

ARTICLE

The shame of injustice: the ethics of victimology and what it means for restorative justice

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Abstract

The role of shame in restorative justice has a long pedigree. Most often shame has been conceptualised in terms of the act of the offender. The focus of this paper is instead on the shame of the person experiencing wrongdoing: a victim who is neither guilty nor responsible for the experience. This has the advantage of making more clear that shame fundamentally concerns an experience of 'who I am' rather than 'what I have done', while the reaction to the experience of shame in victimization should involve attention to the identity-related questions that are posed by this experience. This way of viewing shame is connected to the distinction between countering injustice and doing justice, and offers a number of fresh insights into victimological phenomena in restorative justice and restorative justice more generally.

Keywords: Victimology, restorative justice, shame, Bernard Williams, Susan Brison.

1 Introduction

In Douglas Adams' *Hitchhiker's guide to the galaxy* series a race of hyper-intelligent beings build a computer 'Deep Thought' to answer the question of 'Life, the Universe and Everything'. After pondering about this for some time, about ten million years, Deep Thought offers the answer '42'. When his developers react with misgivings and exasperation to this, Deep Thought replies, 'I think the problem, to be quite honest with you, is that you've never actually known what the question is'.

In my view asking the right question is exactly the kind of changing of lenses in which the potential of 'restorative justice' lies. I put 'restorative justice' in scare quotes, because like Nils Christie I believe that the term 'justice' already directs us

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to a particular type of question.¹ That does not mean that I think it is necessarily mistaken, but that it does not fully reflect the questions the experience of injustice poses.

Justice, as Judith Shklar (1986) put it, is the most legal of the virtues. It imposes a particular order on social life, on the conceptualisations of people's sense of self and their relationships, and thereby directs us towards a certain interpretation of ethical experience that can be captured (and criticised) under the heading of 'morality'.² The question it asks about wrongdoing is 'what happened here', its method involves matching conduct against a set of predefined and preferably universal rules, and its answers are then framed in terms of guilt and its counterpart, blame. It does so with an air of self-evidence, which obscures the reduction involved in this conceptualisation, a reduction that involves a fiction, which Bernard Williams (1993) has characterised as 'a distinctive and false picture of moral life, in which the truly moral self is characterless'.³ That is perhaps harsher than I would like to put it, but it does emphasise what is missing. For instance, 'it cannot help one to understand one's relations to those happenings, or to rebuild the self that has done these things and the world in which that self has to live' (Williams, 1993: 94). More generally it cannot offer answers to the questions injustice poses that involve 'who am I' or 'who are we'. As Williams argued, and John Braithwaite (recognised in relationship to 'restorative justice',⁴ these are questions that involve the experience of *shame* 'because it embodies conceptions of what one is, and of how one is related to others' (Williams, 1993).

However the full scope of the perspective that *shame* can offer us in our understanding of injustice and reaction to injustice has yet to be fully acknowledged. In my view this is first because most authors, Williams and Braithwaite included, have emphasised the shame of the person who commits wrongdoing. This is – of course – important, but such act-based shame is more difficult to distinguish from guilt, particularly in the development of responses to wrongdoing. Braithwaite's concept of 'reintegrative shaming', in particular, appears approximately similar to reparative connotations of guilt, while it also appears to retain the focus on *making* the offender feel guilty/ashamed, which has been rightly criticised in the literature (Van Stokkom, 2002). This coincides, secondly, with the complexity of shame, which also means that it is open to various interpretations (see for an overview Zahavi, 2015). The issue is that under these conditions shame is likely to be (mis)interpreted in terms of 'what happened here', which obscures some of its key features and, in particular, its additional ethical relevance.

The focus of this article is instead on the shame of the person experiencing wrongdoing: a victim who is neither guilty nor responsible for the experience. This has the advantage of making more clear that shame fundamentally concerns

1 Christie (2013: 15) was more direct in his assessment: 'To me, it sounds like a bad choice. The worst part of it is "justice". It leads us straight into the institution of Law.'

2 See for this criticism Bernard Williams (1993) and/or Nietzsche (1887). For a summary of this position, see Clark (2000).

3 I return to this issue and indeed this quote more extensively later.

4 See his classic *Crime, shame and reintegration* (Braithwaite, 1989).

an experience of 'who I am' rather than 'what I have done', while the reaction to the experience of shame in victimisation should involve attention to the identity-related questions that are posed by this experience. For this question, acts are not irrelevant, not at all in fact, but gain full meaning only when they are evaluated in their connection to these identity questions, rather than imposing an artificial distinction between one's acts and one's identity, as guilt presumes to do.

