THE SCALES OF INJUSTICE

Charles Blattberg*

This paper criticises four major approaches to criminal law – consequentialism, retributivism, abolitionism, and “mixed” pluralism – each of which, in its own fashion, affirms the celebrated emblem of the “scales of justice.” The argument is that there is a better way of dealing with the tensions that often arise between the various legal purposes than by merely balancing them against each other. It consists, essentially, of striving to genuinely reconcile those purposes, a goal which is shown to require taking a new, “patriotic” approach to law.

Le présent article porte une critique à quatre approches majeures en droit pénal : le conséquentialisme, le rétributivisme, l’abolitionnisme et le pluralisme « mixte. » Toutes ces approches se rangent, chacune à leur manière, sous le célèbre emblème des « échelles de justice. » L’argument est qu’il existe une meilleure façon de faire face aux tensions qui opposent les multiples objectifs judiciaires plutôt que de comparer le poids des uns contre le poids des autres. Il s’agit essentiellement de s’efforcer à réaliser une authentique réconciliation de ces objectifs. Il apparaîtra que pour y parvenir il est nécessaire d’avoir recours à une nouvelle approche du droit, une approche précisément « patriotique. »

I. INTRODUCTION

The origins of the use of scales as an emblem for criminal justice remain obscure. Yet they probably lie in both Greek and Egyptian mythology. The *Iliad* tells of Zeus’ scales, which the greatest of the gods would use to weigh men’s chances in battle, as well as of Achilles’ shield, upon which were depicted legal proceedings whose winner received talents of gold (*talanta* originally meant scales).¹ And the Egyptian goddess Maât, who represented truth and order, was assigned the task of weighing the souls that arrived in the underworld in order to determine which could reach the paradise of the afterlife.²

At least with the Greeks, then, the use of the scales emblem appears to have had nothing to do with reason or merit. Indeed as John Huzingas points out, Zeus’ scales and Achilles’ talents were emblems of pure chance; right, in other words, did not weigh more than wrong.³ The matter was different with the

* Associate Professor of Political Philosophy, Department of Political Science, Université de Montréal; www.mapageweb.umontreal.ca/blattbec. I would like to thank William E. Conklin for his comments on an earlier version of the article.

1 Homer, *Iliad*, 8.69-75, 12.433-8, 16.658, 19.222-4, 22.209-13.

2 See E.A. Wallis Budge, *The Gods of the Egyptians: Studies in Egyptian Mythology*, vol. 1 (New York: Dover, 1969) at 418.

3 See Huzingas, *Homo Ludens: A Study of the Play Element in Culture* (Boston: Beacon Press, 1950) at 79-80.

Egyptians, given that Maāt was paired with Thoth, who represented the reasoning powers of Rā, the sun god which embodied all of the others.⁴ And yet given that this was reasoning carried out by the divine rather than by the human, it was presumably inscrutable to the latter.

Nevertheless, the seeds for a notion of rational weighing in a more mundane sense were there right from the start: in book seven of the *Iliad* Apollo refers to Athena, who later became known as the goddess of wisdom, as using the scales;⁵ and it appears that Maāt/Thoth came in time to be identified with Plato's *logos*.⁶ That said, a long period of transition had to be undergone before the West could abandon the thoroughly irrational trials by combat that were present right up until the 16th century within English and Germanic legal traditions and replace them with contemporary proceedings, wherein the scales of justice represent that everyday form of reasoning which we sometimes call "pondering" (from *ponderare*, the Latin for weighing).

My argument, however, is that we have not come far enough. Because the law, I want to claim, is just not at its best when it is associated with the scales emblem. Of course that association is often vague,⁷ but my complaint is with any and all forms of balancing, whether this refers to weighing the merits of a given case, to the balances that are often struck between the diverse purposes of the law, or whatever. For I believe that there exists a superior form of reasoning, one which aims for genuinely *reconciling* things rather than merely balancing them against each other. Pondering has its limitations because it assumes – and, as I shall show, ensures – a zero-sum or adversarial relation, since raising one pan of a set of scales means lowering the other and an adversary is someone who gains precisely when his opponent loses. Some things, however, are simply incompatible with such a relation. That is why, as I shall show, those approaches to criminal law which favour balancing either fail to recognize certain legal purposes altogether, a result of their reducing them to a single purpose or single "master purpose," or they distort them, or limit them, or do all three.

What might these purposes be? Faced with an apparently illegal act, it seems simple common sense to feel concerned about at least the following: that the truth of what actually happened be accurately known; that, should it turn out that an offence was indeed committed, there be a proper recognition of its wrongness, hence some form of censure and sanction of the offender; that there be some way to prevent the offence from occurring again, thus protecting the security of the public; that, if possible, the offender be rehabilitated and so become no longer the kind of person who would commit such an offence; and that the whole process not be too costly. What I shall argue, essentially, is that all of the approaches to criminal law which invoke balancing in one form or another lead to less than optimum ways of meeting one or more of these purposes. Moreover,

4 Budge, *supra* note 2 at 29, 407.

5 Homer, *supra* note 1 at, 7.26.

6 Budge, *supra* note 2 at 407.

7 "The difficulty is that many of those who employ this terminology fail to stipulate exactly what is being balanced, what factors and interests are to be included or excluded, what weight is being assigned to particular values and interests, and so on", Andrew Ashworth and Mike Redmayne, *The Criminal Process*, 3d ed. (Oxford: Oxford University Press, 2005) at 40.

despite my interest in common sense, I shall advance this claim by identifying what seem to me to be the different metaphysics that underlie these approaches. There are basically two of these, and they can best be distinguished by invoking their mereologies, their conceptions of parts and wholes.

Essentially, one is monist, according to which all parts are ultimately conceived as aspects of a unified whole; and the other is pluralist, according to which all parts are things which are fundamentally independent of each other. The reason that the approaches to legal justice which affirm either of these two are attracted to the metaphor of balancing scales is that they conceive of conflict as consisting of separate items that have “clashed” or “collided.” For this suggests that the best way to respond is, metaphorically speaking, to place them on the different pans of a set of scales and to weigh them against each other. Monists believe this because they think that things in conflict cannot be connected to each other, hence to the whole, since that whole is unified and so by definition non-conflictual. And pluralists do so because conceiving of things as separate from each other just comes naturally to them; even when they recognize those things as parts of a whole, their assumption is that they can always be detached from that whole.

If we are to make room for truly reconciliatory solutions to conflict, however, which is to say for solutions that are positive- rather than zero-sum, then we need to imagine conflicting parts that can be *integrated together* rather than balanced against each other. And for that we must conceive of those parts as “oppositional” but not also “adversarial,”⁸ by which I mean that they, including the persons advocating them, need to be seen as features of a whole such that it might be possible to *realise* the whole by reconciling the parts rather than compromising them. This requires a different mereology, one which allows the parts to conflict with each other while remaining connected to the whole – a whole that, evidently, should not be considered unified. The conflict is reconciled, then, when we manage to transform a whole in a way which brings its parts into a more harmonious relation.

Ever since at least Aristotle’s *Metaphysics*, however, philosophers have tended to consider “wholeness” and “unity” as synonyms.⁹ What we need to do instead is to think of wholes, or at least the kinds of wholes that are relevant to ethics, as having “cracks” in them – these representing the sites of conflict – and so picture a conflict as consisting, not of separate things that have “banged together” (as if they were like cars involved a head-on collision) but of particular regions of a whole that, because of the cracks in it, exhibit tension or disharmony between them. This allows us to pose the question of how that whole might be transformed in order to repair its cracks and so reconcile the conflict.

This is the central aim of the alternative conception of criminal justice that I wish to defend here. It assumes a metaphysic that, we may say, is situated *in*

8 For more on this distinction, see Charles Blattberg “Opponents vs. Adversaries in Plato’s *Phaedo*” in *Patriotic Elaborations: Essays in Practical Philosophy* (Montreal and Kingston: McGill-Queen’s University Press, forthcoming) [Blattberg, *Patriotic Elaborations*].

9 See e.g. Aristotle, *Metaphysics* at 1023b25 and, for a more recent case, Carl G. Vaught, *The Quest for Wholeness* (Albany: SUNY Press, 1982).

between those of monism and pluralism. Moreover, criminal justice as so understood should be situated within a larger conception of political justice that I have associated with “patriotic” political philosophy.¹⁰ Patriots, as I define them, are members of civic or political, as distinct from national, communities; they are citizens who strive to realise their common good by responding to their conflicts with a non-adversarial form of dialogue, one which aims to avoid balancing. As I shall show, this is true not only of political conflicts but also of those which arise due to the commission of a crime.

