Chapter 13: Contingency in Obligation

This paper begins with an exploration of a set of tensions that arise between some ambitions of moral theory and the role of morality in the regulation and construction of ordinary life. It ends with a conjecture about moral justification in a moment of radical social and constitutional transition, and a challenge to the view that when such moments are politically necessary they may be normatively discontinuous with morality. The route from beginning to end is by way of an account of various kinds of contingent obligations. The idea is that in coming to terms with contingency in obligation within morality we acquire resources to extend the reach of moral justification across the putative gap between morality and political necessity.

An important strand of modern moral theory aspires to capture the connected standards of universality of rule or principle and the unconditional nature of obligation. This can come to be regarded as the source of an ideal of sorts: that there be universality in the content of obligation as well.[1] Our moral lives, by contrast, are run through with obligations that are contingent, in form as well as content, specific to here and now. We are answerable to moral demands that arise from evolving institutions as well from the vagaries of human life. One response from the side of theory might find our moral lives to that degree imperfect. I doubt that could be right. A different response would take the measure of the contingency as a challenge to the ambitions of moral theory.[2] Once we appreciate the many different ways in which obligations are contingent, where things genuinely could have been otherwise, it might be wondered how we could support the claim of objectivity thought necessary for the unconditionality of obligation. In some cases the answer is easy, but not in all. My plan is to approach the topic of contingency in obligation in the spirit of this challenge, examining contested claims from the bottom up. I regard the ways

we engage with morality in both ordinary and unusual circumstances as providing data, and adopt the working hypothesis that some of the difficulties we encounter may have their source in the ambitions of moral theory, or in the way we interpret them, rather than in the facts of moral life. Reversing the angle of inquiry can often reveal occluded aspects of things; in this case, one hoped-for effect of the shift is some increased insight into the conditions that can give rise to moral obligations.

Some of the questions I will consider may appear more empirical than philosophical. This oddity of method is appropriate to the subject: ethics is a boundary discipline, beholden both to its internal standards (of correctness in judgment and action) as well as to the conditions of the practical world it orders. This can leave it open, in particular cases, to contest which sort of question we ought to be asking.

Consider, in this light, an initial piece of data and the consequences that flow from it for moral theory. Knowing in advance where our obligations lie, what claims of duty we may encounter, is not just practically useful for planning, but essential—arguably necessary—for living a coherent life.[3] If compelling moral demands, personal or impersonal, may be lying in wait for us around any corner, we would have to set ourselves to anticipate and manage them; and if we cannot know in advance what they are, it is reasonable to think even the best of us would be rendered less able to invest ourselves, our energy and attention, in the projects and relationships that make life worthwhile. A great deal of practical uncertainty of any sort tends to be bad for us; moral uncertainty is especially problematic because moral demands, when they do show up, can override other concerns. This fact, on its own, pushes moral life to be conservative, resistant to change. And because most of us live locally, embedded in complex social and institutional networks, the conservative content of morality that we encounter will also often be local: promises are to be made *this* way, help to be offered like *that*.

These features of moral life—that it resists change and has a local face—have other sources as well. Morality is important in and to our lives: it is to be maintained against strong passions, and it can require the sacrifice of valued interests. Such importance would be belied if morality were inconstant or readily changed.[4] And since it is part of morality's work to mold and direct institutions and relationships, it must appear in a form that fits with what they are locally like, else it would not be able to provide the constancy of direction that is among the conditions of flourishing for both institutions and individuals.

But the story of what we want from morality—the kind of thing we want it to be—contains elements that suggest the constancy or stability of morality and its local face may not be in total harmony. We might want the stability of morality to arise not from its pragmatic encounter with local mores or our psychological needs, but to reflect the fact that it tracks or expresses some objective truth about the way things ought to be. The local aspect of lived morality suggests, if not full-blown relativism, something other than the universality of moral principle that is often regarded as the telltale of objectivity.

There is also the matter of moral correction and moral change (they are not the same). One might think: the more local the shape of our moral understanding, the more likely it is to be wrong, in large ways and small. This would create problems at different levels. There is the potential challenge the occurrence of local error sets for moral stability (assuming errors discovered are things to be corrected). But also, the very unavoidability of local error might make one think that the project of looking at "lived morality" cannot belong to philosophical inquiry. At best, perhaps, it belongs to its less formal department of engineering or office of pragmatics—applied ethics in a literal sense. But is this right? Inquiry directed at determining correct moral principles and standards is certainly sharply different from a project of understanding the conditions needed for agents in actual social settings to absorb morality and

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negotiate moral requirements. But why think it follows that the latter kind of inquiry is normatively, and so philosophically, limited?

Suppose that the Doctrine of the Double Effect is a true principle of permissibility (harms that arise as unintended but foreseen effects of overall beneficial action count less than they would if intended). The lesson of double-effect would be lost in a moral space that was dependent on strict performance standards (imagine a society in which traditional forms of action play a central and extensive role in social life). Where trust depends on external signs, claiming that one's intention was not directly engaged with a harm caused may not be a credible way to mark a moral difference.[5] But even if this were a social or psychological fact, it would not challenge the correctness of the doctrine's standard. What is left to ask is whether it is necessarily a good thing to have (or bad to lack) the doctrine playing a significant role in moral practice. How could that be a philosophical question? One might equally ask: how could it be anything else? It is certainly not an empirical or sociological question ("a good thing" in what sense?). It is a question about the contingency of moral content and its significance for claims of obligation. I don't see how we can understand what morality is about without answering it.

If one of the projects of morality is to make the world different, more habitable, more ordered, shaped by our understanding of what is right and good, then the situated agent, living in some specific social space, has to be in the forefront of philosophical reflection. Against an assumed background of objective moral principle, we will ask agent-centered epistemological questions: how should we decide what to do, how to be, given where we now find ourselves? There is precedent for asking the question this way in Kant: morality as a philosophical subject must have its pure or rational part, where we investigate the nature of its authority and the objective principles that lie at its foundation, *and* it must have an empirical part, where we come to grasp what we are to be like and what we are to do—here and now, and towards the future.[6]

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But then we do need to make philosophical (as well as practical) space for thinking about moral correction and change, and so find a way to manage the contingency in obligation that results.

As we shall see, not all contingency in obligation raises problems. Sometimes the contingency is in secondary principles or meta-rules of response to moral failure, but there is unconditional obligation at the ground level for agents acting. Less easy to accommodate would be ground-level obligations that impose significant burdens but that arise in ways that cannot be anticipated: where the kind of thing we may be required to do is not in or implied by our lexicon of duties.[7]

I think there are difficult obligations of this kind, and that they come about chiefly in conditions where creative solutions to moral difficulties are needed or attempted, often in the space between individual morality and politics. At the limit, there are occasions where the morally innovative or improvisatory acts of some can obligate all. Such a class of obligations would raise questions at many levels: about the closure of moral theory, about the stability conditions for coherent moral action and character, about the conditions of legitimacy for the creation of new obligations, and about their justification.

In what follows, I start out by describing some of the relevant data about our moral lives and circumstances that include the easier to tolerate aspects of contingency in obligation. After canvassing a range of harder cases and the resources morality requires to manage them, I take up the more radical idea of allowing for moral improvisation in moral theory and deliberative reflection. This will in turn provide a framework for examining the very different kind of contingency where political necessity can seem to override or supplant the authority of moral justification. I approach this topic of by way of a real case: the obligations that arose with the creation of the South African Truth and Reconciliation Commission. Although the context is political—the establishment of a new constitutional community in post-apartheid South Africa—

and with the creation of the Commission came abrogations of fundamental rights and the imposition of new obligations, I aim to show that justifying what was done by appeal to "political necessity" is not necessary, and that using resources drawn from other forms of contingent obligations, the contested actions can be located within the extended scope of morality, and that the new obligations, though radically contingent, are morally justified.