In previous publications – including last year's Annual Lecture in this journal, see Pemberton (2019) – I have sought to clarify victims' experiences with justice processes conceptually through reference to the distinction between *doing justice* and *countering injustice*. In section 2, I will revisit this distinction and sketch some of the features of justice that are helpful to understand the contrast with which ways countering injustice can be distinguished from doing justice. That is the latter's emphasis on rules, and game-like structure, its focus on the relationships between people and on guilt and morality. In section 3 I will discuss Susan Brison's phenomenology to show that the experience of injustice concerns a relationship within the self, which may be translated into rules but does not require rule-breaking to be experienced as such. The latter is clarified through reference to the term 'ontological assault', which I see as key to the experience of injustice. In section 4, I then turn to victim shame and its link to ethics, as distinct from morality. The crucial aspects of identity in the experience of injustice are omitted if the focus is solely on the moral, rather than the ethical, issues of victimology. In section 5, I connect the discussion of victim shame to processes of restorative justice and argue that a key victimological advantage of these processes is the opportunity they offer to incorporate matters of identity. Here I also suggest the inherent 'playfulness' of restorative processes, in contrast to the game-like structure of formal justice processes, which is linked to the idiosyncratic nature of answering the identity-related questions. But this also suggests a fundamental limit, connected to the reality of the possibility of 'dark play', i.e. the destructive sides of this playfulness. In the concluding section I argue that this line of thinking offers a novel reinforcement of Lode Walgrave's (2008) maximalist position on restorative justice, albeit with the caveat that I have qualms with both 'restorative' and 'justice'.

2 Some features of justice

In her book *The faces of injustice* Judith Shklar (1990) tasked us with viewing injustice as 'an independent phenomenon in its own right'. This is contrary to the 'normal model', which views injustice as a derivative and/or opposite of justice, in which justice and injustice occupy two poles of one dimension, in which striving for justice is seen to be an automatic reaction to injustice, while 'doing justice' and 'countering injustice' are synonyms. For Shklar, instead, doing justice is at once more and less than countering injustice. It is more because justice is (primarily even) concerned with goals that are not connected to the experience of injustice: the purpose is the regularity, the order or, as Shklar put it, 'well-oiled social functioning'. But it is also less because this focus means that justice only

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takes those elements of injustice into account that are connected to these goals and thereby ignores much of what makes up the concrete experience of injustice. Indeed much of what is most vital to victims of wrongdoing and crime is not relevant to conceptions of justice: the personal details of what it felt like, the victim's story past, present and future and the manner in which the experience might factor within this story, the imprints of the act on the body and the mind, and the concrete, personal and idiosyncratic meaning of the victimisation in the victim's life.

Justice succeeds in achieving the order that is its primary focus by imposing a game-like structure on the reaction to injustice. As David Graeber (2015: 159) analysed, games have the following features:

First they are clearly bounded in time and space, and thereby framed off from ordinary life. There is a field, a board, a starting pistol, a finish line. Within that time space, certain people are designated as players. There are also rules, which define precisely what those players can and cannot do. Finally there is always some clear idea of the stakes of what players have to do to win the game. And critically: that's all there is. Any place, person, action, that falls outside that framework is extraneous; it doesn't matter; it's not part of the frame.

Shklar (1986: 10) emphasised the game-like structure of the law in the following quote:

The legal system is 'there': a body of accepted rules. Professor Hart's obsession with games as the paradigm for legal activity is very revealing in this respect. Law is thus pictured as a matter of combat, but one in which both 'teams' accept the rules as a matter of self-evidence.

A key consequence of this game-like structure is that justice views injustice in terms of rules and rule-breaking, i.e. the centrality of rules guiding the relationships between people to justice and, as a consequence, conceptualising injustice as a breaking of these rules.

These rules are context-independent and universal and apply irrespective of the identity and relationships of the people involved. Indeed the identity and relationships of the people involved is largely irrelevant to the application of the rules. Relevantly here, Avishai Margalit (2002) distinguished morality from ethics, denoting *morality* as the system that would apply in these cases. In his view morality is the normative system that applies to our *thin* relationship with others, i.e. those that solely rely on our common humanity. As I will explain in more detail later, Margalit saw ethics, then, as the system that concerns our thick relationships, with family, friends or community members, for instance.

The moral self in this perspective is characterless. As Williams (1993: 94) states,

In this picture, I am provided by reason, or perhaps by religious illumination (the picture owes much to Christianity), with a knowledge of the moral law, and I need only the will to obey it.

As I will argue later, theories of justice, like Rawls' (1971) eponymous one, take such a characterless moral self as a starting point for their reflections. In turn, this means that the questions systems of justice set out to answer in the face of injustice concern 'what has happened here', and thereby guilt and blame. As Martha Nussbaum (2004: 230) argued 'guilt punishments make the statement: "you committed a bad act"', and do not purport to speak to issues of identity.

