describe. 'These feelings are not usually explicit objects of experience or thought – we tend to be pre-occupied by what is going on in the world, rather than with the backdrop against which those happenings are intelligible' (Ratcliffe, 2012: 27). This poverty of vocabulary to describe such shifts in existential feelings is further compounded by similar lack of interpretative resources to make sense of them. 'If we fail to acknowledge that experience incorporates a background sense of belonging to a world, then we will inevitably misinterpret an alteration of this sense of belonging in terms of something else' (Ratcliffe, 2012: 27).

Ratcliffe's main source of empirical evidence for the existential feelings he describes is derived from the first-person experience of psychological disorder,

including depression and schizophrenia, but he has also linked his perspective to the experience of victimisation and trauma (see Ratcliffe, 2017). His insights are important in three ways, which will be further developed in the following section. First, his work reveals the manner in which victimisation first concerns (an alteration in) the affective experience of self, that is, as a shift in existential feelings. Second, it also emphasises the fact that this self can be fully understood only as being-in-the-world rather than the 'modern' Cartesian subject,<sup>8</sup> the latter referring to the type of 'Lone Ranger' theory of humans, in which the healthy individual is seen largely as one who is 'self-contained, independent and self-reliant'.<sup>9</sup> Third, it makes clear that the nature of the experience of victimisation makes it suspect to frame such experience in terms of (transgressions of) expectations, assumptions and beliefs. The issue is that existential feelings operate at the 'pre-intentional' level: before intentional states of mind such as expectations, assumptions and beliefs can be formed about what should and should not happen in the world, one already has to find oneself in it (Ratcliffe, 2017). The interpretation of what should have been expected, assumed and believed is then retrospectively applied to the experience, as a consequence of meaning and sense-making in the aftermath of experience, rather than something that existed independently and prior to its occurrence. This retrospective fallacy is compounded by the fact that this meaning and sense-making is co-determined and indeed biased by the available linguistic and conceptual apparatus.

## 5. Narrative foreclosure and radical loneliness: Brison's phenomenology

The importance of existential feelings is succinctly laid out in *Lucky*, Alice Sebold's (1999: 27) memoir of her rape and its aftermath. She 'was now on the other side of something they could not understand', to which she added, 'I did not understand it myself'. The experience had fundamentally altered the way she experienced life: 'My life was different from other people's; it was natural that I behaved differently'. She related this difference to a sense of ubiquitous ominousness: 'Threat was everywhere. No place or person was safe' (Sebold, 1999: 229).

Sebold's memoir is testament to the role of the shift in existential feelings in severe forms of victimisation and the difficulty of accurately understanding and verbalising this experience. It receives its most full-blown treatment in Susan Brison's (2002) *Aftermath: violence and the remaking of the self*. Brison was a victim of rape and attempted murder, and *Aftermath* is the book in which she puts her philosophical acumen to the task of developing a phenomenology of experiencing rape and living through the consequences, in which she also invokes the testimonies of other survivors of violence, rape and even genocide and the Holocaust. In particular, she points to the three interconnected ways in which her sense of self was impacted by her experience: the damage to her *embodied self*, her *self as narrative* and her *autonomous self*.

8 Ratcliffe's perspective is highly indebted to Heidegger, as the use of these phrases confirms.

9 I adopted the term 'Lone Ranger' from Bernard Rimé (2009).

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The first is the embodied self. Before the rape, Brison and her husband were trying to conceive, to have their first child. In a similar vein to Pellegrino's perspective on illness, Brison noted,

I was no longer the same person I was before the assault, and one of the ways I seemed changed was that I had a different relationship with my body. My body was now perceived as an enemy, having betrayed my newfound trust and interest in it, and as a site of increased vulnerability (2002: 44).

Victimisation has the potential to wreak havoc on the manner in which we normally take our relationship with our body for granted. As Bernstein (2015) analysed Brison's work, at the same time we *are* our body and we *have* our body. The latter refers to our control over our own body, while the former refers to the fact that our embodiment is the main way in which we exist physically *in* and interact *with* the world. Victimisation drives a wedge between these two: we still are our body, but no longer feel we are in control of it. The rapist took over control of Brison's body, while in the aftermath her body appeared as alien and even as an enemy. The experience of rape and physical violence serves to forcibly remind us of our embodiment, while rendering us extremely vulnerable by diminishing or destroying our sense of control over our own body. As Carole Winkler (1991: 14) – another rape victim – described it, 'Our existence becomes like a body on life support'.