And so, in order to provide support for this patriotic conception of criminal law, I want to offer some criticisms of the major alternative approaches to criminal justice on offer today – each of which, in its own way, appeals to the balancing scales emblem. Three are monist: consequentialism, retributivism, and abolitionism; and a fourth is pluralist: that which, in the literature, is usually referred to as the “mixed” approach.

II. CONSEQUENTIALISM

Consequentialists aim to bring about a state of affairs in which something is maximized, such as utility if we follow Bentham, or freedom as “dominion” according to John Braithwaite and Philip Pettit’s more recent republican approach.¹¹ It is in reducing all goods to a single master value that consequentialists may be considered monists,¹² and it is worth noting that, when faced with conflict, they fulfil their monism by calling for the conflicting things to be weighed against each other but always with the aim of maximizing the master end.¹³ Of course, one by now classic critique of consequentialism is that, while it is able to weigh a wide diversity of things, including all of the commonsensical legal purposes identified above, it is able to conceive of them as only instrumentally, and so never intrinsically, valuable. For each is given weight only because it contributes to a separate end, the master value that is to be maximized. But this is problematic when it comes to the need to develop an accurate picture of what happened in a given case as well as, should it turn out that an offence was indeed committed, to recognize this properly with appropriate censure and sanction. The problem is that both of these are concerned with truth, and it is in the nature of truth that something is true whether or not it is also useful (just as, of

10 Charles Blattberg, *From Pluralist to Patriotic Politics: Putting Practice First* (Oxford and New York: Oxford University Press, 2000) [Blattberg, *Pluralist to Patriotic*].

11 See e.g. Jeremy Bentham, *Introduction to the Principles of Morals and Legislation*, ed. by J.H. Burns and H.L.A. Hart (Oxford: Oxford University Press, 1970 [1789]), c. 13-17; and John Braithwaite and Philip Pettit, *Not Just Deserts: A Republican Theory of Criminal Justice* (Oxford: Clarendon Press, 1990).

12 Writing of human actions in general, Bentham tells us that “though numerous and heterogeneous, [they may] derive a sort of unity from the relation they bear to some common design or end”; while Braithwaite and Pettit recommend their approach because it “allows us to take a unified view of the demands of rationality and morality.” Bentham, *ibid.* at 7 § 19; Braithwaite and Pettit, *ibid.* at 8.

13 References to such weighing or balancing can be found in Bentham, *ibid.* at c. 4 § 5, c. 13 § 5, c. 14 § 8, 10, 17, 18, 20, c. 15 § 2, c. 17 § 8; and Braithwaite and Pettit, *ibid.* at 9, 11, 13, 15, 33, 68-9, 78, 106, 109, 116, 154-5.

course, untruth may occasionally be quite useful). Could framing someone of a crime or exaggerating the wrongfulness of a given offence contribute, in some cases, to maximizing utility or dominion in the society overall? Consequentialists cannot, in principle, claim otherwise, which is why we must say that their approach can lead us to fail to fully meet these two purposes.¹⁴

But rather than simply rehearse this venerable criticism here, I want to voice another. It is that consequentialism often does too much for us. What I mean is that it answers too many questions, as opposed to leaving it to those directly involved in a given case to try and respond to it with dialogue. For example, one reason Braithwaite and Pettit commend their book to us as “a bargain at the price!”¹⁵ is that their theory is not limited to saying things about the means and ends of criminal sentencing but gives us “an integrated account of what ought to be done by the legislature, the judiciary, and the executive in regard to the key policy questions raised by the criminal justice system.”¹⁶ To do otherwise, they point out, is to help answer perhaps only three of the ten questions that they believe should be raised as regards criminal justice.¹⁷ But while they are certainly right to recognize the necessity of “thinking wide” about this subject, they are wrong to assume that we ought to be shopping for a systematic theory in order to help us do so. Indeed it is precisely this assumption that is behind the over-reach that, I would claim, is typical of all monists.

Consider the first question from their list of ten, which has to do with the kinds of behaviours that should be criminalized, hence with the legal purpose of properly recognizing offences. Later in their book, Braithwaite and Pettit tell us that, if we follow their theory,

only those activities would tend to be criminalized which threaten the persons, property, or province of other citizens. In other words, we think that the republican commitments would direct the criminal justice system towards the minimal type of institutions which the liberal applauds.¹⁸

Now while I happen to be a (Canadian) liberal myself, I am willing to accept that not everyone favours this ideology, indeed that it is fully legitimate for them not to do so. I accept this because, unlike monists, I do not believe that it is possible – much less desirable – to derive one’s ideological commitments from philosoph-

14 Braithwaite and Pettit, *supra* note 11 at 72-76, tell us that, unlike utilitarianism, their approach is not vulnerable to this charge since freedom as dominion has, by definition, a subjective dimension which would be compromised if people began to suspect that the state was not scrupulously respecting their rights. But what about those occasions when state agents think that they can hide their unscrupulousness? It is true that a parent who wishes to instil a sense of independence in a teenage child would do well to explicitly endorse a constraint which leads the child to believe that his or her decisions won’t be interfered with, even when the parent considers them wrong. But the parent could still violate that constraint without compromising the child’s sense of independence as long as he or she did so in secret.

15 *Ibid.* at 10.

16 *Ibid.* at 11.

17 See *ibid.* at c. 2.

18 *Ibid.* at 94

ical theory. Monists think otherwise because they assume that their theories are, or can be, fully coherent, which is to say unified, and so that there is no need to rely upon the cultural contexts in which they are set in order to resolve the tensions or holes that (I would claim) they always contain. They thus believe that issues such as that regarding what kinds of behaviours should be criminalized ought to be solved by applying their theory, rather than by citizens and their representatives engaging in truly open, i.e., non-theory-guided, dialogue.

To be clear, it is not that Braithwaite and Pettit believe that they have shown precisely how their theory produces the answers to all of the questions they raise; on the contrary, they admit that, in formulating it, they have done no more than establish “a research agenda for republican criminology.”¹⁹ Of course this still implies a process which, while certainly open to including other participants, is nevertheless meant to be led by criminology professors who are charged with applying their theory. The problem, however, is that real dialogue requires listening to one’s interlocutors, not to some preconceived doctrine.²⁰

One of the reasons Braithwaite and Pettit favour theory application is because they assume that criminal justice can constitute a unified “system” or “network of highly connected sub-systems,”²¹ hence that it is something capable of being guided by a similarly systematic theory. They thus recommend theirs to us not only because it is coherent, its parts not being in contradiction with each other, but also because the set of answers it provides are, on the whole, said to be better than those provided by other theories.²² But I would claim that neither (social) theories nor practices can constitute coherent systems. This is so of the former because, as I suggested above, such theories always contain tensions or contradictions within them. And as regards the latter, aside from some highly restricted contexts that are governed by tight sets of procedures, they are not only similarly disunified by nature, given that they often express incommensurable values, but they are also holistic in an “organic” rather than “systematic” sense. What I mean is not merely that they are wholes which are greater than the sum of their parts since this may also be said of systematic wholes²³ (given that the parts of a system can, given its structural properties, take on different qualities depending on where – or if – the parts are situated within it). What makes the parts of an organic whole different is that they can never be conceived as isolable “components,” “modules” or “elements.” This is so because there is a sense in which, in the very same way every cell in a body contains the molecular DNA information for the whole body, an organic whole is something which is present, to a degree, in each of its parts. Otherwise put, the parts of an organic whole are always “integrated” with each other, unlike those of a system that, we might say,

19 *Ibid.* at 9. See also at 86.

20 Blattberg, *Patriotic Elaborations*, *supra* note 8.

21 Braithwaite and Pettit, *supra* note 11 at 17.

22 *Ibid.* at 15-16.