3 Injustice and the ontological assault

Before Shklar argued that we should view injustice as a phenomenon in its own right, Elizabeth Anscombe (1958) offered an in part overlapping and scathing critique of 'modern moral philosophy'. Her view was that its fixation on rules meant that it was a waste of time, as this 'law conception of ethics' could only be coherent if it was underpinned by a theological fundament. She argued that understanding morality and moral transgressions as rule-breaking necessarily points to the centrality of *sin* in our normative frameworks. The sets of rules that make up the law conception of ethics are supposed to clarify to the (potential) sinner when he or she has transgressed the rules laid out by God. But as Bernstein (2015) summarises her view, without God, it is not clear why broken rules should take precedence in our moral deliberations over broken bodies and ruined lives. Instead, the relevance of broken rules should rather be parasitic on the experience of broken bodies and ruined lives.

This already points to one issue in which viewing injustice as 'a phenomenon in its own right' can offer fresh insights (see also Pemberton, 2019). It offers the possibility to question whether injustice can be fully captured in rules, even rudimentary ones, and rule-breaking. In the second instance, it also loosens the connection between the experience of victims' ruined life and broken body and the rule-breaker. This offers the possibility to first situate injustice in the victim's experience of him or herself, rather than, or at least in addition to, his or her relationship to others, including the offender. The latter is a necessary feature of our conception of justice, in reaction to injustice, but not of injustice itself.

Like Bernstein I find Susan Brison's phenomenological account of her own victimisation to offer the type of 'adequate philosophy of psychology' that Anscombe deemed necessary to start developing a meaningful moral philosophy. Brison's (2002) account emphasises the two issues already mentioned about injustice: first, her account situates the primary experience of injustice in the way she views herself, and, second, her account stresses the importance of viewing injustice, first, outside of the framework of rules and rule-breaking. That is not only because she prioritises the first-person experience of 'broken bodies and ruined lives', but also because her account reveals that much of the stuff of this experience concerns matters of which she was not aware or took for granted

before being victimised. A rudimentary rule, at a minimum, contains expectations about what will or is supposed (not) to happen (see Yack, 1999).

Brison's experience can be described as an *ontological assault*. This term was coined by the medical-ethicist Pellegrino (1979) to describe the experience of sudden life-threatening illness, where it refers to the radical shift in the way a person experiences his or her own body. Where initially an implicit experience of unity and continuity existed, life-threatening illness can suddenly catapult the patient into experiencing a lack of unity and even opposition towards his or her own body. The term ontological assault, then, has a double meaning. First, it threatens the being, the existence of the person in question, while simultaneously revealing features of their being that were previously hidden or taken for granted, precisely in what it threatens. Philosopher Matthew Ratcliffe (2008, 2012) has conceptualised such shifts in the background experience of life in terms of his construct 'existential feelings', which refers to the affective experience denoting 'the intimate association between feeling, how one finds oneself in the world and one's grasp of reality' (Ratcliffe, 2012: 25).

Brison describes the consequences of her victimisation as a threefold attack on her self: her embodied self, her self as narrative and her autonomous self. The manner in which she describes the assault on her embodied self, closely resembles Pellegrino's perspective on life-threatening illness. It drives a wedge between two distinct relationships we have with our own body: we are a body, and we have a body. Maintaining the unity between the body we have, and the body we are and can control, is, as Bernstein (2015: 116) puts it, 'a moment by moment, social achievement, something I do or fail to do in accordance with more or less stringent social values and norms'. This frail, but nevertheless taken-for-granted unity was shattered by the assault. Someone else gained full control over her body, leaving Brison with the vulnerable and helpless body 'that we are'. Instances of torture also emphasise this experience, as they capitalise on the active use of the pain of the 'body that we are' to force us to do things – reveal information, betray others – that go fully against our deepest convictions and volitions.

Such betrayal by our own body is also the experience of rape victims, for instance when they might become sexually aroused during the attack. Brison emphasised another aspect of betrayal. Before the assault, she was attempting to conceive for the first time. Afterwards (Brison, 2002: 44):

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.

This twofold relationship with our bodies normally escapes our conscious experience: it speaks for itself that we live in our bodies and are lord and master of our bodies. But in victimisation this duplicity becomes apparent, precisely because the taken-for-grantedness is undone. The fact that it was previously taken for granted adds to the victims' distress as it not only makes it difficult to put into words, but also makes it difficult for others to understand.

This similarly applies to what Brison calls the attack on the self as narrative (see also Crossley, 2000). Our evolving life stories are a key element of our identity. People are storied animals, and the stories we tell about and to ourselves largely determine who we are. Narratives maintain our continuity through time and with our surroundings, our communities and our culture. Our interpretation of our own history as well as the manner in which we connect our future to our present and our past is based on and nested in (meta)-narratives we find in our culture.

Victimisation imperils this narrative sense of continuity. How can the victimisation be experienced as continuous with what went before, the present and the future? And how can a path towards the future be paved with the recent horrors still so alive in the mind? In the same way as Brison understands the damage to the embodied self, this experience can be viewed as a narrative rupture. It diminishes the life story as a meaningful whole.