I

Resistance to contingency in obligation, or to any moral novelty, runs deep, and has its source in the way morality figures in our everyday life. The normal moral agent—someone well brought up, with no errant psychological spikes or troughs—will have integrated determinate moral concerns and moral limits into the content and structure of her projects, even into the possible objects of her desires.[8] In ordinary circumstances, she will move seamlessly in the space of pragmatic and moral reasons. For the most part, moral questions will not and need not arise because her actions and choices are already responsive to the moral norms that apply. Politeness, offering a helping hand, queuing, honesty, respect, and the like, are not separate from what a decent person wants to do.

Some of this just belongs to practical competence. We make judgments and valid inferences without overtly thinking about them, either because we just "see" connections, or because we have acquired some appropriate habits of response—the way an experienced driver responds to a skid, or a competent chess player engages a defense. Although we might say that someone who responds in this way does so "without thinking," we also take her reasons to be accessible, or reconstructable: we know a lot about what we are doing, and why we do this rather than that. There is nothing peculiar to morality in this, though morality may require that we be able to look at things in a finer grain, or with more focused attention, depending, for example, on the kinds of responsibility we have for things going wrong.[9] A little lack of attention to what we

are doing in wandering through a market is of negligible significance, a benign absent-mindedness or fugue; we can't be so easy on ourselves where what is at stake is important to what we care about, or where our attention is under moral direction.

A different source of moral seamlessness, one most intimately related to our agency, runs even more quietly in the way we approach choice and decision. There are reasons not to careen into people as one passes through a crowded lobby, and there are reasons to express gratitude for a favor done. If you ask me why I said "thanks," or avoided collision with the someone in my path, the reason I retrieve does not explain why I did "this rather than that," for there was no *that* for me in the space of possibilities. This restriction of the space of possibilities (of actions as well as objects of action) partly constitutes our moral character and is a necessary condition of virtue. Decision in such cases is not a result of choice or calculation. In accounting for this, we are drawn less to analogies with skills and more to field features of perception. From where I stand, there is no path through the space now occupied by someone else, just as there is no question about whether to express gratitude—though some, to be sure, about how best to do it. However we account for this field feature, the plain fact is that the world of the normal moral agent has a moral shape.

Though morality aims to shape the world of human action, parts of it are made to order. Whatever the account of fundamental principles, morality is responsive in certain obvious ways to the basic needs of human existence. But while it is neither arbitrary nor contingent that pain and suffering figure centrally in moral thought, how they count, and whose pain and suffering counts, may be, to some extent, an open question. I do not mean that we just decide these matters—that there are no standards here—but rather that there may be some indeterminacy, something we must fill out. Between the blue-blood's hangnail and the loss of a species of toad there is a lot of space for working out costs and harms and responsibility. But even if the

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standard of obligation we arrive at is in some sense negotiable, because we are in better (or worse) circumstances, or understand and are able to do more, it is a standard nonetheless—not an arbitrary rule—as there is justification for the lines being drawn where they are. The fact that even core morality has to be filled out in these ways does not render it less objective, nor less fixed from the point of view of the acting agent.[10]

Another locus of moral contingency has a different explanation. When land, or the means of production, are owned privately, we are in a specific space of rights and permissions that shapes much of what the world looks like to us. But while property must be stably organized in some way to establish rightful possession, there is no unique way of doing this: things could have been—still can be—otherwise. This kind of contingency of obligation is well accommodated by a two-level theory: abstract principles reflecting fundamental needs, interests, and values, which offer direction for the construction of more determinate rules and practices. Although which rule or standard is adopted is contingent, again, for the normal agent acting, the obligations and duties are set.

However, the same features that morality must have if we are to be able to live in its terms—that it can figure in the acquisition of basic practical skills, organize perception, and set the background conditions for everyday life—are, when internalized for these purposes, sources of tension and resistance if the content of our duties ought to change, or if we are presented with a region of moral concern with which we have little experience. Our practical skills, our sense of salience and confident response are most at home in set practices. Yet, somewhat paradoxically, it is just these abilities that must be called on if we are to be appropriately responsive to new reasons in unfamiliar circumstances: to absorb significant change without harm we require the stability of character and moral self-confidence that normal moral life provides. So there is something a bit perplexing here in the terms of fit between good or normal moral character and

developing demands of obligation.

It strikes me as doubtful that there is *an* ideal type of character fit both for negotiating normal action and conditions demanding change. Indeed, there are as likely to be many ideal types as there are to be any. We require certain abilities, but neither the route to them nor the psychological configuration in which they reside need be of one kind. One reason for this is that normal character development is not cost free. We each come to adult agency with a mix of tendencies: some beneficial, some inclining us to cause harm.[11] If we are lucky in life—in choices and circumstances—our flaws may not tarnish our record. If we are not lucky, the very tendencies that give us confidence in action may turn out to be ones we ought not rely on.

One kind of bad luck can occur when social circumstances evolve in morally unexpected ways. Patterns of behavior that were normal and inoffensive may be revealed to be sites of injury; something once thought charming comes to be regarded as demeaning, even an expression of aggression or dominance. Reasonable claims of innocence are no protection against fault.[12] When this happens, reactions are often defensive, and sometimes hysterical; the world can come to be an alien and hostile place, and acting well can seem out of reach. The comfortable fit of seamless requirements and confidence is replaced by a moral demand that we not only acknowledge uncomfortable truths, but also remake ourselves in their light.

If a significant degree of self-knowledge and self-reform is morally required, the recognition that much of our self-knowledge only comes through trial and error, while self-reform is, at best, an uneven process, ought to bear on how we frame notions of responsibility, blame, and obligations of self-improvement. We do not expect people to know themselves *ab initio*, but we do expect them to learn from their mistakes. Likewise, though we cannot expect people to develop independently of their upbringing, we do expect them to move beyond the limitations of what they are taught. Our account of character and obligation will then have to

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have a view about how to make responsible moral agents—what sort of upbringing, in what conditions, produces agents who are able to generate and respond to new knowledge about themselves and their environment. The processes are interdependent: the content of known morality is reflected in our moral training; moral training includes abilities for self-shaping; these abilities make us responsible for creating and sustaining our moral character in the face of new knowledge; and so we must become trainers of ourselves. If ever there were a virtuous circle, this is one.

Of course, more than increased self-knowledge is involved. If the world in which the normal agent acts throws up new questions, unanticipated relationships and human-made circumstances, we should expect to have obligations to initiate moral inquiries, to expand the base of relevant knowledge, to engage with and excavate morally relevant history. This too will put pressure on our moral understanding, on the type and content of the obligations we take ourselves to have, as well as what we need to be like in order to meet them.

II

Details aside, many of these points are obvious. Normal moral agents are made out of messy stuff; the contexts of action are to some degree opaque; ways in which we change the world (including ourselves) will often turn around and change morality. A natural response might be a reminder that the lived morality of actual agents is not the morality of philosophical or moral theory. And perhaps we might say this in the same spirit with which we say that our ordinary experience of and beliefs about the world is not science. But hard science is not an ideal of ordinary belief, whereas many regard the content of moral theory—at least its principles and procedures of deliberation—as something to be purposefully realized in our actions and practices. This is perhaps why some think that the facts of unavoidable failure and limits of our

practical abilities and our moral knowledge, when coupled with the contingencies the world (and other people) may throw at us, point to a different kind of two-level moral theory, not now abstract principle and rules of application, but a moral analog of what, in the case of political institutions, Rawls called "nonideal theory."[13] There's a lot to be said about nonideal moral theory. I want to say only a little.