Such 'taken-for-grantedness' also concerns more abstract ways in which we are in the world. Brison discusses the experience of our narrative selves. Our identity is importantly storied: we construct our own life stories, while our life stories help us understand ourselves as continuous beings from the past into the present and the future, and as connected to our close and distant social surroundings (Ricoeur, 1986). Severe forms of victimisation endanger this narrative identity: they cause a rupture in people's life stories, who existentially struggle to make sense of the relationship between the persons they were before, during and after the victimisation with the persons they are now, and the implications of this as they move into the future (Crossley, 2000; Pemberton et al., 2018). Such a rupture is also visible in the storied sense of connection to our social surroundings. In this, the phenomenon of 'narrative foreclosure' is key (Freeman, 2000), a self that lingers on even after the life story has effectively ended. Brison describes this as the disappearance of the past and the foreshortening of the future, narrowing our normal sense of being past, present and future all at once, to being a momentary self. 'Like animals, we were confined to the present moment', as Auschwitz survivor Primo Levi (1989: 75) put it. The difficulty or even inability to experience oneself as temporal is thus the backdrop against which narrative foreclosure occurs. But the ability to do so is key to human existence, which is most crucially distinguished from things and – perhaps more debatably – animals in that the latter instead occur as a succession of 'nows', simply being present at discrete moments in time.

Again the taken-for-granted manner in which we exist as temporal beings-in-the-world is diminished or devastated much in the same token that this is the

case for our embodied selves (Ratcliffe et al., 2014). What also applies to both is the necessity and difficulty of speaking to others as a means to counter the experience of injustice. This relates to the 'taken-for-grantedness' of the experience it imperils. The Dutch translation for taken for granted is *vanzelfsprekend*, meaning that it speaks for itself, it goes without saying. The issue is then that our language fails survivors in communication of their experience. Again, Primo Levi (1985: 9) observed, 'Our language lacks the word to express this experience, a demolition of a man'. The Alice Sebold quote from above 'on the other side of something they could not understand' reveals the extent to which the absence of what was taken for granted is a key part of what victimisation entails, while the same applies to the realisation that others still take for granted what the victim has lost. The fact that survivors of violence know the sense in which what is lost is taken for granted by others also means that they do not expect others to understand what they have been through.

Finally, Brison discusses the damage to her autonomous self. The damage to her embodied self, and her self as narrative, left her with profound difficulties in understanding herself as being able to pursue her own final ends, the goals and the relationships that provide the horizon of her life. I mentioned the difficulty it raised to her desire of becoming a mother, while the narrative foreclosure renders projecting, planning and pressing forward into the future all but impossible. If you cannot really feel yourself existing into the future, the extent to which you can plan or project ahead is diminished.

In her discussion of this feature of her experience, she also makes the profound point that her victimisation confirmed the relational nature of her experience of autonomy. 'Enhancing my autonomy in the aftermath of my assault reinforced my view of autonomy as fundamentally dependent on others.' (Brison, 2002: 61). In much Westernised social science research, selves are not understood in this way. Instead, a large body of work ascribes to what Heidegger referred to as the modern Cartesian subject. It is the kind of self that hews closely to those that are involved in theories of justice. I think this view is generally mistaken. As McMullin (2013: 16) writes, 'The confines of one's inner self are porous; to be a self is to be fundamentally shaped by the web of significance that is the world.' We are not beings who are selves first and then subsequently interact with a world outside, but are better understood as 'being-in-the-world', a self that, as Brison (2002: 62) summarises, is 'created and sustained by others and, thus, is able to be destroyed by them'.<sup>10</sup>

Instead, Brison's account offers the insight that *becoming* a 'Lone Ranger', a shut off, self-contained individualised, non-relational self, is a *consequence of victimisation* that the victims in the aftermath desperately need to remedy. This is where the ontological assault of victimisation comes into its own. The ontological assault in life-threatening illness can be understood in terms of the manner in which it opens up a wedge between self and body, which is also visible in experiences of victimisation. But it can also be felt as an attack – damage, diminishment

10 This is a perspective that is also captured in feminist conceptions of ethics of care (e.g. Gilligan, 1982) and relational autonomy (e.g. McKenzie & Atkins, 2010).

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or destruction – on the manner in which victims exist, immersed and connected to the physical, temporal and social world. The ontological *care* structure of the victim's existence itself is imperilled, leaving the victim with the experience of a self that is 'radically alone'.<sup>11</sup>

Regaining a sense of self in the aftermath of victimisation requires regaining an experience of 'communion' that in our normal lived experience is taken for granted.<sup>12</sup> I should stress here that it is not a sense of a relationship between people as separate selves but the role of our communion with others as a means to become and sustain our own selves. Rebuilding autonomy in the aftermath of victimisation requires people to 'remake themselves', and people's own choices and actions are vital to this end. However, without reconnection to others, it would remain a self in the radically lonely limbo to which it was condemned by the victimisation.