This rupture also envelopes the sense of 'authorship' of one's own life narrative. It has been well put that 'we are never more (and sometimes less) than the co-authors of our own narratives' (MacIntyre, 1982: 213), but the extent to which one experiences to have any say in the further development of one's own story is damaged by victimisation. Even more so, the victimisation can give the experience that the life story has effectively ended. Brison's chapter on this issue is tellingly called 'Outliving oneself'. Terminated at the moment of victimisation, victims might experience 'narrative foreclosure' (Freeman, 2000). As Auschwitz survivor Primo Levi (1985: 75) expressed it, 'Like animals, we were confined to the present moment'. Herein lies another dire discovery: victimisation can divorce our sense of the present from the past and future, while our normal and taken-for-granted mode of being involves a temporality that includes past, present and future all at once. We become aware of this feature of our existence when it becomes damaged or even faces destruction.

Finally, Brison considers the damage to her autonomous self. The damage to her embodied and narrative selves already diminished the extent to which she was able to view herself as someone who is able to pursue her own final ends, the ends that determine the horizon of life. I already mentioned what the experience did to her wish to become a parent, while narrative foreclosure makes planning ahead and even perceiving a future daunting tasks. In the experience of injustice, sources of final ends are snatched from us – and/or sources of the pursuit of pleasure and happiness become places of anguish and despair.⁵

In her discussion of this facet Brison emphasises the crucial point that her victimisation underlined the relational character of her own autonomy as fundamentally dependent on others. For Brison, being a self, is not something that is first separate from the world and subsequently interacts with it, but should be understood as a 'being-in-the-world': a self that is created and sustained by others but that can also be destroyed by them (see also McKenzie & Atkins, 2010). Again, being-in-the-world is something that normally escapes our conscious

5 The former applies to the murder of a loved one, for instance, and the latter, for instance, to Brison's experience of wanting to conceive.

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thinking, we love others and goals outside of us, care for and about others and are fundamentally immersed in and connected to a world beyond ourselves. But the infection of final ends radically individualises the victim. The experience of victimisation offers the unwelcome insight that being-in-the-world is not to be taken for granted, that the connection to what we most deeply care about and love can be instantaneously taken from us. This is coupled with and strengthened by an awareness that exactly the taken-for-grantedness will make it difficult for others to understand what we have lost, while it will also make it difficult for us to articulate this experience. As Alice Sebold, a victim of rape, wrote in her memoir *Lucky*: 'I was now on the other side of something they could not understand.' To which she added: 'I could not understand it myself'. My colleagues and I (Pemberton, Mulder & Aarten, 2019) have coined the term 'radical loneliness' to describe this experience.

One of the most awful examples of this, of which I am aware, can be found in the book the *Holocaust testimonies* by Lawrence Langer (1991: 12):

Anna G. tells of a ten-year old girl who refused to go to the 'left' (toward death) after selection. Kicking and scratching, the young girl was seized by three SS men who held her down while she screamed to her nearby mother that she shouldn't let them kill her. According to Anna G. one of the SS men approached the mother who was only in her late twenties, and asked her if she wanted to go with her daughter. 'No' the mother replied, at which point the witness observes. 'This left a tremendous effect on me'.

Anna G. – and others, like Lisa Tessman, who discuss her case – view this as an example of undermining the unconditional nature of motherly love. Of course, the woman in this example cannot be held accountable for her choice. But the almost demonic feature of this situation – similar to the more well-known situation of Sophie's choice – is that forcing her to choose in this situation nevertheless seems to diminish this most profound form of love, making it relative to the circumstances.

Tessman's questions in her book *Moral failure* (2014: 171) cut to the heart of the issue. In the first place 'would every mother, myself included, do the same?'. Such love is an ultimate example of being-in-the-world, and of the manner through which we are connected to the goals that make us autonomous beings. But if this is only relative to circumstance, what does this imply over other, less profound forms of love and caring? And in turn, what does this suggest about our being-in-the-world? In the second place, Tessman argues that much debate about the moral dilemma for the mother or for Sophie is framed in the wrong terms. It is focused on the act, on what they should have done or chosen, or whether or not there was a right choice to make. Instead, as Tessman concludes, 'if a question about Sophie's choice can reach the point of articulation at all, it is something more like "how was Sophie destroyed by the choice that confronted her"'. The ethical relevance here is not on the act, but on the manner through which people can maintain a meaningful identity.

Here the ontological assault in victimisation comes fully into its own. Where it refers to the unity with one's own body in life-threatening illness, in victimisation it concerns the damage to/diminution of/destruction of the manner in which we exist embodied, narrative, temporal and social in and connected with the world. We are normally unaware of these existential feelings, also because they precede our consciousness, emotions and intentions, but victims are confronted with them in the shifts associated with narrative foreclosure and radical loneliness (see more generally, Ratcliffe, 2008).