Parallel to the political case, nonideal moral theory negotiates two regions of difficulty. First, there is a moral analog of institutional noncompliance. Without assuming anything very bad about people, there is an expectable degree of moral failure: promises will be broken, lies told; anger will erupt into violence. Second, parallel to the problem of unjust institutions, there are the seriously immoral actions of some that pose practical and moral threats to others—where, for example, violence or coercion compel people into situations in which impermissible actions or ends are (rationally or morally) unavoidable. Nonideal theory will then introduce strategies for managing propensities to failure within the normal (norms of apology, blame, and repair), and principles for permissible resistance and response to wrongful actions, including, especially, resistance and response to those kinds of actions that make persons of moral integrity vulnerable to the purposes of wrongdoers.

Morality could also be nonideal in a more ordinary sense. Failures of agents might show lived-morality to be in some way deficient if they arose because attempting to follow moral rules or ideals imposed large psychological and material burdens, or routinely involved one in moral conflicts, or because the circumstances or the moral rules made it too hard or too time consuming to determine what to do. Or it might be nonideal because of the uneasy fit between morality and the social institutions in which moral action takes place: for example, economic institutions that produce severe inequalities can make the unadjusted individual burdens of care too high. Considerations of this sort are sometimes brought forward to favor "common sense" and rule

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conceptions of morality, so that the interface between agent and principle is made simpler, or burdens are shifted from individual to group.[14]

Of course not all moral failures are at the level of individual moral action. We might have available to us a set of principles that would get us closer now to a better state, but which, over time, would do less well than some other set whose flaws have more immediate untoward effects.[15] Or we might have a region that calls for procedural regulation and no fully adequate procedure is available. We might have practices that in one case or another fail to realize their defining purpose, but overall guide well. Though a moral practice is constituted by its rules, it is justified by its purpose. Given unavoidable imperfections or shifting demands of circumstances, it is in principle open to change, adjust, or fine-tune the rules (different metaphors will suit different occasions). Most practices can survive such changes; they are organic in that way. But practices must also be somewhat resistant to change and challenge: if they were not, their rules would lack authority.

In the political case, nonideal theory presupposes as an ideal an objective to be achieved (for Rawls, the "well-ordered society"). In the moral case, it is hard to say whether we should be looking toward a moral order of things (a kingdom of ends) or perfect virtue, if they are different, or even if there is a sense in which the ideal in morality is as something we are to promote. (I doubt that it is. If what made one think that lived morality calls for nonideal theory is that its requirements need to be adjusted to the limits of agents *as* human agents, then it really is hard to get a grip on the notion of the ideal.) We may be morally obligated to promote just institutions, so that given an appropriate conception of justice, and of the limits of social life, there is a well-formed notion of the ideal that nonideal theory is to promote. But we have no similar obligation to promote the institutions of morality (whatever that would mean).[16]

That morality must have ways of responding to the fact that ordinary agents may not

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always act well, or that we have practices that both require and resist adjustment, does not by itself point to an ideal condition where things would be otherwise. It seems equally sensible to think that the point of morality and such facts of human limits are in important ways co-determining. More malign failures do not in the same sense belong to morality: from its point of view, action that undermines the grip or sense of moral principle is always unexpected, even if not uncommon. That is why normal morality cannot prepare us for all the ways moral action may be subverted, or for what to do when we seem compelled to actions morality (even strategically adjusted morality) does not permit. For different reasons, but to similar effect, normal morality cannot tell us how to respond to new circumstances or unexpected revelations about familiar ones. But of course we will have to respond in each kind of case.

This leads me to think that what is at issue in many cases is less about ideal and nonideal theory than about the need for principled ways to extend morality beyond the boundaries of normal moral action. For that we will require access to deliberative resources—fundamental principles of action and volition, or conceptions of our relations to one another—that support general standards of correctness for actions and practices. We don't appeal to such principles in ordinary judgment, but they provide the terms of justification for the obligations and duties we take ourselves to have and thus make possible, if anything can, the extension of our moral understanding into unfamiliar territory.

III

In most of the regions so far canvassed, contingency in obligation is handled in one way or another by additional rules (or action-guiding principles). In some cases, the rules are socially or situationally specific determinations of higher-order principles; in others, they are reactive responses to kinds of failure that are frequent enough and/or serious enough to require set terms

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of response. But not all contingencies are susceptible to this sort of management. Whether because they are more extreme, and so disrupt the very idea of establishing rules (global catastrophes and the other "what ifs" of the overheated moral imagination), or because they are singular and seem to challenge our terms of justification, some moral contingencies require a different kind of resolution.

As noted earlier, one of the problems one might fear contingency in obligation would introduce is instability in the content of ground-level duties and obligations. Instability is to be distinguished from mere variability of moral requirement. That can be normal, a function of changing conditions that affect action and our relationships or commitments to others. Making a promise, I cannot know with certainty what I will have to do. Being a parent, I cannot know what will be required of me as my child develops, has unexpected needs, or extends my liability. In a sense, this form of uncertainty is already contained in the obligation taken on. If I am not prepared to adjust my activities as events develop, then I have not undertaken the obligations responsibly in the first place. Typically, in incurring an obligation, we accept an authorial position: a commitment to make the narrative of self and some others come out "just so."[17]

Among the things we learn quickly is that our authorial control over the happenings in the world, even in our immediate environment, is limited. It is not just that we have limited powers, our actions are hostage to the unexpected. In the face of this, a prudent agent takes steps to minimize vulnerability: we trim our projects and ambitions; we construct a social world that helps make the effects of others' actions more predictable, and our own intentions more likely to succeed. We do not obligate ourselves if there are too many intermediate steps, or our success is dependent on the unpredictable actions of others. Still, unexpected actions and events are inescapable, and if something significant hangs on it, they can alter what we may plausibly have

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committed ourselves to do.   However, while the normal moral agent cannot be assumed to know or anticipate what is happening right now half-way around the world, or what lies she is being told by authorities, or what increases in knowledge will show to be morally salient, things will happen, things probably are happening, that will make what she should do different, and even different in kind, from what she can now expect. This introduces a different order of uncertainty and contingency in the range and content of our obligations—not something that we can, with prudent foresight, prepare for. One curious effect of absorbing this is that it makes morality—at least, moral knowledge—more like science than we typically think. The problems and questions we are taxed to answer expand. We may uncover new moral particles or systems or facts about our psychology that our "old science" cannot accommodate. We revise the way we understand the connections (causal and moral) between material conditions and obligations. And we know that the expansion of our knowledge will continue.[18]

It will follow that although lived morality (our ethical life) is by its nature parochial, as it must be in order to play its role in anchoring the conditions of everyday life, morality itself is not parochially limited. This creates an in-principle tension between the moral facts, as it were, some of which are visible, others newly encountered or excavated, and the desired or desirable seamlessness and stability of ordinary life. While not all tensions are signs of something gone wrong—they are inherent in many normal processes of growth and development—the tension between the conditions of ordinary lived morality and the scope of morality *tout court* is not a piece of a natural process, though it is, or is now, a tension we cannot avoid.

We might then think of the morality we live as a working model—an expression of moral understanding at a time, articulated in terms that cohere with the social and political institutions in which most of our action will take place. The coherence is not primarily about cognitive

consonance. Many social institutions—law, educational welfare agencies— are moral

institutions: they exist to do moral work, or to make moral action and relations possible.[19] Some

moral practices are elaborated in terms that make little sense apart from local ways of life (the

significance of the hand-shake). This degree of embeddedness partly explains why we cannot

expect lived-morality to change easily, not even in response to increased moral awareness and

discomfort. Because so much moral work is done without much thought, or done for us, even

the appearance of something new to consider can be disorienting.