23 Which is why those who follow G.E. Moore’s notion of “organic unity,” which asserts little more than “the value of a whole must not be assumed to be the same as the sum of the values of its parts,” are unable to distinguish between organic and systematic wholes. G. E. Moore, *Principia Ethica* (Cambridge: Cambridge University Press, 1903) at 28.

are “interlocked.”²⁴ This suggests that there will always be something distorting about the attempt to identify correlations between “inputs to” and “outputs from” an organic whole since it assumes that the identity of the whole’s parts, as well as that of any inputs and outputs, can be fixed and isolated instead of being wholly dependent on the context. Otherwise put, isolable parts only make sense when we are dealing with the operations of a system rather than with the developments of an organism. But when it comes to social practices and the values that they express, we are not.

While there is, of course, insufficient space to defend these sweeping meta-physical and ontological claims here, I want to at least try and lend them plausibility by criticizing Braithwaite and Pettit’s conceptions of both theory and practice. I begin with theory. “A comprehensive theory,” they tell us, “is coherent in so far as the answers provided are consistent with one another.”²⁵ One might be tempted to say their theory is coherent virtually by fiat since it does not so much provide answers (plural) as a single, all-encompassing answer from which all others are to be derived: in every case, do what you can to maximize freedom as dominion. And yet we do not have to look very far to find a contradiction.²⁶ On the one hand, Braithwaite and Pettit describe their favoured end as universal, since all theories must be able to abstract, to invoke “a universal value that is capable of being realized here or there, with this individual or that.”²⁷ On the other hand, however, they claim that their theory avoids “universalist pretensions”²⁸ since it may be appropriately applied only to Western-style democracies given that these are the only ones in which it is capable of commanding a consensus. Moreover, even if Braithwaite and Pettit accept that freedom as dominion is not as universal as they originally made out, I would still complain that it is wrong to expect that this value – indeed any value – could ever be accorded the same level of importance throughout the diversity of Western political cultures.²⁹

Second, practice. As we have seen, Braithwaite and Pettit like to refer to the practices of criminal justice as a system, one which consists of a number of open sub-systems. Among other things, this leads them to emphasise the influence of the sub-systems on each other. But notice how they do so. As regards the issue of

24 Blattberg, *Pluralist to Patriotic*, supra note 10 at c. 1, 3.

25 Braithwaite and Pettit, supra note 11 at 15.

26 One which, I would claim, is endemic to all uses of the “reflective equilibrium” approach, which was first introduced into political philosophy by John Rawls. See John Rawls, *A Theory of Justice* (Oxford: Oxford University Press, 1999) at c. 1.

27 Braithwaite and Pettit, supra note 11 at 26.

28 *Ibid.* at 42.

29 Indeed there are occasions when Braithwaite and Pettit, *ibid.* at 96, themselves fail to give dominion very much importance. For example, they discuss an imagined case of public indecency wherein a young couple on a bus offends the other passengers by engaging in intimate sexual relations. According to the authors, if need be their theory would countenance the police removing the couple in the interests of public order. Because, they tell us, those for whom “life would be unpleasant for most of us if this kind of behaviour were allowed to go in public and that we are entitled to protection from such an intrusion on our feelings” should not be dismissed out of hand. But this suggests that Braithwaite and Pettit are more concerned with avoiding unpleasantness than with the violation of the couple’s dominion that their expulsion from the bus would bring.

how much discretion should be allotted to given agents, for example, they point out that

if we stop actors in one sub-system from exercising discretion to implement such values, we leave it to actors in other sub-systems who share these same values to compensate by exercising their discretion to the same end. Hence, if the problem of judges who are soft on drinking and driving is dealt with by mandatory prison terms or mandatory licence suspension, police officers who are equally soft on drunk drivers may exercise their discretion to arrest fewer of them.³⁰

The effect, in other words, is that “the old equilibrium”³¹ gets reasserted, since “attempts to destroy discretion in one or two sub-systems of the criminal justice system simply displaces it to other sub-systems.”³²

But there is no “it.” The claim, in other words, that actors in different places within the whole exercise the “same” capacity, namely “discretion,” and do so towards “the same end” is simply inaccurate. For while there are certainly what Wittgenstein would call family resemblances here, different acts of discretion are never “the same” in the sense that they may be isolated like variables and then compared or measured in terms of more or less. This is true of whatever is identified as inputs or outputs to and from the whole, as well as of the ostensive modules which, when interlocked, make that whole up. The reason is that when that whole is holistic in an organic rather than systematic sense, the meanings of its parts will always depend on their context. Because in such wholes the principle of identity ($a = a$) does not hold, it makes no sense to search for correlations between things, much less to identify them as relating in equilibrium.

For example, with respect to the input and output above of soft attitudes towards drinking and driving, while Braithwaite and Pettit may certainly say that mandatory prison terms reduce the discretion of judges, it is not really that very same capacity which police officers are exercising when they choose to arrest fewer drunk drivers. This is because, given that the officers make those fewer arrests as a result of their having a soft attitude towards the crime and so a fear that those they arrest will be disproportionately punished, there is a sense in which the officers feel *forced* to act in this way, and the kind of discretion that one uses because one is forced to – assuming that it is even right to call this discretion, since there is clearly something paradoxical about it – simply cannot be equated with that which is a normal part of exercising one’s duty, i.e., the judges’. Moreover, the judges are deciding upon *how heavily* drunk drivers should be punished, while the police officers are deciding *whether* they will be tried and punished at all – a punishment which, whether or not the suspects are ultimately found innocent, also includes the often trying experience of being prosecuted in the first place. Given these differences, we should conclude that Braithwaite and Pettit’s

³⁰ *Ibid.* at 23.

³¹ *Ibid.*

³² *Ibid.* at 20.

claim – that “the old equilibrium” is simply reasserting itself – mischaracterizes what is really going on, indeed so much so that I’m tempted to refer to this as yet one more case of “the old equilibrium of injustice.”

III. RETRIBUTIVISM

The most powerful defence of retributive justice is probably Hegel’s. Hegel begins by emphasising the universal dimension of criminal acts, their “infinite aspect,” by which he means the bad example that they set.³³ Such acts are wrong because in committing them one makes a “show”³⁴ of universal right while in reality negating its principles. In the case of a theft, for example, one violates both a particular, the legitimate right of the victim to the object stolen from him, and a universal, the victim’s moral status as a person, which is embodied in his very capacity for property rights.³⁵ To commit a crime, then, is essentially to assert that there exists a contradiction between the principles of right and, good monist that he is, Hegel assumes that right cannot abide contradiction. Hence his claim that a criminal act represents a “nullity” from the start, its negation of right being something that must itself be negated.³⁶ And that is where punishment comes in.

To Hegel, punishment must aim to “annul” the infringement,³⁷ to restore right by inflicting an injury on the criminal that is equal in value to that brought about by the wrong he or she committed.³⁸ So it is here, we may say, that Hegel connects up with the balancing scales emblem. For it is as if, before an offence is committed, we begin with ideal modern society, wherein all rights are respected and any scale has its pans perfectly level with each other. Then, because someone has chosen to perform a criminal act, we imagine the pans as having been put off balance, this being why we need punishment to cancel the act in order to level them off again. The extent of that punishment must therefore be based on an equivalence between the punishment’s “value” and that of the criminal’s will. Hegel admits that determining this is always difficult, and he cautions that philosophy can do no more than assert the need to do so. For it is the judge, rather than the armchair philosopher, who must ensure that there is not “one lash too many, or one dollar or one cent, one week in prison or one day, too many or too few.”³⁹

This accounts for Hegel’s claim that, when done properly, punishment “honours” the criminal as a rational being, for in restoring the balance between the harm cause and the legitimacy of the legal order it reconciles him both with that order and with himself.⁴⁰ And yet this is true only if we adopt the standards of

33 Hegel, *Philosophy of Right*, trans. by T.M. Knox (Oxford: Oxford University Press, 1952) at § 22, 91, 100. See also Wolfgang Schild, “The Contemporary Relevance of Hegel’s Concept of Punishment,” in Robert B. Pippin and Otfried Höffe, eds., trans. by Nicolas Walker, *Hegel on Ethics and Politics* (Cambridge: Cambridge University Press, 2004) at 160.

34 Hegel, *ibid.* at § 82.

35 *Ibid.* at § 95.

36 *Ibid.* at § 82.

37 See *Ibid.* at § 98-99, 101-2.

38 See *Ibid.* at § 99, 220.

39 *Ibid.* at § 214 R; see also § 101.