4 Shame and guilt, ethics and morality

Brisson's phenomenology can serve to elaborate our understanding of the relationship between experiences of injustice and justice processes, through its connection to the phenomenon of shame, while this also offers the possibility to further elaborate shame itself and its distinction from guilt. In many accounts of shame in the literature it is not seen as a fully mature response to moral and ethical questions, being perceived to be superficial and heteronomous (see Williams, 1993; Zahavi, 2015). The idea is that someone who experiences shame is solely concerned with the manner in which his or her behaviour is perceived by others. People do not actually believe to have done something wrong when they experience shame, but solely regret being exposed or found out by others. Shame is then seen to be a function of losing face and in turn with attempts to salvage or defend reputation. In many of these accounts guilt is seen to be the more mature and more productive emotion. Feeling guilty is independent of being found out by others and is followed by remorse and sincere attempts to rectify the harm and damage caused.

In my view shame is misunderstood in this type of account, being viewed solely in terms that make sense in accounts of guilt: focused on an act, in an interpersonal setting. But there is more to the experience of shame, and it is neither solely nor primarily act-focused, while its interpersonal features are adequately understood only once they are interpreted in terms of the relationship with the self. The self is shame's primary concern.

There is indeed a core of exposure of a part of the self in shame (Zahavi, 2015). It is no coincidence that many languages refer to the genitals, using phrases invoking shame. The Dutch language, for instance, refers to that area of the body as the *schaam-streek* (the shame-area) and to the female labia as *schaam-lippen* (lips of shame). The exposure is not merely physical, as shame can also refer to other elements that make up our identity – our history, our relationships, our emotional life – exposure can refer to all of these things. Shame, then, is an experience (often no more than a moment) of realisation of a truth about the self. That can indeed be caused by an act, but an act is not necessary; it is the realisation and the experience that it concerns a truth about the self that is key. As Dan Zahavi (2015) writes, 'What is revealed in shame, although highly undesirable, is nevertheless experienced as familiar, as something that discloses the truth about oneself'.

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Another way in which the framework of guilt is transposed to shame concerns the former's characteristic as being an evaluative judgment: the actions in question are evaluated in comparison to a norm or a rule. But as Rukgaber (2018) recently pointed out, such judgment is not a component of the experience of shame. It is better understood as a retrospective attempt to understand this experience, rather than of shame itself. Shame is instead a type of existential feeling, more similar to pain than to a judgment.⁶

In this painful experience the social component is important, but again differently than in the guilt-caricature of shame. Bernard Williams refers to this as the 'silly mistake'. For many experiences of shame, no actual audience is needed, and an imaginary audience is also sufficient. And even this requires further qualification. The importance of taking the position of the imaginary audience is that it offers the opportunity to see ourselves as objects, including those parts of our being that escape our subjective control. In this regard, philosopher Giorgio Agamben (1999: 105-106) argued that

to be ashamed means to be consigned to something that cannot be assumed. But what cannot be assumed is not something external. Rather it originates in our own intimacy, it is what is most intimate in us [...]

A good example of this is indeed the 'gaze of the other' that Sartre (1943) described in his famous example of the voyeur at the keyhole. But this is not the only possibility: it concerns parts of the self that are in one way or another social in nature. Like German Seidler remarks, 'Das Schamsubjekt ist "ganz bei sich" und gleichzeitig "außer sich"'.⁷ The question the existential experience of shame poses concerns 'who am I', but it is an I that is 'created and sustained by others'.

Victim shame should therefore be located in the experience of objectification, which is a vehicle to exposure of a truth about the self. This exposure is most often, but perhaps not necessarily, a negative experience. Brison's victimisation is an extreme form of objectification. The rapist took control of her body and used it as an object for his own gratification. This gave her an insight into the ontology of her body and also exposed other ontological truths. As she said herself (Brison, 2002: 20),

It's been hard for me, as a philosopher, to learn the lesson that knowledge isn't always desirable, that the truth doesn't always set you free. Sometimes, it fills you with incapacitating terror and, then, uncontrollable rage.

The enduring nature of experiences of victimisation can also be understood in this light. As Jean Amery (1985: 34) summarised: 'Whoever is tortured, stays tortured. Torture is ineradicably burned into him, even when no clinically objective

6 See for the likeness of shame to existential feelings, in particular, Ratcliffe (2017: 112-114).

7 Seidler in Zahavi (2012: 320). Zahavi, D. (2012) Self, Consciousness and Shame. In: Zahavi, D. (ed.) *The Oxford Handbook of Contemporary Phenomenology*. Oxford: Oxford University Press.

traces can be detected.' This is so because the reality that is revealed in torture and other forms of victimisation, as J.M. Bernstein concluded (2015: 110):

It is a constant in the literature on torture and the camps that it is the victim, not the torturer, who carries the burden of shame, since it is the victim who experiences his body as no longer his, as beyond control...an involuntary thing, a thing of spasms, howls, leaks, bursting and shrivelling.