This is most easily seen at the outer limits of moral embedding, in the norms of manners

and etiquette. It can be difficult to think of these norms as part of morality since they regulate

modes of dress, patterns of socializing and eating, historically meaningful rituals of civility.

These are not the kinds of prescriptions we think of when we bring "morality" to mind, yet they

provide the visible form and many of the daily terms of a moral way of life. It is not far-fetched

to say that manners and etiquette articulate the outward form of respect—moral business, if

anything is.[20]

There are predictable costs at this end of the spectrum. The embeddedness of etiquette in

the minute details of living partly explains why it can so easily devolve into high silliness; it goes

seriously wrong when it vies for the content and not just the form of our (usually non-intimate)

relations. And since etiquette is often also used to provide marks of class, it can seem important

to reject it outright (or just ignore it); at the least we should not confuse this aspect of its concern

with moral ones. Still, one needs to proceed with care in deconstructing etiquette's social

pretensions: they are often ossifications of something with a point, and not as costlessly

rejectable as we (or righteous adolescents) might think. The way we meet and greet one another,

how we behave in groups and public meetings, what we signal with what we wear, must have

conservative inertia if they are to perform their function.[21]

Although ordinary morality is essentially conservative, it does change. What drives change is no one thing, and some of the sources of moral change can be both elusive and morally complex. Certainly not all moral change is for the good. And some changes only appear to make things morally different, especially when they are not well integrated into agents' moral understanding. On the negative side, we know that fear or trauma can cause persons or groups to regress. A strong shared emotion sometimes renders ordinarily decent individuals open to actions they could not straightforwardly countenance. What they then do may be hard to explain in terms of their standing intentions and goals—hard for them as well. Better explanations will appeal to psychological effects: some kind of causal mechanism that affects individuals when they are in group situations. Historical examples are all too common: mob violence, massacres, lynchings, various acts of religious and ethnic extremism, all participated in by ordinary persons. Such episodes may even attain a perverse kind of normality for some sustained time.[22] Positive change also can occur in the absence of a deliberative cause and without a sustained effect on moral life. Individuals, even whole communities, can rise to something that surpasses their own expectations of what is possible. Many of the best known examples of extraordinary actions are taken in response to actual or threatening eruptions of violence, human and natural.[23] They too can become normal for awhile, yet they rarely bring lasting change to the morally ordinary. Like their physical analog, when the rush of moral adrenalin abates, the new powers and interests are lost and devolve into tales of heroism.[24]

From the point of view of moral theory, both kinds of alteration are matters of psychology that need to be monitored and managed. Lessons may need to be learned, cautions and barriers introduced. However compelling at the time, they may not represent a route to

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moral change that morality itself can recommend. This can happen if the change relies on

abilities and character traits that cannot survive the moment, or the actions are not ones that

could flow from or even fit with agents' understanding of their obligations.[25] This is not to say

there are no questions about obligations one might come to have when such temporary moral

phenomena occur. It may seem easy to know what to do or avoid when the issue is others' evil,

but it is less obvious what we are obliged to do when surrounded by members of our community

caught up in a desire to do some extraordinary good. It seems unlikely that those not part of the

emotional surge could be obligated to act in accordance with the new, temporary, standard.[26]

But I think they may not act in what were the old, ordinary ways, if this now would compromise

the good attempted. Collective increases in public kindness, or a willingness to help strangers, or

to rescue the persecuted, would seem to impose obligations on all in ways that even widespread

acts of personal heroism do not.

  The kind of change that morality can most readily welcome arises from deliberative

responses to new or newly available (or newly effective) knowledge about events or changes

(that may or may not themselves be the product of intention or plan). A new possibility of action

is identified as a way through or around some moral difficulty which either the new conditions or

the new knowledge generates. It may not matter *how* a possibility is identified; it matters a great

deal that a connection be made with available resources of obligation and justification as a

condition of affirming the possibility. Such interventions may then work their way into shared

moral knowledge and practice. (School integration in the 1950s, partly as a response to

psychologists' reports about the stigmatizing effect of racial segregation is an example.) If, as

we do with our knowledge of the physical world, we have reason to expect our moral knowledge

to in this way increase and change—knowledge of what may be required of us, as well as of the

possibilities and difficulties of successful action—then an openness to the ongoing intentional alteration of the landscape of obligation ought to be an integral part of the morality we live, and itself a source of distinctive obligations. This kind of openness does not ignore the concern for the stability. Only some forms of stability require conservation, others involve maintaining balance, or securing a new equilibrium. The question is then not about stability per se, but about the right kind of stability.

IV

This comparison with our physical knowledge might suggest a simpler theoretical account. Wanting to sustain the objectivity of moral judgments and the stability of practices, I have emphasized the role of deliberative continuity: we deal with moral contingency and change by reknitting the moral fabric, as it were. The focus is on how things are for *agents*, whose choices and responses, guided by deliberative principles, construct a moral world. But suppose one thought that moral theory could accommodate the full range of cases because all possible obligations and duties are, in quasi-Leibnizian fashion, already contained in the concept or extension of our moral principles. It is a tempting picture, for it treats contingency as of mainly practical interest, on a par with adjusting one's financial practices to the on-going interpretation of the tax code. On such a view, although we do not and cannot know what all our obligations and duties will be, for any set of circumstances, what duties there are is determined by the moral principles that apply. Our efforts may be partial and approximates, but the epistemic norm for moral judgment and deliberation is getting something right in the matching sense.

There are many reasons to resist this picture, but chief among them is that it leaves no place for the (anti-rigorist) idea that individuals and groups can produce moral responses to

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circumstances that were neither epistemically nor in any other sense "already there" —that their choices and actions can enact new norms, something created or improvised. We might want to go further and say: not only can a new obligation not be conditionally contained in prior moral principle, it need not be a uniquely correct response in the circumstances. So, for example, the suspicion that judgments of merit were affected by gender bias in orchestral auditions or in the refereeing of academic journal articles led some to introduce blind review (hearing but not seeing a performer; excising identifying information from a manuscript). Once introduced, I think it was clearly obligatory to adopt such measures, whether or not there might have been other means of acknowledging equity concerns (point systems, quotas).[27] Partly this was because the remedy was compelling, but also, an improvised remedy will often transform the way past norms of action are understood, potentially changing the significance and/or content of known rules and principles, so that what might have been another means no longer seems so (e.g., once the problem is identified *by the solution* as one of bias in judgment, not of numbers). All of this adds to the reasons for thinking the explanation of contingency is not a matter of epistemic access. Even failed moral improvisations—ones that are not intrinsically flawed, but which fail, for example, because of bad timing, or lack of sufficient fit with prior values—can create new spaces of moral possibility.

The phenomenon of improvisation, though a bit mysterious, is not really exotic. Most of us are familiar with the moment in the work of a group when someone recalls a past strategy or looks something up that enables the group to solve a problem. Much more unusual is the person who can, at the same kind of impasse, see a novel way of acting that will not only solve the problem, but through her grasp of the problem and its solution, transform a group's conception of its powers and even of its charge (even more rarely, this may happen collectively). Most

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forms of moral problem-solving are well understood in the first way: involving factual discovery and reliance on precedent, they pose no strain on any reasonable conception of how morality works. But not all are like this.