40 *Ibid.* at § 100 R, 220.

what I have claimed is the inferior form of rationality associated with weighing or pondering. For genuine reconciliation requires integration rather than zero-sum balancing since it must produce a win-win outcome for all concerned. This, however, is impossible when someone is to be punished since this means that they will, by definition, lose something of value. That is why offenders who are threatened with potential punishment cannot avoid conceiving of the law as an adversary, indeed as an institution looking to exact revenge on behalf of the state,⁴¹ rather than as an opponent with whom it may be possible to reconcile. And they would be right to do so.

In fact, there is even something about the way punishment tends to be measured that ensures an adversarial relation between the offender and the legal order. For to represent things with numbers (50 lashes, a \$500 fine, a 5-year prison term, etc.) is to abstract them, to separate them from their context, and when there is a conflict over such things then they can only be related in a zero-sum way. Consider an exchange of items whose value is measured in terms of money. Say I give you something worth x dollars; necessarily, I will be considered “down” that x dollars – minus, of course, the dollar value of whatever I then receive for it in return. So when money is involved then, as Marx has described, an exchange will consist of “the alternating relation between two persons who are in polar opposition [i.e., adversarial] to each other.”⁴² But say we never thought to convert the items’ use-value into the abstract, inherently “antagonistic forms”⁴³ of exchange-value: you give me your hockey helmet (for which you no longer have use for anyway, your father having given you a new one) in return for my hockey stick (which had always been too small for me). By conceiving of the items as they exist for us contextually, given our particular situations, we can appreciate how each is worthless to the one who trades it away but valuable to the one who receives it. By holding on to all of the details, in other words, we are able to interpret the exchange as synergistic. But not if we choose to measure the items in terms of an abstract unit such as money. And it is the same with punishment, which as we have noted tends to be expressed either monetarily or in physical terms by hurting or imprisoning the offender’s body. By quantifying such “just measures of pain,” then, we ensure an adversarial relation wherein the more units of punishment suffered by the offender translates into more “enjoyment” for the law.

Hegel also has no room for the reconciliation of the offender and victim. For reconciliation, unlike mere accommodation, requires that those involved in a conflict recognize that they share a common good. Only that way can they possibly reach a common understanding about this thing that’s shared as distinct from a mere agreement over some set of trade-offs. Hegel, however, can be said to conceive of those involved in a conflict as separate from each other and so as

41 See William E. Conklin, *Hegel’s Laws: The Legitimacy of A Modern Legal Order* (Stanford: Stanford University Press, 2008) at 311-313.

42 Marx, *Capital*, vol. 1, trans. by Ben Fowkes (New York: Random House, 1976) at 208. The same adversarial dynamic is also established when people choose to express the values they are conflicting over in the language of rights. See Blattberg, *Pluralist to Patriotic*, *supra* note 10 at c. 7.

43 Marx, *ibid.* at 199.

“floating” above the whole since, otherwise, they would be not in conflict but, like the whole, unified. Thus does he repeatedly describe conflicts as consisting of “clashes” or “collisions,” and thus does he refer to the criminals who persist in characterizing their just punishments as evil as expressing a subjective, “superficial”⁴⁴ point of view. Because to Hegel, criminals should instead recognize how their punishment, when it is truly punitive as distinct from vengeful,⁴⁵ “reconnects” them with the unity that is the whole and so brings them into alignment with objective right.

How different all of this is from an approach which aims to sanction criminal acts with reparation rather than punishment. Say I stole your car, took it for a ride, and smashed it. What if, instead of lawyers battling over the measurable duration of my future prison term, the question becomes: how might I be convinced of the need to feel shame and remorse for what I have done, as well as to repair the damage? Answering it will surely require a reconciling conversation and, should one succeed, offender, state, and victim would all find themselves in a win-win situation. Say it was agreed that I should apologize as well as repair the damage done (I happen to be a mechanic). Given that I myself now agree that what I did was terribly wrong, I actually *want* to do these things. Surely I would be more honoured as a rational being if I were allowed to do them than if I were punished against my will in order to set some abstract balance aright. So while sometimes potentially justifiable overall, it is precisely because punishment can go no further than striking such a balance that we should recognize how, at best, it constitutes no more than a form of “justifiable injustice.” For after all, that’s a sword Lady Justice is carrying in her other hand and, unlike with conversation, swords can only do good (when they do good) while also always doing bad.

Indeed, given the assumption of organic holism, recognizing illegality with sanctions that are punitive rather than reparative will have the added disadvantage of ensuring zero-sum – hence never integrated or reconciled – relations between all of the other legal purposes that we referred to above. We can see why by drawing an analogy between the identification and then sanction of a criminal act and the reconstruction and then interpretation of a text. For we may think of a crime as like a story, say one that we might find in a novel: something has happened, there are characters involved, and there is a beginning, middle, and end.⁴⁶ Of course this will be a non-fictional rather than fictional story, since it is a part of history; but it is a story nevertheless. Thinking about it in this way al-

44 Hegel, *supra* note 33 at § 99 R.

45 *Ibid.* at § 103.

46 Ian Watt runs the analogy in the opposite direction: “The novel’s mode of imitating reality may therefore be equally well summarized in terms of the procedures of another group of specialists in epistemology, the jury in a court of law. Their expectations, and those of the novel reader coincide in many ways: both want to know ‘all the particulars’ of a given case – the time and place of the occurrence; both must be satisfied as to the identities of the parties concerned, and will refuse to accept evidence about anyone called Sir Toby Belch or Mr Badman – still less about a Chloe who has no surname and is ‘common as the air’; and they also expect the witnesses to tell the story ‘in his own words’. The jury, in fact, takes the ‘circumstantial view of life’, which T.H. Green found to be the characteristic outlook of the novel.” Ian Watt, *The Rise of the Novel: Studies in Defoe, Richardson, and Fielding* (Harmondsworth: Penguin Group, 1963).

lows us to see how the task of determining precisely what happened is analogous to the work of textual philology, the discipline of reconstructing texts. For just as the philologist pieces together fragments in order to establish a definitive work, courts need to decide upon the evidence of a case gathered for them by the police in order to develop an account of precisely what happened. Both police and the courts must also take on a task analogous to that the literary critic, for they have to interpret the evidence/text in order to decide whether the suspect should be arrested (the police) and, if so, whether he should then be arraigned and found either innocent or guilty (the courts). Should the verdict be guilty, moreover, the court will then have to engage in interpretation in order to determine the necessary censure and sanction.

Both the philological- and critical-like tasks are thus concerned with truth, the first being of the factual and hermeneutical kinds and the second being strictly hermeneutical. But if the second can potentially lead to punishment then, in keeping with what was said above, it will ensure an adversarial relation between the offender and the state, and it should be evident that this will hinder rather than help with making the required interpretations. Say I finished a confusing novel and, wishing to understand it better, I call on two literary critics for help. Which would make the most sense: (i) to instruct, indeed pay, each to present an interpretation which is the polar opposite of the other, leaving me with the job of formulating one that balances the two extremes on the assumption that it will be the most true; or (ii) have each present what they believe to be their best interpretations, which are partly the results of friendly discussions between them, and then have them point out where they agree and where they disagree so that I may, following yet more discussion, develop the interpretation that seems to me the most inclusive and so the best? Surely (ii) is the better path. Indeed balancing is not only an inferior way of proceeding when faced with opposing interpretations of a case as a whole but also when it comes to the opposing features of a single interpretation, since it will always be better to develop an account which integrates or reconciles, rather than merely balances, those features. And it goes without saying that this is also true of disagreements over evidence, hence as regards our first, philological-like task.

This critique of adversity is meant to apply not only to Anglo-American judicial traditions but also to the inquisitorial ones, wherein there are occasions in which “one is not unaware that the examining magistrate shows a certain tendency to behave as an agent for the prosecution.”⁴⁷ Because in both there will be people in the room – in particular, the defendant and his or her advocate – who face a potential conviction that could mean punishment for the former, and so they cannot be expected to feel secure, hence open-minded enough to participate in a genuine conversation. Of course conversation is not only absent from trials but also from pre-trial plea bargaining, whose increasing frequency over the past thirty years has meant that more and more cases are dealt with through negotiation rather than trials.⁴⁸ But negotiation is also too adversarial to allow

47 Robert Vouin, “The Protection of the Accused in French Criminal Procedure” (1956) 5:2 *I.C.L.Q.*, 157 at 170.

48 See e.g. Thomas Weigend, “Why Have a Trial when You Can Have a Bargain?” in Antony Duff,

room for conversation.