The question shame poses is therefore a different one than that of guilt. The latter concerns 'what happened here', and, more precisely, whether and if so who can be held responsible for what happened. That also refers to a truth, but not one that queries the identity of offender and victim. Indeed, in Williams' terms in conceptions of guilt the moral self is seen to be characterless, as knowledge of the moral law is provided by reason or by religious illumination and is therefore identity-independent. This means that

The structures most typical of shame then fall away: what I am, so far as it affects the moral, is already given, and there is only the matter of discerning among temptations and distractions what I ought to do (Williams, 1993: 94-95).

The characterless moral self is a staple of theories of justice. In John Rawls' (1971) theory that bears that name, it is also visible in his participants in the Original Position, behind the veil of ignorance, who reason about justice, without knowledge of their history, identity, relationships and social position. It is a secular version of what Nietzsche (1887/1967) criticised in terms of the *ascetic ideal* in Christianity. In this sense Williams is an heir to Nietzsche and also criticises the sort of morality to which questions of guilt are central.⁸

It is not necessary to fully endorse Nietzsche's and Williams's rejection of morality, to maintain that identity issues involved in victimisation (like those for offenders) have an ethical relevance, that questions of guilt obscure.⁹ That is also true when 'what happened here' is more explicitly approached from the perspective of the victim, as is the case in the concept of humiliation. Where questions of guilt privilege attention to the extent to which the offender transgressed a rule, and was sufficiently and intentionally aware that this was the case, the experience of humiliation would instead redirect our attention to the consequences of this act to the victim.

This is, for instance, central to Avishai Margalit's (1996) argument in his *The decent society*. In this book he adopts the experience of humiliation and its prevention as a cornerstone of his societal perspective. The core of humiliation is the experience of diminished self-respect on the part of the victim. The offender's act entails a negative, denigrating and even dehumanising message for the victim

8 See, for the similarities and differences in their positions, Clark (2000).

9 Indeed, as is clear from Clark's (2000) analysis, their rejection of morality should be understood against the backdrop of a particular interpretation of morality.

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that is subsequently internalised by the victim. That last issue is important, while Margalit also includes the condition that there are situations in which such internalisation is reasonable. A good example is that the degree of control or power of the offender over the victim means that the latter does not have any real freedom to escape the offender's message, as would be the case if the humiliation is committed by a societal, governmental institution. The victim of torture could serve as an archetype for these situations, and this is also true of the situation in the concentration camps. An observation about Charlotte Delbo's views on Auschwitz is a case in point:

The crushing reality of the place, the pain, the exhaustion, the cold, that would later congeal into a hardened skin of memory, prevented her and her companions from fantasizing that they were someone or somewhere else (Langer, 1991: 4).

Humiliation and victim shame therefore seem similar. However, the truth that is exposed in humiliation is that of the power relationship with the offender and the victim's inability to prevent or halt the humiliation at a particular moment. That is surely a more victim-oriented question than that posed by guilt. But this nevertheless maintains a focus on the relationship between victim and offender, coupled with the requirement that the humiliation can be judged as to its reasonableness. In my view humiliation endures in the victim's life, when it is experienced as exposing a truth concerning the self: when it thereby becomes victim shame.

In different publications I have referred to Margalit that this difference, the difference between 'what happened here' questions and 'who am I' questions can also be clarified by distinguishing morality and ethics (Margalit, 2002; Pemberton, 2015). According to Margalit, the first should be applied to the 'thin' relationship with others, with whom identity, history, familiarity and actual real-life ties are irrelevant. For those with whom we have a 'real' relationship – our children, loved ones, friends and the like – a framework in which we treat them as strangers does not suffice. Margalit therefore proposes to use the term 'ethics' to apply to our 'thick' relationships. Recently, I argued that Margalit's ethics of thick relationships can also be conceptualised in terms of identity questions (Pemberton, 2019). Where Margalit notes that the relationships with ourselves are also thick relationships, I have instead opted for a position that the thick relationships with others can also be understood in terms of the self. Instead of focusing on the fact that 'I have a thick relationship with my daughter', this emphasises that 'I am a father'. *Ethics* in these terms is not so much related to justified expectations that others might have of myself and my actions but of the ethical relevance of questions that concern the manner in which I, in my actions and experiences, maintain my own identity.

The crux of this section is therefore that the question that is central to *doing justice*, that of moral guilt, does not exhaust the question posed by injustice. In *countering injustice*, the ethical question concerning victim shame is instead central. To this the question of moral guilt is certainly not irrelevant, but solely ask-

ing 'what happened here' will often not suffice to answer the questions concerning 'who am I'.

5 Restorative justice and victim shame

Shaming and restorative justice have a long shared history. In my view the previous perspective on victim shame can serve to highlight the nature and advantages of restorative justice, while simultaneously suggesting the pitfalls and limitations.