I think that morality, and so moral theory, must allow for improvisation, both in its sense of system (that it is open to change not only *at* the bottom, but *from* the bottom), and in the way it acknowledges (and educates) the abilities of agents to effect moral change. In this respect, morality is unlike other practices with which it is often, at least formally, compared. It is not like games, which typically involve fixed systems of rules; and it is not like the law, which can change, but only through the activities of designated authorities (judges, legislatures, etc.). No one has authority to change moral norms. Changes that morality can countenance come by way of the responses of individuals and groups that mark out a direction of action that is held open to challenge on grounds of correctness of fit (fit both with the problem to be solved and also with the rest of morality) and of the legitimacy of costs imposed. It may be that a novel response, once understood, will fit easily with familiar moral principles. But it may also happen that in appreciating the force of an improvisation, one is moved to rethink or reinterpret familiar principles and values. Sound methods of moral justification need not regard the prevailing understandings as fixed. A culture's reflective engagement with these challenges is one way an appropriate demand for stability can be met.

V

To demonstrate the fruitfulness of this approach, I want to turn to a more extreme kind of case, where contingent phenomena seem to require not just a revision of moral understanding but the partial abandonment of moral strictures. Explanations of a normative divide between

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morality and politics are often made in these terms: political necessities can give us reasons to do things that morality cannot countenance.[28] In times of war or civil upheaval, rights may not be upheld, commitments kept, or justice done. The rationale is the over-arching need for peace and security, or social order, or a change in regime. Because the goal is of such weight in terms of human goods (or evils avoided), it supports a permissive stance towards means. When the crisis is over, this rupture between politics and morality is repaired.

It would be more than odd to regard this *realpolitik* as good in itself. It arises, when and if it does, because of the limits of morality, whose rules prohibit the actions deemed politically necessary. While I won't argue against the possibility of such necessities, I do want to suggest that with a more capacious understanding of morality's resources, and in particular the possibility of moral improvisation, the "necessity defense" might be less frequently needed. And that would be good in itself.

To explore this possibility, I want to examine the issues as they arose in the debate over the establishment of the South African Truth and Reconciliation Commission (TRC)[29]—a set of temporary, extra-judicial commissions through which victims of apartheid's violence could formally register crimes committed against them, perpetrators could seek amnesty, and some amount of reparations would be provided to victims. The legacy of grievous injustices of apartheid presented a range of obstacles to the possibility of shared moral life that ordinary morality and existing institutions lacked resources to overcome. The TRC was designed to bridge that gap. It is an especially apt case for my purposes, since those who created the TRC explicitly intended by so doing to obligate others—specifically, to forego redress for claims they had against perpetrators of immoral, criminal acts, and to accept the regimen of the TRC in its stead. Given the circumstances in which the obligations were to be introduced, the question of

their legitimacy arose naturally, and political necessity was one immediate answer, though not one the principals endorsed.

The TRC has been viewed variously as a baldly political compromise introduced to avert a civil war, or as a situation-specific transition stage in the institution of constitutional democratic rule, or as a local modification of the post-Nuremberg structures used to provide an accounting of state crimes. I think the record shows that it was no *bald* compromise; it is hard to imagine a more articulate or morally anguished public debate, regardless of the existence of some backroom deals. I also think its creation was a piece of a strategy for constituting civil society, but it was not for that an act of political necessity, nor something to be subsumed under the rubrics of irregular or reparative justice (though the procedures were irregular and reparative). The costs imposed were morally significant, and it would be best to offer a moral justification, if there is one. The question is: of what kind? I will argue that the TRC can be understood as a moment of moral improvisation, and as such prompts an account of the moral costs and benefits that reframes the issues involved. Pragmatic considerations can figure in its justification, but not so as to make the brunt of the argument instrumental—doing what had to be done for some pressing end.

There is always some danger in trying to do philosophical work with an historically specific event. However, the wariness that is in order when one is adducing as argument a flow of interconnecting events and actions is to a considerable extent addressed in this case by the great care of the participants took to publicly acknowledge and justify the moral complexity of their decisions. And there is a related advantage. Distinctions that might seem artificial in a philosopher's example here lie on or close to the surface of the historical record. It is an unusual moment in which thoughtful efforts were made to use available morality to introduce moral

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change.[30] So if there is a risk, I think it is one worth taking.

To make the case for the TRC as an example of successful moral improvisation, I need to show three things: that the creation of the TRC is not to be regarded in purely political terms; that its origin was in an improvisation that created obligations not latent in the moral world (in ideal or nonideal terms); and that nonetheless these obligations could be justified in the moral terms of the world they changed. The contingency of the obligations was at both ends: the source is in no rule or principle, and the outcome is a set of obligations whose justification, though moral, is tied to time and place.

In the moral story of the TRC, the moral improvisation comes in two steps. First, there was an act of individual creativity. It is credibly claimed that Nelson Mandela's stunning refusal to seek retribution for the grievous wrongs he suffered did much to create the moral possibility of social order and democracy in post-apartheid South Africa.[31] What he did, and was seen to have done, is to offer himself as a model of moral self-transformation. In refusing both the natural desire for revenge and any formal claim for just retribution, he created a possibility of self-movement from the status of victim of unjust violence to the status of citizen of a state (one not yet fully existing) committed to an ethic of forward-looking civic benevolence. But Mandela's act was not of a kind that many others could repeat. It required unusual moral heroism, and its success depended on Mandela's special public position. What Mandela and others saw, however, was that *given* his example, an institution might be constructed, the TRC, that would make generally available a less heroic avenue to the same transformation of moral status, from victim to citizen. (And this would be so even if it was also true that some of the actual argument for and the resulting form of the TRC was a product of naked political bargaining.[32])

The second step introduced the obligations. In particular, with the institution of the TRC,

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all persons would be obligated to forego normal routes of judicial redress for a wide class of crimes committed against them. Instead, they would have access to the TRC, either directly through public testimony and/or confrontation with the perpetrators of wrongs before the Commission, or by filing affidavits, or, symbolically and indirectly (given the testimony and the affidavits) through the creation of a new history whose framing theme turned what had been merely private stories into a public moral narrative. For those friendly to the work of the TRC, it is this symbolic and indirect moral possibility, with its wide inclusiveness, that provided the key element in its justification.[33] (Accounts of the TRC that emphasize forgiveness thus mistake its grand ambition.)

Critics of the TRC argued that the obligation to forego judicial redress was not a necessary condition of an important moral possibility, but, very much to the contrary, an additional injustice, one that undermined the legitimacy of the claimed obligation, and so also, of the TRC (perhaps the TRC could obligate, but it could not obligate the relinquishing of *these* rights). If neither the act of creating the TRC nor the TRC itself could impose this obligation, and the imposition of the obligation was not a morally necessary action (no one argued that it was), the contested obligation was at best genuinely contingent, and, absent further justification, vulnerable to the criticism.[34]

In fact, with the TRC came an array of new obligations. Victims (their families and allies) were obliged to forego not only revenge but also retributive justice, accept not only the possibility of amnesty, but also a future in which they would share a normal social world with the unpunished guilty. Perpetrators were obliged to accept the amnesty process as a condition of their peaceful inclusion in the social order, a process that carried risks: of the roughly 9000 who applied for amnesty only a few hundred met its conditions—that the deed for which amnesty was

requested had been politically motivated and that a full public account of it be given. Archbishop Tutu expressed the odd gravity of the first condition this way: "You are able to tell the amnesty committee that you are proud of what you did, albeit that it constitutes an offense under law." It did not matter what the actual intention of the torturer was, or his personal moral guilt. What did matter was the conceptualization and subsequent repudiation of the political motive and its legitimizing source. For those who did not receive amnesty—because it was not granted or because they would not apply for it—there was risk of civil suit and criminal prosecution. Last, there was something like a general obligation to participate in the construction of a moral history: to resolve conflicting memory and private story into an emerging public narrative that would provide a shared truth, if in parts a permanently contested truth, on which a morally sound politics could be built.