This perspective also restricts the extent to which thinking about victimisation in terms of repair or restoration to a previous self is useful. Realising victims' nature as beings-in-the-world can help us steer clear of adopting metaphors for victimisation that see it in biomedical terms: victims as self-contained, and individual, biological entities that need repair or restoration to their previous level of functioning. It is a view that is also suspect in medicine itself, as I will argue later. The remaking of the self of which Brison speaks is a self that is altered by living through the experience, one for whom the victimisation and its aftermath, the manner in which it was situated in time become part of the fabric of existence: the taken-for-grantedness in different existential feelings will not return, which – I should add – does not have to be for the worse, although it often will. Rather than restoration, I would think that *re-storying* might be an apt term for the process upon which the victim will have to embark.<sup>13</sup> Restorative justice practices have distinct advantages over formal criminal justice in this regard. Unlike the latter, restorative justice embraces narrative as part of the process, while the interaction with the offender and the manner in which the victim and the offender meet can be viewed in terms of their narrative implications, including the possibility of transformation of the victim's narrative (see for an overview Pemberton et al., 2018).

Taken together, the key to understanding the experience of injustice is to understand it in terms of its features as an 'ontological assault': an attack on our selves as 'beings-in-the-world', as embodied, temporal, narrative and relationally autonomous beings, in which the experience of a shift in our existential feelings is important, and indeed makes these feelings explicit: precisely in the breakdown of such 'feelings of being' we become aware of them.

- 11 There are some parallels here with Jill Stauffer's (2015) concept of 'ethical loneliness', but her concepts and arguments are considerably different from mine.
- 12 See for the use of communion in this sense Bakan (1966). For its application to victimology, see Pemberton, Aarten & Mulder (2017).
- 13 The importance of *re-storying* as a perspective on restorative justice is by no means restricted to the victim, as is evident from the many excellent studies in the emerging domain of narrative criminology. See Presser & Sandberg (2015).

## 6. The fact of victimisation: *phronesis* and playfulness

On these terms, countering injustice involves a focus on remaking the self, an endeavour that is fundamentally bound to people's idiosyncratic experience. In this regard, the comparison with the ontological assault in life-threatening illness is illuminating for its similarities and differences. Here, the ontological assault refers specifically to the (diminishment of the) integrity of self and body, an experience in which body stands opposed to self, and that also alters the individual's sense of relatedness to the world of others and of things. 'Thus, the experience of illness is an experience of *disintegration* and *disunity*, often accompanied by a frustration and disillusionment that are profoundly "existential"' (Davis, 1997: 176), also given that it can explicitly threaten the individual's existence. *The fact of illness* is the subjective state of the individual experiencing this ontological assault and as such can be distinguished from *disease*, which refers instead to a quantifiable disorder of biologic function objectively located in the body. The fact of illness and disease are, of course, not unrelated, but the experience of illness can exist in the absence of disease and vice versa, while the distinction also suggests that there is more to the craft of medicine than curing disease.

Indeed, Pellegrino argues for a conception of healing following illness as the ultimate *telos* of medicine, focused on 'a return to the unity of self and body, although this unity may represent a renegotiation, a newly struck balance, between the self's hopes and the body's capacities'. Given that this renewed unity of self and body is contingent on the first-person interpretation of the patient suffering the illness, this 'return of unity' cannot be determined in abstraction from this experience. It is here that Pellegrino invokes the distinction Aristotle (2014) made in his *Nicomachean ethics* between the intellectual virtues *episteme*, *techne* and *phronesis*. The first concerns the acquisition of universal knowledge, and the second the craft of applying this knowledge in a particular situation. This is the way the curing of diseases is conceptualised: a craftsmanship that involves knowing what to do, how to do it and why one does it. The healing of illness, however, involves *phronesis*, which is often translated as the practical wisdom of knowing how to act in a particular social and political context, which crucially involves the questions of what ought to be done, and incorporates the meaning and morals of those actors involved in the situation (see also Davis, 1997; Flyvbjerg, 2001).

This brief analysis of the ontological assault in life-threatening illness is important in view of the analogy of the dichotomy of countering injustice and doing justice with healing illness and curing disease, respectively. Like healing illness, the purpose of countering injustice can be conceived as a remedy to the damage inherent in the ontological assault, in the case of victimisation the attack on ourselves as beings-in-the-world, including the resulting sense of narrative foreclosure and radical loneliness. Its distinction from doing justice can also be understood in a similar manner: justice seeks an amalgam of an epistemological foundation and technical application, which can be abstracted from the particular situation, context and interpretation of the actors involved. Countering injustice, however, necessarily navigates the particular idiosyncratic experience of victimi-

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sation, including the interpretation, meaning and morals of those directly involved. A similar argument for invoking the virtue of *phronesis* can therefore also be made in the case of countering injustice.