Much of the potential of processes of restorative justice lies in their ability to view the concrete context, rather than rely on abstract rules that are subsequently applied to the lived situations in which people find themselves (see also Braithwaite, 2002). In that sense it is an attempt to move from 'broken rules' to 'broken bodies and ruined lives'. Moreover, it spends more time considering the 'who am I' questions involved in the experiences of victim and offender, in particular offering the recognition that the offence might be relevant to answering these questions but that they do not come with a fixed answer. Theorising of restorative justice comes with a real promise that acknowledgment of what has happened can serve as a starting process for real and profound change in the situation of those directly involved in offences and to (their connection to) their surroundings (see also already Christie, 1977).

In my view the relevance of shame is that the change in these processes is not viewed as a change of 'characterless' selves, who through the experience of guilt come to see the error of their ways, but through the real, relational and lived experience of people who become aware of their ability to change, to learn from past experiences and to reconnect to their actual surroundings (see also Pemberton, 2019). Much of the stuff that makes up restorative justice meetings, the importance of sincerity, of trust and of interaction, are matters for which abstract rules imposed from the outside are not fully irrelevant, but only matter insofar as lived and actual experience allows.

Above I have already noted my qualms with the unreflective use of the word justice, but the term restorative should also be treated with caution. It conveys the impression that what the process intends to do is to restore the participants, the relationships and/or the situation to a previous condition. In my view that is a remnant of the thinking associated with justice. There is an assumption that processes of justice somehow bring us back to the situation preceding the offence. However, as Elizabeth Wolgast (1987) argues in her *The Grammar of Justice*, following a murder, a rape or the torture of a child, the punishment of the offender and his or her subsequent suffering 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. In these situations any return to the previous situation occurs by definition, not by fact.

The notion of restoration, moreover, contains the view that we can understand the situation of the victim as being whole before the offence, that this wholeness is damaged/diminished/endangered by the offence, and that the processes in the aftermath of victimisation are intended to return the victim to this

wholeness (Pemberton, 2015; 2019). This atomised view of victimisation is not only at odds with the reality of the experience of victims, but also misses the point that the ontological assault in victimisation involves his or her sense of communion, the realisation of being-in-the-world, created and sustained by others. Reconnection is then a vital element of the process upon which the victim needs to embark, and this reconnection will need to incorporate the experience of victimisation, including the memories and the reality it exposed. This means that the victim's self, including these social aspects of self, will need to be remade in new ways. Overall, the process is perhaps better termed *re-storying* than restoration: a remade narrative that includes the victimisation and its aftermath, rather than an expectation that this experience can be undone, to return to the ways things were before it.

All of this fundamentally includes questions of 'who am I', which also points to the difficulty of determining in rules set from the outside of the processes through which these identity questions should be settled. The game-like quality of doing justice can be juxtaposed with the 'playfulness' of countering injustice. Graeber argued for this fundamental distinction in his analysis of bureaucracy, but it holds equally and perhaps even more so for the law. I have repeated this a number of times in other publications, but 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. The issue here is, first, that the activity of countering injustice, to which mediation and conferencing have much to offer, should be undertaken without the expectation of a clear end-point, if one at all, and without the view that processes and participants need to be defined from the outside, in advance and in abstract. The recurring difficulty to devise legal frameworks for restorative justice strikes me as being located in this spot, while it also suggests limitations to the type of positivist research into restorative justice processes that seeks to liken it to an intervention that can be fully described on the basis of general and context-independent processes.

However, this perspective comes with its limitations. Graeber pointed to the reality of 'dark play'. There is a destructive side to playfulness (Graeber, 2015). Revenge, for instance, can be construed as a playful reaction to injustice (Pemberton, 2015). Acknowledging the reality of dark play, including revenge, offers a rationale for criminal justice's focus on 'what happened here'. It is considered to be an important safeguard of his or her interests that he or she should be condemned for his or her actions, rather than for his or her identity. Again as Nussbaum (2004: 230) argued, 'Guilt punishments make the statement: "you commit-

ted a bad act", shame punishments make the statement "you are a defective sort of person".

The difficulty, however, is that this line of thinking hinges on the fiction of our ability to make a neat distinction between one's acts and one's identity (Williams, 1985), which subsequently is solely maintained in definition, but not in fact throughout the process. The issue is that my acts are an important, indeed crucial, part of what makes me a person. This does not mean that I oppose the adoption of this fiction in processes of justice. It strikes me as having a valuable function in protecting (or at least attempting to protect) the suspect's or offender's interests. That is particularly true if otherwise identity following an offence is understood as something that is resistant to change, remaining affixed to the suspect/offender, and therefore leaves a permanent Mark of Cain on the offender.¹⁰ This is in a somewhat similar vein to the presumption of innocence, which does not refer to a presumption taken literally but instead to a behavioural stance towards the suspect, to treat him or her as if he were innocent (Groenhuijsen & Kwakman, 2002). It is, or at least can be, in the best interest of the suspect to be treated as if he or she was innocent and can also be in the best interest of the suspect to be treated as if his or her actions can be separated neatly from his or her identity.