Even though the occasion for these obligations was a radical political transition, and the obligations were given specific content by a quasi-parliamentary process, I do not think their nature or their justification is best dealt with in political terms. If we take political obligations to be those whose main line of justification derives from political institutions, the justification of (basic) political institutions and the obligations incurred in establishing them is not political, but moral.[35] Since from the point of view of justification the TRC is not a political institution, but part of the formation conditions of political institutions, its justification depends on the legitimacy of the obligations it imposes, and *their* justification will depend on showing *both* that they promote some vital social good *and* that they are continuous with first-order moral standards and principles. That is why it will not help to argue that there is a standing obligation, political or moral, to bear costs in order to establish or re-establish political order, for it is precisely the justification of being obligated to bear those costs that is in question.

The question of justification is most acute with the obligation to forego retributive justice, since what it required innocent victims (or their families) to forego does seem to be precisely what they had a fundamental right to in virtue of their violated innocence. Especially given the continued operation of regular courts, how could persons become obligated not only not to exercise but not to claim their legal rights? It is true that in emergencies a state may suspend some rights. But in this case, the additional fact that so many agents of the state were perpetrators of the crimes in question undermines its authority to justify the amnesty on those grounds. If the TRC was to be part of a process of legitimation and inclusion, its role would be compromised if the obligation to forego retributive justice and accept the conditions of the amnesty could not be justified in a way that answered the moral complaint. The problem is particularly difficult because of features shared with more radically contingent obligations: the obligation was unforeseen and unforeseeable; it was not chosen or voluntarily adopted by all affected; and it was not the unique solution to a state of moral conflict.

Let us focus first on non-uniqueness. We have already seen one kind of non-uniqueness with two-level theory, where obligation follows from institutions that give form to a higher-level principle that could have been expressed differently. But the TRC was not such an expression; it introduced an obligation that altered the moral terrain, imposing significant burdens, and it was just one of a number of possible obligations that could do the moral work. Why couldn't victims rightly object if they were to be so obligated, at considerable cost, when some other obligation was available, morally equivalent, and would impose lesser burdens on them? In a different but related context of non-uniqueness, T. M. Scanlon offers a decision principle that is suggestive.[36] He argues that where there is a region of activity that requires moral regulation, and there is more than one legitimate principle that can do the job, the fact that one of these principles is generally,

even if not universally, accepted in a community can be sufficient for it to obligate all. Those who are inconvenienced by the accepted principle, or just prefer another, have no legitimate grounds to object to it, no reason based in its non-uniqueness to resist it.[37]

If there were a way to extrapolate to the TRC, we could then say that both principles— the principle of retributive justice and the principle of amnesty (requiring that retribution be foregone)—might be morally supported, and yet only one, though either one, could obligate. However, the conditions of Scanlon's principle are not satisfied by the TRC, since it is the option of retributive justice that is already in place. On its own, Scanlon's principle is conservative.

The attraction of thinking about the TRC using some analog of Scanlon's non-uniqueness principle is that we would not have to judge the decision for amnesty as legitimate only if so deciding tracked a balance (in which some fundamental claims are outweighed). Nor would we need to describe the contested principles as representing an underlying conflict of duties (in this case, one looking backward, one forward). That is, if there really were different routes or principles that were morally legitimate, each supported by equally sound moral considerations, then in choosing the amnesty condition, the value of punishing gross violators of human rights would not need to be judged less weighty than the forward-looking goals of reconciliation and the constitution (or reconstitution) of civil society. It is doubtful this would assuage feelings of outrage at losing the opportunity of "seeing justice done," but it would address the sense of moral offense that individual entitlements are being swept off the stage for the collective good.[38]

Now to do its work, Scanlon's principle, or any analog of it, has to appeal to something to give reason to elect one of the competing principles. First-order reasons are exhausted in support of the principles. The reasons to favor one principle over the other are, in a broad sense, pragmatic. But pragmatic considerations cannot trump or outweigh either principle, so there is a

puzzle about how they enter at this stage.[39] Moreover, not just any pragmatic consideration would do, as if there were a wide-open consequentialism at the level of principles. That the adoption of one of two morally legitimate principles concerning punishment, or privacy, would have a positive effect on GNP seems irrelevant to the decision between them, though the same effect would not be irrelevant with respect to a pair of principles about fair taxation.

Overall, what we need is a way to fully acknowledge all the moral considerations that are reflected in the competing principles, without weighing and balancing—an analog of Scanlon's principle would do that—*and* find criteria of relevance for the introduction of pragmatic considerations. We do not want to say that individuals who would make a claim for retributive justice—claims that could be honored—not only are blocked from pursuing their claims, but are also obligated to accept principles requiring them to forego their claim, on grounds that just appeal to numbers, or even general welfare. Fundamental moral claims should not be discounted in that way.[40]

A more general way to think about an alternative to weighing and balancing is in terms of a revisionary casuistry: replacing moral arithmetic with a form of argument that leads to a rethinking of the way underlying values support specific claims and moral relations. The goal is to present the conflict in a different moral configuration than the one originally contested, while still maintaining the integrity of the moral reasons on all sides. The challenge is to proceed without an *ex ante or* fixed commitment to each reason's full moral significance or justificatory reach. When successful, a sound revisionary casuistry can create a path through moral conflict by partially disarming the contesting parties.

In the case of the TRC, what we need to be able to do is think differently about the moral significance of the majority. We will not resolve moral complaints against the amnesty principle

so long as we see the choice for the TRC as a matter of majority preference or will—an inappropriate pragmatics. How else might we regard it? First, the object of choice is not merely an independently valid principle of obligation, but also one whose supporting reasons offer a vision of a future accepted by those who will, by means of the principle, act for that future together. In such a case, one might almost argue, *can* implies *ought*. And second, in contrast to more familiar weighing and balancing situations, the agents here saw themselves faced with a novel situation, where, as I would put it, there was need for improvisation.[41] Now any valid moral improvisation will be constrained by, among other things, shared moral history: those who are to act on its principle have to be in a position to experience it (hear it) as obligatory. That is why the mix of political, religious, and traditional experiences and values brought to the decision between principles does not make the decision other than moral, and certainly not impure. These beliefs properly inform the decision, for they partly constitute the abilities agents have for action and sacrifice, and so inform their vision of what is possible. This is one of the ways Mandela's exemplary action clearly made a moral difference. By drawing on shared values and experiences, his singular action revealed a creative potential in the abilities and values people already had. Absent Mandela's example, the institution of the TRC might not have been able to generate a legitimate collective obligation.

In a sense, then, the claim that the circumstances prior to the creation of the TRC supported more than one legitimate principle is not quite right. More than one principle could have been justified—that is, is supported by sound casuistry—but only one principle was in fact made viable, or became a real possibility. Even if the counterfactual were true (had the other principle been chosen, it would have served as well), real possibility is determined from the point of view of those making the decision, and not all possible futures can be imagined, or imagined

all at once. The actual conditions of moral life are thus part of the argument determining moral possibility.

However, if this shows a different way to support the decision for the TRC, we still need to account for the status of the moral interests represented by the option foregone. In some resolutions of moral conflict, a correct judgment about what to do does not remove the competing source of obligation—there are remainders, and if we can act in light of them, we should.[42] In the case of the TRC, however, any reassertion or continuation of the foregone retributive claims would seem to be excluded by the amnesty provision itself. And yet key elements that supported those claims remain. Vicious illegal acts will not be punished; guilty persons will circulate with impunity among not just the innocent but their victims. True, that just is the effect of an amnesty. But in these circumstances, it seems hard to resist the argument that because of the abiding moral cost in foregoing retribution for those who supported the path not taken, the amnesty violates *some* ongoing moral claim. At the time, some who were concerned about this issue argued that the conditions of the amnesty—that perpetrators come forward and publicly admit to wrongdoing in the pursuit of political ends—were weakly retributive insofar as they created vulnerability to shame and public censure.