Moreover, the greater the potential for punishment, the greater the incentive those who would avoid being punished have to deceive, meaning that punitive-induced adversity has disadvantages which are ethical as well as epistemic. And it is, of course, not only defendants who are encouraged to add lying to whatever wrongs they may have already committed, but also attorneys, whether for the defence or the prosecution. Indeed, it has even been suggested that if lawyers, particularly those working within Anglo-American legal traditions, are to fulfil their roles successfully then they need to become serial deceivers.⁴⁹ Add to this the brutalisation of all those who run the prisons⁵⁰ and we have reason to accept that this, the ethical price of compromising the integrity the participants in a retributive process, must be included within any tally of the cost, the last of the legal purposes I identified above.

Talk of cost leads me to want to call attention to how expensive prisons tend to be, as well as to mention the inability of inmates to contribute economically or otherwise to society. Nor should we ignore the price in suffering that must be paid by those inmates' innocent friends and family. But before saying anything more about these matters, I want to point out how, though punishing criminals certainly serves to condemn their acts publicly, it is far less effective at communicating that condemnation to the criminal. For surely any attempt to *impose* feelings of repentance on someone is counter-productive since such feelings can be genuine only when they are voluntarily. Hence Martin Wright: "punitive sanctions are more likely to produce resistance, resentment and attempts to avoid the pain; they inhibit learning rather than promote it."⁵¹ Not so when an offender is faced with the need for repair rather than punishment, since repair *is* compatible with listening and so with reaching an understanding through conversation. And such understandings – if they come – will surely contribute to rather than balance against the offender's rehabilitation in a way that prisons, widely recognized as "schools of crime" as well as places which harden their inmates, never can. Finally, repair's ability to facilitate rehabilitation also provides greater security for the public, unlike punishment which, it has become a commonplace, fails to serve as an effective deterrent. So it is that, except in the case of those who are locked-up for life, the high recidivism rates associated with punishment as imprisonment suggests that, in the long run, the relation between retributive justice and public security can only be zero-sum.

Returning to the question of cost, I have no intention of suggesting that a process which favours repair over punishment will be free, although we have reason to expect that, given the reduced participation of legal professionals that would attend it, it will be relatively cheap. That said, striking a balance between

Lindsay Farmer, Sandra Marshall and Victor Tadros, eds., *The Trial on Trial*, vol. 2: *Judgment and Calling to Account* (Oxford: Hart, 2006).

49 See Arthur Isak Applebaum, *Ethics for Adversaries: The Morality of Rules in Public and Professional Life* (Princeton: Princeton University Press, 1999) at 104-108, 199-200.

50 See e.g. Philip Zimbardo, *The Lucifer Effect: How Good People Turn Evil* (New York: Random House, 2007) at c. 14-15.

51 Martin Wright, "Is It Time to Question the Concept of Punishment?" in Lode Walgrave, ed., *Repositioning Restorative Justice* (Portland, OR: Willan Publishing, 2003) at 8.

justice and the expense of legal proceedings still seems unavoidable. And yet even here I want to argue that retributivism virtually ensures that it will not be done properly.

Consider what Ronald Dworkin, another retributivist, has had to say on this matter. Dworkin begins by wondering whether people are not "entitled to the most accurate trials possible, hang the cost."⁵² At first, he complains that those who would respond by calling for "striking the right balance" between the interests of the accused on the one hand and those of the community in limiting expensive trials on the other at best merely restate the problem. Given that Dworkin is no friend of consequentialism, this is only to be expected. And yet the surprising thing is that, at the end of the day, he too calls on us to engage in balancing. How can this be?

It can because Dworkin believes that balancing is acceptable as long as it is guided by a deeper monist vision, one designed, not to maximize some end, but to respect a conception of equality which establishes the "principles of fair play."⁵³ These principles are not themselves to be balanced or compromised for they must guarantee the proper respect of people's rights to just criminal procedures. They are said to do this by ensuring "consistent weighting" when it comes to the inevitable balances that must be struck between the risk of suffering the moral harm which comes from being wrongfully convicted or sentenced on the one hand and the expense to the community of ensuring the most accurate trials possible on the other.⁵⁴ To Dworkin, that some individuals will suffer this moral harm is unavoidable; what can be guaranteed, however, is that the injustice of their doing so will not be unfair.

Surely, this is a distinction which only an academic could love. For the knowledge that the injustice one is suffering is not due to any unfairness in the system cannot really be expected to provide much comfort. That Dworkin appears to believe otherwise is ironic since the willingness to sacrifice an individual's welfare in the interest of the community's is just the kind of thing one might expect from a conservative rather than a liberal, and yet the very same conception of equality that underlies Dworkin's principles of fairness is one that, he has informed us elsewhere, is the basis of liberalism as opposed to conservatism.⁵⁵

So, once again, we find ourselves confronted with the derivation of an ideological position from philosophy, from monist theory. This is a problem because, to repeat the obvious, not everyone is liberal. Liberals tend to place great weight on the presumption of innocence and on procedures such as those which restrict the permissibility of evidence because we are deeply concerned with upholding the respect for the individual. That is why we tend to want to spend more on ensuring the integrity of legal proceedings than do conservatives who, of course, put greater emphasis on the security of the community. But surely, assuming that

52 Ronald Dworkin, "Principle, Policy, Procedure," in C.F.H. Tapper, ed., *Crime, Proof and Punishment: Essays in Memory of Sir Rupert Cross* (London: Butterworths, 1981) at 194 [Dworkin, "Principle, Policy, Procedure"].

53 *Ibid.* at 206.

54 *Ibid.* at 211.

55 See Ronald Dworkin, "Liberalism," in *A Matter of Principle* (Cambridge, MA: Harvard University Press, 1985) [Dworkin, "Liberalism"].

the conversation has broken down and we have all had to turn to our respective political ideologies for guidance, we should be negotiating with each other in good faith. And should those negotiations succeed, then we should expect that they will produce different accommodations in different polities, as well as in different contexts within the same polities. What I am saying is that, when the time comes to strike a balance – and when money's involved then, for the reasons I gave above, come it inevitably will – it is simply wrong for Dworkin to demand that this balance be theoretically rigged in favour of one ideology over all of the others. For how, then, could we justifiably speak of *good-faith* negotiations?

Nevertheless, the fact is that when retributivists accept, as they must, some limit on the expense of criminal procedures, they *are* willing to strike a balance – as long, once again, as this is done within what they consider to be a proper monistic context. So the basic difference between them and consequentialists on this matter is simply that they think the latter are unable to provide that context. For example, Gerry Maher argues that only approaches comparable to Dworkin's sufficiently protect individual rights while providing us with a clear rule according to which those rights and interests may be ranked and so balanced. Without such clarity, he warns, the law would be unknowable since there would be no means of predicting a judge's decision.⁵⁶

I have no wish to take sides in this debate with consequentialism. What I do want to point out, however, is how this claim about ranking reveals something that all monist theorists share, namely the assumption that it is possible to *commensurate* the items being balanced – not in the strict sense of reducing them to a common unit of measure, but enough so that they may be considered rationally comparable.⁵⁷ This, monists believe, is what unity provides: it is because whatever is placed on the scales' pans is balanced by virtue of a *single* beam that there can be comparison at all. And though this balancing may entail compromise, at least the "master" value – equality, utility, dominion or whatever – will be realised in the process.

Yet there exists a conception of practical reason, one which shares much with Aristotle's notion of *phronēsis* (practical wisdom) while dropping the monist architectonics underlying it, that is able to compare incommensurables. It thus allows us to invoke a rational process which aims for repair and reconciliation since it is able to take the needs of the victim into account, hence all of the incommensurable particulars of his or her sufferings and situation. But, objects the monist, wouldn't the context-dependent nature of such reasoning undermine proportionality? One reason the retributivist, in particular, favours numbers is that she believes that the commensuration they provide makes proportionality possible.⁵⁸ But for the very same reason that \$10 is worth much less to a rich

56 See Gerry Maher, "Balancing Rights and Interests in the Criminal Process," in Antony Duff and Nigel Simmonds, eds., *Philosophy and the Criminal Law* (Stuttgart: Franz Steiner, 1984) at 100-101.