Indeed, the differences between the situation of victimisation and life-threatening illness only serve to strengthen the case for this distinction and the inclusion of the virtue of *phronesis*. First, as mentioned above, justice's primary purpose is not countering injustice but preserving order. In comparison with the situation of healing illness versus curing disease, this raises the chances of countering injustice versus doing justice being not only distinct, but also contradictory purposes. Part of the prudence of *phronesis* in this regard would involve navigating contradictions that may arise.

Second, where Pellegrino remarks that medicine is the 'most scientific of the humanities' (or the most humane of the sciences), given the objective, biological basis for disease, justice is itself instead steeped in socially constructed meaning and explicitly and primarily political in purpose. Reformulating Shklar's critique of legalism in Pellegrino's terms reveals that the 'amalgam of episteme and techne' to which processes of justice aspire is itself the result of political choice, rooted in an understanding of the social and political context, and in that way draws upon *phronesis*.

Countering injustice, in turn, is also decidedly political in nature. In previous work, I connected the victim's attempt to do so to the thinking of Isaiah Berlin (1997), in the way he understood political freedom as the possibility to make *radical choices*: those that cannot be settled by reference to principles alone, often necessitate striking a balance between incommensurable and incompatible values, can provide a complete overhaul of the situation and the identity of the person making them (see Pemberton, 2015). The fact that they concern identity-defining choices places them firmly in the realm of ethics discussed earlier. The aftermath of victimisation is riddled with such choices: the choice to avenge, to forgive, to seek justice, to despair and recoil. In each case, whether or not they are suitable depends on the victim in question, on the social, cultural, legal and political environment and on the way the victim understands himself or herself and his or her environment. Their outcome is not covered by set principles. Indeed, as noted above, these radical choices can involve the necessity of questioning and discarding principles and systems of justice in a given context, while the experiences of those on the receiving end of injustices can provide a litmus test for the functioning of the political order itself (Shklar, 1998; Williams, 2005).

The most general metaphor for the process of countering injustice, also in comparison with doing justice, traces David Graeber's distinction between *play* and *games* (Graeber, 2015; see also Pemberton, 2015). According to Graeber (2015: 192), 'A game is a bounded specific way of problem solving. Play is more cosmic and open-ended. A game has a predictable resolution, play may not. Play allows for emergence, novelty, surprise'. Where games are rule-bound, play is an imaginative enterprise, depending on context-dependent interpretation that fundamentally contains freedom and arbitrariness. Where games have a clear beginning and end, and have clear boundaries to indicate what and who do and do not belong to them, in play all these things are ambiguous. Play may seep into other



activities, has porous borders, if any, and does not (have to) make explicit who is and who is not part of it. Where games are an attempt to confine, restrict or even rule out the possibilities for play, play can and often will generate new games.

This analogy reveals the extent to which countering injustice is a process in which outcomes are emergent rather than preconceived and predetermined. It is clear when the justice process has come to its conclusion, and it is clear when and under what conditions justice 'is done', while neither of these statements holds for countering injustice. Again, the same can be said to be true for healing illness, but the necessity of reconnection to others in remaking oneself in the aftermath of injustice serves to increase its indeterminacy. It also points to the fact that the automatic assumption that the process following injustice needs to lead to a resolution, and indeed a resolution that involves casting a verdict or making a decision, is again a remnant of justice-based thinking.

Practices of restorative justice have a natural fit with both *phronesis* and playfulness. The focus on the particular context, the priority to people's own in-depth understanding of the situation, and the emphasis on direct stakeholders' choices, actions and imagination in the process all bear witness to this. Similarly, the form and importance of various results are recognised to be context dependent and emergent (Braithwaite, 2002). The first main challenge concerns the extent to which restorative justice processes are able to avoid viewing 'the outcome' of the process as being a resolution of the experience of injustice (see Pemberton et al., 2018). Such a presumption of *closure* is not only empirically mistaken, as the end point of a justice process rarely coincides with the closing act of an experience of victimisation, but can itself add to the experience of injustice. Indeed, the metaphor of playfulness can help us understand that an outcome as such is beyond the reach of our institutional reaction. The second requires acknowledging the reality that there is a destructive side to playfulness (Graeber, 2015). Elsewhere, I have argued the playfulness of revenge, for instance (Pemberton, 2015; Pemberton & Aarten, 2017). Rather than downplaying this reality – for instance, by the use of a particular ideal-type of victimisation (Bosma, Mulder & Pemberton, 2018) – navigating the impulses to such dark play would also be a requirement of *phronesis* in restorative practice.