I doubt that the forms of public censure available could have been an adequate response to the retributive claims. Moreover, it is not clear that this role was consistent with the reparative ambitions of the TRC. But neither of these point addresses the real issue. If any part of the retributive claim is met, or acknowledged, then the decision to forego retribution is not effective. So, either there is an abiding retributive claim, which undermines the legitimacy of the amnesty decision, or the amnesty decision somehow cancels the retributive claim.[43] That is, the claim cannot be acted on—conceptually cannot (nothing would count as satisfying it)—or the reasons

that had supported it no longer do.

To this point, I have treated the retributive claim as self-evident. In the last stage of the argument, it will be helpful to think a bit about the values that support it, and to introduce a revisionary casuistry here as well. We say that a victim of a crime has a claim in justice to seek the punishment of the guilty perpetrator. Take this to be a legal fact. Behind the legal fact is a more complex story. Consider one familiar version of it.[44] In broad strokes, there are, on the one hand, social needs: for deterrence of harmful acts, for making the social fabric whole again, and for institutions that embody ideals of fairness and the rule of law. On the other hand, there are moral concerns. Only the guilty should be punished; some notion of proportionality in punishment; etc. But, morally speaking, there has to be more. If we suppose that the desire for revenge is a natural response to wrong or harm done, it is an open moral question whether such a desire should be turned into or reflected in a moral reason or claim.[45] Now, a legal system that makes retributive claims possible can be seen as creating a moral substitute for, or a translation of, the desire for revenge. It both asserts a monopoly of force, blocking the natural expression of the desire, and offers an interpretation of what it is about the desire that matters: say, the recovery of the moral or social status of the victim. The interpreted desire can then be captured in a judicial system that gives a legal status to the victim, by treating her private harm as a legitimate cause of public action, through a system of trial and punishment for accused wrongdoers.

Suppose some such account is plausible. We could then see the (morally) improvisatory TRC (including the decision for amnesty) as introducing a competing method of capture for the interpreted desire, the effect of which is to cancel the retributive claim. That is, the decision for amnesty will give the desire for revenge no retributive expression. The truth about injury and

moral harm will still be publicly acknowledged, and the victims' status regained, but not by way of the institutions of retributive and compensatory justice.[46]

It is a strength of this account that the considerations that favor the decision for an institution like the TRC do not support it as a permanent substitute for the formal systems of criminal and civil justice. They belong to conditions of transition where a break with the past is called for and normal institutions cannot accommodate that role. A well-founded legal system expresses a community's commitment to the rule of law. That is why enforcement of laws can restore a community. But where the commitment is what is at issue because the community needs to be constituted, and those who were not entitled to share in that commitment need to be enfranchised, there is moral room and reason for extraordinary or quasi-judicial action. For the TRC, the argument that seems most to the point is that in the circumstances of transition from a regime that routinely violated human rights to a democratic system of government, the restitutive moral function of retributive justice could not be realized. There was therefore a need, for a time, for a different way of publicly negotiating past wrongs done that managed the entry of disenfranchised victims into the class of citizens. Given the goal of securing equal moral status, the abridging or balancing of fundamental moral claims was not a morally possible means to this end.[47] By contrast, the public creation of a moral history through the testimony and affidavits received and broadcast by the TRC was an enfranchising act in that it changed the basis on which moral status was acknowledged. Thus, given a justification for the TRC based on the absence of conditions of civility and trust that allow ordinary systems of justice to perform their status-securing function, its legitimacy depended on making a credible claim to (re)instate them—though once re-instated, they are different, since situated in a different moral history.

VI

There are several things to note by way of conclusion. First, I take the extended web of moral justification offered on behalf of the TRC to support the claim that legitimate collective obligations can be generated by morally improvisatory acts. In general, the resumption of normal moral life will close the arc of the improvisation. The contingent obligations it introduces are replaced, or absorbed and no longer experienced as anything new. In either case, what now counts as normal is no longer what it was; hopefully it is better,[48] and stably so. Retrospective reconstruction may seem to show that the change was latent in the community's core values. Inevitably, there will be such connections: improvisations are constrained by their starting points, and when they are to result in collective action, they are also constrained by the values and abilities of those who are to act. But all of this connectedness does not defeat the claim that what has been done is something moral, and something new.

Second, there is the role of what I have been calling "pragmatics" in making obligating decisions between contending principles: considerations such as stability, psychological fit, historical viability, and so also the sheer need to resolve political and social crises to create or restore moral conditions of ordinary life. I have argued that they can enter determinations of basic rights and claims, but only *after* their justification is complete, and only so long as they fit or enhance the work of first-order values. In this way pragmatics can extend, not just compete with, moral justification.

Last, we have seen how the reach of morality extends beyond the norms of ordinary moral life. Political crises can introduce unexpected normative questions, but the political context does not necessarily make the questions political—in the sense of belonging to a special sphere of argument—nor show that the resources of morality are inadequate to answer them.

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The discussion of the TRC shows one possible creative extension of these resources: the improvisatory intervention and the resulting reorientation of justificatory argument. It is really something we should expect. Fundamental moral values and principles have greater potential for organizing our affairs than can be realized or even appreciated at any given time. It is this potential that is tapped for new procedures of justification when contingencies might seem to outstrip moral argument.

Notes

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1. One might wonder whether there is the thought here that all good persons should act in the same way— recognizable as such to one another.

2. Or, as a challenge to conceiving of morality in these terms. One might, for example, use the Hegelian distinction between *Moralität* and *Sittlichkeit* to traverse this domain, the first marking a set of timeless obligations and rights, the other the obligations that belong to historically specific forms of life. While sensitive to many of the moral phenomena I describe, this kind of division tends to miss the contingency that occurs at all levels of obligation.

3. This piece of data shows up in different moments of philosophical discussion: in arguments about integrity and the need for space free of positive moral demands; as a background condition in accounts of flourishing; as a limit on the scope of our responsibility.

4. See, for example, H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961), 169ff.

5. This is not all arcane. Taboos can be a moral form of strict liability (sexual activity with minors). And sometimes, where temptation to abuse is high, we may want to rescind individual authority (military interrogations offer an instructive example).

6. *Groundwork* 4:388-389. From the side of the pure part, this is the subject matter of "*Sittenlehre*"; from the side of psychology or sociology, "practical anthropology."

7. The sense of "implied" here is deliberative: even if after the fact one might show something to follow as a consequence, if the reasoning was not available—not just difficult, but practically

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beyond reckoning—then the consequence is not deliberatively implied by what we know.

8. I use "normal moral agent" as a term of art. She is the subject addressed by the non-heroic elements of a moral theory, or, what amounts to the same thing, the object of good parenting. The elements of character of a normal moral agent will not be the same across times and places, but the feature of fit is constant: hers is the character that is at home in her social world. In some severe circumstances, there may be no place for a "normal" agent; in others, what is normal will hardly be moral. Although morality ideally provides guidance in all circumstances, it would produce an order—a moral order—in which most of us can most of the time be at home.

9. There may also be differences in the extent to which we can recover our reasons in the moment, a matter of deliberative agility, even creativity, at the limit.

10. Some might dispute this, pointing to elements of morality—respect for persons, for example—that are immutable. But what respect for persons amounts to is not always the same; what is immutable is that respect play a central role in justifications of the ways we may treat each other.