57 This appears to be the sense in which Maher asserts commensurability as a requirement. See *ibid.* at 102. It is because I believe Dworkin would agree that I think John Cottingham is wrong to suggest that Dworkin "does not address the commensurability issue at all." John Cottingham, "The Balancing Act: Weighing Rights and Interests in the Criminal Process," *ibid.* at 115

58 Retributivists inherit their concern for commensuration from older, revenge-based conceptions

man than it is to a poor man, we should recognize that numbers are deceptive in this respect.⁵⁹ Indeed, I would go further and suggest that proportionality, given its association with balancing and abstract magnitudes, is simply not the most appropriate characterization of what it means to “get it right” when one is aiming to bring about remorse and repair. Because these require a conception of criminal justice which fully embraces context, hence one that affirms conversation rather than proportion.

For only conversation, in which interlocutors are opponents who are not also adversaries, can make way for integrating, for genuine reconciling rather than balancing, hence for the win-win outcomes that realise rather than compromise the common good. When it does so, moreover, it may be said to help all involved feel more at home with the law, indeed perhaps even more so than if there had never been a conflict due to a crime in the first place. As Dudley Knowles points out, however, Hegel insists “that persons cannot be, know, or feel themselves to be at home in a world where conflicting claims are made regarding each other’s moral status and specific rights.”⁶⁰ Retributivists must do this because they have no room in their thinking for the idea of conflict between opponents who are not also adversaries. But if we recognize that even the most ideal society constitutes a non-unified whole, indeed one riddled with conflict, both criminal and political, then we will interpret their belief that one can feel at home only in the absence of conflict as not merely idealistic but positively utopian. Thus should we reject their balanced utopias in favour of that ironically even more ambitious ideal, namely reconciliation.

IV. ABOLITIONISM

Abolitionists also favour reconciliation, but in a way that would do away with, or at least serious curtail, criminal law. For theirs is a very particular conception of reconciliation, one which equates it with “restoration.” This restoration is said to come, not from maximizing something, nor from punishing someone, but from all involved in a given case engaging in dialogue.

Now dialogue, as I noted above, requires that interlocutors be fully sensitive to the particulars of the context and so it is incompatible with the application of a theory. Despite this, abolitionists are still monists, a direct result of their conception of reconciliation as restoration. We begin to appreciate why when notice the similarities between their approach and Hegel’s, similarities which comes to the fore when we recognize that their goal, as Nils Christie has affirmed it, is “to restore the situation and thereby preserve social systems.”⁶¹ For Hegel, as we have seen, also hopes to “get something back again,” and indeed what both he and

of justice. On the latter, see William Ian Miller, *Eye for an Eye* (Cambridge: Cambridge University Press, 2006) at 7, 31–42, 160–79.

59 Braithwaite and Pettit, *supra* note 11, at 126–127, 180, make a similar point.

60 Dudley Knowles, “Hegel on the Justification of Punishment,” in Robert R. Williams, *Beyond Liberalism and Communitarianism: Studies in Hegel’s Philosophy of Right* (New York: SUNY Press, 2001) at 130.

61 Nils Christie, *A Suitable Amount of Crime* (New York: Routledge, 2004) at 96 [Christie, *Amount of Crime*].

the abolitionist hope to get back is nothing other than a state of equilibrium. As Howard Zehr has written,

Both retributive and restorative theories of justice acknowledge a basic moral intuition that a balance has been thrown off by the wrongdoing. Consequently, the victim deserves something and the offender owes something. Both argue that there must be a proportional relationship between the act and the response. Where they differ is on the currency that will right the balance or acknowledge that reciprocity.⁶²

Thus does another abolitionist, Grazia Mannozi, endorse the scales of justice as “an emblem of the principle of proportion,”⁶³ one which, we may add, assumes a supposedly balanced, unified reality. The monism here is reflected in, among other things, the abolitionist’s belief that restoration is always, at least in principle, possible. When persons fail to reconcile, that is, it must be either because of their “blood vengeance,”⁶⁴ as Herman Bianchi has put it, or because some other cause has made them unable or unwilling to engage in the necessary dialogue.⁶⁵ The fault, in other words, is never with some inherently irreconcilable, “cracked” moral reality. No surprise, then, that even though Christie’s first piece of research consisted of a study of Nazi concentration camp guards, he believes that there are no evil monsters in the world⁶⁶ – none, we might say, who would take advantage of its cracks in order to push people into them, destroying them simply for the sake of it.⁶⁷ It is because Christie recognizes no such cracks that he believes even the worst crimes can potentially be restored.

But we do not need to invoke evil in its most radical sense to recognize that there are occasions when, no matter how willing and able are the interlocutors, dialogue just cannot succeed. Consider a more “ordinary” case of murder, about which Christie has written:

What about serious crimes, so upsetting to the surrounding community that they – the surrounders – insisted that pain had to be used? The mother of [a] murdered child forgave the offender, but the surroundings did not. Who should be listened to? This would, in the concrete cases, depend on what sort of system the parties were members of. If the system consisted of victim and offender, and only these two, the problem would be non-existent, at least for these two. But the more members the

62 Howard Zehr, “Journey to Belonging,” in Elmar G.M. Weitekamp and Hans-Jürgen Kerner, eds., *Restorative Justice: Theoretical Foundations* (Portland, OR: Willan, 2002) at 29.

63 Grazia Mannozi, “From the ‘Sword’ to Dialogue: Towards A ‘Dialectic’ Basis for Penal Mediation,” in Weitekamp and Kerner, *ibid.* at 243.

64 Herman Bianchi, *Justice as Sanctuary* (Bloomington: Indiana University Press, 1994) at 29.

65 Christie, *Amount of Crime*, *supra* note 61 at 80-82, 106; and Bianchi, *ibid.* at 29-30, 45-47.

66 See Christie, *ibid.* at x, 97.

67 On evil as so understood, see “Good, Bad, Great, Evil,” in Blattberg, *Patriotic Elaborations*, *supra* note 8.

system had, and the less closely related the victim and/or the offender was to the other members, the greater the problem of community reaction would become.⁶⁸

But what, one asks in astonishment, about the murdered child? Surely he or she is also a victim here, indeed the chief victim.⁶⁹ So even if the “system” consists of only mother and offender, and even if the mother finds it in her heart to forgive, both should still recognize that the child does not have the option of doing so, hence that the problem remains anything but “non-existent.” Because death, it should be obvious, takes one out of any potential dialogue and so makes reconciliation impossible. As the Bengali writer and religious leader Ram Mohan Ray once put it: “Just imagine how terrible it will be on the day you die, / Others will go on speaking, but you will not be able to respond.”⁷⁰ Only a monist could miss this undeniable fact.

The assumption of unity is behind another way in which abolitionists – or at least those who accept that we cannot do without punishment altogether – appeal to the idea of balancing. For they identify punishment with the modern state, which they conceive as separate from, indeed as in a necessarily adversarial relation to, civil society and the reconciliatory dialogues that may take place within it.⁷¹ This state, moreover, is understood to constitute its own unity – whether, with Christie, because it is a monoculture dedicated solely to capital or, with Bianchi, because it is a sovereign, secularized Christian entity⁷² – and this unity is considered irremediably outside, indeed transcendent,⁷³ of the self-enclosure that is civil society. So what we have here is a vision of two separate unified wholes, to which is added a conception of crime as something that takes place within the confines of one of them, i.e., as “a violation of relationships among people and not a violation of the state.”⁷⁴ The result is that the response to crime gets interpreted as the basis of another zero-sum dynamic, this time between the two: when restoration fails in civil society then, and only then, are we supposed to turn away from it and towards state punishment. Hence Christie’s claim that “the more State, the more the conditions are laid down for punishment, and the less State, the less the conditions encourage punishment,” while Bianchi calls on us to endorse a “balance of power” between the “two systems

68 Nils Christie, *Limits to Pain* (Oxford: Martin Robertson, 1981) at 114 [Christie, *Limits to Pain*].

69 Bianchi also appears to neglect the chief victim when he writes that “Persons who have committed unintentional manslaughter have a greater chance of convincing people of their repentance than does a conscious killer.” Bianchi, *supra* note 64 at 139.

70 Quoted in Amartya Sen, “Human Rights and Asian Values,” in Joel H. Rosenthal, ed., *Ethics and International Affairs: A Reader* (Washington, DC: Georgetown University Press, 1999) at 179.