## 7. Conclusion

In his contribution to the inaugural volume of *Restorative Justice: an International Journal*, Nils Christie (2013: 15) had this to say about the term 'restorative justice': 'To me, it sounds like a bad choice. The worst part of it is "justice". It leads us straight into the institution of Law'. As is apparent from this article, I share this sentiment, at least in part. As Judith Shklar (1986) made clear, justice is not a neutral value, but rather 'the most legal of virtues' and its unreflective application to experiences of victimisation might blind us to much of what is most pertinent, at least in the experience of those suffering its direct consequences.

Instead, viewing injustice as an independent phenomenon in its own right, separate from justice, can make us recognise the features of *the fact of victimisa-*

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*tion*: the reality of the experience of broken bodies and ruined lives, rather than the broken rules that make up the stuff of justice. This reality cannot be (fully) grasped on the terms of justice and is more than merely the negation or opposite of justice. Following Margalit, I argued for the adoption of a distinction between morality and ethics, with the former concerning the ‘thin’ relationships between people and the latter a relationship within the self that includes the thick personal relationships that make up our identity. I made a case for understanding the core of what victimisation entails as an *ontological assault*, an assault on our being-in-the-world, which at once poses a threat to existence and at the same time reveals features of our ontology precisely in what it jeopardises or even destroys. The specifics of this ontological assault include a shift in existential feelings, the taken-for-granted backdrop of our lives, and in its attack on caring involve phenomena that I have described as *narrative foreclosure* and *radical loneliness*. The nature of these existential feelings as taken for granted makes them difficult or even impossible to put into words, while the nature of the damage done by victimisation makes reconnection through speaking and storytelling vitally important.

In such matters lies the conundrum of attempts at *countering injustice*, as the ethical endeavour seeking to remedy the fact of victimisation. I hope to have made clear that I see the potential of restorative justice in the extent to which it succeeds in doing so. The nature of the ontological assault of victimisation reinforces restorative justice’s focus on real lived relationships, while *phronesis* is already the virtue in use in much of restorative justice practice. Similarly, the possibilities restorative justice offers for action, choice and imagination on the part of the participants suggest the space it creates for playful activity, while its context dependence offers inroads to fully understand outcomes as emergent rather than predefined from the outside. The fact of victimisation finally sits uneasily with an understanding of the trajectory after victimisation as a return to a previous situation. I therefore suggested replacing restoration, if it is understood in such a fashion, by *re-storying*, remaking the self in narrative, to which restorative justice processes have much to contribute.

Countering injustice, however, comes with its limitations. First, the rescue of injustice from the confines of justice and the emphasis on the latter’s limitations do not mean that doing justice can be ditched wholesale, to be replaced by countering injustice. As Shklar reminded us, precisely in full recognition of its limitations, justice is often likely to be the ‘best we can do’. The experiences of playfulness and idiosyncrasy are elements of the fact of victimisation, but also need to be contained by an orderly system, which will often be at odds with what countering injustice might require. The tension between ‘restorative’ and ‘justice’ is fundamental, rather than solvable. Appreciating that a tension between doing justice and countering injustice is often unavoidable would already be a large gain, but will also saddle our reaction to victimisation with a sense of muddling through, rather than neat, clear and aspirational solutions.

Moreover, a clearer focus on injustice will rob us of one of the main ways in which justice offers solace in the aftermath of wrongdoing and evil. Where justice can be defined, a verdict cast and a case decided, the reality of countering injus-

tice will often reveal the extreme limitations of our social institutions in coming anywhere close to a resolution. The truth often is that the senselessness and diminishment in the experience of victims, the ruining of their lives, will endure. Restorative justice's focus on the reality of the aftermath of victimisation could bear witness to this, but this is obscured by the unwarranted optimism inherent in the notion of justice, and in the promise of restoration as well. Such optimism often entails adding an additional burden to the weight the victims in these situations are forced to carry, on the often false assumption that the outcome will lead to closure and allow the victim to move on, while it skews restorative justice's attention to the situations in which something resembling restoration and justice is possible. Instead, a 'maximalist' position would first emphasise that the limitations of restorative justice in coming to terms with injustice in these situations also apply, and with greater force, to other avenues open to victims. The latter is particularly true of the formal criminal justice system. And second, it would acknowledge that precisely where countering injustice is the most difficult to achieve and even the most difficult to imagine, it is also the most needed.

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