11. We have regions of high sensitivity and of likely negligence; we tend to replicate past injuries. So we may harm without intention to cause harm; yet when we do, we should not say it is accidental.

12. We may then have good reason to respond differently to first offenses than to repeated ones, especially when repetition occurs in the face of what has become obvious.

13. References to Korsgaard, Murphy, Schapiro, and Shiffrin.

14. E.g., obligations of individual beneficence replaced by private charities and social welfare institutions.

15. Issues of this sort have recently been raised concerning the rationales for preventive war and the need to curtail civil rights in order to fight terrorism.

16. Even if there are better norms of friendship than those we have, our obligation is to be (or to help others be) better friends. The idea of an institution of friendship is no more than a *façon de parler.*

17. We might use this metaphor as yet another way of marking the difference between negative and positive duties: negative duties tell us that the narrative may not unfold this way (by this means), or over there; positive duties set us on a path: to get Jamie into college, Joey out of harm's way, the package into Mary's hands.

18. One might think that the very idea of morality changing is suspect, or worse, an opening to some kind of relativism about moral claims and judgments. But even if we thought that fundamental moral principles were fixed—*a priori* or eternal—the conditions of their application are not, and that creates quite enough space for there to be pressure for change on the lived-morality of individuals (this is easy to see for the principle of utility; I think it no less true for the morality of the the categorical imperative).

19. Some of this is familiar: we cannot make promises or exchange goods without the institutions of promising and property. Some is less so: we may have obligations (e.g. of beneficence) that we cannot fulfill without moral risk or fault unless there is institutional

mediation (see Jonathan Garthoff, "   " (unpublished dissertation). Of course, there is a danger on the other side as well: reliance on public devices of caring may make persons less morally sensitive, and less able to act well when they must act on their own.

20. For a useful discussion, see Sarah Buss, "On Appearing Respectful: The Moral Significance of Manners," *Ethics* 109 (1999): 795-826.

21. A function that includes in an essential way the possibility of its iconoclastic subversion.

22. One would like to think that when the frenzy is over and normal life resumes that there is shame. This does not always seem to be the case. There is ample evidence of pride (souvenirs kept in plain sight, stories told the children, a willingness to re-enact, if asked), and remorse, if it occurs, may take generations, or the externally imposed intervention of courts and tribunals.

23. Sometimes it is ordinary life that is temporarily transformed. The French village of Le Chambon during WWII is a famous example.

24. Interviews sometimes suggest after-the-fact puzzlement. In other cases, a possibility for human interaction is glimpsed and then mourned, and once again, inspiring stories are told. It would be interesting to know under what conditions change of this sort can enter ordinary morality through acts of retrospective integration.

25. The comparison with supererogatory action is instructive. Supererogatory actions go beyond duty, but they do not surpass an agent's moral understanding and remain connected to the content of obligation. Though they too may call on abilities and will that an agent cannot normally access.

26. Though they might become so obligated if it becomes permanent.

27. This is why it will not do to say that all the moral business lies in a standing obligation to do what one (permissibly) can to remedy injustice. That misses the obligating nature of what is actually done.

28. Some might argue that what I call political necessity is really a species of moral justification, at the limit, where morality condones or even directs the violation of its central standards. It's a view that doesn't so much beg as give up on the moral question. A different way of ducking the problem is to claim that political justification is of its own kind, so that given its distinctive subject, one should not expect congruence with morality. Though we should not expect states to operate on the principles that govern personal relations, that is a reason to extend our understanding of morality, not to leave it behind.

29. The TRC was created by an act of Parliament in 1995 (fulfilling the directive of the postamble of the 1993 Interim Constitution to establish some mechanism and criteria for granting amnesty for conduct "associated with political objectives and committed in the course of conflicts of the past"). The first hearings were in 1996. The work of the Commission officially ended in April 1998 (though the amnesty phase went on until July 2001); its *Final Report* was issued in November 1998. The moral question begins with postamble.

30. I don't claim that the debates got all or even most things right, nor that it was the moral force of the deliberative conclusion that carried the day. But the public discussions leading up to the TRC were remarkably clear about what was at stake, morally, if less clear about how or whether they resolved the moral problems introduced by their decisions. One of the purposes of this

discussion is to suggest that the moral resources they had available to them were in fact adequate to the task.

31. The nature of the circumstances in which a charismatic individual can be morally effective is a question for social science. How the change affected can be legitimate and correct is the business of moral theory.

32. Chiefly, balancing the moral and personal costs of amnesty with the needs for public order, given that any viable future state would not only contain perpetrators and victims, but would have to rely on the good will of both, especially if, as was reasonably believed, the police and military would not tolerate purging malfeasors.

33. Analogous claims are made about the need for International War Crimes Trials. The claim is not (or not just) that ordinary criminal trials might not be successful, or would be too dangerous. That risk could be seen as part of what makes the use of the criminal justice system necessary—a way of bringing horrific acts within the orbit of ordinary justice. The justification for these abnormal judicial activities is more commonly that some moral possibility needs to be opened (or closed) that exceeds the orbit of ordinary justice, some difference negotiated between criminal liability and accountability per se. It is exactly the nature and extent of this sort of justification that is in question in the case of the TRC.

34. The issue of authority to introduce the change is unusual in this case, since the TRC was established through public and open discussion. And if that was done well, there may be no authority question that is not tied to the question of moral legitimacy (i.e., some things may not be changed or foregone, no matter what the process).

35. In this sense, the obligation to form or enter a state cannot be a political obligation, though obviously it has political content.

36. T. M. Scanlon, *What We Owe to Each Other* (Cambridge, MA: Harvard University Press, 1998), 339f.

37. Uniqueness *is* necessary for the meta-principle legitimating the authority of lower-order principles.

38. This was vivid in the complaints of Steve Biko's family.

39. Moral arithmetic isn't straightforward: one can't argue that since the principles are equal, pragmatics just adds a little weight-of-reasons to one side. The objections to deciding against a basic moral claim by appeal to numbers or welfare or pragmatics would just re-enter.

40. Scanlon's own use of his principle is left unclear: it might be that the pragmatic concerns are the values of stability or continuity, or merely the preference or comfort of the majority.

41. Even if an existing institution had been embraced, it would have been for new reasons, and so represent a decision for a different principle.

42. Suppose we can act to save either *A* or *B*, both drowning; we cannot save both. We decide to save *A* and allow *B*'s fate to unfold as it will. If *B* drowns, there is no moral remainder. We did what we could. But if *B* miraculously hangs on, we have further obligations toward him. We cannot now let *B* drown, even though our earlier decision to let *B* drown was without fault. The obligation continues past the decision point of action. However, the continuing presence of the obligation need not warrant action of the same kind: there may be new considerations that

bear, including the effects of the first action. If *B* hangs on, but *A* needs to get emergency care to survive, the earlier choice to save *A* seems to encumber decision, even when *B*'s need to be saved reasserts itself. So the fact that the obligation continues does not return us to the original choice situation.

43. This is not a general claim about remainders and residues. It is a special feature of this case that if the retributive claim survives, the principle that blocks retribution fails.

44. To make a point, I borrow liberally from chapter 5 of J. S. Mill's *Utilitarianism.*

45. I say "turned into" rather than "acknowledged as" to reflect the idea that desires alone do not support reasons or claims.

46. This sort of argument led some who supported the amnesty from criminal liability to want there to be room for civil suits seeking damages. The third arm of the TRC, The Committee on Reparation and Rehabilitation, was partly designed to capture that aim.

47. Thus rather than setting a limit *for* morality, it a task *of* morality to set the terms in which such a goal can be an obligating target of our individual or collective action.

48. Better from its own as well as from the prior point of view.