71 “Deliberative democrats” relate state and civil society in a similar way. See “Patriotic, Not Deliberative, Democracy,” in Blattberg, *Patriotic Elaborations*, *supra* note 8.

72 Christie, *Amount of Crime*, *supra* note 61 at c. 2; and Bianchi, *supra* note 64 at 6-18.

73 Hence Christie’s depiction of modern state justice as “hierarchical” and Bianchi’s as “vertical.” See Christie, *ibid.* at 76-77; and Bianchi, *ibid.* at 59-60, 143.

74 Dennis Cooley, *From Restorative Justice to Transformative Justice: Discussion Paper* (Ottawa: Law Commission of Canada, 1999) at 35.

that must exist side-by-side.”⁷⁵ To the abolitionist, then, the challenge of contemporary criminal justice is conceived as none other than that of “restoring the balance between state and civil society to the advantage of the latter.”⁷⁶

But just as civil society is not really unified and self-enclosed, we have no reason to accept a conception of the state and its criminal law as some unified other. After all, the state is not monolithic but itself a locus of conflict, and a patriotic politics, at least, would have us try and respond to that conflict with dialogue, in particular, with conversation. Patriotism, in other words, draws a dotted rather than solid line between civil society and the state, allowing us to appreciate how criminal activity does damage not only to the relationships between people within the former but also between them and the latter, which is to say between them and the law, understood now not as some abstract, transcendent set of unified rules but as the expression the citizenry’s common good.⁷⁷ Otherwise put, the political community, too, can be a victim. A sharp division between state and civil society makes sense only if we agree with Christie that the state cannot avoid treating its citizens as if they were strangers while civil society is a domain of potentially neighbourly relations.⁷⁸ But to recognize that citizens share a common good is, following Aristotle, to recognize that they are even more than neighbours, since there is a sense in which they are friends.⁷⁹ In calling for crime to be dealt with along the lines of civil law, then, abolitionists would only dissolve this civic friendship – something that, in modern times, is already weak enough as it is.

None of this is to say that we should fail to distinguish between political conflict, which is behind the making of laws, and criminal conflict, which arises from the breaking of them. Indeed while Christie is quite right to point to the edifying potential of conflict,⁸⁰ he fails to appreciate that this is more true of the political kind than of the criminal. Political conflict is simply more controversial, hence more interesting and so, we might say, of a higher quality than is criminal conflict. For the latter is based on already established laws, those which (ideally) have achieved more or less of a consensus amongst the citizenry. Put differently: a criminal act constitutes a wrong virtually by definition, while one reason political acts are what they are is that the political community has yet to reach any sort of agreement about their meaning. Christie, however, would have us collapse the distinction between the two, as when he encourages us to put a political gloss on all crime or when he suggests that there can be a suitable amount of

75 Christie, *Limits to Pain*, *supra* note 68 at 115; Bianchi, *supra* note 64 at 97.

76 Jan Froestad and Clifford Shearing, “Conflict Resolution in South Africa: A Case Study,” in Gerry Johnstone and Daniel W. Van Ness, eds., *Handbook of Restorative Justice* (Portland, OR: Willan, 2007) at 554.

77 See Blattberg, *Pluralist to Patriotic*, *supra* note 10 at c. 5.

78 See Christie, *Limits to Pain*, *supra* note 68 at 111 and Christie, *Amount of Crime*, *supra* note 61 at 75-77.

79 See Aristotle, *Nicomachean Ethics*, trans. Terence Irwin (Indianapolis: Hackett, 1985), bks. 8-9 [Aristotle, *Nicomachean Ethics*].

80 See especially Nils Christie, “Conflicts as Property,” (1977) 17 *Brit. J. Crim.* 1 at 1, 15 [Christie, “Conflicts as Property”].

it.⁸¹ Moreover, while he is certainly right to point out that criminal conflict can provide those involved (especially, I would add, the criminal) with some much needed “norm-clarification,”⁸² he fails to appreciate how political conflict can lead to “norm-development,” by which I mean reconciliations that are more forward-looking and progressive, not to mention profound. That said, even norm-clarification is best characterized as transformative rather than (merely) restorative, since all reconciliation brings something *new* into the world. We cannot return to some antecedent, balanced unity because there is no such unity.

So, while criminal and political conflict must be distinguished, the line we draw between them, just like that between civil society and the state, should be dotted rather than solid. Law, in other words, is but less controversial politics and, when at their best, both aim for reconciliation since both are parts of the common good that citizens share. This means that, when it comes to those times when criminal justice requires that we move from attempting repair to punishment, we should conceive of this move, not as a shifting of some balance between two separate systems, but as a relocating from one feature of an organic whole to another.

If I had to identify one source of abolitionists’ attraction to balancing, it would be their very loose conception of reconciliation. This is itself a result of their failure to make the distinction above between dialogue as negotiation, which is adversarial and so can, at best, produce balanced accommodations, and dialogue as conversation or discussion, which is no more than oppositional, hence able to bring genuine, win-win reconciliations.⁸³ Indeed, it is only because Antony Duff, who is not an abolitionist, makes the same mistake⁸⁴ that he is able to advance a critique of abolitionism which is based upon a blurring of punishment and restoration. Duff puts “communicative censure” at the centre of his account of criminal justice, a form of communication which he identifies with the law’s use of punishment in order to persuade convicted criminals to recognize and repent for their wrongdoing. Since restoration cannot consist of mere apology – for there must also be feelings of shame and remorse in addition to material repair or compensation – Duff argues that any restorative process must also be seen as painful to the offender and so should be considered a form of punishment. Hard treatment such as imprisonment, in consequence, is different only in degree.⁸⁵

But the pain which attends the recognition of and remorse for wrongdoing is not the same as that which is brought about by punishment. The reason is that the latter is imposed while recognition and remorse must, as we have seen, be

81 See Christie, *Amount of Crime*, *supra* note 61 at c. 3, 8. It is because of this blurring, moreover, that Christie never thinks to suggest that a victim may be unwilling to engage in dialogue with an offender not because she is irredeemably vengeful but simply because she has better things to do with her time – attend to a political conflict, for example.

82 Christie, “Conflicts as Property,” *supra* note 80 at 8.

83 For the blurring of these two, see e.g. Bianchi, *supra* note 64 at 29-30, 48, 59-60, 63, 66, 98, 127; and Christie, *Amount of Crime*, *supra* note 61 at 98-99.

84 See e.g. Antony Duff, *Punishment, Communication, and Community* (Oxford: Oxford University Press, 2001), at 92-93, 158-163 [Duff, *Punishment*].

85 *Ibid.* at 80-82, 95-99.

voluntary. Indeed any attempt to bring recognition and remorse about by force will only make their coming less likely – it is the difference, we might say, between “persuading,” which can involve pressure or coercion, and “convincing,” which must be strictly rational.⁸⁶ That Duff explicitly refers to communicative censure as a form of persuasion thus makes a great deal of sense, but this then forces him to make the dubious claim that bringing offenders to respond appropriately to their wrongdoing is in no sense a form of moral education.⁸⁷ The claim is dubious because there is an important difference between the edifying “growing pains” that can attend conversation and those pains which are inflicted by punishment, if only because the latter, like negotiated concessions, must always signify loss. So Duff’s attempt to undermine abolitionism by giving punishment a place within restoration fails, and yet it does so due to an error that he shares with the abolitionists: the blurring of conversation and negotiation, of genuine reconciliation and balanced accommodation. Avoid this blurring and we have reason to avoid abolitionist balancing.

V. “MIXED” PLURALISM

To H.L.A. Hart, “our main social institutions always possess a plurality of features which can only be understood as a compromise between partly discrepant principles.”⁸⁸ So it goes with criminal punishment, any “morally tolerable account [of which] must exhibit it as a compromise between distinct and partly conflicting principles.”⁸⁹ Thus does Hart take pains to contrast his approach with all of those that would invoke “one supreme value or objective” or “single value or aim” as part of some “drive towards an over-simplification of multiple issues which require separate consideration.”⁹⁰ Indeed Hart does not fail to stress the need to “distinguish similar questions and confront them separately,” for he believes that each part of the social institution of law calls for a “separate explanation” and a “separate justification” given that each poses, yes, “separate questions.”⁹¹

Evidently, given that pluralist metaphysics conceives of parts as fundamentally independent things, Hart’s approach is indeed pluralist. The tendency in the literature to describe it as “mixed” arises from his expressed desire to give

86 In a number of his writings, Rousseau has similarly distinguished between persuading and convincing. See especially his *Emile: Or Education*, trans. Barbara Foxley (London: J.M. Dent & Sons, 1928) at 175.