But as Groenhuijsen & Kwakman (2002) helpfully emphasised, a direct transference of the presumption of innocence to the position of the victim would have a counterproductive effect: it is not in the interest of the victim to be treated as a 'presumed' victim, but instead to be treated as if one has been victimised. Something similar is at work in my view concerning the separation of acts and identity to which our concepts of guilt aspire. That fiction protects the interests of the offender, but at the same time runs counter to the experience of injustice in victimisation as here the identity questions are key. The 'who am I' questions of victim shame are crucial to understand the injustice that has occurred, what is possible to counter this injustice and the extent to which we have succeeded in this regard. As Williams (1993: 94) put it,

[...] we shall hope to succeed only if we ask what kinds of failing and inadequacy are the source of harms, and what those failings mean in the context of our own and other people's lives. This is the territory of shame [...]

Such a perspective on shame emphasises its centrality to processes of restorative justice (see also Retzinger & Scheff, 1996). Full restorative justice processes become possible in the instances in which the suspect/offender voluntarily relinquishes the protection that the reduction from shame to guilt is intended to provide. This protection is a necessity due to the 'dark' side of victim shame. Success in the process, then, also hinges on shame-related mechanisms, including acknowledgment of shame and the possibility of transformation of identity, for both sides.

10 Elsewhere I referred to the 'thinning' of relationships in criminal justice as a means to protect the offender, see Pemberton (2015).

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The focus on shame offers a fresh perspective on the position of victims, of which much might also be useful for understanding the experience of offenders/suspects. There is the importance of *reconnection* – as a counter to the radical loneliness the victim might experience – and the similar importance of *re-storying* – perhaps rather than restoration – a self remade anew in narrative (Pemberton, 2019). These issues also refer to the situation in which the suspect/offender is not willing to participate, for it can also help us understand the form and substance of victims' rights and services, offering a vantage for their design and evaluation of their success. In addition, re-storying and reconnection are also familiar themes in the literature on narrative criminology (e.g. Maruna, 2001) and on shame management in restorative justice (e.g. van Stokkom, 2002).

6 Conclusion

In a previous article in this journal (Pemberton, 2019), I aligned the line of thinking advanced in the previous sections with Lode Walgrave's maximalist perspective on restorative justice. In short, his view is that restorative justice should resist its limitation to a particular set of processes, finding, instead, any action that contributes to the goal of restoration to be restorative justice. It is clear from the previous sections that I have some hesitation with 'restorative' and have argued for its replacement or reinterpretation as re-storying and reconnection, while I have also suggested the contradictions between the focus on lived experience, context and injustice in restorative justice and the rule-based, context-independence of justice.

But terminology aside, I would argue that the motivation underlying the maximalist perspective is to seek to develop a full-fledged alternative to the current approach to crime and victimisation, which will still include formal criminal justice processes, but where recourse to them is sought on the basis of reasoning endogenous to the maximalist perspective. I would like to suggest that the perspective of countering injustice, outlined in this article, does just that. It offers a line of argument that centres on the understanding that the first question concerning the experience of injustice fundamentally concerns identity, and that approaches to countering injustice need to incorporate the 'who am I' or 'who are we' questions that are absent from our processes of justice. This does not preclude narrowing these issues – the move from shame to guilt – to the type of 'what happened here' questions that are the province of our systems of justice, but it does so specifically on the basis of and in acknowledgment of the inherent complexities that identity-based questions can have. The move from shame to guilt offers valuable protection of the suspect/offender, who is by this token spared the possible ramifications of the 'dark play' to which a victim might feel compelled in answer to his experience of victim shame.

But this then comes with the realisation that even in these situations, questions of identity maintain their ethical relevance to the experience of victims. The perspective on victim shame outlined in this article, as well as the emphasis on re-storying and reconnection, does not lose its purchase on victim experience when

the justice process itself is restricted to establishing guilt. Indeed, as these will often be the situations with the most at stake, the more severe forms of wrongdoing, with the most far-reaching implications for victims' sense of self, facing down the difficult and sometimes insoluble questions of what can be done is more rather than less important. Pemberton and Letschert (2017: 34) once equated victimology's sad truth as a Catch-22: 'precisely where countering injustice is the most difficult to achieve and even the most difficult to imagine, it is also the most needed.' In doing so, pausing to ask 'who am I' or 'who we are' before or instead of 'what happened here' is, in my view, paramount. The answers that our current processes offer to the experience of injustice might not be as incomprehensible as Deep Thought's '42', but they still often seem to be talking at cross purposes to victim experience. The answers the type of maximalist position on restorative justice, outlined in this article, can offer might still fail to be fully satisfactory by a wide margin, but at least they will be answering the right questions.

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