87 He makes that claim in Duff, *Punishment*, *supra* note 84 at 98, 110-111. Indeed it seems that Duff himself is not fully convinced of it. Responding to one critique, he writes: “I am not, I confess, wholly confident that this is an adequate answer to the objection.” *Ibid.* at 212, n. 21. Responding to another, he does no more than simply restate his premise: “There is some truth in this. But we should resist the temptation to make it a definitional truth that all wrongdoing shows the wrongdoers to be in need of moral (re-)education.” *Ibid.* at 212 n. 13. To which this reader feels impelled to ask: why?

88 Hart, “Prolegomenon to the Principles of Punishment,” in *Punishment and Responsibility: Essays in the Philosophy of Law* (Oxford: Oxford University Press, 1968) at 10 [Hart, “Prolegomenon to the Principles of Punishment,”].

89 *Ibid.* at 1.

90 *Ibid.* at 2-3.

91 *Ibid.* at 4.

both consequentialist and retributivist concerns their due. And yet, “mixed” is somewhat misleading since the pluralist, as we have seen, does not integrate or reconcile things but, as Hart has just told us, he compromises them, balances them against each other. And indeed the maintenance of “balance” is, to Hart, often the central task of all who would uphold legal justice.⁹²

But given that he, like all pluralists, conceives of the things being balanced as incommensurable, how can he consider this balancing rational? To answer the pluralist also needs to appeal to something like Aristotle’s conception of practical reason, but in this case he or she will conceive of it along the lines, not of conversation and its striving for reconciliation, but of negotiation and its struggle for balance. That said, because we are dealing with incommensurables the metaphor of a commensurating single beam balance, which as we have seen is popular with consequentialists and retributivists, is no longer appropriate. That is why I suggest that, following Michael Stocker, we imagine instead a single pan hung by a string in the middle, one upon which the various items to be balanced can be placed in different positions, causing the pan to tilt in different directions.⁹³ This, then, is the kind of scale we should be thinking of whenever Hart writes of reaching “a reasonable compromise between many conflicting interests”⁹⁴ or of striking a balance “in the light of the circumstances.”⁹⁵

Given the above, it should come as no surprise that Hart is unable to conceive of the legal purpose of censuring and sanctioning criminal acts in anything other than punitive terms. Because that is what results from not only his strictly balancing conception of practical reason but also the related idea that the purpose of punishment is something that can be conceptualised independently of other purposes, hence is definable with a set of necessary *and sufficient* conditions (the definition of just punishment, Hart informs us, consists of precisely five elements).⁹⁶ To define a concept in this way is, metaphorically speaking, to draw a solid line around it, to abstract it fully from context, and such an abstraction is incompatible with a reparative conception of censure and sanction since, as we have seen, repair requires an extreme sensitivity to context (in particular, that of the victim’s). Now though I do not have the space to argue the point here, I want to claim that any abstract conceptualisation will necessarily have “cracks” or “holes” in it, lacunae that can only be filled in with understandings arrived at through actual dialogue. And given that understandings are not accommodations, such a dialogue must take the form of conversation, not negotiation. Any proper conception of censure and sanction in a given case, then, necessitates reconciling meanings that the victim and offender share with their fellow citizens, hence realising the common good of the political community as a whole.

To Hart, however, as we have seen, there is no such whole, only a plurality of parts. Indeed if there was he would almost certainly conceive of it as unified,

92 Hart, *The Concept of Law* (Oxford: Oxford University Press, 1997, 2nd ed.) at 132, 135, 159 [Hart, *Concept of Law*].

93 See Michael Stocker, *Plural and Conflicting Values* (Oxford: Oxford University Press, 1990) at 148-149.

94 Hart, *Concept of Law*, *supra* note 92 at 132.

95 *Ibid.* at 135.

96 See Hart, “Prolegomenon to the Principles of Punishment,” *supra* note 88 at 4-5.

hence be forced to embrace a postmodernist approach, one which welcomes the paradoxes that come from asserting both the one and the many, monism and pluralism, together.⁹⁷ But Hart is no fan of paradox, which is why we find him embracing only the “uneasy compromise”⁹⁸ that is inevitably forced upon us whenever we separate things out and weigh them against each other.

VI. PATRIOTISM

Patriotism, as we have seen, strives for reconciliation and not merely compromise. But unlike abolitionism, this reconciliation is not equated with restoration, as if it were possible to return to some previous, unified state of affairs. For there is no such unified state. Unity, despite the assumptions of consequentialists, retributivists and abolitionists, is simply not something of this world, nor should we be adopting the metaphysics of the opposite, fragmenting extreme that is pluralism. Rather, what we need to do is emphasise, not retrogressive restoration, but progressive transformation, a necessity if we are to realise the good that, we should at least presume, both offenders and victims share. Moreover, as we have also seen, this good is not something that ought to be restricted to the bounds of civil society, since its primary expression is carried out by the state and its laws. That is why conversations between offenders and their victims should be understood to take place on the basis of those laws, laws which (at their best) express what, once again, is shared by the citizenry as a whole. And it is also why, when those conversations succeed, the reconciliations they bring may be said to realise *all* of the purposes of the criminal law that we have identified above.

One must admit, however, that more often than not they will fail, that the conversation will break down – if, that is, those involved ever managed to get one started in the first place. Now it is when conversation fails – but only then – that we need to struggle for the “justifiable injustices” that balancing makes necessary. For that is when we must turn from the oppositions of conversation to the adversity of negotiation. Such negotiations will be considered legal rather than political when the parties recognize that they ought not to go beyond certain limits previously set out by the law: for example, the fact that, in a particular case, a crime was indeed committed is not something that can be open for negotiation. But aside from such givens, legal negotiations can and indeed should take place. However they, too, can fail, and when they do there will be a need to turn to an even more adversarial process, that of trials ruled over by monological judges, those who decide upon any balances that must be struck by deliberating alone, returning to the courtroom only when they are ready to hand down their decisions. From all that has been said above, it should be evident that the more such trials can be avoided, the better.

97 As do Mark Tunick and Alan Norrie, for example. See Mark Tunick, *Punishment: Theory and Practice* (Berkeley: University of California Press, 1992), c. 5; and Alan Norrie, “Simulacrum of Morality? Beyond the Ideal/Actual Antinomies of Criminal Justice,” in Antony Duff, ed., *Philosophy and the Criminal Law: Principle and Critique* (Cambridge: Cambridge University Press, 1998) at. 116-117 [Duff, *Philosophy and the Criminal Law*].

98 Hart, “Prolegomenon to the Principles of Punishment,” *supra* note 88 at 27.

So reconciliation is never guaranteed. But we can be sure of one thing: that the conversations which may nevertheless sometimes bring reconciliation simply cannot arise if we adopt either monist or pluralist approaches. Not because, as the postmodernists tell us, reaching an understanding through the exchange of reasons is something inherently impossible, but because conversation is an extremely fragile mode of dialogue, one that is simply incompatible with the bellicosity encouraged by the various balancing-first approaches. Which is why, if we are to avoid falling directly into their adversarial traps, we need to take a path that is neither monist nor pluralist, much less a paradoxical combination of the two. Rather, what is required is a means of moving between these two extremes.

The patriot provides that means. Patriotism is not monist because it recognizes the presence of “cracks” in the whole, sites of conflict which may, or may not, be reconcilable. And it is not pluralist because it never fails to assert the fundamental place of that whole, to conceive of all parts as always a part of it, as they must be if their reconciliation, as distinct from mere balancing, is ever to be possible. And when such reconciliation does succeed, we might describe the process as consisting of a move “towards the One, as a many.” For what results is both integration, hence progress towards unity, and fidelity to difference, to all of the often incommensurable goods and purposes that are fundamental to any proper conception of the criminal law. That is why, given that one of the meanings of the root of the word “patriotism” is “of the fathers,” I offer the approach as a way for us to be more authentically true to, rather than to merely balance, all of the things that we have traditionally striven to uphold with the law. Scales of justice? We can do better.